The Honorable Martin Walsh
Secretary
U.S. Department of Labor
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*
Regulation Identifier Number 1235-AA43

Dear Secretary Walsh:

On behalf of Raymond James Financial, Inc. ("Raymond James" or "RJF"), I appreciate this opportunity to provide comments on the Department of Labor's ("DOL's" or "the Department's") proposal to revise the regulations that govern the analysis for determining employee or independent contractor status under the Fair Labor Standards Act ("FLSA").[1]

Since 1974, Raymond James has been one of a small number of companies that allow individual financial advisors to choose between working either as employees or as independent contractors. Thus, we are uniquely qualified to provide perspective on the effects that the proposal would have on the investment services industry and our clients.

In this letter, we have provided a general overview of our different working models and how they serve investors. We have also described how this hasty and over-broad proposal may reduce the total number of independent financial advisory firms, disrupt large-scale business operations, and reduce investor choices. We hope that after consideration of our comments and those of our affiliated independent financial advisors, the Department will preserve the current regulations or pursue changes on a more measured basis.

I. Employees And Independent Contractors At Raymond James.

In the investment services industry, the individuals who provide investment advice, financial planning, and related services are known as "financial advisors." Financial advisors who join Raymond James have options: they may choose to work as employees or as independent contractors. For these purposes, Raymond James operates separate subsidiaries.

[1] 87 Fed. Reg. 62218 (Oct. 13, 2022).

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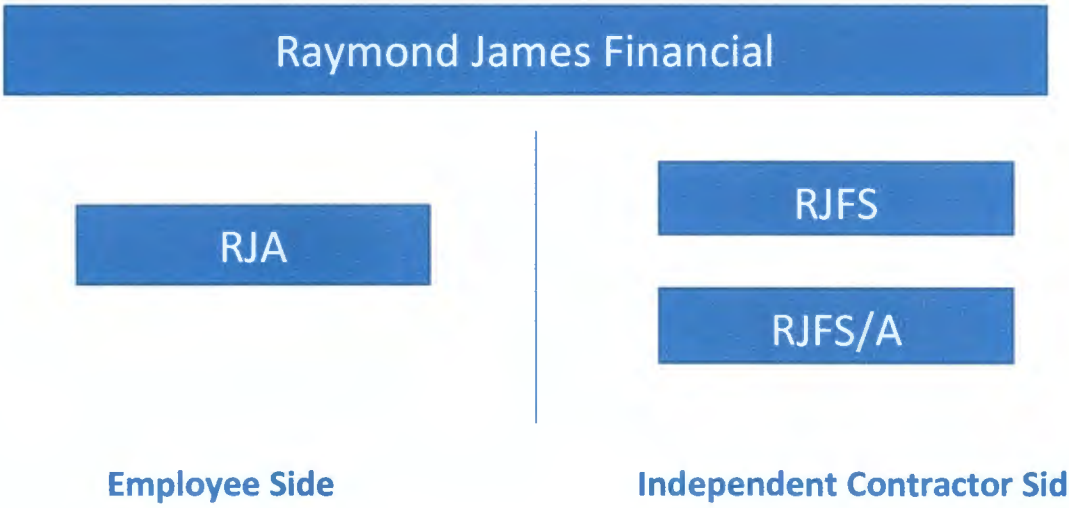

A. Employee Model: Raymond James & Associates.

If the individual wishes to be an employee, he or she may be hired by *Raymond James & Associates* ("RJA"). RJA is a securities broker-dealer and investment adviser, registered as such with the Securities and Exchange Commission ("SEC"), and a member of the main self-regulatory organization in the securities markets, the Financial Industry Regulatory Authority ("FINRA"). It is overseen by each of those regulators, and by the securities regulators of all U.S. states and territories.

Within RJA, there are approximately 3,275 employees who are financial advisors. RJA determines their place of work and working hours. RJA provides them with office space and equipment that it owns or leases, and otherwise covers all costs of operations (e.g., utilities). General liability and workers compensation insurance are covered by RJA. The employee financial advisors are supported by managers and administrative staff who are also assigned and employed by RJA.[2] Compensation for RJA financial advisors includes minimum salaries and employee benefits.

