AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement

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February 28, 2019

Ms. Diana Foley
Securities Consultant
Office of the Secretary of State
Securities Division
2250 Las Vegas Blvd. North
Suite 400
Las Vegas, Nevada 89030

Re: Proposed Fiduciary Duty Regulation under Nevada Revised Statutes Chapters 90 and 628A

Dear Ms. Foley:

The American Retirement Association ("ARA") appreciates this opportunity to comment on the regulations proposed to be added under Chapter 90 of the Nevada Administrative Code (the "Proposed Regulation") pertaining to laws imposing a fiduciary duty on certain financial planners as set forth in Nevada Revised Statutes Chapters 90 and 628A, as modified by SB 383.

The ARA is providing comments on the Proposed Regulation, in particular, its potential application to retirement plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA").[1] As we explained in our June 30, 2017, comment letter on SB 383 and in our testimony at the workshop held by the Secretary of State on October 6, 2017, ARA believes that ERISA already provides a uniform body of benefits law and regulation that protect participants and beneficiaries from impermissible conflicts of interest. In enacting ERISA, Congress intended to provide a uniform set of national rules that should be respected by Nevada in promulgating regulations under SB 383.

The ARA believes that the Proposed Regulation should not apply to advice provided to participants and beneficiaries in ERISA-covered plans or to the plans themselves because a fiduciary standard is already imposed under ERISA.

The American Retirement Association is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-deferred Savings Association ("NTSA"), the ASPPA College of Pension Actuaries ("ACOPA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has more than 25,000 individual members who provide consulting and administrative services to American workers, savers, and

[1] Pub. L. 93-406, 88 Stat. 829 (September 2, 1974).

the sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Executive Summary

ARA has long believed that financial professionals who provide investment advice should be held to a fiduciary standard that requires their recommendations to be in the best interests of their clients. ARA advocates for an expanded concept of fiduciary responsibility at the federal level, and supported the extensive rulemaking project undertaken by the U.S. Department of Labor ("DOL Rule")[2] to broaden the definition of an ERISA fiduciary. The DOL Rule, which was vacated by a federal court,[3] would have increased consumer protections for an expanded universe of retirement accounts by covering IRAs. ARA continues to support an expanded fiduciary standard, but recognizes that having such a standard be a function of state law is problematic for ERISA plans and their service providers. This is due to the very real potential for conflicting fiduciary standards between state law standards and fiduciary standards already in effect under ERISA.

ARA believes that legislation by individual states without exemption of ERISA-covered plans will lead to duplicative regulation, investor confusion, legal conflicts and compliance challenges while not providing additional investor protection benefits. The inevitable compliance and legal costs which result will mean higher costs for consumers. Moreover, assuming that the Proposed Regulation's standard of a "fiduciary duty" is shaped by the courts of Nevada, its meaning could be significantly different then what has developed over more than 40 years under federal law.

In the discussion that follows, we review ERISA provisions relating to federal preemption and investor protections. We also provide the ARA's recommendations on how the Proposed Regulation could be modified to maintain its intent to increase consumer protections for IRAs and other investor accounts while avoiding conflict with ERISA. ARA is not advocating to decrease any protections for consumers. The exclusion we are requesting is only where the advice is currently subject to ERISA's fiduciary standards, which still apply to advice with respect to ERISA-covered retirement plans notwithstanding that the DOL Rule was vacated.

Background

ERISA Fiduciary Standard

ERISA has been described as "... a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans."[4] These standards protect plans that are established or maintained by employers through "fiduciary responsibilities for those who manage and control plan assets... and [by] giv[ing] participants the right to sue for benefits and breaches of fiduciary duty."[5]

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[2] Definition of the Term Fiduciary, 82 Fed Reg. 16902 (April 7, 2017).
[3] *Chamber of Commerce of the U.S.A. v. U.S. Dep't of Labor*, No. 17-10238, slip op. 46 (5th Cir. Mar. 15, 2018).
[4] DOL website at https://www.dol.gov/general/topic/health-plans/erisa.
[5] *Id.*

An important element of ERISA is defining what actions or authority are sufficient for a person to be classified as a fiduciary. Under ERISA §3(21), a person who provides investment advice with respect to the assets of an ERISA plan for a fee or other compensation typically would be classified as an ERISA fiduciary.[6] Examples of common ERISA fiduciaries include investment managers and advisers. Plan trustees with exclusive authority to manage plan assets also generally are fiduciaries under ERISA.

ERISA §404 sets forth standards that apply to fiduciaries in their dealings with ERISA-covered plans and participants. Among other things, an ERISA fiduciary must "...discharge his duties with respect to a plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan."[7] Under ERISA, fiduciaries are prohibited from engaging in "self- dealing" transactions.[8] This includes a prohibition on receiving any consideration from a third party as a result of a transaction involving the plan or otherwise using the plan's assets to further the fiduciary's own self-interest.[9]

ERISA §502(a) sets forth an array of private causes of action of which participants and beneficiaries may avail themselves to remedy a violation of ERISA. Among these, ERISA §502(a)(2) permits a participant to bring a direct civil action against an ERISA fiduciary for breach of fiduciary duty. ERISA §502(a)(3) permits an aggrieved participant to initiate a private cause of action for injunctive and equitable relief for a violation of ERISA. "This integrated enforcement mechanism, ERISA §502(a), 29 U.S.C. §1132(a), is a distinctive feature and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans."[10]

In summary, the interests of participants and beneficiaries in ERISA-covered retirement plans are protected by a fiduciary standard that has long been recognized as the "highest known to law."[11] This standard is stringent and its reach is broad. Individuals administering a plan, those providing advice on the investments, and many in between are subject to these requirements. Moreover, on top of the civil and criminal ERISA enforcement carried out by the federal government, participants in ERISA-covered have the right to sue for benefits and breaches of fiduciary duty.

