October 26, 2020

Via Electronic Submission

Ms. Amy DeBisschop
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: RIN1235-AA34, Independent Contractor Status Under the Fair Labor Standards Act

Dear Ms. DeBisschop:

The Securities Industry Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Department of Labor's (the "Department") notice of proposed rulemaking to revise its interpretation of independent contractor status under the Fair Labor Standards Act ("FLSA") (the "Proposal"). We support the intended purpose of the Department's Proposal "…to promote certainty, reduce litigation, and encourage innovation in the economy."[2]

I. The Value of Independent Contractors in the Securities Industry

Independent contractors have long been an integral part of the securities industry. Independent broker-dealers ("BDs") and the nearly 160,000 individuals that affiliate with them as independent financial advisors ("FAs") serve millions of clients across the U.S. by providing investment education and guidance. Many clients are modest to middle income investors seeking advice on retirement planning, educational funding, and other life events. Many of these FAs offer or provide additional services to protect their clients' financial well-being, such as

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] 85 Fed. Reg. 60600 (Sept. 25, 2020).

insurance solutions and tax planning advice. For FAs that choose this route instead of being an employee of a BD, independent contractor status allows them to own and operate their own small business (formed as sole proprietorships, professional corporations, partnerships, LLCs, or other legal entities) and control the manner and means of its operation. Their business bears the hallmarks of an independent contractor. They benefit from a decentralized business structure, buy or rent their own office space, employ their own staff, select and manage their vendors, and are typically responsible for covering their own expenses and providing for their own retirement and health and welfare benefits.

These FAs are entrepreneurs who assume the risks and seek out the rewards of entrepreneurship. They control their own profit or loss. Compensation is traditionally based on commissions, fees, or other transaction-based consideration that is carefully recorded on the IRS Form 1099. Importantly, FAs own the relationship with their clients – the most valuable asset in the securities industry – and an important reason that some individuals choose to operate as an independent contractor. In short, operating as an independent contractor encompasses the flexibility that these entrepreneurs may require to be successful as it provides them the ability to more easily transition their client base when they choose to change the BD they affiliate with.

Notably, FAs work in a highly regulated industry and are required[3] by the securities laws to associate with a BD, which could be a firm that has a fully independent contractor business model or offers a choice between independent contractor or employee status, and be licensed with the Financial Industry Regulatory Authority ("FINRA").[4] Association with a BD is grounded in important public policy. The BD handles licensing and registration of its associated persons with FINRA and supervises them for the protection of investors. Independent FAs affiliate with BDs not only to meet their regulatory obligations, but also to carry out their clients' goals and transactions. For instance, BDs generally offers custody of client funds, provide trade execution, and takes care of the required reporting and disclosure obligations so that the FA can focus on client service. Such FAs generally operate under a written contract or arrangement with the BD that clearly details his or her status as an independent contractor and specifies that they are not an employee of the BD. There is no potential for misunderstanding each side's role in the arrangement.

Recently, the traditional independent contractor model utilized by our independent BD members and their FAs has been challenged, albeit indirectly. This has been a byproduct of the attention focused on the gig economy's new industries that almost exclusively utilize independent contractors. Efforts to address worker classification in the new gig economy have focused on the

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[3] Exchange Act § 15(a), 15 U.S.C. § 78o(a); FINRA By-Laws Art. III § 1.

[4] Exchange Act § 15(b)(8), 15 U.S.C. § 78o(b)(8).

relatively new and restrictive ABC test.[5] But adoption of the ABC test would impact other industries, as we saw in California, necessitating a complex and burdensome process for exempting certain relationships to avoid unnecessarily upsetting and reorganizing historical practices, such as in the securities industry, where independent contractor status is appropriate.

II. The ABC Test Threatens Independent BDs and FAs

The Proposal addresses alternative tests and rightly rejects for very good reasons the ABC test that has gained attention and traction in recent years. The ABC test mistakenly presumes that all workers are employees and are only independent contractors if all three prongs are met. The failure to meet any one prong disqualifies the independent contractor's status. This is particularly concerning because of the legal uncertainty that the "B" prong – *withing the usual course of business* – of the ABC test presents for industries like ours that have historically structured their businesses to permit workers to operate as independent contractors. California recognized this problem when it adopted the ABC test for its wage and hour law and it specifically exempted several industries, including ours, allowing such exempted industries to continue to rely on the multifactor *Borello* test.[6] Thus, protecting the historic business model and allowing those FAs who choose to operate and control their small businesses in the securities industry to do so.

Lacking developed case law and being too rigid, the ABC test provides neither certainty nor clarity to industries that rely on the independent contractor model. That is why we welcome revisions to the FLSA's "economic realities" test. The revisions reassure both BDs and FAs. The proposed test would continue to provide FAs with flexibility in how they operate their business and further support and aid their efforts in for advising and helping American families build secure financial futures.

