

December 13, 2022

Jessica Looman
Principal Deputy Administrator, Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave NW
Washington, D.C. 20210

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

Dear Ms. Looman,

LPL Financial LLC (“LPL” or “the Firm”) appreciates the opportunity to provide comments in response to the Department of Labor (“DOL” or the “Department”) proposed rule to modify employee or independent contractor classification under the Fair Labor Standards Act (“FLSA”). We commend the DOL for undertaking the rulemaking process and proposing a rule that recognizes that entrepreneurs who establish and build small businesses utilizing their managerial skills and professional expertise can operate in an independent contractor model to create multigenerational financial advising practices.

I. Overview of LPL

LPL is a leading retail investment advisory firm, independent broker-dealer and registered investment adviser custodian. We are dually-registered with the SEC as a broker-dealer and investment adviser. LPL serves as a trusted partner to more than 21,000 financial professionals across the country, including financial professionals at over 1,100 banks and credit unions and approximately 500 registered investment advisers. LPL provides them with the technology, research, clearing and compliance services and practice management programs they need to create and grow thriving practices. LPL enables affiliated financial professionals to provide personalized financial guidance to millions of American families seeking wealth management, retirement planning, financial planning and asset management solutions. Our affiliated financial professionals operate in all 50 states.

We are steadfast in our commitment to the advisor-centered model and the belief that investors deserve access to personalized guidance from a financial professional. LPL offers six different affiliation models for advisors, so they have the freedom to choose the business model, services, and technology resources that best suit their practice, their clients, and professional goals. The majority of financial professionals affiliating with LPL make the choice to operate their business as independent contractors, while others choose to affiliate as employees of our firm.

II. Support for Independent Financial Professionals

Independent contracting has been a cornerstone of the financial advice industry for decades. When an individual decides to become a financial professional, they can choose which affiliation model works

best for their clients and them. Advisors who decide to affiliate as independent contractors rather than employees are often motivated to build their own small business and establish a legacy that can be passed down through generations.

Becoming a small business owner allows for economic independence, and requires the use of significant managerial and entrepreneurial skills. Independent financial professionals make decisions like the location of their business, their branding and office space, their hours, the employees they hire and more. They are responsible for the strategic direction of their financial advising practice (e.g., to focus on financial planning, or cash management, and the like), their rate of growth and their client profile. LPL believes that it is important to preserve this model of advice because flexibility can encourage more participation in the industry, which increases the access that individual investors have to personalized financial advice.

III. Comments on Proposal

LPL believes that the DOL's independent contractor proposal will not result in the reclassification of independent financial professionals as employees, and we commend the DOL for proposing a rule that assesses the totality of circumstances when determining worker classification.

LPL agrees with the Department's assessment that it does not have the authority to adopt the ABC Test. Further, we do not believe that the ABC Test is the appropriate test to determine independent contractor status because it is overly restrictive and would result in the unnecessary widespread reclassification of workers who are choosing to be independent contractors. The experience of California's Assembly Bill 5 is instructive. The California legislature took action to exempt more than 100 professions from the statute because the ABC Test failed to acknowledge that financial professionals, among others, desire the choice of independent contracting. If the ABC Test were to be enacted by the federal government, it would similarly require the exemptions included in California law and create an unnecessarily complex process for promulgating regulations around worker classification.

We appreciate the opportunity to comment on this proposal. Below is a discussion of each of the six factors proposed for the economic realities test and commentary on the impact they will have on financial professionals. We believe that, when viewed in a totality of the circumstances, independent financial professionals can clearly be considered independent contractors who are economically dependent upon themselves.

Opportunity for Profit and Loss Depending on Managerial Skill

The proposal recognizes that a worker's opportunity for profit and loss depending on their managerial skill is a factor to be weighed when determining worker status. We believe that the fact that independent financial professionals have significant opportunity for both profit and loss depending on managerial skill is an important factor that would weigh towards their correct classification as an independent contractor.

Independent financial advisors own their small businesses and have an independent contractor relationship with a broker-dealer such as LPL to provide back office compliance and technology support. The financial professional is responsible for making decisions that directly impact their opportunity to make a profit; this includes the number of clients they have, the minimum net worth of clients to work with and the fees charged for assets under management. Likewise, the financial professional exercises independent judgment in deciding how many employees their small business needs to employ, the location of their business and their branding efforts, and bears responsibility for the day-to-day

operational costs. These decisions all reflect the use of managerial skill and entrepreneurial judgment, and show that the financial advisor is bearing responsibility for obtaining profit, and consequently responsibility for losses.

Ultimately, successful independent financial professionals who have built profitable businesses can sell their practice as they transition to retirement. This is a significant opportunity for profit, and is not always available to financial advisors who affiliate as an employee of a broker-dealer because in that situation, the broker-dealer often owns the books of business and retains clients when the financial professional transitions to retirement. Similarly, the value of the business is directly tied to the amount of investment that the individual has put into the business as discussed in the next section.

Investments by the Worker and the Employer

LPL supports the Department's decision to treat investment as a standalone factor. Investment is an important indicator of independent contractor status, and we support the DOL's decision to consider both capital investment and entrepreneurial investment.

