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July 21, 2015

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

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712
U.S. Department of Labor
200 Constitution Ave NW, Suite 400
Washington, DC 20210

Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule (RIN 1210-AB32)

Proposed Best Interest Contract Exemption (*specifically*, low-fee investment exemption) (ZRIN 1210-ZA25)

Dear Sir or Madam:

The Association of Institutional INVESTORS ("Association") appreciates the opportunity to comment on the Department of Labor's ("DOL" or the "Department") proposed "Best Interest Contract Exemption" (the "BIC Exemption") and proposed changes to the definition of a "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") and Section 4975 of the Internal Revenue Code of 1986 ("Code").

The Association consists of some of the oldest, largest, and most trusted institutional investment advisers. All our member firms are registered as investment advisers with the Securities and Exchange Commission ("SEC" or the "Commission"). Collectively, our member firms provide advisory services to more than 80,000 pension plans, mutual funds, and similar investment entities on behalf of more than 100 million American workers and retirees. Our clients rely on us to prudently manage participants' retirement funds, savings, and investments based on a client's own investment objectives and within agreed upon guidelines. As such, the Association is well positioned to provide insight regarding the DOL's proposed fiduciary rule and its potential impact on American workers and retirees.

In the sections below, the Association highlights our primary concerns with the Department's 2015 proposed fiduciary rule and the low-cost investment exemption option under the BIC Exemption proposal (collectively referred to as the "Proposal").

Overview

The Association shares the Department's desire to strengthen investor protections and promote retirement security. However, we are concerned that some areas of the Proposal will negatively impact the market for investment products and services. The Association finds the scope of the proposed investment advice definition to be impractically broad. We are concerned that this broad nature can lead to unintended consequences. We believe the proposed rules, as written, would actually impair a saver's ability to receive helpful investment educational information, access quality advice, and make informed choices about retirement – undermining the Department's ultimate goal of helping all Americans to save for retirement.

In this letter, the Association wishes to comment on the following aspects of the Department's Proposal:

- Low-cost investment exemption
- Definition of fiduciary investment advice
- Seller's carve-out (i.e. arm's length transactions with expert plan fiduciaries)
- Platform providers carve-out
- Valuation carve-out

Low-Cost Investment Exemption

The Proposal invites comment on whether an additional exemption should be developed for certain low-fee investments that would allow investment advice fiduciaries and their financial institutions to accept payments that might otherwise be prohibited when recommending the lowest-fee products in a given investment class.

The Association notes that advice under such a simplified exemption may not always be in the best interest of plan participants. Low-fee investments do not necessarily mean that an investment is safe or appropriate for a participant. To be sure, cost is an important factor to consider when selecting plans, but it is not the determinative factor for whether a given investment plan is prudent or in a participant's best interest. Advisers typically consider several other factors, including the client's risk tolerance, objectives and other investments. Advisers need to be free to exercise their professional judgment based on all the relevant criteria, not just price. A simplified exemption for low-cost investments would limit investor choice and devalue advice. Specifically, we are concerned that such an exemption may lead plan fiduciaries to chase low-fee products and services that may not be in the plan participants' best interest – in short, abandoning their duties as a fiduciary. As a practical matter, such an exemption for "high quality" low-fee investment would also be difficult to operationalize. First, defining what constitutes "high quality" or "low-fee" would be a challenging exercise as all investments carry risk and fees typically vary by asset class and form of investment. Second, the Department should also keep in mind that an investment may be high quality for its class, but that class of investment may not be prudent or in the best interest of the particular investor.

Accordingly, the Association opposes the development and adoption of an exemption for low-cost investments and strongly encourages the Department to leave policy considerations that may have wide-ranging impact on financial markets to federal regulators with the appropriate expertise – namely, the U.S. Securities and Exchange Commission.