For certain types of products, life insurance for example, RJA limits its employee financial advisors to selling to their clients only if directly through RJA. RJA also prohibits them from providing tax or accounting services to their clients because RJA is not licensed or otherwise qualified to provide such services.

B. Independent Contractor Model: Raymond James Financial Services and Raymond James Financial Services Advisors, Inc.

We have found that individual financial advisors most often begin their careers as employees of RJA, or as employees of other securities firms. But after a financial advisor has acquired years of experience and her own base of clients, she may choose to start her own business

[2] In a limited number of cases, RJA permits some financial advisor employees to provide their own office locations, and (with guidance from RJA) select their own support personnel.

and become an "independent financial advisor." She would then end her employment relationship with RJA or other current securities firm. Depending on her business strategy, that financial advisor may choose to become an independent contractor of:

- *Raymond James Financial Services, Inc.* ("RJFS");
- *Raymond James Financial Services Advisors, Inc.* ("RJFSA"), or
- Both RJFS and RJFSA.

For these purposes, the financial advisor will enter into an "Independent Branch Owner Agreement" ("IBOA") with RJFS and/or RJFSA. In these arrangements, based on the choices of the individual financial advisor:

- RJFS provides and arranges for such services as trade execution, securities custody, trade clearing and settlement, margin lending, and similar.
    - RJFS is a securities broker-dealer (a firm that effects transactions in securities). It is registered with the SEC and all states in that capacity. It is a member of FINRA, and other securities industry self-regulatory organizations.
- RJFSA provides and arranges for investment advice support, such as research, securities analysis, and portfolio modeling.
    - RJFSA is as an investment advisor but not a broker-dealer. Therefore, unlike RJFS or RJA, it is not a member of FINRA, and is not regulated or overseen by FINRA. Instead, it is regulated and overseen by the SEC.

The IBOA explicitly states that the relationship is that of a company and an independent contractor, and not one of employment. It specifies the services that RJFS and/or RJFSA will provide to the independent contractor, and allocates revenues between the parties. Independent financial advisors do not receive minimum salaries or employee benefits, but the fees they receive from servicing their clients may be higher than what they would earn as an employee financial advisor.

As specifically reflected in the IBOA, an RJFS independent financial advisor owns the relationship with his or her own clients. Raymond James is prohibited from soliciting these clients for itself. This gives the Independent Branch Owner freedom to switch from Raymond James to another firm and bring their clients with them – a concept known as "portability."

Independent Branch Owners also form and capitalize their own business entities to support their practices. They determine their office location, purchase or lease office space, maintain or improve their offices, pay utilities, create and use their own trademarks, determine their own working hours, and hire staff or even other financial advisors. They prepare and file their own business tax returns. Pursuant to the IBOA, they must carry their own general liability and workers compensation insurance. Independent Branch Owners also choose and fund their own health and benefit plans, and offer such plans to their employees. They also determine the amounts of revenue that they will allocate to business operations, salaries, any business expansions, and their own compensation.

Independent Branch Owners also control the direction, cost, frequency and timing of their own marketing efforts. They may also conduct certain other business activities, such as offering insurance products directly through carriers, independent registered investment advisory services, or accounting and tax services that are not permitted at RJA. Such products and services are not offered through or controlled by Raymond James.[3]

Independent contracting provides independent financial advisors with the satisfaction that comes with being a business owner. The business model is so successful that independent financial advisors have formed their own industry association, the Financial Services Institute ("FSI"), which provides support and advocacy for advisors in their dealings with the companies that associate with them and with regulatory authorities. FSI is independent of other organizations that represent the securities industry more generally. We understand that approximately 5,000 independent contractors, as members of FSI, have signed letters to the Department in opposition to the current proposal.

