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July 21, 2015

Office of Regulations and Interpretations
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
RIN 1210-AB32**

Dear Madam or Sir:

Mesirow Financial Investment Management, Inc. (“Mesirow”) thanks the Department of Labor (the “Department”) for the thought, time and effort put into the initiative (the “Proposal”) to update and redefine fiduciary investment advice under section 3(21) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

Mesirow is the pioneer of outsourced fiduciary services within the retirement plan marketplace. Mesirow serves over 20,000 plan sponsors nationally and is responsible for over \$37 billion in assets under its care. The Investment Strategies group at Mesirow is an independent, outsourced fiduciary that provides plan-level, advisory and discretionary fiduciary services to plan sponsors and fiduciaries of defined contribution plans of all sizes.

Mesirow’s mission is centered on reducing the operational and fiduciary burden on plan sponsors and fiduciaries, and to help plan sponsors and fiduciaries of every size better manage their retirement plan portfolios by providing professional fiduciary services, governance, efficiency, and value. Because Mesirow recognizes plan sponsors and fiduciaries may need different services and fiduciary support depending on their size, resources, and specific plans, Mesirow’s fiduciary programs can be customized to the particular needs of each plan sponsor and fiduciary. Notably, Mesirow’s services may be provided as an integrated part of a provider’s platform or directly adopted as an “add-on” service by plan sponsors or fiduciaries.

Given Mesirow’s wide range of services that assist plan sponsors and fiduciaries in fulfilling their fiduciary duties, Mesirow encourages the Department to promote the continued proliferation of beneficial products and services within the vast retirement plan marketplace. To help accomplish this goal, Mesirow suggests that any final regulations provide as follows:

- *Bundled Services and the Platform Provider Carve-Out.* Bundled services, such as Mesirow’s outsourced fiduciary services, offered or provided through a recordkeeper’s platform fall within the the carve-out set forth in the Proposal at 29 C.F.R. section 2510.3-21(b)(3) (the “Platform Provider Carve-Out”).
- *Recommendation of a Third Party Fiduciary Service.* The following situations are not “recommendations” under the the “recommendation” provision set forth in the Proposal at 29 C.F.R. section 2510.3-21(a)(1)(iv) (the “Recommendation Provision”):
 - *Recommendation By A Platform Provider.* A recordkeeper merely making available a third party fiduciary on its platform otherwise satisfying the Platform Provider Carve-Out.
 - *Recommendation of a Third Party Fiduciary Service By a Non-Platform Provider Service Provider.* A service provider intermediary, such as an adviser or third-party administrator, merely making a recommendation of a third party fiduciary service when no compensation is paid to the intermediary in connection with the recommendation.

I. Bundled Services Offered Or Provided Through A Recordkeeping Platform Should Be Included In the Platform Provider Carve-Out

The Proposal’s Platform Provider Carve-Out provides that persons who make available securities or other property to an employee benefit plan through a platform or other mechanism from which a plan fiduciary may select or monitor investment alternatives is not fiduciary advice. *See* 80 Fed. Reg. 21928, 21957 (Apr. 20, 2015).

While Mesirow thanks the Department for recognizing that the offering of a “platform” is not a fiduciary act, we urge the Department to go further to protect vital services beyond a pure “recordkeeping platform” itself that are currently made available to plan sponsors and fiduciaries through a platform solution. Thus, Mesirow respectfully suggests that the Department expand the Platform Provider Carve-Out to include other bundled services offered on a platform alongside the investment options made available to plan sponsors and fiduciaries. Services such as third party administrative services, qualified default investment managers and third party fiduciary service providers, such as Mesirow, are often bundled within the recordkeeper’s platform. These are all valuable services that the plan sponsors and fiduciaries may not otherwise know are available unless offered through a platform itself.

Consider the example of the American Recordkeeping Company that specializes in servicing the retirement plan market for ERISA governed retirement plans with less than 500 participants. American Recordkeeping Company offers its plan sponsor clients the ability to select from hundreds of investment options. Understanding that some clients may not have the financial resources to prudently select and monitor investment options available on the platform under a “prudent expert” standard, American Recordkeeping Company makes available Mesirow’s outsourced fiduciary services to plan sponsors and fiduciaries adopting its platform.

The American Recordkeeping Company includes a description of Mesirow's services and allows a plan sponsor or fiduciary to select Mesirow's outsourced fiduciary service to help select and monitor the investment options for the plan sponsor's defined contribution plan.

However, Mesirow's services may not fit within the current construction of the Platform Provider Carve-Out. Given the pro-participant, beneficiary, and plan fiduciary nature of these services, Mesirow suggests that the Department include them within the scope of the Platform Provider Carve-Out in any final guidance.