ERISA Preemption

According to the United States Supreme Court, "Congress enacted ERISA to 'protect ... the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans, and to 'provide for appropriate remedies, sanctions, and ready access to the federal courts.' 29 U. S. C. §1001(b)."[12] To this end, ERISA has an expansive pre-emptive reach that is intended to ensure that employee benefit

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[6] ERISA §3(21).
[7] ERISA §404(a)(1).
[8] ERISA §406(b).
[9] *Id.*
[10] *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).
[11] *Donovan v. Bierworth*, 680 F.2d 263, 271 (2d Cir.),cert. denied, 459 U.S. 1069 (1982).
[12] *Id.*

plan regulation is "exclusively a federal concern." [13] ERISA §514(a) provides that the sections of ERISA relevant here supersede any state law that is in conflict.[14] Excepted from pre-emption are state laws that regulate insurance, banking or securities, as long as the state law does not attempt to regulate an ERISA plan under laws that would deem it to be an insurance company (or other insurer), a bank, a trust company or an investment company.[15]

It was because of the potential for differing state standards that Congress included provisions in ERISA to pre-empt conflicting state laws.[16] According to the recent U.S. Supreme Court decision in *Gobeille v. Liberty Mutual Ins. Co.*, "[E]RISA pre-empts a state law that has an impermissible 'connection with' ERISA plans, meaning a state law that 'governs… a central matter of plan administration' or 'interferes with nationally uniform plan administration.' "[17] The *Gobeille* decision related to a Vermont law requiring certain health plans to provide data to a state agency. The Court found that the state's law and regulation required reporting, disclosure and recordkeeping by an ERISA plan in violation of ERISA's pre-emption provisions:

> These matters are fundamental components of ERISA's regulation of plan administration. Differing or even parallel, regulations from multiple jurisdictions could create wasteful administrative costs and threaten to subject plans to wide ranging liability…. Pre-emption is necessary to prevent the States from imposing novel, inconsistent and burdensome reporting requirements on plans.[18]

More recently, a Federal appeals court said that a state law has a "connection with" a plan if it "bears on an ERISA-regulated relationship." *Or. Teamster Emp'rs Tr. v. Hillsboro Garbage Disposal*, 800 F.3d 1151, 1155 (9th Cir. 2015); *see also The Depot v. Caring or Montanans, Inc.*, -- F.3d --, 2019 WL 453485 at *14 (9th Cir. Feb. 6, 2019).

This analysis applies equally to ERISA's provisions that regulate fiduciary conduct. In *New York State Conf. of Blue Cross & Blue Shield Plans v Travelers*, the Court specifically listed the fiduciary responsibility rules found in ERISA §§401-414 as an area of plan administration controlled by ERISA.[19] The same underlying rationale that supported pre-emption of the Vermont recordkeeping law applies to the regulation of fiduciary conduct, *i.e.*, the need for a uniform national standard. For this reason, the application of SB 383 in the context of an ERISA plan would be pre-empted.

In addition, because ERISA provides civil remedies for its enforcement, any state-law cause of action that "… duplicates, supplements or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted."[20] ERISA's civil enforcement provisions are intended by Congress to be exclusive such that "…any state-law cause of action that duplicates, supplements, or supplants

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[13] *Id*. (citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)).
[14] ERISA § 514(a).
[15] ERISA § 514(b)(2).
[16] ERISA §514.
[17] *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 941 (2016).
[18] *Id.* at 945.
[19] 514 U.S. 645, 651 (1995).
[20] *Davila* at 216.

the ERISA civil enforcement remedy conflicts with this clear congressional intent [and is pre-empted.]"[21] This would apply to any cause of action created under SB 383. This view is affirmed by the February 20, 2019, legal opinion (enclosed) we received from the Trucker Huss law firm of San Francisco, California, which concludes that SB 383 and the Proposed Regulation are preempted by ERISA to the extent they purport to regulate the relationship between "financial planners," as defined by the statute, and employee benefit plans, their fiduciaries, participants and beneficiaries.

In addition, it is important to note that ERISA preemption does not apply to IRAs. Consequently, IRAs would remain subject to SB 383 and the Proposed Regulation (unless otherwise preempted by other federal laws).

Finally, we note that the concept of ERISA preemption appears to underlie securities provisions of the Nevada Revised Statutes ("NRS"). Specifically, "security" as defined in Chapter 90 of the NRS explicitly excludes "an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974" (e.g., 401(k) plan). In similar fashion, the Proposed Regulation should reflect ERISA's comprehensive scope, which would not diminish the increased consumer protections of the Proposed Regulation.

Nevada Law

SBS 383 expanded the definition of financial planners under Chapter 628A of the Nevada Revised Statutes, imposing a fiduciary duty of care on broker-dealers, sales representatives and investment advisers who are paid to provide advice on the investment of money. Senator Aaron Ford, primary sponsor of the legislation (and now Attorney General of Nevada) said "the goal of SB 383 is to ensure investment advice Nevadans are receiving is in their best interest." Deliberations on SB 383 in the Nevada legislature describe experiences of retirement investors who did not receive impartial investment advice because their accounts were not protected by a fiduciary duty. Examples cited by Nevada lawmakers, while focused on retirement accounts, did not involve retirement plans already subject to a fiduciary duty under ERISA, which specifically states a fiduciary must act in the best interest of participants in plans covered by ERISA. Members described an opportunity for Nevada "to take a stand against conflicted financial advice" where the efforts of the federal government had stalled, as the DOL Rule was subject to challenge in federal court.[22]

SB 383 gives the Administrator of the Nevada Secretary of State's Division of Securities authority to define by regulation certain acts as violations or exclusions of the fiduciary duty as well as authority to prescribe "means reasonably designed to prevent" violations of the duty. The Proposed Regulation would result in state law fiduciary status for broker-dealers and sales representatives that engage in many common brokerage activities, such as providing investment recommendations, financial plans, and analyses and reports regarding securities to customers. The Proposed Regulation does not exclude advisory activity with respect to participants and

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[21] *Aetna Health Inc. v. Davila,* 542 U.S. 200, 209 (2004).

[22] Minutes of the Committee on Commerce, Labor and Energy of the Nevada Senate (Seventy-Ninth Sess., April 12, 2017) and Minutes of the Meeting of the Assembly Committee on Commerce and Labor of the Nevada Assembly (Seventy-Ninth Sess. May 12, 2017).

beneficiaries of ERISA-covered plans or the plans themselves, that are already subject to an ERISA fiduciary standard.

Discussion

ARA believes that financial professionals who provide investment advice should be held to a fiduciary standard and give recommendations that are in the best interests of their clients. ARA has long been supportive of the DOL's efforts to revise and broaden the definition of an investment advice fiduciary under ERISA as under the DOL Rule. Although ARA strongly supports a fiduciary standard, its application as a function of state law is very problematic for ERISA plans and their professional service providers. This is due to the very real potential for conflicting standards between state law and those set forth in ERISA.

For example, under Section 1 of the Proposed Regulations, it is not clear what is meant by a broker-dealer's or sales representative's "fiduciary duty toward their clients." Its meaning could be significantly different than what has developed over the last 40 years under federal law. In addition, under Section 7 of the Proposed Regulation, "an investment adviser, representative of an investment adviser, broker-dealer, or sales representative…shall disclose [certain] gains as he result of a client following their advice…no later than at the time the advice is given." However, under ERISA, there are independent required disclosure regimes for ERISA fiduciaries under regulations issued under ERISA §408(b)(2), among other things.[23] On top of these existing federal requirements, the Proposed Regulation imposes new and different disclosures than are presently applicable under ERISA.