The Firm contracts with approximately 1,700 independent financial advisors who own their own independent businesses and who retain an additional 2,000 financial advisors (whether as employees or independent contractors of the Independent Branch). This amounts to 48% of financial advisors affiliated with Raymond James.

Since the time of DOL's approval of the current regulations in 2021, 500 independent contractors have entered into contracts with RJFS and/or RJFSA.

Over 800 more financial advisors are independent contractors working through so-called "bank networking" arrangements with unaffiliated financial institutions. These individuals are employees of banks or credit unions that have entered into "Networking Agreements" that provide their customers with access to investment services pursuant to SEC Regulation R.[4] These individuals are also registered with FINRA, and are subject to all of the same standards, oversight, and compliance requirements as our other independent contractors.

* * *

Other financial firms work with employees or independent contractors in the general manner described above. However, very few firms offer the choice to be either an employee or independent contractor.

Raymond James has offered the ability to choose to become an independent contractor since RJFS was founded in 1974. A few of the benefits for the individual financial advisor are

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[3] On the other hand, FINRA rules and securities regulations require RJFS and/or RJFSA to review such activities for potential conflicts of interest, and to ensure that investors would not view them as part of Raymond James' business (*see* FINRA Rule 3270, "*Outside Business Activities of Registered Persons*"). The firm may be required to prohibit or place restrictions on the activity, and must ensure that activities are properly disclosed on the financial advisor's public registration forms (*see e.g.,* FINRA Form U4, *Uniform Application for Securities Industry Registration or Transfer,* Question 13, "Other Business"; SEC Form ADV Part 2B, Item 4 "Other Business Activities").

[4] 17 CFR Part 247 ("Exemptions and Definitions Related to the Exceptions for Banks from the Definition of Broker").

described above, but for Raymond James, the independent contractor business is also highly valuable.

In the first place, RJFS and RJFSA increase and diversify our revenue streams. This permits Raymond James to expand its business, invest in new infrastructure, offer more services, and create jobs. Also, it is often easier, faster, and lower-risk to enter a new market through an independent contractor than to establish a new office staffed with RJA employees. We have found that independent financial advisors have advantages in that they tend to be very involved with their communities. They use their local contacts and networks to grow their businesses, to the benefit of Raymond James and the community as a whole.

In fact, Raymond James independent financial advisors provide their services in over 1,100 cities, including numerous small cities and towns. RJFS and RJFSA associate with approximately 2,700 financial advisors who are based outside the country's ten largest municipal areas. Thus, RJFS has independent branches in small cities like Bluefield, West Virginia (population 10,000), and Creston, Iowa (population 8,000). This is consistent with a pattern in the investment services industry: the largest firms operate on an employee basis, and concentrate their offerings in the larger urban areas. The potential customer base in less-populated areas cannot justify a large firm's higher costs. At large investment advisory firms, in order to have an in-person, non-robotic financial advisor, the minimum balance to open an account can range above $250,000. Thus, in rural areas, small cities, and towns like Creston or Bluefield, investment services are more commonly found through independent financial advisors.

Our independent financial advisors service approximately 1.5 million client accounts. They provide long-term financial planning for clients who are investing for every purpose: college tuition, retirement savings, small business planning, home purchases, and more.

Finally, each Independent Branch Owner is also a small businessperson. Altogether, these small businesses are employers of 8,000 individuals.

II. Analysis of the Proposal.

We are confident that most observers would agree that independent financial advisors of RJFS, RJFSA and similar firms are not "employees" under the FLSA, and do not need its protections. Indeed, in a 2013 case that analyzed the general independent financial adviser model in the financial services industry, the U.S. District Court for the Southern District of California found that an individual was indeed an independent contractor, and not an employee.[5] Although this case applied the California Labor Code, the Court looked to the same factors that are utilized in FLSA analyses, including control of hours and working conditions, use of specialized skills, payment of business expenses, etc.

