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July 21, 2015

Office of Regulations and Implementations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Definition of the Term "Fiduciary"; Conflict of Interest Rule- Retirement
Investment Advice
29 CFR Parts 2509 and 2510
RIN 1210-AB32

To Whom It May Concern:

This comment letter is submitted on behalf of National Regulatory Services ("NRS"), part of Accuity. NRS is the nation's leading compliance consulting, technology and education firm founded in Lakeville, CT in 1983. NRS provides compliance and consulting services, compliance technology solutions, national conferences, seminars and the NRS Certified Compliance Professional certificate program to approximately 6,000 investment advisers and broker-dealers, ranging from sole practitioners to the largest global financial firms.

A substantial majority of these investment advisers and broker-dealers provide services to individual retirement accounts ("IRAs") and so would be considered "fiduciaries" under the rules proposed (the "New Proposal") by the Department of Labor (the "Department") in its release dated April 14, 2015 (the "Release"). As a provider of compliance services and solutions for investment advisers, broker-dealers and other financial institutions, NRS, and our clients, place a premium on clarity and precision in the regulatory environment which promotes transparency regarding the expectations of the regulator as well as the obligations of the regulated.

NRS appreciates the opportunity to comment on the New Proposal. After a general comment on the proposal as a whole, NRS's comments will follow the table of contents used in the Release.

General Comments:

The New Proposal, if enacted, would have a far-reaching impact on investment advisers and broker-dealers. NRS is concerned that the New Proposal, in its current form, would likely have some unintended consequences that would, at a minimum, create confusion and hinder the efficient delivery of much-needed financial services to retirement plans and individual investors. NRS therefore urges the Department to provide as many specific examples as possible to demonstrate how the requirements of the New Proposal apply to specific situations commonly faced by investment advisers, broker-dealers, and other potential fiduciaries. The remainder of our comments will address specific situations that we believe would benefit from further clarification.

I. C. Gains to Investors and Compliance Costs

NRS notes that the benefit analysis used in this section does not appear to address the benefits received by investors through incidental advice provided by broker-dealers. In NRS's experience, this incidental advice can be crucial in helping retirees navigate the sometimes bewildering world of investing. Many registered representatives of broker-dealers are not simply stock or fund pickers; they often assist their clients in understanding their investments, making adequate plans to pay for 10, 20 or 30 years of living expenses following retirement, and dealing with the vicissitudes of a sometimes volatile economy.

As the Department notes on page 26 of the Release, there is a "gap in expertise and information between advisers and the customers who depend on them for guidance." By focusing on investment costs alone, the New Proposal may make it difficult for broker-dealers to be fairly compensated for the time and effort required to share this expertise.

NRS recommends that the Department provide specific examples of how compensation for incidental advice can be addressed in the Best Interest Contract Exemption. For example, would a statement that the fiduciary adviser "will not always recommend the lowest-cost products in order that [the fiduciary adviser] may be compensated for providing incidental advice about the client's other investments and overall financial situation" be adequate?

IV. A. Categories of Advice or Recommendations

The types of activities that constitute recommended advice include “a recommendation to take a distribution of benefits ...” NRS is concerned that this is so broad that it could bring in persons who otherwise would not be considered fiduciaries. Take, for example, an investment adviser who is meeting with a retired client for whom the adviser manages a portfolio that specifically excludes retirement assets. The client mentions that he is finalizing his year-end finances, and the adviser reminds him to be sure to take a required IRA distribution. Would that be sufficient to make the adviser a fiduciary? NRS recommends adding a carve-out for recommending minimum required distributions or other distributions that may be required by law or regulation. (Please also see the discussion of indirect compensation in Section IV.D., below.)

IV. A. 4. Recommendations of a person to provide investment advice or management services

The New Proposal imposes fiduciary status on persons who provide “recommendations of persons to provide investment advice for a fee or to manage plan assets” for “direct or indirect compensation.” This may be confusing. For example, let’s say a solicitor who is not otherwise a fiduciary adviser suggests the use of an adviser to an investor. The investor then hires that investment adviser to manage \$1,000,000 in non-retirement assets and a \$10,000 IRA. The investment adviser pays the solicitor a percentage of the non-retirement assets, but no percentage of the IRA. Under this scenario, would the solicitor be receiving indirect compensation? NRS suggests that the Department use specific scenarios to clarify what does and does not constitute indirect compensation in this scenario. (Please also see the discussion of indirect compensation in Section IV.D., below.)

In a situation in which a solicitor was considered a fiduciary adviser only through the recommendation of an unaffiliated investment adviser, it would appear that the solicitor would then be required to have a Best Interest Contract with the client in order to be able to receive compensation from the investment adviser (itself a fiduciary) in order to avoid the prohibited transactions rules. NRS suggests that the Department clarify whether or not a Best Interest Contract would be required in that situation.

IV. C. 4. Investment Education

The New Proposal requires that, in order to qualify for the investment education carve-out, “information and materials not include advice or recommendations for as to specific investment products, specific investment

managers, or the value of particular securities or other property.” NRS is concerned that this requirement will make investment educational materials less accessible to plan participants.

In NRS’s experience, many smaller plans offer only one investment option in different categories. For example, a small plan may offer a growth equity fund, a value equity fund, an international fund, a bond fund, and a money market fund. Restricting the investment education materials from mentioning the specific names in this situation will only make an already unfamiliar process more difficult for inexperienced participants. Another common scenario is one in which a plan offers retirement-date-targeted funds to its participants. In NRS’s experience, only the very largest plans may offer these types of funds from more than one fund company. NRS sees very little utility in hiding the name of the fund company from plan participants.