In our testimony at the October 6, 2017, workshop held by the Securities Division regulators and in our aforementioned comment letter, ARA argued that there are strong legal and policy arguments for exempting investment advisory services to ERISA-covered retirement plans and their participants and beneficiaries from the regulations – and that it was the intent of Congress in enacting ERISA to provide a uniform set of national rules and causes of action that should be respected by Nevada in promulgating regulations. To that end, our comment letter argued that any Nevada regulation of fiduciary advisory services to employer-sponsored retirement plans and their participants and beneficiaries would not only be preempted by ERISA, but that even if the "savings clause" in ERISA's preemption provision were somehow interpreted to cover the Nevada regulation of these activities, it would still require the matter be referred to federal court.

ARA recommends that because of the existing enforcement mechanisms provided by ERISA §502(a) and the likelihood of pre-emption by ERISA §514, the Administrator of the Nevada Secretary of State's Division of Securities should clarify the Proposed Regulation by providing that fiduciary services provided to ERISA plans (and fiduciary services provided to the participants and beneficiaries in such plans) are excluded from the application of the Proposed Regulation. Importantly, our recommendation would ONLY apply to advice that is subject to an ERISA fiduciary standard. **Our recommendation would not affect advice with respect to investments held outside of ERISA-covered retirement plans, including IRAs which are not**

[23] ERISA Reg. §2550.408(b)(2)(c)(1).

subject to ERISA. To achieve this, we recommend the addition of the following italicized and underlined language to Section 1.1 of the Proposed Regulation, *"Fiduciary Duty of broker-dealer and sales representatives (NRS 9-0.575, NRS 62A.020)":*

> A broker-dealer or a sales representative who provides investment advice to clients, manages assets, performs discretionary trading, utilizes a title or term set forth in Section 5.4 below, or who otherwise establishes a fiduciary relationship with clients, owes a fiduciary duty to their clients *unless such activities involve moneys or other property of an employee benefit plan, including advice with respect to rollovers, transfers, or distributions from such a plan, subject to §404 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1104), and the accompanying regulations thereunder.*

ARA looks forward to working with you on this important issue. We would welcome the opportunity to discuss these comments further with you. Please contact Will Hansen, ARA Chief Government Affairs Officer, at WHansen@USARetirement.org. Thank you for your time and consideration.

Sincerely,

/s/ Brian H. Graff, Esq., APM
Chief Executive Officer
American Retirement Association

/s/ Will Hansen, Esq.
Chief Government Affairs Officer
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/s/ Allison E. Wielobob, Esq.
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February 20, 2019

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Re: The Preemption of SB 383 by the Employee Retirement Income Security Act

Dear Mr. Graff:

You previously requested our opinion regarding the potential preemption by the Employee Retirement Income Security Act of 1974 ("ERISA") of Nevada SB 383 (the "Statute") which was signed into law on June 2, 2017, and became effective on July 1, 2017. Generally speaking, the Statute expanded existing Nevada law defining the term "financial planner," and provides remedies against financial planners that violate the fiduciary standard that it imposes.

In a letter to you dated August 21, 2017, we concluded that courts would hold that the Statute is preempted by ERISA to the extent it purports to regulate the relationship between employee benefit plans, their fiduciaries, participants and beneficiaries, on the one hand, and persons providing investment advice for a fee or other compensation to those plans, on the other.

On January 18, 2019, the Office of the Secretary of State of the State of Nevada issued a Notice of Draft Regulations and Request for Comment regarding the Statute (the "Draft Regulations").

In this letter, we first revisit the Statute and the changes that it made to Nevada law. We also discuss some of the relevant portions of the Draft Regulations that bear on our analysis. We then discuss ERISA preemption concepts, and how those concepts are likely to be applied to the Statute and the Draft Regulations by reviewing courts. We conclude that the Statute is preempted by ERISA to the extent it purports to regulate the relationship between "financial planners" as defined by the Statute, and employee benefit plans, their fiduciaries, participants and beneficiaries. The Draft Regulations as presently constituted only reinforce this conclusion.

The Securities Division of the Nevada Office of the Secretary of State has solicited written

comments regarding the Draft Regulations. We recommend that Section 5 of the Draft Regulations be modified to provide that services otherwise within the scope of the Statute provided to employee benefit plans governed by ERISA, or to fiduciaries, participants or beneficiaries of those plans are exempt from the provisions of the Statute.

THE STATUTE

NRS Chapter 628A regulates "financial planners." NRS §628A.010 previously defined "financial planner" as a person who for compensation advises others upon the investment of money or upon provision for income to be needed in the future, or who holds himself or herself out as qualified to perform either of these functions, but did not include:

(a) An attorney and counselor at law admitted by the Supreme Court of Nevada;

(b) A certified public accountant or a public accountant licensed pursuant to NRS 628.190 to 628.310, inclusive, or 628.350;

(c) A broker-dealer or sales representative licensed pursuant to NRS 90.310 or exempt under NRS 90.320;

(d) An investment adviser licensed pursuant to NRS 90.330 or exempt under NRS 90.340; or

(e) A producer of insurance licensed pursuant to chapter 683A of NRS or an insurance consultant licensed pursuant to chapter 683C of NRS, whose advice upon investment or provision of future income is incidental to the practice of his or her profession or business.

Pursuant to the Statute, subsections (c) and (d) above were deleted. Consequently, under §628A.010, as amended, broker-dealers, broker-dealer sales representatives, and most investment advisers licensed under state or federal law are now considered "financial planners" that are subject to a fiduciary standard under state law if they otherwise fit within the definition of "financial planner."

NRS §628A.020 provides that "[a] financial planner has the duty of a fiduciary toward a client. A financial planner shall disclose to a client, at the time advice is given, any gain the financial planner may receive, such as profit or commission, if the advice is followed. A financial planner shall make diligent inquiry of each client to ascertain initially, and keep currently informed concerning, the client's financial circumstances and obligations and the client's present and anticipated obligations to and goals for his or her family." NRS §628A.010(1) broadly defines "Client" as "a person who receives advice from a financial planner."

NRS §628A.030 provides that if loss results from a financial planner's advice under subsection (2) of that section, "... the client may recover from the financial planner in a civil action the amount of the economic loss and all costs of litigation and attorney's fees."

In addition to expanding the list of persons subject to liability as a "financial planner," the Statute amended NRS Chapter 90 to add a new section that mandates, "A broker-dealer, sales

representative, investment adviser or representative of an investment adviser shall not violate the fiduciary duty toward a client imposed by NRS §628A.020." Civil penalties of up to $25,000 may apply for a willful violation of the Nevada securities law. NRS §90.630(2)(d).