We are also confident that the Department is more concerned with the situation of workers who cannot fend for themselves, as opposed to licensed, credentialed investment professionals with business savvy, years of experience, and portable clients. Nevertheless, we believe the proposal could unintentionally sweep independent financial advisors into the "employee"

[5] *Taylor v. Waddell & Reed Inc.*, 2013 WL 435907 (Feb. 1, 2013).

category. This would have significant negative consequences for independent financial advisors, their employees, the investment firms they work for, and retail investors across the country.

A. Factor Weighting.

The current regulation was approved by the Department in January 2021.[6] It lists six non-exclusive factors to consider when determining whether a worker is an employee or independent contractor. They are, in brief:

1. The nature and degree of control over the work.
2. The individual's opportunity for profit and loss.
3. The amount of specialized skill required for the work.
4. The degree of permanence of the relationship.
5. Whether the work is part of an integrated unit of production.
6. Any other factor tending to demonstrate independent contractor or employee status.

The first two factors are "core" factors, carrying greater weight in the analysis. When the two core factors point in the same direction, "there is a substantial likelihood that is the individual's accurate classification."[7]

Now, just seven months after a court holding that the rule was actually in effect, the Department has stated that a multi-factor test where two factors are more important than the others is too confusing (even for federal judges), and may lead to inconsistency.[8] Instead, the DOL is proposing a new rule with seven factors whose weights would vary because "the weight to give each factor may depend on the facts and circumstances of the particular case."[9]

We believe this proposal is misguided. The existing regulation is quite straightforward and easy to understand. Therefore, it supports consistent and predictable results, which are essential for businesses to operate and drive economic growth. The proposal to adopt seven variable factors, on the other hand, invites confusion and litigation over the minutiae of working relationships.

Moreover, the current rule's formulation of the importance of control and opportunity for profit and loss is consistent with case law and economic reality. If the ultimate question is whether an individual is his own boss, then his control over his work and working hours would naturally

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[6] 86 Fed. Reg. 1168 (Jan. 7, 2021). Within a month of adoption, there commenced a year-long saga of efforts to delay the regulations, to withdraw the regulations, and then litigation over the regulations. Hence, although the current rules were effective in March 2021, the Department has never implemented them.

[7] 29 C.F.R. 795.105(d), published at 86 Fed. Reg. 1246. The rules that the Department proposes to delete and replace are so new that they have not yet been published in the Code of Federal Regulations.

[8] "Rather than weighing all factors against each other depending on the facts of a particular work arrangement, courts and the regulated community must evaluate factors within and across groups in a new hierarchical structure, which will likely cause confusion and inconsistency." 87 Fed. Reg. 62229.

[9] 87 Fed. Reg. 62274.

be more important than, for example, his possession of a special skill. Likewise, the opportunity for profit or loss stemming from his own management or initiative is more probative of status than whether a commercial working relationship is long- or short-term. Thus, court decisions interpreting the FLSA are generally decided in accord with the determination of the control and profit opportunity factors.[10] The primacy of these factors in the current regulation merely reflects a common sense assessment of economic realities that should remain in place.

B. Nature and Degree of Control.

The proposal also advances a complete reconceptualization of the "control" factor. Its treatment of control implemented in order to comply with legal obligations is particularly troublesome. Under the current regulations:

> 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.[11]

The proposal would outright reverse this standard to provide that "[c]ontrol implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control."[12] Further, it would stipulate that limiting the worker's ability to work for others is evidence of an employee relationship, apparently even if such limits are imposed by laws or regulations.[13]

In order to protect investors, federal and state securities laws, as well as rules and regulations adopted by the SEC, FINRA and state regulators, establish requirements for financial advisors and the securities firms that they work with. These standards do not distinguish between employee and independent contractor relationships. For example, regardless of status, a representative of a broker-dealer must be registered with FINRA as a representative of his firm, pass qualification examinations, be fingerprinted and pass background checks, and be subject to a mandatory supervision and compliance program.[14] In addition, in order to guard against divided loyalties, many states prohibit an individual from being dually registered with more than broker-

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[10] Cases cited by the Department in the proposal almost uniformly classify workers in the categories indicated by the core factors of control and opportunity for profit or loss. See e.g., *Walsh v. Wellfleet Commc'ns*, No. 20-16385, 2021 WL 4796537 (9th Cir. Oct. 14, 2021); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308 (11th Cir. 2013); *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369 (5th Cir. 2019); *Brock v. Mr. W Fireworks, Inc.*, 814 F. 2d 1042, 1051 (5th Cir. 1987).