Mesirow notes that this concern about the scope of the Platform Provider Carve-Out applies to plans of all sizes – from small to large. Large plans can have similar problems and issues that outsourced fiduciary service providers like Mesirow can alleviate. In the era of tight corporate budgets and employee downsizing, many plan sponsors do not have the financial or human capital to fulfill their fiduciary duties under ERISA.

Consider the example of Boston Recordkeeping Group that services the large plan market with plans over 2,500 participants. Boston Recordkeeping Group, like the American Recordkeeping Company described in the example above, offers its plan sponsor and fiduciary clients the ability to select from thousands of investment options available on the Boston Recordkeeping Group's platform, including proprietary investment options. Boston Recordkeeping Group understands that many of its plan sponsor and fiduciary clients are wrestling with tight financial budgets and are unable to properly handle the investment selection and monitoring responsibilities for their defined contribution plans in house. Thus, Boston Recordkeeping Group includes the Mesirow outsourced fiduciary services in the platform provided to its plan sponsor and fiduciary clients.

Services such as Mesirow's investment option selection and monitoring solutions are beneficial to participants and beneficiaries of defined contribution plans within a wide range of market segments in the retirement plan industry. Mesirow's fiduciary services offered to plans and their participants often provide professional fiduciary services to plans that may otherwise not have these services available to them and included as part of their fiduciary processes. If the Department does not include bundled services within the Platform Provider Carve-Out, recordkeepers may be less willing to include such services on their platforms (or, alternatively, will increase the costs passed through to plan sponsors, fiduciaries, participants, and beneficiaries), thus undermining the same fiduciary processes that the Department regularly encourages when communicating with plan sponsors. Mesirow suggests that such an outcome is inconsistent with the Department's stated objectives for the Proposal.

As such, Mesirow asks that the Department encourage the use of beneficial products and services, and include bundled services, such as outsourced fiduciary services, within the Platform Provider Carve-Out.

II. The Department Should Clarify The "Recommendation" Portion Of The Proposed Definition Of Investment Advice

As a fiduciary service provider that offers both discretionary and advisory services, Mesirow understands, and is sympathetic to, the Department's concerns regarding the actions of certain marketplace participants that purport to provide advice to participants and plans and avoid liability through contractual or other methods. However, Mesirow is concerned that the Proposal's breadth, while an attempt to cure the marketplace of these "bad apples," will result in several unintended, but significant, negative consequences in the retirement marketplace. In particular, Mesirow is concerned that the marketplace will need to undergo a drastic and substantial change if the Recommendation Provision is finalized as set forth in the Proposal.

Because the term "recommendation" could unintentionally and easily be construed in an extremely broad manner, there is concern in the marketplace that a recordkeeper would be considered to provide fiduciary advice simply by making Mesirow and other third party fiduciary service providers available on their platform. As the Department is well aware, recordkeepers make significant efforts to avoid fiduciary status given the significant pricing pressures on their services that would be amplified to a potentially unsustainable level if they were classified as ERISA fiduciaries. Thus, if the Department does not include bundled service providers in the Platform Provider Carve-Out, Mesirow suggests that the Department clarify that recordkeepers and other platform providers who make available additional services on their platform will not be considered to be making a "recommendation" of those services under the Recommendation Provision by merely offering them on their platforms.

Using the American Recordkeeping Company example above, American Recordkeeping Company's merely offering Mesirow on its platform should not be considered a "recommendation" of Mesirow's services. This result should hold true even if the recordkeeper makes information about Mesirow available to the plan sponsor for their consideration.

Similarly, both the Platform Provider Carve-Out and the Recommendation Provision fail to address the key role of helpful intermediaries within the marketplace. Plan sponsors and fiduciaries committees often ask third party administrators, advisors, and other service providers to recommend fiduciary service providers for their consideration. Mesirow is concerned that these specialized intermediaries may be considered fiduciaries for other purposes because they, often out of a desire to help their clients, make recommendations of recordkeeping platforms or other service providers for services they do not provide. Mesirow suggests that the Department make it clear that such a recommendation, when no compensation is paid to the intermediary for that recommendation is not a fiduciary act.

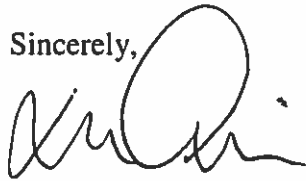
Thus, Mesirow asks that the Department clarify that these recordkeepers and intermediaries who make recommendations of potentially outsourced fiduciary services, are not fiduciaries because of these recommendations. This approach will acknowledge and reflect the key role of the various marketplace participants – from recordkeepers to intermediaries – in virtually all segments of the retirement market.

* * *

Mesirow appreciates the opportunity to work with the Department on these issues of great importance to the American retirement system. We would welcome the opportunity to

discuss these comments further with you. Please contact **Michael Annin** at **312-595-7281** with respect to any questions regarding the matters discussed herein. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Annin', written in a cursive style.

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