To the extent that the Department determines that it is appropriate to change course and adopt the ABC or any other test in the final rule, the Department should not implement such changes without first proposing specific language that would give the public notice and opportunity for comment, especially given the significant economic impact such a change will have on operations. Failure to formally vet proposed changes with the public would violate the spirit and purpose of the notice and comment requirements. Although the Proposal raises and rejects the ABC test as an alternative, it would not be a "logical outgrowth" of the proposal, because "fair notice" of the changes are needed for compliance with the Administrative Procedures Act ("APA").[7] Without first setting forth the specific elements of the test and possible exemptions in

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[5] *Supra* note 2 at 60635-36.

[6] Codified under Lab. Code § 2783.

[7] *See Long Island Care At Home, LTD. v. Coke*, 551 U.S. 158, 174 (2007) ("The object, in short, is one of fair notice."); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (stating that purposes of APA's notice and comment requirements are "(1) to ensure that agency regulations are tested via exposure to diverse

a notice of proposed rulemaking, employers will not have "fair notice" of any change or the ability to comment on the economic costs associated with changes.[8] Thus, SIFMA believes that the adoption of any test other than streamlined economic realities test set forth in the Proposal without fair notice and opportunity to comment would violate the APA.

III. The Department Proposes a Rational Test

The proposed rule would replace the existing six-factor "economic realities" test with a similar but streamlined test that ultimately determines whether a worker is in business for themselves or is economically dependent on an employer for the work. To do so, the Department proposes to give greater weight to two factors: 1) the nature and degree of the worker's control over the work, and 2) the worker's opportunity for profit or loss. The proposed test and weighting of factors appropriately reflects and accommodates the economic realities of SIFMA's independent BD members and their FAs who choose to operate as independent contractors.

We note that the test's control factor retains an important feature that allows FAs to work in the securities industry as independent contractors. The Department's explanation of the control factor confirms that requirements imposed on independent contractors to ensure compliance with government or other regulatory rules and regulations do not tip the scale in favor of employee status. This is important for the highly regulated securities industry, where BDs are legally required to supervise their affiliated FAs to ensure compliance with the firm's policies and procedures. Over 30 years ago, Congress specifically recognized the unique status of worker classification in the securities industry when in 1997 it passed a "duty to supervise" safe harbor for broker-dealers under the tax laws.[9] Congress was reacting to the IRS, which at the time was looking at the term "supervision" critically, and was leaning toward classifying all FAs as "employees" because the BDs were legally obligated to "supervise" their affiliated FAs for investor protection purposes. While the proposed test removes any doubt, we suggest codifying this principle by providing an example of our industry and utilizing the following language:

> *In determining the level of control over a worker by a service recipient, no weight shall be given to instructions from the service recipient which are imposed only in compliance with investor protection standards imposed by the Federal Government, any State government, or a governing body pursuant to a delegation by a Federal or State agency.*

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public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review").

[8] *See Prometheus Radio Project v. FCC*, 652 F.3d 431,450 (3d Cir. 2011) (stating that "the opportunity for comment must be a meaningful opportunity. That means enough time with enough information to comment and for the agency to consider and respond to the comments." (internal citation and quotation marks omitted)).

[9] Section 921 of the *Taxpayer Relief Act of 1997* (PL 105-34).

Two additional comments on the “Permanence of the Working Relationship” and “Integrated Unit” factors. First, relationships between BDs and FAs last many years in our industry. An FA may be affiliated with a BD the entirety of their career, and their clients and communities see this. The unique permanency of these relationships should not weigh against our industry and in favor of employee status. At any time, both parties can terminate the relationship, but their long-lasting nature evidences both parties’ satisfaction. Second, we would appreciate confirmation or clarification that FAs engaged in financial advice and sales utilizing a BD’s platform to effect said sales are not part of the BD’s “integrated production process for a good or service” of the integration factor, § 795.105(d)(2)(iii).

IV. Uniformity Across Circuits Improves Compliance and Understanding

By putting in place a federal standard to address employee status, the Department provides certainty to hiring firms and individuals working in an independent capacity. This is particularly important for our members who operate nationally, as well as those independent contractors who may move from one state to another. By having a uniform set of rules to follow, both employees and independent contractors will understand the rules that apply in their case. The benefits are substantial about the government providing uniformity on employment laws. This is important for ensuring there are not overlapping or conflicting regimes, which make compliance more complicated. For national institutions, this ensures that they can put together a comprehensive workforce that complies with a common set of standards which are easier to implement and communicate. This is particularly an issue for businesses that have national operations. This is particularly true for our independent BD members who often conduct their operations across national markets.

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We appreciate the Department's efforts to provide clarification and certainty on independent contractor status. We look forward to engaging with you on this important effort. If you have any questions regarding our comments or require additional information, please do not hesitate to contact us at (202) 962-7300.

Respectfully submitted,

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