Independent financial advisors are inherently entrepreneurs. They have taken the step to start their own small business, which requires significant capital investment. This includes tangible expenses related to operating an office such as furniture and technology infrastructure, which are all at the discretion of the advisor. It also includes intangible investments of time, focus and entrepreneurial spirit. Each independent financial professional is responsible for the strategic direction of his or her business and the amount of investment needed to reach their business goals. A larger investment can help spur increased profitability, and could include investments in marketing, business development, brand recognition and other enablers for growth. Further, additional professional designations like the Certified Financial Planner (CFP) can be obtained but require significant time and investment. These investments can also lead to a robust book of business that is owned by the independent financial advisor, regardless of their broker-dealer affiliation. When an advisor is looking to transition out of the business, that book is a valuable asset that can be sold to a different financial advisor and provide a return on investment for the selling advisor.

With each investment decision, independent financial advisors are exercising managerial skill to make sure that the decision is best for their business. These decisions are made independently of the broker-dealer with which the independent contractor has a relationship, and are indicative of independent contractor status.

Degree of Permanence of the Work Relationship

In the proposal, the Department states that exclusive relationships or a relationship that is indefinite can be more indicative of an employee-employer relationship. LPL believes that the Department should refine this provision to recognize that an indefinite relationship can also be reflective of the need for stability and an enabler to the growth of a business. When a financial professional enters into an independent contractor relationship with a broker-dealer, a substantial amount of time and investment goes into establishing the relationship. This includes changing office locations, client communications, the onboarding and repapering of client accounts, transferring of licenses and registrations and other regulatory obligations. Although the relationship can be terminated, and it is not uncommon for financial advisors to switch broker-dealer affiliations, it is a significant decision because of the ensuing disruption for clients. Therefore, independent financial advisors do not establish new independent contractor relationships frequently although they are free to do so at will.

Further, we would ask the Department to recognize that certain relationships must be exclusive because of other regulatory requirements. Under FINRA rules, registered representatives of broker-dealers cannot be registered with multiple broker-dealers. However, the independent financial advisor is making the choice to affiliate with whichever broker-dealer best suits their needs and allows them to be independent.

Nature and Degree of Control

LPL similarly recommends that the Department refine the nature and degree of the control factor to acknowledge that when the control is required by regulatory agencies including the SEC and FINRA, it should not undercut independent contractor status. The financial industry is a heavily regulated industry and broker-dealers are responsible for supervision of registered representatives and their brokerage or advisory activities. This supervision is intended to protect consumers, who trust their assets to a financial professional in order to prepare for life events including paying for college, buying a home or retiring.

The control exercised by a broker-dealer over an independent financial advisor differs from other industries, where the putative employer is supervising independent contractors for reasons such as productivity or workplace safety. Independent financial professionals do not have to meet any productivity goals set by LPL as a broker-dealer, and they do not have to adhere to a specific schedule beyond the schedules for trading set by exchanges. Therefore, LPL believes that the regulatory control it is obligated to undertake over a financial professional because of state and federal financial industry regulatory requirements should not be considered probative of control.

Extent to Which the Work performed is an Integral Part of the Employer's Business

Although independent financial professionals and broker-dealers each need the other to carry out their business, this factor should not lead to a conclusion that affiliated financial advisors are not properly classified as independent contractors because the roles of the broker-dealer and the independent contractor are distinct and mutually reliant on each other. The broker-dealer provides operational support and back office compliance services that enable independent financial advisors to focus on providing advice to their clients. In this affiliation model, the broker-dealer is not providing the same services to clients as the financial advisor because the broker-dealer does not provide advice to clients.

Further, because there are multiple affiliation models for financial advisors to choose from, both the worker and the putative employer could exist without each other. The independent financial advisor could choose to affiliate as an employee with a different broker-dealer, or affiliate with their own Registered Investment Adviser (RIA) and limit their services to just advisory. Their business could continue should the broker-dealer cease operations. Moreover, each broker-dealer is not solely dependent on the business of any single financial advisor. Rather, broker-dealers offering an independent affiliation model are often providing support for thousands of financial advisors. Thus, the fact that financial advisors and broker dealers are integral to each other's success does not lead to the conclusion that the advisors cannot be independent contractors.

Skill and Initiative

Financial services is a highly regulated industry that requires financial advisors to develop sophisticated skills and take initiative to develop a strong practice. In order to be a financial advisor, an

individual must hold certain licenses issued by FINRA and the states. These exams require a substantial amount of time and effort to prepare for, and the overall pass rate for the FINRA Series 7 exam is estimated to be around 65%. Candidates with an educational background in finance or business, who have a baseline knowledge of the industry, are also more likely to receive a passing score. This level of skill and licensing is necessary because clients trust financial advisors to help them save for the future.

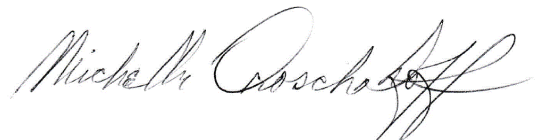
Every financial advisor is required to hold certain licenses and can acquire other certifications to personalize their business. However, independent financial advisors take further business-like initiative to establish their own small businesses. While broker dealers like LPL provide various types of support, independent financial advisors succeed and build their businesses through their own skill and initiative. This clearly indicates independent contractor status under this factor.

IV. Conclusion

LPL appreciates the Department's overall approach to this rule proposal. We agree that independent contractor status should be determined by considering a totality of the circumstances, with equal weight for each factor. Under this test, we believe that independent financial professionals are properly classified as independent contractors who are economically independent, relying on their business expertise, judgment and skills and entrepreneurial drive to create small businesses across the country.

Thank you for the opportunity to provide comments on this proposal. Please contact me with any questions or to further discuss this letter.

Sincerely,



Michelle Bryan Oroschakoff
Managing Director
Chief Legal Officer