



VIA ELECTRONIC MAIL

October 26, 2020

Cheryl Stanton, Administrator
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division, U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Regulatory Information Number (RIN) 1235-AA34 - Independent Contractor Status Under the Fair Labor Standards Act

Dear Ms. Stanton:

We, the undersigned trade associations, appreciate the opportunity to comment on the U.S. Department of Labor (Department) proposed rule clarifying the worker classification provisions of the Fair Labor Standards Act. (Proposed Rule).¹ The Proposed Rule seeks to codify and clarify Department interpretation applying an 'economic reality test' to determine whether workers are employees or independent contractors under the Fair Labor Standards Act (FLSA).

Our organizations are the leading trade associations in the financial services sector. Our members provide needed advice and services, often provided by independent financial professionals, to millions of Americans, helping them achieve their financial goals.

We are pleased to support the Proposed Rule which will provide greater clarity and certainty for independent contractors and promote consistency. This is particularly important in the financial services sector where the independent business model plays a crucial role in serving small businesses and Main Street Americans who are saving and investing for education and retirement.

The public comment process presents an opportunity for the Department to consider the unique nature of the financial services sector and how the interpretation and application of classification test can impact our ability to serve Main Street, as discussed below. We hope our comments will be helpful to the Department in providing further clarity, specifically regarding application of the control element of the economic reality test to the financial services sector.

Independence in the Financial Services Sector

For over 40 years, independent financial services professionals have served Main Street Americans and small businesses, helping them build wealth and achieve financial security. There are more than 160,000

¹ Regulatory Information Number (RIN) 1235-AA34 - Independent Contractor Status Under the Fair Labor Standards Act. <https://www.federalregister.gov/documents/2020/09/25/2020-21018/independent-contractor-status-under-the-fair-labor-standards-act>

independent financial advisors in the US – more than half of all producing registered representatives.² These financial professionals choose to be self-employed independent contractors, managing their own businesses. They affiliate with larger broker-dealer and investment adviser firms that execute and clear their clients' transactions while providing the supervision, oversight and compliance required by law.

Discussion of Proposed Rule

As the Executive Summary of the Proposed Rule explains, courts and the DOL already apply a test to determine whether, “as a matter of economic reality, [a] worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor).” It goes on to note, however, that “the test's underpinning and the process for its application lack focus and have not always been sufficiently explained by courts or the Department, resulting in uncertainty among the regulated community.”³

In codifying the economic reality test the Proposed Rule would establish five distinct factors to be weighed, but it would give primary consideration to two of those factors: the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss.

We support the Proposed Rule's approach to applying the economic reality test, including the primacy of the control factor together with the opportunity for profit or loss. Our support is predicated on the Proposed Rule's explicit provision that, “Requiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.”⁴

The express exclusion from the control element for legal and other obligations can and should be reasonably interpreted to include control that is necessary for or in furtherance of compliance with securities industry law and rules, including rules of self-regulatory agencies and securities exchanges. However, to minimize any confusion or misinterpretation, we suggest that a more specific exclusion for the financial service sector would be appropriate. We note that such an industry-specific provision was included in the Taxpayers Relief Act of 1997, which established that “no weight may be given to instructions from the service recipient which are imposed only in compliance with government investor protection standards or investor protection standards imposed by a governing body pursuant to a delegation by a Federal or State agency.”⁵ More recently, California undertook major revisions to its employee classification laws in 2019 and included an explicit exemption from its newly adopted standards for the financial services sector. We believe this precedent, demonstrates the wisdom of including such an exemption in the proposed rule and that such exemption would further the Department's goals of promoting greater clarity and consistency.

Conclusion

Establishing an independent business involves a significant commitment for a financial professional and can include significant risk. We believe the Proposed Rule represents a positive step in providing greater certainty for those professionals and consistency in the application of the FSLA.

² Cerulli Associates, Advisor Headcount 2016, on file with Financial Services Institute.

³ Regulatory Information Number (RIN) 1235-AA34 - Independent Contractor Status Under the Fair Labor Standards Act.

⁴ Ibid. Section 795.105(d)(1)(i).

⁵ Pub. L. No. 105-34, § 921, 111 Stat. 788, 879 (1997) (codified at 26 U.S.C. § 3121 note (2015)).

We appreciate the opportunity to support the Proposed Rule and your consideration of our comments.

Respectfully submitted,

American Securities Association
Financial Services Institute
Insured Retirement Institute
Securities Industry and Financial Markets Association