[11] 29 C.F.R. § 795.105(d)(1).

[12] 87 Fed. Reg. 62275.

[13] 87 Fed. Reg. 62247, 62275.

[14] *See* FINRA Rule 1210, "Registration Requirements"; FINRA Rule 3110, "Supervision" (Each member shall establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.")

dealer. If a securities broker-dealer detects improper conduct by one of its associates, the firm must take disciplinary or other actions, and may be required to report the misconduct to FINRA.[15]

These obligations apply to every broker-dealer nationwide, so that investors can expect a uniform standard of oversight from firm to firm, and state to state, no matter whether they are working with an independent contractor or an employee. They reflect government control, and not control implemented by the broker-dealer.[16]

The investment services industry has long operated – in RJFS's case, since 1974 – on the premise that control implemented to secure regulatory compliance does not indicate employee status. RJFS, RJFSA, and financial firms that compete with us have grown and operated in reliance on this basic principle. Indeed, the concept was recognized by Congress when it amended the Internal Revenue Code in 1997 to reflect that "[i]n determining … whether a registered representative of a securities broker-dealer is an employee … 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."[17] Regulatory standards in the investment business also ebb and flow over time. If the proposal were adopted in its present form, control determinations would be subject to intermittent re-valuations and never reach consistency.

We note that if regulatory control over independent contractor financial advisors were deemed to trigger employment status, then those of RJFS's independent contractors who are employees of banks in networking arrangements (and who are subject to the same oversight standards),[18] would have to be deemed co-employees of both RJFS and their financial institutions, creating serious disruptions for both firms.

Therefore, Raymond James respectfully requests that the Department clarify that the type of supervision and control described above and long-recognized in the financial services industry, including requiring exclusivity in performing financial services, would not weigh in favor of employee classification.

Finally, we note the proposal would provide that "facts relevant to the employer's control … include whether the employer uses technological means of supervision (such as by means of a device or electronically)." This amounts to an automatic point in favor of a "control" conclusion because in today's economy, *every* aspect of business "uses" technology.[19] We believe it should

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[15] FINRA Rule 4530; Form U4, *Uniform Application for Securities Industry Registration or Transfer*, Question 14, "Disclosure Questions."

[16] *See, Taylor v. Waddell & Reed Inc.*, 2013 WL 435907, *6 (Feb. 1, 2013) ("allegations of "control" pursuant to legal requirements are not employment indicia").

[17] Taxpayers Relief Act of 1997, Pub. L. No. 105-34, Title IX § 921(a), 111 Stat. 788, 879 (codified at 26 U.S.C. § 3121 note).

[18] See p. 8, *supra*.

[19] Investment firms use technology to perform all aspects of their functions, including acceptance of orders, trade execution, fund transfers, client communications, detection of financial crimes, etc. Supervision for the protection of clients and related recordkeeping is embedded within the technologies that perform these functions.

be stricken because the *means* of supervision have never been a part of the test. Control analyses should be the same no matter whether an employer uses smartphones or tin cans joined by a string.

C. Degree of Permanence of Relationship.

Under the current regulations, the duration of the relationship weighs in favor of employee status when it is "by design" indefinite or continuous. The proposal would remove "by design." The DOL does not appear to describe the reason for this change *at all*. To the extent that it fails to explain the reason for removing this critical aspect of the current rules, we submit that the Department has failed to provide appropriate notice of the terms of the proposed rule change, and that its economic analysis of the proposal requires re-assessment.