NRS suggests that the Department extend the carve-out to allow naming investment options in plans that offer only one investment option in a particular category. NRS further recommends that, for plans with multiple investment options in various categories, that the Department consider allowing educational materials that list all investment options for plans with multiple options, so that the participant is not left to try to determine which funds meet which categories.

In addition, the Department asked for comment on whether to use FINRA’s communications standards to distinguish between advice and education in whole or in part. NRS recommends that the Department adopt the FINRA standards in their entirety for clarity, to avoid confusion, and because this would have a minimal impact on current industry practices.

IV. D. Fee or Other Compensation

NRS anticipates that some investment advisers will consider not charging fees for managing a small IRA for a client who has substantial assets in addition to an IRA. Would waiving the fee for the IRA assets be sufficient in order for the investment adviser to avoid fiduciary status? Would the analysis change if the adviser considered the assets in the IRA in determining the appropriate allocation for the non-retirement assets? NRS recommends that the Department provide scenarios to help determine when an investment adviser may be receiving indirect compensation.

IV. F. Administrative Prohibited Transaction Exemptions

Ongoing Duty

The discussion of the Best Interest Contract Exemption does not appear to address the term of the Best Interest Contract and, consequently, the fiduciary adviser's duty (if any) to provide ongoing services.

In *Tibble v Edison*¹, the Supreme Court held that a fiduciary's duty to an ERISA plan is ongoing. The case has been remanded to the 9th Circuit for further consideration, so the full scope of this duty has yet to be determined. However, this decision raises the question of when a fiduciary's duty to re-evaluate investments ends. This is particularly concerning for broker-dealers and insurance providers, as the Court did indicate that there were more scenarios in which failure to reevaluate investments might be a breach of fiduciary duty.

It is unclear how this ruling will affect the drafting of Best Interest Contracts. Can a Best Interest Contract provide for a special short term fiduciary relationship for brokers, insurance advisers, etc.? If so, will a Best Interest Contract need to be obtained on a transaction-by-transaction basis? Will the nature of brokerage and insurance services exempt these professions from long term ongoing requirements?

NRS recommends that the Department clarify whether, in the eyes of the Department, a Best Interest Contract necessarily imposes any ongoing fiduciary duty on fiduciary advisers.

Solicitors for Registered Investment Advisers

As noted in Section IV A 4, above, it appears that a solicitor for an investment adviser would need to meet the requirements of the Best Interest Contract Exemption in order to avoid committing a prohibited transaction by accepting a fee from another fiduciary.

In NRS's experience, most solicitors only offer the services of a few investment advisers. Indeed, apart from solicitors who participate in certain large wrap fee programs, it is unusual to see a solicitor who offers the services of more than a handful of firms, and it is common to see solicitors who offer the services of only one or two investment advisers. These solicitors often solicit for investment advisers with which they have a personal as well as a business relationship, or with which their clients have had substantial experience.

¹— S. Ct. —, No. 13-550, 2015 WL 2340845 (May 18, 2015)

This being the case, NRS is concerned that these solicitors may not meet the requirement of the Best Interest Contract Exemption that fiduciaries relying on this exemption who “limit the products their advisers recommend” must “make a finding that the limitations do not prevent advisers from providing advice in those investors’ best interest.” While NRS is certain that the vast majority of solicitors believe they are acting in the client’s best interest, most do not base this on a comparison of the recommended investment advisers with a national database of advisers who pay solicitor’s fees (if such a database even exists).

NRS recommends that the Department (a) determine if the service of another investment adviser is a “product” for the purposes of the Best Interest Contract Exemption and (b) if such a service is a “product,” clarify the requirements for making “a finding that the limitations do not prevent advisers from providing advice in those investors’ best interest.” Specifically, NRS recommends that the Department state whether or not subjective, non-quantifiable information (such as a solicitor’s own experience with an investment adviser) would satisfy the requirements of the Best Interest Contract Exemption.

IV. G. The Provision of Professional Services Other than Investment Advice

NRS recommends that teachers be added to the list of professions that qualify for this exemption. Teachers should not be inhibited from answering questions about a student’s personal situation (particularly if that student is at or near retirement age).

NRS is also concerned that the following statement is overly vague:

Only when these professionals act outside their normal roles and recommend specific instruments or render valuation opinions in connection with particular investment transactions, would they be subject to the proposed fiduciary definition.

Does this mean that recommending specific instruments when acting within their specific roles is permissible, or does the recommendation of a specific instrument take these professionals outside of their normal roles? Moreover, how does one determine the scope of their normal roles? Does an accountant who calls a report she provides to a client a “financial plan” automatically step out of her normal role?

These questions were addressed for SEC-registered investment advisers in SEC Release IA-1092 (October 8, 1987), which has lasted over 25 years as the touchstone in determining when advice about securities was incidental to the practice of a profession. NRS suggests that the Department consider replacing the current language about professionals acting in their “normal roles” with IA-1092’s well-accepted definition² of conduct incidental to the practice of a profession.

Conclusion

If we may assist further or provide additional information or background on our comments, please let us know. We at NRS would certainly look forward to assisting the Department in this very important area affecting the entire financial services industry.

Sincerely,

John Gebauer
President

² Without going into detail, IA-1092 does not extend the professional exclusion from investment adviser registration to a professional who holds himself out as providing advisory services or who accepts separate compensation for advisory services.