Finseca™

December 13, 2022

The Honorable Martin J. Walsh
U.S. Secretary of Labor
Attn: Amy DeBisschop,
Division of Regulations, Legislation and Interpretation,
Wage and Hour Division,
U. S. Department of Labor
200 Constitution Avenue, N.W., Room S-3502
Washington, D.C. 20210

Re: RIN 1235-AA43, Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Secretary Walsh:

On behalf of Finseca, thank you for the opportunity to provide comments on the Department of Labor's ("DOL") proposed regulation (the "Proposal") addressing the distinction between "employee" and "independent contractor" for purposes of wages and overtime under the Fair Labor Standards Act ("FLSA").

We are Finseca:

Finseca is a national trade association comprised of over 6,500 financial security professionals who serve hundreds of thousands of clients every day in communities across the country. Our members help their clients with comprehensive and holistic financial planning that places risk protection (life insurance and annuities) as the centerpiece – an approach that a recent study by Ernst & Young demonstrates provides better financial outcomes than financial plans without these guarantees.1 Our members are licensed insurance agents and producers, agency leaders, and brokerage professionals, many of whom are also registered representatives of broker-dealers or representatives of registered investment advisors. Some of our members are licensed as all three.

1 "Benefits of Integrating Insurance Products into a Retirement Plan," Ernst &Young, LLP, October 2022, accessed at https://www.ey.com/en_us/insurance/how-life-insurers-can-provide-differentiated-retirement-benefits on December 9, 2022.

As an organization, our mission is to empower our members to help more American families achieve their version of financial security by pursuing policies at both the federal and state levels that create the best possible environment to do planning. Thus, one of our key goals is to preserve consumer choice and access to the financial security professionals and products that families need to make these crucial decisions.

We are taking the opportunity to comment on the Proposal because we are concerned that, as written, it may unnecessarily cast doubt on long-established and well-regulated independent contractor relationships for our members, impeding their ability to empower their clients to achieve their version of financial security.

Executive Summary: Any Final Rule Must Not Disrupt the Independent Contractor Status of Financial Security Professionals

Financial security professionals have been independent contractors from the very beginning of the FLSA, and these long-standing business models are essential to assisting families with their financial security needs. We understand that the Department seeks to clarify the FLSA's application to new developments in the labor market, but we are very concerned that this effort to address new circumstances could materially disrupt long-standing, well-understood, and properly classified independent contractor relationships for our members. What's more, disrupting these relationships would not provide additional protection, as our members—if misclassified as employees—likely would be exempt employees in any case.

The 2021 Rule avoided these harms by providing clarity for our members and maintaining these business relationships. Unfortunately, the Proposal would introduce unwarranted ambiguity into the analysis, primarily because it blurs the line between economic alliances among businesses (such as the businesses many of our members operate when selling insurance products) and the economic dependence of an employee on an employer.

We believe no amendment to the 2021 Rule is necessary. However, if the Department does promulgate a final rule, it must ensure that the status of financial security professionals is not ambiguous. Accordingly, if there is a final rule, we ask that the Department include a clarifying example that will make its application to our members clear. We suggest an example similar to the following:

> Q: Where a financial security professional operating as an independent contractor predominately or exclusively sells the products of a particular financial institution, does that distribution relationship between businesses negatively affect her status as an independent contractor?

A: No. An independent contractor is not an employee solely because of a limited or exclusive relationship as a distributor of products produced by a manufacturer.

We provide our detailed comments on the Proposal below.

The Entrepreneurial Spirit – Why Finseca Members Choose Independence:

Financial security professionals can play many roles. Our members may be the individuals that directly help a family or a business with their financial planning and risk protection needs. They may manage an office, an agency, or a firm of individual financial security professionals. They may provide the products and services in independent brokerage or investment advisory settings. However, none of these work relationships are new innovations in a changing labor environment—they are long-standing, well-understood relationships that are highly regulated by state and Federal agencies enforcing insurance and securities laws and regulations.