In any case, if this aspect of the proposal is adopted without change, then an employee relationship could apparently be found, even if the parties intended otherwise, after some undefined time period of working together.

Raymond James believes that the intent of the parties should matter when considering whether the duration of a working relationship indicates employment or independent contracting. Contract turnover rates differ from industry to industry. In the investment industry, independent financial advisors commonly maintain long-lasting contractual relationships with financial services firms, not because they must, but because they affirmatively choose to do so. An independent financial advisor with a portable book of business may shift from one firm to another at any time. However, they often remain with one firm for years because that firm provides good service, compliance infrastructure, or because they re-negotiate their contracts for better terms. Independent financial advisors also know that such longer-term stability is more appealing to their clients.

In fact, RJFS has several independent contractors who have worked with the firm continuously since 1974, and the RJFS attrition rate is less than one percent per year. In order to recognize that long-term satisfaction with the relationship should not undermine their choices, we believe that the designs of the parties should remain relevant to the "duration of relationship" factor.

D. Design of the Working Relationship.

Of course the designs of parties are interrelated with the formation of all aspects of working relationships. True independent contractors and their counterparties negotiate the terms of the relationship, including their respective control over output, working hours, and compensation in order to suit their wills. It is true that courts apply an "economic reality" analysis that looks to the actual conduct of the parties when classifying employees and independent contractors, but bona fide contracts *are* economic realities that can be enforced by their terms. Thus, the terms of a contract are not irrelevant: it is a matter of weight. We believe that the intent of the parties should therefore receive some (although not controlling) role in the independent contractor versus employee analysis.

If implemented with appropriate safeguards, doing so would benefit the analysis by providing some assurance that the parties will receive what they contracted for, and that there will not be an unanticipated reclassification in the future. In order to prevent overreaching by

employers, we believe that the parties' relative bargaining power and sophistication in the relevant industry could be considered. Thus consideration of the intent of the parties could be a non-controlling factor in the analysis when all of the following are present:

a) A written contract between the parties;

b) The contract is explicit as to the nature of the relationship (independent contractor or employee);

c) The contract is between parties who have sufficient relative bargaining power and sophistication in the relevant industry to understand and withstand the potential risks and rewards of the arrangement, and

d) There have been no intervening changes in the relationship that would indicate a change in design by either party.

If – and only if – all of these conditions are met, then we believe that the stated intent of the parties should be reflected as a factor in any final rule. This concept could also be implemented through a safe harbor, or in other ways, but we believe it could provide much needed clarity and predictability.

III. Potential Costs and Disruptive Effects of the Proposal.

Independent contracting is the *raison d'etre* for two major subsidiary entities in the Raymond James family. We are concerned that without changes to modify the concerns outlined above, the proposal would unnecessarily disrupt their operations, the ability of a financial professional to be an independent business owner, the employment of persons they hire, and the provision of investment advice to clients.

In the first place, if adopted as proposed, the new rules will at least require a costly re-evaluation of our existing independent contractor relationships. All of our Independent Branch Owner Agreements would have to be re-evaluated and potentially terminated or renegotiated. Each of our Independent Branch Owners would have to hire their own legal counsel for these purposes. A low estimate of legal fees incurred by an Independent Branch Owner in this process would exceed several thousand dollars, depending on local attorneys' rates. To a financial professional and small businessperson who has chosen the path of an independent contractor, this would be an exasperating waste of capital at the government's hands. All told, legal expenditures for our Independent Branch Owners in the aggregate could easily exceed $10 million.[20]

Worse, if a court or regulator were to deem our heretofore independent contractors to be employees, then the business models of those 1,700 independent financial advisory firms would be invalidated. Some portion of these advisors may be willing to become employees, but they would have to wind down their independent small businesses. Winding down a business is lengthy, expensive process that requires tax filings at the federal and state levels, filing for dissolution with the appropriate state, closing bank accounts, termination of office leases,

[20] This is in addition to the "familiarization costs," discussed below.

termination of employee benefit plans, transfers of benefit plan accounts, transfer of FINRA registrations to a new employer, and paying associated fees.