Definition of Fiduciary Investment Advice

The Department's Proposal replaces ERISA's current five-part test for determining whether a person is deemed to render "investment advice." Specifically, the Proposal defines a fiduciary as a party that provides investment recommendations, investment management recommendations, appraisals of investments, or recommendations of persons to provide investment advice for a fee or manage plan assets to the extent such party receives a fee or other compensation (directly or indirectly) for such advice, provided that the person either acknowledges fiduciary status or provides the advice under an agreement, arrangement or understanding that the advice is individualized or specifically directed to the advice recipient for consideration in making investment or management decisions regarding plan or IRA assets.[1]

The Proposal would define a recommendation broadly as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."[2] The Proposal excludes from the definition of investment advice certain education materials. However, it would significantly narrow the scope of investment education that can be provided compared to current rules; under the Proposal, educational materials would no longer be able to name a particular investment or make reference to the appropriateness of any individual investment option.[3]

The Association is concerned about the broad scope of this revised definition of advice and the narrow scope of investment education exclusion. We believe the proposed definition as written would adversely impact our clients' ability to receive helpful investment educational information, access quality financial advice, and make informed decisions about their retirement plans. Under the revised, expanded definition, we worry that certain routine investor communication materials could be deemed to be investment advice. The Department should keep in mind that an investment adviser provides not only fiduciary services (investment management of particular assets) but also non-fiduciary, non-customized information for clients, including discussion of current markets and trends. The Association worries that under the Proposal, all types of education materials – including those currently provided free of charge via websites and general mailings – could no longer be provided to plans and IRAs. The Association recognizes the Department's efforts to address such concerns in its carve-out for investment education. However, the carve-out as outlined in the Proposal must be broadened to permit identifying conforming investments and provide a safe harbor for factual recommendations.

Under the Proposal, advisers that provide investment advice to a plan fiduciary may themselves become fiduciaries. This may be appropriate when an adviser has been hired to guide a plan sponsor that lacks financial expertise. However, as drafted, the proposed rule may also pull in an adviser that provides general information to another investment professional who happens to have a plan or IRA client. The proposed definition, if implemented, might lead investment dealers to decline to provide vital market assessments and reports to their investment manager clients due to concerns that they may be deemed fiduciaries for providing simple factual information or market color, which may constitute advice under the Proposal.

The proposed broad definition may also lead to the situation in which general product marketing or investment education materials supplied by a product provider to an intermediary might be deemed

[1] Prop. Reg. 29 C.F.R §2510.3-21(a).
[2] Prop. Reg. 29 C.F.R. §2510.3-21(f)(1).
[3] Prop. Reg. 29 C.F.R. §2510.3-21(b)(6)

fiduciary advice. For example, a mutual fund wholesaler may provide educational and marketing materials about its products to intermediary financial institutions as part of its wholesaling activities. If such intermediary has client plans or IRAs for which it is a fiduciary, under the Proposal's broad language, the mutual fund wholesaler may be deemed to have made a "recommendation" to a plan fiduciary even if the wholesaler has no knowledge that the recipient of the advice is a fiduciary, or will use it in a fiduciary capacity.

Similarly, the proposed definition may also impact the work of non-discretionary advisers that provide model portfolios to financial firms. Such firms may purchase model portfolios in order to take advantage of the expertise of a manager in a particular strategy when managing their clients' accounts and typically pay the model provider an asset-based fee. Model portfolio providers generally have no knowledge of the underlying relationship between a financial firm and its clients, who may be receiving advice based on the model portfolios or whether the clients are plans, IRAs or other types of clients. The Association is concerned that under the Proposal, providing a non-customized model portfolio to a financial institution may result in the model provider being deemed a fiduciary. If so, model portfolio providers may cease to provide this valued financial information to firms that service plans and IRAs.

The Association believes that the Department should further clarify the definition of fiduciary investment advice – a more precise, tightly-written definition would make it unambiguously clear that routine communication mailings, even if client-specific, would *not* be deemed as investment advice. Similarly, the definition should exclude the provision of financial information from a product provider to a financial professional when not individualized to a specific client.

Not only does the lack of definitional clarity lead to ambiguity over what qualifies as fiduciary advice, but it also adds to the confusion as to when a fiduciary relationship is established between parties. For example, when acting as discretionary investment advisers to retirement plans subject to ERISA, Association members are ERISA fiduciaries under ERISA section 3(21)(A)(i). The breadth of the new definition, however, raises concerns that such investment advisers could inadvertently become fiduciaries before they are hired as a result of "advice" provided during the normal sales process. If an advisor becomes a fiduciary during the sales process, it risks committing prohibited transactions, for example, while negotiating its fee with the plan client.