The Statute therefore broadens the list of persons who, under Nevada law, are considered "financial planners," and subjects "financial planners" to potential liability for certain remedies (including the civil penalties referred to above) in connection with services provided to "clients." The term "client" is broadly defined under relevant Nevada law to mean "a person who receives advice from a financial planner." NRS §628A.010(1). Accordingly, unless exempted by regulation or otherwise, the term "client" would include a participant or beneficiary of an employee benefit plan who receives advice with respect to the investment of money held within an employee benefit plan governed by ERISA or with respect to a rollover, distribution or transfer of monies held by such a plan. It would also include the fiduciaries of an ERISA-governed plan who are responsible for managing the plan's assets or for selecting and monitoring the plan's designated investment alternatives.

THE DRAFT REGULATIONS

Pursuant to the Statute's amendment of Nevada law, the Administrator of the Nevada Secretary of State's Division of Securities was authorized to issue regulations that:

(a) Define or exclude an act, practice or course of business of a broker-dealer, sales representative, investment adviser or representative of an investment adviser as a violation of the fiduciary duty toward a client imposed by NRS §628A.020; and

(b) Prescribe means reasonably designed to prevent broker-dealers, sales representatives, investment advisers and representatives of investment advisers from engaging in acts, practices and courses of business defined as a violation of such fiduciary duty.

As mentioned above, the Draft Regulations were issued on January 18, 2019. Some of the relevant provisions of the Draft Regulations are summarized below.

Section 1 provides that broker-dealers or sales representatives that provide "investment advice" to clients, manage assets, perform discretionary trading, utilize a title or term set forth in Section 5.4 of the Draft Regulations, or who "otherwise establish[] a fiduciary relationship with clients," owe a fiduciary duty to their clients.

Section 4 defines "investment advice" to include, but is not limited to:

(a) providing advice or a recommendation regarding the buy, hold, or sale of a security to a client;

(b) providing advice or a recommendation regarding the value of a security to a client;

(c) providing analyses or reports regarding a security to a client;

(d) providing account monitoring for the purpose of potentially recommending a buy, hold, or sale of a security;

(e) providing advice or a recommendation regarding the type of account a client should open;

(f) providing advice or a recommendation regarding the fee options available for the services provided by the investment adviser, representative of the investment adviser, broker-dealer, or sales representative;

(g) providing information on a personalized investment strategy;

(h) providing a financial plan that includes consideration of buying, holding, or selling a security;

(i) providing a limited list of securities for consideration by a client or by a limited group of clients that is tailored to the client or group of clients;

(j) providing information about a security that is not provided in the offering documents or is an opinion regarding the security or its potential performance;

(k) recommending a broker-dealer, sales representative, investment adviser, representative of an investment adviser, or financial planner; and

(l) providing advice or a recommendation regarding an insurance product or an investment by comparison to a security, or that includes the buy, sale or hold of a security.

Section 5 of the Draft Regulations sets forth exemptions to the Statute's fiduciary duty standard. That section does not exempt from the Statute's reach services provided by a "financial planner" to an employee benefit plan, or to an employee benefit plan's fiduciaries, participants or beneficiaries.

Section 9 of the Draft Regulations provides that broker-dealers and sales representatives shall each be presumed to owe fiduciary duties to their clients, and shall have the burden of proving in an arbitration, civil or administrative hearing that an exemption to the fiduciary duty imposed by the Statute exists.

Section 10 of the Draft Regulations provides that the "Administrator" (i.e., the Administrator of the Securities Division of the Office of the Secretary of State) shall have the authority to adopt by order any fiduciary duty related rule, exemption, form, or prohibition approved by the Securities and Exchange Commission for application to investment advisers, representatives of investment advisers, broker-dealers and sales representatives, so long as the adoption does not materially diminish the fiduciary duty set forth in Chapter 90 or Chapter 628A of the Nevada Revised Statutes.

The Draft Regulations make no reference to ERISA, to employee benefit plans governed by

ERISA, or to the relationship between financial planners and employee benefit plans, their fiduciaries, participants and beneficiaries. In light of the express reference in the Draft Regulations to the relationship between the fiduciary duty imposed by Chapters 90 and 628A of the Nevada Revised Statutes, and rules approved by the federal Securities and Exchange Commission for application to investment advisers, representatives of investment advisers, broker-dealers and sales representatives, it would appear the omission of any reference to ERISA and to persons traditionally regulated by ERISA is intentional.

ERISA's REGULATION OF "FIDUCIARIES"

While Nevada law purports to regulate "financial planners," ERISA regulates the relationship between "fiduciaries" (as defined by ERISA) and employee benefit plans and their participants and beneficiaries.

ERISA §3(3) (29 U.S.C. §1002(3)) defines "employee benefit plan" or "plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." "Employee pension benefit plan" means

> … any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(ERISA §3(2)(A), 29 U.S.C. §1002(20)(A).)

ERISA primarily defines "fiduciary" in functional terms. That is, persons who perform the functions set forth in ERISA §3(21) (29 U.S.C. §1002(21)) are fiduciaries within the meaning of ERISA. Most relevant to this analysis are ERISA §3(21)(A)(i) and (ii) (29 U.S.C. §1002(21)(A)(i) and (ii)), which state in part, that

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,[1]

[1] Persons who exercise discretionary authority or discretionary control respecting management of an ERISA plan include "investment managers" as defined by ERISA §3(38) (29 U.S.C. §1002(38).) "Investment manager" means:

> [or] (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so."

Persons identified as a "financial planner" under Nevada law would therefore likely be considered a "fiduciary" under ERISA, to the extent the financial planner is rendering services to an employee benefit plan governed by ERISA, to the plan's fiduciaries and/or to the participants and beneficiaries of the plan.

ERISA §404 (29 U.S.C. §1104) sets forth standards that apply to fiduciaries in their dealings with ERISA plans and the plan's participants and beneficiaries. Among other things, an ERISA fiduciary must "...discharge his duties with respect to a plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan." ERISA also prohibits fiduciaries from engaging in "self-dealing" transactions. *See* ERISA §406(b) (29 U.S.C. §1106(b)), which prohibits fiduciaries from dealing with plan assets in their own interest or for their own account, acting in a transaction involving the plan on behalf of a party whose interests are adverse to those of the plan, or receiving consideration for their own personal account from any party dealing with the plan in a transaction involving plan assets.

