



VIA ELECTRONIC MAIL

July 1, 2024

The Honorable Bill Cassidy, Ranking Member
United States Senate Committee on Health, Education, Labor and Pensions
428 Dirksen Senate Office Building
Washington, DC 20510

Re: Request for Information on Portable Benefits for Independent Workers

Dear Senator Cassidy:

I write on behalf of the Financial Services Institute (FSI)¹ in response to your Request for Information (RFI) on ways to modernize federal law to allow independent workers access to portable workplace benefits like retirement and health care.² The RFI seeks information on ways to remove federal legal and regulatory barriers to portable benefits for independent workers while protecting their flexibility and freedom to earn a living as they best see fit.

FSI appreciates the opportunity to comment on this important subject. Independent financial advisors are small business owners by choice. As explained in further detail below, their independent contractor status is central to their business and enables them to better serve their clients. Recent efforts to expand employee protections to more workers have threatened independent financial advisors' ability to continue to operate as independent contractors. We outline specific pain points that could be addressed in future legislation. Like many small business owners, our financial advisor members also struggle to find quality, affordable medical insurance for themselves and their staff. FSI has explored potential solutions that could be offered to members. We discuss below what we are currently able to offer our members and the shortcomings that could be addressed with future legislative solutions.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the United States, there are more than 500,000 independent contractors in the financial and insurance industries, including 160,000 independent financial advisors, who account for approximately 52.7 percent of all producing independent financial advisors.³ By their choice, these financial advisors are self-employed

¹ The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

² <https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-requests-information-from-stakeholders-on-portable-benefits-for-independent-workers>

³ Cerulli Associates, Advisor Headcount 2019, on file with author; NERA Economic Consulting, The Role of Independent Contractors in the Finance and Insurance Sectors (Nov. 2022), (finding that more than half a million people work as independent contractors in the financial and insurance sector and in financial-services occupations).

independent contractors, rather than employees of independent financial services firms.⁴ They own and operate approximately 130,000 financial advisory and insurance brokerage firms, employing approximately 330,000 people and accounting for 27 percent (\$47 billion) of the output of the financial-advisory and insurance-brokerage industry. Between 2015 and 2019, independent contractors in the financial services sector created approximately 54,000 new businesses and 174,000 new jobs.⁵

Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the affordable financial advice, products, and services necessary to achieve their investment goals. This business model has two players: financial advisors and independent financial services firms. Financial advisors normally establish their own business without any coordination with or approval required by the firm. Some advisors engage in limited operations, such as purchasing and selling securities on behalf of clients. Others may have a more significant enterprise, offering a full range of financial planning, investment advice, insurance, tax, and estate-planning services.

FSI's members serve clients across all income levels. Through their association with independent financial services firms, independent financial advisors are able to provide financial advice that helps investors save for common financial needs such as college tuition, homeownership, retirement, and support for their aging parents. These advisors' services are especially important in underserved minority and rural communities that lack access to a robust financial-services market, because they frequently offer a one-stop shop for affordable investing advice, tax preparation, financial education, and estate planning.

Financial advisors affiliate with independent financial services firms because it is required by securities regulations.⁶ Those regulations require anyone who effectuates securities transactions or offers advice concerning investing in securities to register with the SEC or affiliate with a corporation that is registered with the SEC. Individual advisors who choose to affiliate with a financial services firm do not individually register as broker-dealers but instead agree to supervision by their firms, which assume responsibility for ensuring compliance with federal law and the conduct rules of the Financial Industry Regulatory Authority, Inc. (FINRA).

Critically, *financial advisors are not employees of independent financial services firms*. The key

⁴ The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, or a dual registrant. The use of the term "investment advisor" or "advisor" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

⁵ NERA Economic Consulting, *The Role of Independent Contractors in the Finance and Insurance Sectors* (Nov. 2022).