Under the Proposal, sales conversations and materials may be deemed investment advice. The proposed definition of advice includes a "recommendation as to the management of securities or other property" and a recommendation of a person who will provide such advice for a fee.[4] Accordingly, an adviser's proposal that a plan select such adviser to provide investment management services may fall within the proposed definition. Even responding to a plan's Request for Proposal (RFP) or Request for Information (RFI) may be considered fiduciary advice. Members of the Association often outline and discuss a range of service options with plan sponsors as part of a RFP and the plan typically requests detailed and specific information about the adviser's investment strategy; under the Proposal, such discussions may be considered recommendations.

Another avenue that plans use to hire a manager is to hire a consultant; such consultants will likely be considered fiduciaries under the Proposal. Consultants reach out to investment advisers on a regular basis to update information on the adviser's investment strategy, performance and products for their databases. Under the proposal, the provision of such information to the consultant could

[4] Prop. Reg. 29 C.F.R. §2510.3-21(a)(1).

result in fiduciary status for the adviser with respect to the consultant's plan clients. Thus the investment adviser risks becoming a fiduciary prior to even having contact with the potential client plan. The risk of becoming a fiduciary during the sales process likely will cause advisers to provide less information. The proposed definition would limit our member firms' ability to have a meaningful sales discussion with plan sponsors and their consultants, making it difficult for sponsors to understand the full range of investment options available. Consequently, the proposed definition would diminish the ability of plan fiduciaries to choose the most appropriate provider for their investment objectives.

The Association notes that the Proposal does not include a mutuality standard, which exists in current regulation. The removal of this critical concept creates a situation where one party may think a fiduciary relationship has been established while the other party does not. In order to ensure the interests of participants and investment advisers are protected, the Association requests the Department to retain the mutuality standard.

Seller's Carve-Out

The Seller's Carve-Out from the Proposal applies to communications made in connection with an arm's length sale, purchase, loan or bilateral contract (or a proposal to enter into one of those transactions) by an adviser to an independent plan fiduciary. Generally, this carve-out provides two alternative sets of conditions that must be met to qualify for this exception. One applies where the transaction is with a plan that has 100 or more participants and the counterparty knows or has reason to know that the independent fiduciary acting on behalf of the plan "has sufficient expertise to evaluate the transaction."[5] The other applies to transactions with a plan represented by an independent fiduciary with responsibility for managing at least $100 million in assets.

The Association commends the Department for including this carve-out in the Proposal – we agree that such activities should not constitute the provision of advice. However, the Association requests that this carve-out be revised to make clear that it covers the sale of services, such as the investment advisory services provided by our members. We also request that the Department ensure that the carve-out covers the sale of all investment products, not just those where the seller is a counterparty. For example, the carve-out should also cover the sale of pooled funds, such as mutual funds, in which the counterparty to the transaction is the fund, not the entity selling the investment.

Though the Association generally supports this carve-out, we also would recommend that the Department expand the exception to plans of all sizes and IRAs. Should the Department decide, for whatever reasons, not to expand the Seller's carve-out for all plans, the Association respectfully requests that additional carve-outs be proposed to address the concerns outlined in the sections above – these include:

- Sales discussions with plans of any size and IRAs where the selected provider will provide services in a fiduciary capacity, such as discretionary investment advisory services.
- Sales discussions with plans of any size and IRAs where the plan or IRA is represented by a financial professional, whether investment adviser, consultant or broker-dealer.
- Responses to RFPs for a plan of any size as well as responding to consultant inquiries that may apply to plans of any size.

[5] *Id.* at §2510.3-21(b)(1)(i)(B)(4).

Platform Provider/Selection and Monitoring Assistance Carve-Outs

The Proposal provides a carve-out for service providers (e.g., record-keepers or third-party administrators) that market or offer investments through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives for participants and beneficiaries to direct the investment of their plan accounts, so long as the provider conducts its activities without regard to the *individual* needs of the plan or its participants and beneficiaries and the provider discloses in writing to the plan fiduciary that it is not giving advice in a fiduciary capacity. An additional carve-out would allow platform providers for participant-directed individual account plans to provide information limited to investment alternatives that meet objective criteria specified in advice by the plan fiduciary and objective financial data and comparisons with independent benchmarks.