The overwhelming majority of financial security professionals make the affirmative choice to be independent contractors. They embrace the entrepreneurial spirt of owning and operating their own businesses, with all the potential risks and rewards that come with it. Owning their own businesses allows them the freedom and flexibility to tailor their businesses to their own individual expertise, and to meet the needs of their communities. They set the guidelines for how and when they work, grow equity in their businesses and provide small business employment opportunities.

- *Benefits to Consumers*

More important than the many advantages the independent contractor model provides to the financial security professional are the advantages it provides to the consumer. By virtue of their independent contractor status, financial security professionals often can be appointed to offer the products of different insurance carriers, enabling them to choose from a variety of options for the individual family or business. Other financial security professionals may be appointed to sell predominately a particular carrier's products, but they still serve as their own businesses and make their own, independent recommendations to their clients.

This flexibility ensures product choice and competition in the marketplace, and provides better financial security outcomes than if the only choice for financial security professionals were to be FLSA-covered employees, being specifically directed by an employer as to which products to recommend, when to work, how to operate, etc.

In fact, the independent contractor model for financial security professionals is the backbone for distributing the financial planning and protection products that 90 million American families rely upon today.2

- *Benefits to Financial Security Professionals*

Financial security professionals—agents licensed to sell, solicit, or negotiate life insurance—and independent financial advisors historically have been independent contractors and not employees for purposes of determining the applicability of federal and state wage and benefit provisions.3 They maintain their own offices, they purchase their own insurance, they hire their own employees, and they pay employment taxes and workers' compensation premiums for their own employees. When they are ready to retire or exit the profession, financial security professionals can choose to sell the businesses they have created. These professionals enter into written agreements with insurance companies and/or broker-dealers and registered investment advisors that carefully set forth the terms of their independent contractor status. And, as discussed in more detail below, Congress specifically addressed certain life insurance and annuity salespeople's relationships with insurance carriers, providing a means for them to receive retirement and health and welfare benefits despite not being employees of those insurance companies.

We Support Clear, Administrable Standards that Protect Employees and Preserve Traditional Independent Contractor Relationships:

We agree that the Department must promulgate regulations articulating clear, easily administered standards that protect workers who are in an employee/employer relationship. The FLSA has protected the basic rights of employees to the minimum wage and overtime pay for nearly 85 years. If changing economic circumstances in the new "gig" economy create new work arrangements that require clarification regarding the application of the FLSA, we appreciate that the Department may need to amend its regulations. In our view, the Department's 2021 regulation achieved this goal, and provided significant clarity and simplicity.

However, clarifications intended to address new employee/employer circumstances must not displace long-settled independent contractor arrangements in which circumstances have not changed.

2 "Life Insurers Fact Book 2022," American Council of Life Insurers, 2022 at pg. 89, accessed at https://www.acli.com/-/media/acli/public/files/factbook/2022lifeinsurersfactbook_v2.pdf on December 9, 2022.
3 See, e.g.: Gough v. Bankers Life & Casualty Company, 201 WL 585715 (D. Md. Feb. 12, 2019), dismissing FLSA claims, holding that plaintiff had not sufficiently alleged employee status; Sofranko v. Northwestern Mutual, 2008 WL 145509 (W.D. Pa. Jan. 14, 2008), granting summary judgment in favor of defendants on FLSA claim, holding that plaintiff was an independent contractor.

85 years of experience with the FLSA makes it very clear that many workers are not, have never been, and never should be classified as "employees." They operate their own businesses as independent contractors, intentionally designing their working arrangements to provide the benefits and the responsibilities of working for themselves.

The Department will have failed in its duty to protect all workers and to carry out its mandate under the law if amendments intended to address new concerns also disrupt existing, longstanding independent contractor relationships like those utilized by our members.

Financial Security Professionals Have a Well-Established History of Proper Classification as Independent Contractors—the Proposal Creates Unwarranted Ambiguity

Financial security professionals have been properly classified as independent contractors for the entirety of the FLSA's 85-year heritage. These independent contractor relationships are stable and well understood, beneficial to the entrepreneurs utilizing them, and are not the product of any recent changes in labor markets.