⁶ In particular, under the Securities Exchange Act of 1934 (Exchange Act), anyone who effectuates securities transactions or offers advice concerning investing in securities, including independent financial advisors, must register with the SEC or affiliate with a corporation that is registered with the SEC, such as an independent financial services firm. 15 U.S.C. § 78o(a)(1). Federal regulations also require registered investment advisors to implement written policies and procedures designed to prevent violations of the federal securities laws. 17 C.F.R. § 270.38a-1. Individual advisors who choose to satisfy these requirements by affiliating with a financial services firm do not individually register as broker-dealers but instead agree to supervision by their firms, which assume responsibility for ensuring compliance with applicable laws. *Id.*; FINRA Rule 3110.

relationship is the one between a client and his or her financial advisor—not the separate, symbiotic relationship between the financial advisor and his or her affiliated independent financial service firm. Financial advisors frequently switch their firm affiliations, taking their clients and preexisting businesses with them. The firms do not control financial advisors, who set their own hours and rates, maintain their own physical premises, and hire and supervise their own staff. Financial advisors make significant investments in their own businesses and realize profits or losses according to their own successes or failures. They generally operate their business free from the control of the firms except for purposes of compliance with federal and state rules and regulations. Many financial advisors also offer clients services wholly unrelated to their firm affiliation, like tax advice and estate planning.

Thus, financial advisors are independent business owners who comply with certain contractual obligations such as legally required regulatory compliance measures. These advisors are therefore not correctly classified as employees under the Fair Labor Standards Act (FLSA).

Discussion

FSI appreciates the opportunity to comment on how labor and employment laws can be updated to better fit the modern economy. We remain concerned that recent efforts to expand employee protections to more workers have threatened independent financial advisors' ability to continue to operate their businesses and serve their Main Street American clients. FSI also supports some efforts to expand access to benefits for independent workers. These points are discussed in greater detail below.

I. Shortcomings of the Current Worker Classification Model

As an initial matter, we suggest that future legislative or regulatory solutions include language that supervision for regulatory compliance and risk management efforts in industries like financial services should not be considered evidence of control for the purposes of an employment relationship. The now rolled back 2021 DOL Independent Contractor Rule⁷ included such language, which brought the FLSA definition into alignment with the Internal Revenue Code (IRC). Unfortunately, the DOL's 2024 Independent Contractor Rule eliminated the helpful clarifying language.

As outlined above, FSI's financial advisor members have an independent contractor relationship with an independent financial services firm. These advisors enjoy the freedom of running their own practice and offering their clients comprehensive advice, products, and services. Further, financial advisors generally choose between working as independent contractors or as employees of financial services firms. Many prefer to be independent contractors: independent advisors reported overall levels of satisfaction with their broker-dealer that was 5% higher than employee advisors and were around 45% more likely to recommend their affiliated broker-dealer to a colleague than were employee advisors.⁸

⁷ Independent Contractor Status under the Fair Labor Standards Act, 86 FR 1168, January 7, 2021 available at: <https://www.federalregister.gov/documents/2021/01/07/2020-29274/independent-contractor-status-under-the-fair-labor-standards-act>

⁸ Wealth Management Firms Need Advisors as Brand Evangelists to Attract New Talent, J.D. Power Finds (July 6, 2022), available at: <https://www.jdpower.com/business/press-releases/2022-us-financial-advisor-satisfaction-study>

As we explained in our comments on the DOL's Independent Contractor Rule⁹ when it was proposed, even though some independent contractors might benefit from reclassification as employees, others would not, and over-classification of workers as employees would likely harm workers as a whole. For example, reclassification may cause wage cuts or drive many independent contractors out of the workforce. In a study of the economic impact the DOL's Independent Contractor Rule would have on our members,¹⁰ up to 20% of advisors would retire rather than be reclassified as employees. As a result, a significant number of Main Street investors would lose access to a trusted financial advisor. Further, 78% of advisors said that they expect account minimums to increase under the rule, restricting their ability to serve smaller accounts. This would be a particularly harmful outcome for less affluent investors, including younger individuals, minority households and those in rural areas. These financial advisors also estimated that they could no longer serve 31% of their existing clients because of increased account minimums and fees.