Still worse, it may require the former Independent Branch Owner to terminate any personnel (such as support personnel) that the new employer could not retain. As noted above, our Independent Branch Owners provide work for approximately 6,300 other independent contractors and employees. These are workers in communities in small towns and rural areas across the United States. The Department has not considered this potential effect of the proposal.

In addition, an independent financial advisor's clients who do not meet their new employer's minimum account standards would have to find a firm that will accept them, and then transfer their accounts there. An account transfer is expensive: firms generally charge $100 or more to effect a single firm-to-firm transfer of assets (the "ACAT Fee").

Furthermore, in today's increasingly consolidated market, where high minimum balances are frequently required for advisory accounts, smaller investors are often left with few choices other than de-personalized discount brokers.[21] This harms their investments and savings. As detailed by NERA Investment Consulting, investors without personalized financial and investment advice typically do not invest enough of their cash, adequately diversify their portfolios, or properly rebalance their holdings. As a result, advised investors tend to have better investment performance.[22] Having an investment advisor also provides individuals with a person who can focus their attention on future needs, and identify investment products (e.g., 529 Plans), that they may not be aware of. Thus, smaller investors will lose access to the individualized investment advice that an independent advisor can provide.

As to Raymond James, reclassifying 48% of its financial advisors as "employees" would seriously disrupt the firm's business. Raymond James would incur significant costs in order to absorb such former independent contractors and the limited number of their employees that the firm could retain.[23] These costs would include salaries, increased insurance premiums, and the expenses associated with adding participants to healthcare, retirement and other benefit plans. Raymond James would have to increase its fees in order to cover these new expenses, or cut costs elsewhere.[24]

However, we believe the majority of our independent financial advisors would not want to become employees. We believe many would seek to preserve their independent business owner status by opening an independent advisory firm. This will lead to its own set of disruptions.

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[21] The total number of FINRA member firms has declined by about 6% every year since at least 2006 (FINRA Media Center Statistics 2021, https://www.finra.org/media-center/statistics). In 2017 FINRA had 3,726 members. In 2021, that number fell to 3,394 (FINRA, *2022 FINRA Industry Snapshot*, at 13).

[22] NERA Investment Consulting, *The Role of Independent Contractors in the Finance and Insurance Sectors* (Nov. 2022), at 25-26 (citations omitted).

[23] Other employees and independent contractors of a former Independent Branch Owner who became an employee of RJA would have to seek new positions.

[24] The NPRM does not quantify such costs in its estimate of economic effects. Without such analysis, we do not believe that the record can support adoption of the proposal.

Independent advisory firms operate by advising clients whose accounts are held at unrelated securities broker-dealers. The securities broker-dealer provides custody, clearing and settlement services for these accounts, but does not supervise the independent advisory firm or the activities of its personnel. An independent advisory firm is responsible for its own compliance. It does not have a larger broker-dealer that would be responsible for, and liable for, its compliance failings.

Further, independent advisory firms are regulated either by the SEC or by the states where they do business. Because they are not broker-dealers, they are not members of FINRA and are not subject to FINRA's examination or oversight authority. If independent financial advisors determine that being an independent contractor of a broker-dealer is no longer viable, then a market shift to the independent advisory model may result, and place significant new burdens on the SEC and state authorities. Thus, we believe the proposal may have the unforeseen effect of removing layers of oversight to the detriment of investor protection.

IV. Raymond James Supports An Incremental Approach to Reforms.

We are concerned that the haste of this proposal appears to signal that the Department is predisposed toward a decision. Sound regulatory policy and due process of law demand that those affected by agency rulemakings be provided with notice and an opportunity to be heard. This entails allowing adequate time for commenters to gather data and prepare analyses.

Here, the DOL published the proposed rule changes on October 13, 2022 and called for comments by November 28, 2022 (a 45-day time frame that included a national holiday). The proposed rule changes are extensive. They would delete almost every sentence of the current rules and replace them with new or entirely opposing standards.[25] The changes would apply to all industries across the United States economy, and would upset the understanding of the rules that underlies countless existing contractual relationships.