ERISA §502(a) (29 U.S.C. §1132(a)(2)) provides several causes of action that fiduciaries, participants and beneficiaries (and the Secretary of Labor) may pursue to remedy a violation of ERISA. ERISA §502(a)(2) permits a fiduciary, participant or beneficiary to bring a direct civil action against an ERISA fiduciary for breach of fiduciary duty. ERISA §502(a)(3) permits a fiduciary, participant or beneficiary to initiate a private cause of action for injunctive and equitable relief for a violation of ERISA. "This integrated enforcement mechanism, ERISA §502(a), 29 U.S.C. §1132(a), is a distinctive feature and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans." *Aetna Health Inc. v. Davila,* 542 U.S. 200, 208 (2004).

... any fiduciary (other than a trustee or named fiduciary, as defined in section 1102(a)(2) of this title)—

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who (i) is registered as an investment adviser under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.]; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act [15 U.S.C. 80b–3a(a)], is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

ERISA PREEMPTION

The question that you have posed is whether Nevada law, as amended by the Statute, is preempted by ERISA to the extent that it may purport to regulate the relationship of "financial planners" to: (i) an employee benefit plan governed by ERISA; (ii) the plan's fiduciaries; and/or (iii) the plan's participants and beneficiaries.

ERISA's general preemption provision - ERISA §514 (29 U.S.C. §1144) - provides in relevant part: "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

According to the United States Supreme Court, "Congress enacted ERISA to 'protect ... the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans, and to 'provide for appropriate remedies, sanctions, and ready access to the federal courts.' 29 U. S. C. §1001(b)." To this end, ERISA's pre-emptive reach is intended to ensure that employee benefit plan regulation is "... exclusively a federal concern." *Davila, supra,* 542 U.S. at 208, citing *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504 (1981). ERISA's civil enforcement provisions are intended by Congress to be exclusive such that "... any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with this clear congressional intent [and is pre-empted.]" *Davila* at 209. "Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Pilot Life Ins. Co v. Dedeaux*, 481 U.S. 41, 54 (1987).

Courts that have analyzed ERISA preemption sometimes differentiate between "express preemption" and "conflict preemption." "There are two strands of ERISA preemption: (1) 'express' preemption under ERISA §514(a), 29 U.S.C. §1144(a); and (2) preemption due to a 'conflict' with ERISA's exclusive remedial scheme set forth in [ERISA § 502(a),] 29 U.S.C. § 1132(a)." *Fossen v. Blue Cross & Blue Shield of Montana, Inc.*, 660 F.3d 1102, 1107 (9th Cir. 2011), citing *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1081 (9th Cir. 2009).[2] "All of these preemption provisions defeat state-law causes of action on the merits." *Fossen* at 1107, citing *Pilot Life,* 481 U.S. at 57.

A third preemption concept - "complete preemption" - comes into play when analyzing whether a state-law claim that is originally filed in a state court may be removed to federal court. *See generally, Marin Gen. Hosp. v. Modesto & Empire Traction Co.,* 581 F.3d 941, 945 (9th Cir. 2009).

Express Preemption

Express preemption under ERISA §514 is governed by a two-prong test. Under §514(a), ERISA broadly preempts "any and all State laws insofar as they may now or hereafter relate to any

[2] The United States Court of Appeals for the Ninth Circuit has appellate jurisdiction over the United States District Court for the District of Nevada.

[covered] employee benefit plan...." 29 U.S.C. §1144(a). But this broad preemption provision is tempered by the "saving clause" of ERISA §514(b), which spares from ERISA's preemptive reach "any law of any State which regulates insurance, banking, or securities." *Fossen,* 660 F.3d at 1108.

"Relate to ..."

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines,* 463 U.S. 83, 96-97 (1983). At one time, courts gave "expansive effect" to the term "relates to," but more recently have rejected "uncritical literalism" in determining whether a state law "relates to" an ERISA-governed plan. *Gobeille v. Liberty Mutual Ins. Co.*, 136 S. Ct. 936, 943 (2016), quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 656 (1995).

Courts have recognized that, because "everything is related to everything else," applying a literal interpretation of the "relates to" phrase "risked snaring a host of state laws that did not target ERISA's field of federal concern." *Bd. Of Trustees of Glazing Health and Welfare Trust v. Chambers,* 903 F.3d 829, 846 (9th Cir. 2018), citing *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.,* 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

Thus, the Ninth Circuit has stated that it reads *Travelers* as narrowing the Court's interpretation of the scope of §514(a), and that "[i]nstead of interpreting 'relate to' literally, the Court has incorporated general principles of preemption analysis." *Chambers* at 846.

Accordingly, courts in the Ninth Circuit first apply the presumption "that a state law directed at an area of traditional state concern is not preempted," and explain that "the 'assumption [is] that the historic police powers of the States [are] not to be superseded by the Federal Act unless that [i]s the clear and manifest purpose of Congress." *Id.,* citing *Travelers* at 655.

Second, the Supreme Court has also incorporated principles of field and conflict preemption. *Id.* at 847, citing *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank,* 510 U.S. 86, 99 (1993). To that end, courts assess whether the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" or "targets a 'field [] of traditional state regulation." *Id.*

"Whether a state law targets a 'field of traditional state regulation' is a quintessential field preemption inquiry, and whether it 'stands as an obstacle' to ERISA's 'purposes and objectives' speaks to conflict preemption." *Id.; internal citations omitted.*

"Accordingly, under the modern approach a state law is not preempted merely because it has a literal 'connection with' an ERISA plan. Instead, the law must actually '*govern*[] a central matter of plan administration' or '*interfere*[] with nationally uniform plan administration." *Chambers* at 847, citing *Gobeille,* 136 S.Ct. at 943.

Federal regulation of ERISA plans covers four main areas: the fiduciary obligations to plan

members, reporting, disclosure and recordkeeping requirements. *Chambers* at 848. "If a state law encroaches on these areas of federal concern, it is preempted." *Id.* A state law is deemed preempted "... if it plainly regulates in the 'areas with which ERISA is expressly concerned – reporting, disclosure, *fiduciary responsibility* and the like," 'regulates a key facet of plan administration,' or poses an obstacle to the accomplishment of ERISA's objectives." *Id.* at 849; internal citations omitted; emphasis added.