Independent financial services firms operate in a highly regulated environment overseen by the SEC, FINRA, and state securities divisions. Independent financial advisors choose a broker-dealer to affiliate with and have a large number of choices in a competitive market. Because independent financial services firms closely supervise financial advisor activity to comply with SEC, FINRA, and state securities regulatory requirements and engage in related risk management measures, firms are sometimes accused of misclassifying their financial advisors. Thus, they waste significant resources defending their worker classification decisions to the IRS, DOL, and state employment regulators.

Importantly, the SEC and FINRA do not differentiate between employees and other associated persons for securities law purposes.¹¹ Financial services firms must supervise the securities activities of their personnel regardless of whether they are considered employees or independent contractors. In addition, the FLSA, Internal Revenue Code (IRC) and state employment regulators may evaluate the definitions of independent contractor and employee differently. This leads to a confusing patchwork of legal and regulatory requirements for independent financial services firms and their financial advisors. The 1997 Taxpayer Relief Act added language to the IRC stating that supervision for compliance with securities laws cannot be interpreted as control for the purpose of an employment relationship.¹²

⁹ Financial Services Institute, Comment Letter on Employee or Independent Contractor Classification Under the Fair Labor Standards Act (December 13, 2022) available at: <https://www.regulations.gov/comment/WHd-2022-0003-53818>

¹⁰ Financial Services Institute and Oxford Economics, The DOL's Independent Contractor Classification Rule Would Decrease Access to Advice and Increase Costs for Investors (January 2023) available at: https://financialservices.org/wp-content/uploads/2023/01/Oxford-Economics-Report-on-Proposed-IC-Rule-for-FSI.2023.1.17.pdf?_gl=1*mzvzw*__gcl__au*NzE3MjQ5MjMuMTcxMDM2MzcwMw..

¹¹ See, for example, *In the matter of William V. Giordano*, Securities Exchange Act Release No. 36742 (January 19, 1996); FINRA, general information -- "As a registered representative, whether you are an employee or an "independent contractor" (for regulatory purposes there is no distinction between the two terms), you are obligated to follow all applicable securities laws and regulations." <https://www.finra.org/registration-exams-ce/manage-your-career/obligations-your-firm>

¹² Conference Report to Accompany H.R. 2014, Taxpayer Relief Act of 1997, Rpt, 105-220 at p457, 105th Congress (July 30, 1997) available at: <https://www.congress.gov/105/crpt/hrpt220/CRPT-105hrpt220.pdf>

II. Exploring Portable Benefits Options for Independent Workers

It is currently challenging for small and medium sized businesses to obtain reasonably priced health insurance for themselves and their employees. FSI has explored various options to help financial advisors solve this problem, including association health plans (AHPs). Insurance is regulated by individual states meaning that not all states allow AHPs and where available they are cost-prohibitive. There are currently no AHPs for us to offer or carriers willing to underwrite them. However, we are able to offer Professional Employer Organization (PEO) services that include health insurance and other benefits. Unfortunately, this solution does not work for everyone due to the fact that the health insurance is packaged with a variety of other business support services that our members may not need or cannot afford.

Through our CoveredAdvisor benefits program, FSI has partnered with multiple PEOs to try to alleviate the dearth of access to quality, affordable medical insurance for independent advisors and their staff. When our members partner with these PEOs, due to federal regulations, the PEOs must run the advisors' payroll and HR services. Once they pay for those features, which are costly, they gain access to large-group benefits such as medical, vision and dental insurance. Further, insurance is regulated at the state level and some states impose minimum size limits to qualify. For example, in Maryland and New Mexico, a firm must have 50 employees to qualify. While this program has proven helpful for some, it's not a single solution to inaccessible standalone medical insurance, which is desperately needed by independent advisors. We encourage the Committee to consider allowing small employers to band together to purchase health coverage allowing them to share costs and the administrative burden.

Conclusion

Thank you for considering FSI's comments. Should you have any questions, please contact our Director of Legislative Affairs, Hanna Laver, at (202) 499-7224.

Sincerely,

A handwritten signature in black ink, appearing to read "Dale Brown", is positioned above a vertical line.

Dale E. Brown, CAE
President & CEO