The Department seems to have been willing to act on the proposal with arguments and data that market participants would have only 45 days to submit. It granted a short 15-day extension only after many requests, and only after commenters pointed out the holiday period. A short time frame might suffice if the proposal was more limited, but the Department dismisses the possibility of making discrete improvements in just two paragraphs. It makes no serious effort to identify how the regulations could be improved without wholesale replacement.[26]

We believe this haste has resulted in an inadequate economic analysis that does not support the need for changes. For example, the only costs of the proposal that the Department has

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[25] For example, as noted above, the proposal would delete the current rule providing that control implemented to secure legal compliance does not constitute control under the FLSA, and replace it with a rule stating the opposite. There are many highly-regulated industries in this country. The NPRM provides no estimates as to the impact of this reversal on businesses in those industries.

[26] 87 Fed. Reg. 62231 - 62232. For the investment industry in particular the short timeframe is problematic. The SEC has issued at least 25 significant proposed rules this year – many subject to short comment periods (*see* SIFMA, *The SEC's Current Far-Ranging & Aggressive Rulemaking Agenda Will Raise Regulatory Uncertainty and Risks Unintended, Negative Consequences* ("on average the public has had only 38 days to review and comment on a rule proposal") (Apr. 25, 2022).

quantified are the "familiarization costs" associated with learning the new rules. Yet even these are understated by orders of magnitude. The proposal's assertion that businesses and independent contractors will familiarize themselves with the new regulations based on an hour's work or less by a single analyst is simply not realistic.

Further, in considering the effects of the proposal on small businesses, the description of the proposal concludes that there are "some" independent contractors who "may" be small businesses and "may" be impacted by the proposal.[27] The number of independent contractors who operate as small businesses should be a critical factor in this rulemaking. Yet, other than "some," the Department provides no estimate of that number. Surely DOL, which employs numerous economists and houses the entire Bureau of Labor Statistics, could have advanced a more precise estimate than "some."

Finally, the DOL presents workers and businesses with a Hobson's Choice: either accept the new regulations, or there will be no regulations at all:

> [T]he Department believes that rescission of the 2021 IC Rule is appropriate, regardless of the new content proposed in this rulemaking. Thus, even if the substantive provisions of a new final rule were invalidated, enjoined, or otherwise not put into effect, the Department would not intend that the 2021 IC Rule become operative.[28]

DOL maintains that in this event, matters will have to be settled by interpretation of case law or even by litigation.[29] Considering that the Department will not even consider making discrete changes, it does not seem appropriate to require businesses and workers to accept a wholesale re-write or face the risks of having no rule at all.

Here, the Department has published a proposed regulation with scant economic analysis. It appears willing to adopt new rules after allowing only short deadlines for comment. It has rejected the possibility of discrete modifications, and has stated that it will vacate all of the current regulations if its new ones are not adopted. Thus, it appears that the Department has not respected fundamental principles of due process, but has treated the Notice of Proposed Rulemaking as a mere formality.

We hope that this perception is incorrect, and that instead, the Department will consider retaining or making discrete changes to the existing regulations, perhaps in incremental steps, and after due consideration. Alternatively, the proposed rules should be modified to address the concerns described above. A more moderate approach would preserve the predictability that businesses need while improving the protections for the workers that FLSA was meant to safeguard.

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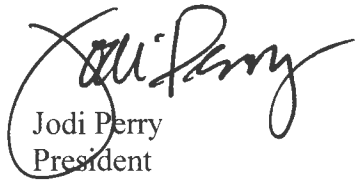
[27] 87 Fed. Reg 62272

[28] 87 Fed. Reg. 62233.

[29] 87 Fed. Reg. 62233.

Raymond James appreciates the Department's efforts and the opportunity to comment on the proposal.

Sincerely,



Jodi Perry
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