A state law has a "reference to" an ERISA plan if it is "premised on the existence of an ERISA plan" or if 'the existence of the plan is essential to the claim's survival." *Or. Teamster Emp'rs Tr. v. Hillsboro Garbage Disposal, Inc.,* 800 F.3d 1151, 1155-56 (9th Cir. 2015). By that measure, the Statute at issue here cannot likely be said to have a "reference to" ERISA plans. However, the question of whether it has a "connection with" such plans remains. State laws have an impermissible connection with ERISA plans if they govern a central matter of plan administration or interfere with nationally uniform plan administration. *Gobeille,* 136 S.Ct. at 943. A state law also has a "connection with" a plan if it "bears on an ERISA-regulated relationship." *Hillsboro Garbage Disposal,* 800 F.3d at 1155; *see also The Depot v. Caring For Montanans, Inc.,* -- F.3d --, 2019 WL 453485 at *14 (9th Cir. Feb. 6, 2019). Congress intended "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government ..., [and to prevent] the potential for conflict in substantive law ... requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Travelers*, 514 U.S. at 656–57 (1995), citing *Ingersoll-Rand v. McClendon,* 498 U.S. 133, 142 (1990). "The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulations in order to permit the nationally uniform administration of employee benefit plans." *Travelers,* 514 U.S. at 657.

Gobeille related to a Vermont law requiring certain health plans to provide data to a state agency. The Court found that the state's law and regulation required reporting, disclosure and recordkeeping by an ERISA plan in violation of ERISA's pre-emption provisions:

> These matters are fundamental components of ERISA's regulation of plan administration. Differing or even parallel, regulations from multiple jurisdictions could create wasteful administrative costs and threaten to subject plans to wide ranging liability.... Pre-emption is necessary to prevent the States from imposing novel, inconsistent and burdensome reporting requirements on plans.

Gobeille, 136 S..Ct. at 945.

This analysis applies equally to the provisions of ERISA that regulate fiduciary conduct. In *Travelers*, the Court specifically listed the fiduciary responsibility rules found in ERISA §§401-414 (29 U.S.C. §1101-1114) as an area of plan administration controlled by ERISA. 514 U.S. at 651. In addition, the Court cited several prior decisions in which it concluded that state laws related to employee benefit plans, and were therefore preempted:

- *Shaw v. Delta Air Lines,* 463 U.S. at 97 (finding that New York's "Human Rights Law, which prohibit[ed] employers from structuring their employee benefit plans in a manner that discriminate[d] on the basis of pregnancy, and [New York's] Disability Benefits Law, which require[d] employers to pay employees specific benefits, clearly 'relate[d] to' benefit plans").

- *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (Pennsylvania's law that prohibited "plans from ... requiring reimbursement [from the beneficiary] in the event of recovery from a third party" related to employee benefit plans within the meaning of § 514(a).)

- *Alessi v. Raybestos-Manhattan, Inc., supra,* 451 U.S. at 524 (New Jersey could not prohibit plans from setting workers' compensation payments off against employees' retirement benefits or pensions, because doing so would prevent plans from using a method of calculating benefits permitted by federal law).

The Court in *Travelers* noted that, in each of these cases, "ERISA pre-empted state laws that mandated employee benefit structures or their administration" and that, "[e]lsewhere, we have held that state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption." *Travelers*, 514 U.S. at 658. *See also Chambers* at 851, quoting *Shaw* and noting that the state laws at issue in *Shaw* and *FMC Corp.* were preempted because they "imposed 'State … regulation of employee benefit plans.'"

In *Chambers,* the court held that a Nevada state law that defined the circumstances under which third party general contractors may be held vicariously liable for subcontractors debts was not preempted by ERISA, because it neither invaded the federal field occupied by ERISA nor posed an obstacle to ERISA's goal of national uniformity in plan administration. *Chambers* at 851.

In contrast, the Statute at issue here undoubtedly has an impermissible "connection with" an ERISA plan. This is because a "financial planner," as defined under the Statute, who also meets the definition of a fiduciary under ERISA, would be subjected under the Statute to alternative regulatory schemes and enforcement mechanisms beyond those provided by ERISA. As a result, Nevada law, as amended by the Statute, would be preempted in the context of services provided by a "financial planner" to an ERISA plan, its fiduciaries, participants or fiduciaries.

The Saving Clause

Assuming that a court would determine that the Statute is preempted by ERISA to the extent it applies to services provided by a "financial planner" for an ERISA-governed plan, its fiduciaries, participants or beneficiaries, the analysis must turn to the second prong of the "express preemption" analysis: determining whether the state law at issue is "saved" from ERISA preemption because it is a law regulating insurance, securities or banking. The vast majority of cases addressing ERISA's saving clause arise in the context of state laws regulating insurance. Conversely, very few cases have considered whether state laws regulating securities are saved from ERISA preemption. One case that arose in the securities context was *Smith v. Provident Bank,* 170 F.3d 609 (6th Cir. 1999).

In *Smith*, plaintiff brought both ERISA claims and state statutory and common law claims against Provident Bank. Plaintiff argued his state statutory claim was saved from ERISA preemption. The court in *Smith* applied then-governing Supreme Court authority interpreting the saving clause in the context of state insurance laws to a state law regulating securities. The Court of Appeals first recognized that "[m]ost cases interpreting ERISA's 'saving clause' have arisen in the context of insurance rather than banking or securities. In that context the Supreme Court laid out the criteria for applying the saving clause in [*Pilot Life*]:

> First, we [take] what guidance [is] available from a "common-sense view" of the language of the saving clause itself.... Second, we [make] use of the case law interpreting the phrase "business of insurance" under the McCarran–Ferguson Act.... [That case law establishes three criteria:] "[F]irst whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry."

Smith, 170 F.3d at 614.

Shortly before the Sixth Circuit issued its decision in *Smith,* the Supreme Court also applied a "common sense" approach in concluding that California's so-called "notice-prejudice rule" (which required insurers to prove that they were prejudiced as a result of an insurer's purported failure to provide timely notice of a claim) was a law specifically directed at insurance, holding that the rule "does not merely have an impact on the insurance industry; it is aimed at it." *Unum Life Ins. Co. v. Ward,* 526 U.S. 358, 375 (1999).

The analysis used to decide whether a state law regulates insurance, and is therefore saved from ERISA preemption, was modified by the Supreme Court's decision in *Kentucky Ass'n of Health Plans, Inc. v. Miller,* 538 U.S. 329 (2003). In *Miller*, the Court held that for a state law to be deemed a law which regulates insurance for purposes of the saving clause, it must satisfy two requirements. "First, the state law must be specifically directed toward entities engaged in insurance. Second, the state law must substantially affect the risk pooling arrangement between the insurer and the insured." *Miller,* 538 U.S. at 342. (Internal citations omitted.)[3]

The McCarran-Ferguson test that the *Smith* court referred to has now been displaced by the two part analysis set forth in *Miller.* Given the lack of case law interpreting the saving clause in the context of state laws regulating securities, as well as the fact that *Smith* relied upon prior Supreme Court authority interpreting the savings clause in the insurance context, it is reasonable to assume that a court today would look to the test established in *Miller* (relating to state laws purporting to regulate insurance) for guidance in determining whether the Statute is saved from ERISA preemption. In doing so, a court would first analyze whether the Statute is "specifically directed toward" entities engaged in the securities industry. That is similar to the first part of the

[3] Obviously, that second part of the analysis does not bear directly on state laws regulating securities, because the concept of "risk pooling arrangements" is not applicable in the securities setting.

analysis engaged in by the Court in *Smith,* which held that in applying a "common sense view" to the issue, a court asks whether the state law at issue is "specifically directed" toward the insurance industry.

