AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement

4245 North Fairfax Drive | Suite 750 | Arlington, VA 22203 • P. 703.516.9300 • F. 703.516.9308

June 14, 2019

Christopher W. Gerold, Bureau Chief
Bureau of Securities
153 Halsey Street, 6th Floor
P.O. Box 47029
Newark, NJ 07101

Re: Proposed Amendment to N.J.A.C. 13:47A-6.3 and Proposed New Rule N.J.A.C. 13:47A-6.4

Dear Mr. Gerold:

The American Retirement Association ("ARA") appreciates this opportunity to comment on the proposed new rule and amendment to the New Jersey Administrative Code which would impose a fiduciary duty on New Jersey investment professionals ("Proposed Regulation"). In particular, we write to express support for the exclusion of Employee Retirement Income Security Act of 1974 ("ERISA")[1] fiduciaries from the application of the Proposed Regulation.

The ARA strongly supports the principle that informs the Proposed Regulation: investors are best served when the interests of advisers and investors are aligned. However, as we explained in our October 19, 2018, comment letter on the Bureau of Securities' ("Bureau") pre-proposal and in our testimony at the informal conference held by the Bureau on November 2, 2018, 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 New Jersey should respect in promulgating regulations applicable to financial professionals.

- **The ARA believes that the Proposed Regulation appropriately excludes fiduciaries to ERISA plans, participants and beneficiaries from coverage because a fiduciary standard under New Jersey law should not apply to advice that is already covered by 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

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

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American workers, savers, and 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 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 ERISA's 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-covered retirement plans and the service providers to those plans. 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 supports the Proposed Regulation's explicit exclusion of persons acting in the capacity of fiduciaries to employee benefit plans, their participants or beneficiaries. ARA believes that fiduciary rules of individual states, without exempting ERISA-covered plans, will lead to duplicative regulation, investor confusion, legal conflicts and compliance challenges while not providing additional investor protection benefits.

Discussion

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]

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."[6] 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.

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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.*
[6] *Donovan v. Bierworth*, 680 F.2d 263, 271 (2d Cir.),cert. denied, 459 U.S. 1069 (1982).

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According to the U.S. 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)."[7]ERISA has an expansive pre-emptive reach that is intended to ensure that employee benefit plan regulation is "exclusively a federal concern."[8] ERISA §514(a) provides that the sections of ERISA relevant here supersede any state law that is in conflict.[9] 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.[10]

* * *

ARA supports the Proposed Regulation's inapplicability to persons acting as fiduciaries to ERISA plans, their participants, and beneficiaries. **ARA recommends** that the New Jersey Bureau of Securities retain this exclusion when the Proposed Regulation is finalized.

ARA 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
American Retirement Association

/s/ Allison E. Wielobob, Esq.
General Counsel
American Retirement Association

[7] *Aetna Health v. Davila*, 542 U.S. 200, 208 (2004).
[8] *Donovan v. Bierworth*, 680 F.2d 263, 271 (2d Cir.),cert. denied, 459 U.S. 1069 (1982) (citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)).
[9] ERISA § 514(a).
[10] ERISA § 514(b)(2).