

October 26, 2020

Cheryl Stanton
Administrator, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: RIN 1235-AA34, Independent Contractor Status under the Fair Labor Standards Act

Dear Administrator Stanton:

LPL Financial LLC ("LPL") appreciates the opportunity to provide comments in response to the U.S. Department of Labor (DOL) Regulatory Information Number 1235-AA34¹. LPL commends the DOL for undertaking the rulemaking process and thoughtfully rethinking the classification of independent contractors under the Fair Labor Standards Act ("FLSA").

I. Overview of LPL

LPL is a leading retail investment advisory firm, independent broker-dealer and registered investment advisor (RIA) custodian. We serve more than 16,000 independent financial professionals and over 800 financial institutions by providing them with the technology, research, clearing and compliance services, and practice management programs they need to create and grow thriving practices. LPL enables them to provide objective guidance to millions of American families seeking wealth management, retirement planning, financial planning and asset management solutions.

We believe that objective financial guidance is a fundamental need for everyone. We enable our financial professionals to focus on what they do best, which is to create the personal, long-term relationships that are the foundation for turning life's aspirations into financial realities. We do that through a singular focus on providing our advisors with the front-, middle-, and back-office support they need to serve their clients. LPL and its affiliates have more than 4,300 full-time employees working to ensure that our associated financial professionals have the resources they need.

II. Support for the proposal

LPL supports the initiative of the DOL to review and update the analysis for determining whether an individual is an employee subject to the protections of the FLSA. The nature of the workforce has changed significantly in the past decade, with more and more workers relying on the flexibility of contract work and the opportunity to own their own business. We appreciate that the DOL is recognizing these changes by proposing to update the Economic Reality Test by focusing on the nature and degree of an individual's control over the work and the individual's opportunity for profit or loss.

LPL is affiliated with more than 16,000 independent contractor financial advisors who own their own small businesses, employ staff, set their schedule, control payroll and make decisions that allow their businesses to thrive in communities all across America. They are able to set the strategic vision for their business so that it is tailored to their goals, including the clients they want to take on and size of their firm. This freedom allows each financial professional to make the best choices for their clients, including helping to ensure that they are able to

¹ See notice of proposed rulemaking and request for comments RIN 1235-AA34, *Independent Contractor Status Under the Fair Labor Standards Act*.

save for retirement, achieve financial goals, and have a stable future. LPL advisors are in business for themselves, their employees, and their clients. For more information on the importance of maintaining independent contractor status for our financial professionals so that they may continue to deliver objective financial advice, we refer you to the attached [brochure](#).

III. LPL Comments on RIN 1235-AA34

a. Economic Reality Factors – Core Factors

Under this proposed interpretation, an independent contractor would not be considered an employee under the FLSA if the independent contractor does not depend on the employer for work. This determination would be made by focusing on two core factors, with consideration of three additional factors if the core factors did not clearly dictate an outcome. This new articulation of the economic realities test looks at the actual work being performed by the parties, rather than the possibility of work. LPL supports this practical way of thinking about independent contractor status.

i. Recommendation: Further Clarification on the Nature and Degree of the Individual's Control Over Work

LPL respectfully requests that the DOL consider adding more specifics into the first core factor of the economic reality test. As proposed, the rule sets forth specific requirements that an individual must comply with, which are typical of both contractual relationships between businesses and the relationship between an employer and an employee.

We believe that this list should be expanded to include the significant compliance requirements imposed by state and federal regulators that the financial services industry must meet, including that anyone seeking to sell securities to the public must be registered with a federally-licensed broker-dealer, and that to advise on securities they must be licensed with a federal or state Registered Investment Advisor firm. For LPL and our independent professionals, as the broker-dealer and registered investment advisor firm, LPL must ensure that the advisors comply with the regulations set forth by the SEC and FINRA, as well as numerous state agencies. However, we do not exercise control over the advisors' schedule, projects or evaluate their performance. Compliance with specific state, federal and self-regulatory organization requirements should be reflected as a factor that does not constitute control, but rather enables the flexibility that allows advisors to focus on the parts of their business that offer growth.

ii. Recommendation: Review of the Degree of Permanence of the Working Relationship Between the Individual and the Potential Employer

The current language proposed in the interpretation makes it more likely that a worker will be classified as an independent contractor when the work is performed for a defined period of time or in connection with a short-term relationship. It suggests that the fact of a long-term relationship undercuts independent contractor status and weighs against independent contractor status for a worker.

LPL recommends that the DOL reconsider or revise this factor to reflect the reality that long-term relationships commonly exist in true independent contractor relationships such as those of franchisee/franchisor and independent financial advisors. Indeed, it is the long-term nature of such relationships that enable small business owners, such as independent financial advisors, to create growing and stable businesses. It allows the business owner to plan for the future, with reliable income and the security of a predictable long-term relationship. As mentioned above, these advisors must be registered with a broker-dealer or RIA to provide these services to the

public, and a long-term relationship is critical to providing stability both to the business owners and to their clients. The proposed language unintentionally creates a perverse incentive to encourage advisors to switch from one broker-dealer to another, simply to maintain classification as an independent contractor. This would undermine the stability of their businesses and their deep relationships with their clients.

With this security and stability, financial advisors are in a better position to invest in upgrades to their facilities, technology, and training to enhance client experience and grow their business. Importantly, the long-term nature of these relationships does not minimize the independence the financial advisors, nor does it impede their ability to choose to affiliate with a different broker dealer if they chose do so – both factors that support the independent contractor status.

iii. Recommendation: Clarification of Integrated Unit of Production

The final factor focuses on whether or not the individual's work is part of an integrated unit of production. If the work performed is a component of the employer's integrated production process for a good or service, the individual is more likely to be classified as an employee. If the work can be easily segregated from the production process, the individual is more likely to be considered an independent contractor. Notwithstanding the efforts of DOL to clarify this factor, we believe that this factor remains amorphous and outcome driven, and request that the DOL consider eliminating this factor or clarifying how this factor applies in a professional services setting.

b. Request for Occupational Exemptions:

LPL requests that the Department of Labor consider adding an occupational exemption to the interpretation of independent contractor status under the FLSA. In California, *AB 5: An act to amend section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.4 and 21 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor*, recognizes that certain industries should not be subject to any test to determine independent contractor status. We recommend that the DOL include an exemption for securities brokers/dealers or investment advisors and their agents and representatives that are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority.

This exemption would ensure that financial advisors are always able to choose the flexibility of being an independent contractor and small business owner if it is the best business model for them to serve their clients. We believe that an exemption to this interpretation would preserve the right to independent financial advice.

IV. Conclusion

LPL greatly appreciates the opportunity to comment on Regulatory Information Number 1235-AA34 and the DOL's consideration of our views. We support the thoughtful initiative of the DOL to rethink the nature of independent contract work and believe this proposal will help clarify employment status under the FLSA. If you have any questions regarding this letter, please do not hesitate to contact me.

Sincerely,



Michelle Bryan Oroschakoff
Chief Legal Officer