There are several types of independent contractor business models common among our members. Some of our members are appointed to represent many different insurance carriers. Some of our members are appointed to represent only a few. Some of our members are in a specific category of independent contractor recognized by Congress regarding salespeople who sell insurance and annuity products predominately for one carrier. What all of these have common is long-standing recognition that they are not employees.

For example, more than 70 years ago in the Revenue Act of 1951 (passed just 12 years after the FLSA), Congress implicitly acknowledged that life insurance and annuity salespeople predominantly selling the products of one carrier were not employees. Internal Revenue Code Sec. 7701(a)(20) created a special type of independent contractor relationship specifically for these insurance salespeople. Even though they are not employees of the carrier they represent, and thus are not eligible for employer-provided pension and health benefits, this law permits them to receive certain pension and welfare benefits based on their sales of that carrier's products. Congress understood these insurance professional arrangements to be independent contractor relationships despite a close economic association with one insurance carrier.

- *The Proposal's Unwarranted Ambiguity—Economic Alliance is Not Economic Dependence*

The Proposal's purpose is to prevent employees from being exploited through misclassification. However, unlike the 2021 regulation it would replace, the Proposal creates ambiguity regarding some financial professional's relationships that are not only long-established, but clearly in the best interests of the consumer and independent contractor.

Economic alliance, such as when a retirement security professional running her own business predominantly sells the products of one carrier, is substantively different than economic dependence of the sort that creates an employee/employer relationship. The examples provided in the Proposal do not adequately address the business models under which our members operate. Financial security professionals may have current arrangements with only a limited number of carriers, but these arrangements do not create economic dependence—the professional has the power to terminate, negotiate or otherwise alter these arrangements as one business entity to another, not as an employee to an employer.

- *The Loss of Independent Contractor Status Would Harm Our Members While Offering No New Protection: They Would be Exempt Employees*

The Department's primary concern about misclassification—that employees won't receive the advantages to which they are entitled as employees, from overtime to employee benefits—generally are not applicable to financial security professionals. Based on the reasoning in DOL Opinion Letter 2009-28, financial security professionals, if they were mischaracterized as employees rather than independent contractors, likely would be exempt employees for whom wage and overtime protections are inapplicable. While mischaracterizing financial security professionals as employees would fundamentally disrupt their business model, it would not extend to them any material legal protections.

Further, the Department notes that worker misclassification by employers "culminates in a reduced social safety net [in which employees] do not receive employer-sponsored health and retirement benefits, potentially resulting in or contributing to long-term financial insecurity."4

This is also not a concern for financial security professionals. The literal business of our members is long-term financial security. Financial security professionals are not being denied retirement and health benefits due to their independent contractor status—in fact, the independent contractor relationship makes it possible for many of our members to structure more generous retirement plans than would be available to them as employees.

4 87 Fed. Reg. at 62,271 (October 13, 2022).

Our members who are independent contractors have been so for their entire professional lives and made the affirmative choice to be so, with other paths available to them in the same field. While the Department may perceive a need to modify its regulations to address new economic circumstances in the employee/employer relationship, it must ensure that any changes do not cast doubt on our members' existing independent contractor classifications that have been in effect literally since the beginning of the FLSA.

The Department Is Correct in Not Selecting the "ABC" Test:

We wish to commend the Department for its conclusion that it "…is legally constrained from adopting an ABC test…[b]ecause the ABC test is inconsistent with Supreme Court precedent interpreting the FLSA…"5 We agree with this conclusion as a legal matter. Further, as a policy matter, we believe that the ABC test would be against the best interest of workers operating as legitimate independent contractors. The very rigid and narrow nature of that test would not only infringe the rights of workers who wish to offer services as independent entrepreneurs, but could threaten livelihoods and business viability by displacing workers who are currently in financial business relationships that work well for both parties.

The Department Should Provide Specific Assurance that the Long-standing Independent Contractor Status of Financial Security Professionals Remains under the New Test:

We appreciate statements in the Preamble to the Proposal indicating that the Department does not intend wholesale change to existing independent contractor relationships, and that its analysis of the Proposal does not predict such an effect. However, we believe the Proposal in its current form does raise these concerns, and should be modified to provide a result consistent with the Department's intent.