"A law is specifically directed toward entities engaged in insurance if it is 'grounded in policy concerns specific to the insurance industry.'" *Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, Plan No. 625*, 856 F.3d 686, 693 (9th Cir. 2017). "[L]aws of general application that have some bearing on insurers do not qualify." *Rudel v. Hawaii Mgmt. All. Ass'n*, No. CV 15-00539 JMS-RLP, 2017 WL 4969331, at *11 (D. Haw. Oct. 31, 2017).

Although the Statute has some effect upon the securities industry, its reach is substantially broader, and goes well beyond regulating services involving the purchase, sale or holding of securities. Instead, the Statute, read in conjunction with the Draft Regulations, purports to generally regulate the standards and conduct of "financial planners" (*see* Statute §628A.010) and the provision of "investment advice" (*see* Draft Regulations, Section 4(a)-(l)), and provides for certain remedies in the event financial planners violate the fiduciary duty imposed upon financial planners in rendering investment advice. As indicated above, the Draft Regulations' definition of "investment advice" encompasses a number of services that may or may not have anything to do with the purchase, sale or holding of securities.[4] Consequently, it cannot reasonably be said that the Statute and the Draft Regulations are "grounded in policy concerns specific to the [securities] industry."

In other words, read as a whole, the Statute and the Draft Regulations are not "specifically directed toward" regulating securities, but have much broader application to anyone who provides advice on the investment of monies or the provision of future income irrespective of whether that advice might relate to a security.

Conflict Preemption

Even if the Statute was "saved" from ERISA's express preemption provision, it is likely that its application in the context of an ERISA plan would nevertheless be preempted pursuant to the principles of conflict preemption. This conclusion is supported by *Davila:* "Under ordinary principles of conflict pre-emption, then, even a state law that can arguably be characterized as 'regulating insurance' will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." *Davila*, 542 U.S. at 217–18.

"[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Davila* at 209. A state cause of action that would fall within ERISA's remedial scheme is preempted as conflicting with the intended exclusivity of

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[4] *See, e.g.,* Draft Regulations, Section 4(e) [providing advice or a recommendation regarding the type of account a client should open]; 4(f) [providing advice or a recommendation regarding the fee options available for the services provided by the investment adviser, representative of the investment adviser, broker-dealer, or sales representative]; 4(g) [providing information on a personalized investment strategy], and; 4(k) [recommending a broker-dealer, sales representative, investment adviser, representative of an investment adviser, or financial planner].

that scheme, even if those causes of action would not necessarily be preempted by §514(a). *Cleghorn v. Blue Shield of California*, 408 F.3d 1222, 1225 (9th Cir. 2005). "Conflict preemption can bar a state-law claim 'even if the elements of the state cause of action [do] not precisely duplicate the elements of an ERISA claim." *The Depot,* 2019 WL 453845 at *15, quoting *Davila* at 209. Stated otherwise, if a state law cause of action conflicts with ERISA's exclusive civil enforcement scheme (ERISA §502(a)), it is preempted, even if the state law at issue is not expressly applicable to employee benefit plans. *See Cleghorn* at 1227, holding that "[w]hether or not [California *Health & Safety Code* §1371.4(c)] may be applicable to ERISA plans, it may not be enforced against an ERISA plan by way of this lawsuit asserting state-law causes of action against Blue Shield because of its denial of ERISA plan benefits." "Conflict preemption under ERISA §502(a) ...also confers federal subject matter jurisdiction for claims that nominally arise under state law." *Id.,* citing *Marin Gen. Hosp., supra,* 581 F.3d at 945.

In analyzing whether conflict preemption exists, a court must determine "... whether the state-law claims 'arise independently of ERISA or the plan terms.'" *Fossen,* 660 F.3d at 1110, citing *Davila,* 542 U.S. at 210. "This question requires a practical, rather than a formalistic, analysis because '[c]laimants simply cannot obtain relief by dressing up an ERISA benefits claim in the garb of a state law tort.'" *Id.* at 1110-11, citing *Cleghorn,* 408 F.3d at 1225.

Consistent with this practical approach, the Supreme Court has held that §502(a) preempts various state laws that, at first glance, appear to be independent of ERISA. For example, in *Ingersoll–Rand Co. v. McClendon*, 498 U.S. 133, 143, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), the Court addressed a state-law wrongful discharge claim arising out of a "termination motivated by an employer's desire to prevent a pension from vesting." The Court held that this claim was conflict preempted because, although the claim was nominally premised on a state-law tort duty that was separate from ERISA, the claim was identical to "a right expressly guaranteed by [ERISA] §510 and exclusively enforced by §502(a)." *Id.* at 145, 111 S.Ct. 478. Similarly, in *Davila*, the Court addressed a state law that imposed a duty on insurers to use ordinary care when making medical treatment decisions. 542 U.S. at 204–06, 124 S.Ct. 2488. The Court rejected the court of appeals's reasoning that the plaintiff "request[ed] 'tort damages' arising from 'an external, statutorily imposed duty of 'ordinary care.'" *Id.* at 206, 124 S.Ct. 2488 (quoting *Roark v. Humana, Inc.*, 307 F.3d 298, 309 (5th Cir. 2002)). Instead, the Court refused to "elevate form over substance," and held the state-law cause of action merely duplicated rights and remedies available under ERISA, and therefore was preempted. *Id.* at 214, 124 S.Ct. 2488; *see also Cleghorn*, 408 F.3d at 1226 (holding that state-law statutory claim was completely preempted under *Davila* because "the factual basis of the complaint ... was the denial of reimbursement of plan benefits to Cleghorn"). *Fossen v. Blue Cross & Blue Shield of Montana, Inc.*, 660 F.3d 1102, 1111 (9th Cir. 2011) 660 F.3d at 1111.

