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

October 19, 2018

Mr. Christopher W. Gerold
Bureau Chief
Bureau of Securities
PO Box 47029
Newark, New Jersey 07101
Sent by E-mail

Re: Potential Amendment to N.J.A.C. 13:47A-6.3

Dear Chief Gerold:

The American Retirement Association ("ARA") is writing to discuss the application of the Bureau of Securities' ("Bureau") proposed uniform fiduciary standard of care to plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA").[1] Specifically, we believe that ERISA already provides a uniform body of benefits law and regulation that protect participants and beneficiaries from impermissible conflicts of interest. 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 New Jersey in promulgating a fiduciary standard of care for investment professionals.

As discussed below, ARA recommends that the New Jersey Bureau of Securities, in exercising its regulatory authority, affirmatively exclude fiduciary services provided to ERISA plans (and fiduciary services provided to the participants and beneficiaries in such plans) from application of the proposed fiduciary standard in recognition of ERISA pre-emption under ERISA §514 and the existing enforcement mechanisms already provided by ERISA §502(a).

ARA 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 savings plans and are dedicated to expanding on the success of employer provided plans. In addition, ARA has more than 24,000 individual members who provide consulting and administrative services to American workers, savers, and sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

BACKGROUND

Federal Law

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

ERISA is 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."[2] ERISA provides "fiduciary responsibilities for those who manage and control plan assets… and gives participants the right to sue for benefits and breaches of fiduciary duty."[3]

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 would be classified as an ERISA fiduciary.[4]

ERISA §404 sets forth standards that apply to fiduciaries in their dealings with ERISA 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."[5] Under ERISA, fiduciaries are prohibited from engaging in "self- dealing" transactions.[6] 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.[7]

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. 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."[8]

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)."[9] To this end, ERISA has an expansive pre-emptive reach that is intended to ensure that employee benefit plan regulation is "… exclusively a federal concern."[10] ERISA §514(a) provides that the sections of ERISA relevant here supersede any state law that is in conflict.[11] 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.[12]

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[2] DOL website at https://www.dol.gov/general/topic/health-plans/erisa.
[3] *Id.*
[4] ERISA §3(21).
[5] ERISA §404(a)(1).
[6] ERISA §406(b).
[7] *Id.*
[8] *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).
[9] *Id.*
[10] Id. (citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)).
[11] ERISA §514(a).
[12] ERISA §514(b)(2)

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.]"[13] "Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."[14]

New Jersey Regulatory Pre-Proposal

Last month, Governor Murphy announced a Bureau directive to promulgate the state's own fiduciary obligation covering all New Jersey investment professionals. We are responding to the Bureau's subsequent solicitation for "comments regarding amendments to its rules to require that broker-dealers, agents, investment advisers, and investment adviser representatives be subject to a fiduciary duty"[15] In relevant part, the pre-proposal states that:

> *"As a result of the [investor] confusion that exists in the marketplace, coupled with the regulatory gap that currently exists with regard to broker-dealers and their agents, investors are often unaware of whether and to what extent those they trust to make financial recommendations are receiving undisclosed financial benefits in exchange for steering their clients to certain product.*[16]

The pre-proposal points to uncertainty at the federal level with the vacatur of the Department of Labor's conflict of interest rule and the pending status SEC's proposed regulation best interest as necessitating state intervention to provide adequate investor protection. Specifically, the proposal documents the Bureau's belief that a uniform standard is necessary to protect investors against the abuses that can result when financial professionals place their own interests above those of their customers as is permitted under the current FINRA suitability standard.

DISCUSSION

We believe that investors are best served when the interests of the financial services professional and investors are aligned. In particular, ARA supports putting the interests of investors (and particularly retirement investors) front and center under a "best interest" standard. Furthermore, we support efforts to tailor rules to preserve investor choice with regard to business models and compensation practices in a manner that is workable for broker-dealers and investment advisers alike.

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, although not determined at this time, regulations could potentially impose new and different disclosure requirements than are presently applicable under ERISA.

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[13] *Aetna Health Inc. v. Davila,* 542 U.S. 200, 209 (2004).
[14] *Pilot Life Ins. Co v. Dedeaux*, 481 U.S. 41, 54 (1987)
[15] 50 N.J.R. 2142
[16] *Id.*

It was because of this potential for differing state standards that Congress included provisions in ERISA to pre-empt conflicting state laws.[17] 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.'[18] 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.*[19]

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.[20] 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."[21] This would apply to any cause of action with respect to an ERISA plan created under Bureau regulations. (However, the concept of ERISA pre-emption does not apply to an IRA that is not part of an employer-sponsored plan. Consequently, the vast majority of IRAs would remain subject to New Jersey regulation (unless otherwise pre-empted by other federal laws)).

In 2017, ARA received a legal opinion from the Trucker Huss law firm of San Francisco, California, with respect to the effect of ERISA preemption on Nevada SB 383 which took effect on July 1, 2017. SB 383 amended the Nevada statutes to impose a fiduciary standard of conduct on broker-dealers, broker-dealer sales representatives, and most investment advisers licensed under state or federal law. The legal opinion concluded that SB 383 is preempted by ERISA to the extent it seeks to regulate financial advisers that provide services to a retirement plan governed by ERISA, to the plan's fiduciaries and/or to the plan's participants or beneficiaries. Although specifically directed to the Nevada statutes, the reasoning of the legal opinion would be equally applicable to regulations issued by the Bureau with respect to ERISA plans since ERISA preemption is a matter of federal law. We attach a copy of the legal opinion for your review.

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[17] ERISA §514.
[18] *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 941 (2016).
[19] Id., at 945.
[20] 514 U.S. 645, 651 (1995).
[21] *Davila* at 216.

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RECOMMENDATION

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CONCLUSION

ARA looks forward to working with the New Jersey Bureau of Securities on this important issue. We would welcome the opportunity to discuss these comments further with you. Please contact Brian H. Graff, ARA Chief Executive Officer, at BGraff@USARetirement.org, or Craig Hoffman, ARA General Counsel, at CHoffman@USARetirement.org if you have any questions. Thank you for your time and consideration.

Sincerely,

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

/s/
Craig P. Hoffman, Esq., APM
General Counsel
American Retirement Association
/s/
Joseph A. Caruso, III, JD, MSPPM
Government Affairs Counsel
American Retirement Association