The Department acknowledged in the Proposal that independent contractor status is necessary and must be preserved, writing, "…there are a variety of bona fide independent contractor relationships that need to be adequately addressed by the test…"6 We agree, and emphasize that financial security professionals are an example of such bona fide relationships that the test must support rather than undermine.

We also appreciated the Department's explanation that it anticipates relatively few independent contractors to be affected by the Proposal, writing, "The Department does not believe, as reflected in this analysis, that this proposed rule would result in widespread reclassification of workers.

5 87 Fed. Reg. 62,267 (October 13, 2022).
6 Id. at 62,231..

That is, for workers who are properly classified as independent contractors, the Department does not, *for the most part*, anticipate that this rule would result in these workers being reclassified as employees. Especially compared to the guidance that was in effect before the 2021 IC Rule, the test proposed in this NPRM would not make independent contractor status *significantly* less likely."7 [emphasis added]

The Proposal's current emphasis on economic dependence as the "ultimate inquiry,"8 combined with its broad range of factors accorded equal weight in a facts and circumstances analysis, creates significant and harmful ambiguity relating to existing relationships, especially where the independent contractor has agreed to a limited distribution or agency appointment arrangement.

Our concerns in this regard are exacerbated by the caveats in the statement above, such as "for the most part" and "significantly." Unlike the 2021 regulation the Department seeks to replace, the Proposal as written would reduce the clarity for our members regarding their independent contractor status. It may not be the Department's goal to effect wholesale change, but it is not acceptable for legitimate independent contractor relationships to be put into doubt.

Put simply, the economic reality test the Proposal calls for does not clearly explain how to evaluate a business owner that enters into a limited or exclusive distribution arrangement, as some of our members do, and this lack of clarity raises questions about what are, in reality, long-established independent contractor relationships. We do not believe issues like this should be matters of first impression for each reviewer. Instead, we urge the Department to clarify that such a distribution arrangement does not create an employee/employer relationship for a financial security professional.

The Department notes in its discussion on the removal of examples in the regulatory text in the 2021 Rule's Section 795.115, that it is proposing to "include examples in the preamble [because] Real-world examples provide valuable information to the general public and regulated parties and help succinctly explain relevant issues in the analysis."9 We agree that such examples can be an effective way to address specific issues, and suggest the following text for the Department's consideration:

> Q: Where a financial security professional operating as an independent contractor predominately or exclusively sells the products of a particular financial institution, does that distribution relationship between businesses negatively affect her status as an independent contractor?

7 Id. at 62,260.
8 Id. at 62,218.
9 Id. at 62,259.

A: No. An independent contractor is not an employee solely because of a limited or exclusive relationship as a distributor of products produced by a manufacturer.

We urge the Department to clarify in the Preamble that it does not intend to change the independent contractor status of financial security professionals for the reasons we outline in this letter. Making a clear statement of this type in the Preamble would do much to alleviate our concerns about the ambiguity presented by the Proposal in its current form.

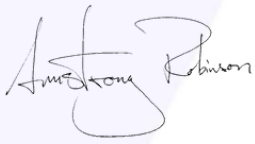
Conclusion:

Financial security professionals have been independent contractors for as long as the FLSA has existed. Congress has recognized and addressed specific aspects of the independent contractor relationship in this industry. The abundance of opportunities within the financial security professional industry to enter into either an employment relationship or an independent contractor relationship means that worker have choice, and are well-protected by the long-established standards in this highly regulated field. The financial services industry is not going through the changes that concern the Department with the so-called "gig" economy.

In short, financial security professionals are not the workers the Department is seeking to protect through the Proposal. Unfortunately, the Proposal could negatively affect these financial professionals and small business owners by unnecessarily raising questions about their independent contractor status. This ambiguity can, in turn, harm the clients who depend on their services.

The Department's desire to address changes in labor markets should not result in a rule that disrupts existing, longstanding and well-regulated independent contractor relationships. We look forward to working with you and your staff to clarify that the independent contract status of financial security professionals is not changed by the Proposal.

Sincerely,



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