In our view, courts reviewing the Statute would likely take a similar view, and conclude that claims arising under Nevada law, as amended by the Statute, against a "financial planner" providing services to an ERISA plan, to the fiduciaries of the plan and/or to the plan's participants and beneficiaries would be duplicative of rights and remedies available under ERISA, and would therefore be preempted. Among other things, the Statute provides remedies, including attorney fees and penalties, against "financial planners" (and fiduciaries under ERISA)

that would supplement and/or supplant the remedies provided under ERISA's civil enforcement scheme. As a result, courts would be likely to find that the Statute is preempted pursuant to a conflict preemption analysis. If ultimately adopted in final form, the Draft Regulations would reinforce this conclusion.

Complete Preemption

Assuming that a fiduciary of an employee benefit plan (or participant or beneficiary in an ERISA plan) were to pursue a claim against a "financial planner" under Nevada law, as amended by the Statute, an issue arises regarding the likely venue for the disposition of the claim. More specifically, the issue is whether any such claim would be addressed in a Nevada state court, or a federal district court.

In a typical circumstance, a Nevada resident may bring an action under Nevada law in a Nevada state court to enforce Nevada law. However, defendants may remove matters to federal court in those instances where the district courts of the United States have original jurisdiction. (28 U.S.C. §1441.) The question arises whether, assuming a Nevada resident were to bring an action in Nevada state court under Nevada law (as amended by the Statute), the claim could be properly removed to federal district court. The answer turns on whether the claim would be "completely preempted."

The Supreme Court first articulated the doctrine of complete preemption under ERISA §502(a) as a basis for federal question removal jurisdiction in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). In *Taylor,* the Court held that ERISA §502(a) reflected Congress's intent to "so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Id.* at 63–64. "Complete preemption removal is an exception to the otherwise applicable rule that a 'plaintiff is ordinarily entitled to remain in state court so long as its complaint does not, on its face, affirmatively allege a federal claim.'" *Marin Gen. Hosp.,* 581 F.3d at 945, citing *Pascack Valley Hosp. v. Local 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393, 398 (3rd Cir. 2004).

A party seeking removal based on federal question jurisdiction must show either that the state-law causes of action are completely preempted by §502(a) of ERISA, or that some other basis exists for federal question jurisdiction. If a complaint alleges only state-law claims, and if these claims are entirely encompassed by §502(a), that complaint is converted from "an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Taylor,* 481 U.S. at 65–66.

Complete preemption is "... really a jurisdictional rather than a preemption doctrine, [as it] confers exclusive federal jurisdiction in certain instances where Congress intended the scope of a federal law to be so broad as to entirely replace any state-law claim." *Marin Gen. Hosp.*, 581 F.3d at 945. "... [A] court need not consider whether a statute 'relates to' ERISA under §514(a) when considering §502(a) complete preemption." *Marin Gen. Hosp., supra,* 581 F.3d at 946, citing *Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Trust Fund*, 538 F.3d 594, 596 (7th Cir. 2008).

Following *Davila,* the Ninth Circuit has "...distilled a two-part test for determining whether a state-law claim is completely preempted by ERISA §502(a): 'a state-law cause of action is completely preempted if (1) 'an individual, at some point in time, could have brought the claim under ERISA §502(a)(1)(B),' and (2) 'where there is no other independent legal duty that is implicated by a defendant's actions.'" *Fossen,* 660 F.3d at 1107–08, citing *Marin Gen. Hosp.,* 581 F.3d at 946. Although both *Davila* and *Marin Gen. Hosp.* discussed complete preemption in the context of ERISA's benefit claim provision (§502(a)(1)(B)), "[t]he complete preemption doctrine applies to the other subparts of §502(a) as well." *Fossen,* 660 F.3d at 1108.

Based on this analysis, it is our view that if a plaintiff brought a claim against a "financial planner" in Nevada state court, relative to services provided with respect to an ERISA plan, the fiduciaries of the plan and/or to the plan's participants or beneficiaries, the claim would satisfy both parts of the two-part test established in *Davila,* and therefore be completely preempted. First, it is clear that a fiduciary, participant or beneficiary of an employee benefit plan subject to ERISA that brings a claim against a "financial planner" under Nevada law relative to that person's services provided with respect to the plan could also bring an action under ERISA §§502(a)(2) and/or 502(a)(3) (seeking damages for the benefit of the plan, and/or appropriate equitable relief).

Courts would also likely find the second prong of the *Davila* test to be satisfied. In *Davila,* the Supreme Court rejected plaintiffs' argument that their claim relied upon an independent legal duty in the form of a state statute that required health insurers to exercise ordinary care when making health care treatment decisions. The Court concluded that the duties imposed by that statute did not "arise independently of ERISA or the plan terms," because the standards set forth in the statute "create[d] no obligation on the part of the health insurance carrier ... to provide to an insured or enrollee treatment which is not covered by the health care plan of the entity." *Davila* at 214.

Any claim that may be brought against a financial planner/fiduciary relative to the services provided with respect to an employee benefit plan subject to ERISA necessarily involves the plan, and implicates the duties imposed by ERISA. Indeed, any plaintiff bringing a claim against a financial planner/fiduciary for losses allegedly incurred by the plan would necessarily be bringing suit for the benefit of the plan itself, since it would be the plan that would benefit from any recovery.

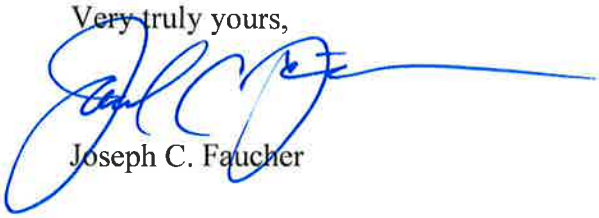
Accordingly, in our view, any claim filed originally in any Nevada state court seeking to enforce Nevada law, as amended by the Statute, against a "financial planner" who allegedly provided services to an employee benefit plan subject to ERISA, the plan's fiduciaries and/or the plan's participants or beneficiaries would be subject to removal to federal district court on the basis of complete preemption.

CONCLUSION

For the foregoing reasons, we believe that courts would find that Nevada law, as amended by the Statute, would be preempted by ERISA to the extent it relates to services provided by a

"financial planner" to an employee benefit plan governed by ERISA, the fiduciaries of an ERISA plan and/or the plan's participants and beneficiaries. Similarly, any claims relating to those services would also be preempted under conflict preemption principles. Actions filed in Nevada state courts seeking to enforce the Statute and pursuing remedies against "financial planners" that provide services to ERISA-governed plans, their fiduciaries, participants and/or fiduciaries would be subject to removal to federal district court based on concepts of complete preemption. In our view, the regulators overseeing implementation of the Statute should take steps to expressly exempt services provided to an ERISA-governed employee benefit plan, the fiduciaries of the ERISA plan and/or to the plan's participants and beneficiaries from the reach of Nevada law as amended, in recognition of the preemption of that law in this regard by ERISA.

Very truly yours,



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