In relevant part, the carve-out for platform providers would apply if "[t]he person ***merely*** markets and makes available to an employee benefit plan . . . ***without regard to the individualized needs*** of the plan, its participants, or beneficiaries, securities or other property through a platform or similar mechanism . . . ."[6] Similarly, the carve-out for selection and monitoring assistance would apply if the person "***merely*** identifies investment alternatives that meet objective criteria"[7] or "***merely*** provides objective financial data and comparisons with independent benchmarks to the plan fiduciary."[8]

Some of the Association's members are investment advisers to mutual funds and offer platforms for plans and IRAs. In reviewing the carve-out, we believe that the proposed language is too vague, introducing ambiguities over its scope and applicability. We are concerned about the harmful impacts that could arise from this uncertainty. Under the Proposal's carve-out for platform providers, platform providers would be considered fiduciaries for simply addressing the specific needs of a plan, which demands a certain degree of individualization by default.

Having affordable and easy access to robust platforms is extremely important to the Association's potential clients. And without more specificity, the availability of these services that have become so common may decrease or become more expensive due to the inevitable increase of compliance costs for platform providers. Such costs would mean higher administrative expenses for plan participants. Accordingly, the Association urges the Department to revise these carve-outs to assure providers that they would not be deemed fiduciaries for simply responding and addressing specific needs of a plan. The Association also requests that the carve-out be expanded to include IRA platforms.

Valuation Carve-Out

Under the Proposal, appraisals and valuations provided in connection with a specific transaction(s) involving the acquisition, disposition, or exchange of securities or other property by the plan or IRA would be considered fiduciary advice.[9] The preamble to the Proposal states, "In many cases the most important investment advice that an investor receives is advice as to how much it can or should pay for hard-to-value assets."[10] The Proposal provides a carve-out for providers of valuations and fairness opinions for providers of appraisals and valuations for collective investment funds or pooled separate accounts that hold assets of multiple, unaffiliated plans. Another carve-out is provided for

[6] Prop. Reg. 29 C.F.R. §2510.3-21(b)(3).
[7] Prop. Reg. 29 C.F.R. §2510.3-21(b)(4)(i).
[8] Prop. Reg. 29 C.F.R. §2510.3-21(b)(4)(ii).
[9] Prop. Reg. 29 C.F.R. §2510.3-21(a)(1)(iii)
[10] 80 Fed. Reg. 21939

valuations provided to a plan, a plan fiduciary, a plan participant or beneficiary, and an IRA or IRA owner solely for purposes of compliance with the reporting and disclosure of applicable law.

The preamble indicates that the pooled investment fund carve-out to the rule applies to an investment fund holding assets of at least one plan or IRA: "the proposal also contains an entirely new carve-out at paragraph (b)(5)(ii) specifically addressing valuations or appraisals provided to an investment fund (e.g., collective investment fund or pooled separate account) holding assets of various investors in addition to *at least one plan or IRA*."[11] However, the language of the Proposal indicates that to qualify, the investment fund requires more than one plan or IRA: "An investment fund, such as a collective investment fund or pooled separate account, in which *more than one unaffiliated plan* has an investment, or which holds plan assets of *more than one unaffiliated plan* under 29 CFR 2510.3-101."[12] There does not seem to be any reason to require that the pooled vehicle have at least two plans or at least two investors, as described in the preamble. The Association recommends that the carve-out be applied to investment funds with a single plan or client. Otherwise, in the event an investment fund has only one plan or client – such as during a ramp-up or winding down period – the fund would be denied access to information found in appraisals and valuations, at a time when the fund may need the information most.

Additionally, a provider of valuation information to a plan, plan fiduciary, participant or beneficiary or an IRA or IRA owner also would not be a fiduciary under the carve-out where such information is used solely for complying with reporting requirements applicable to the plan or IRA or in communications needed to comply with applicable disclosure requirements.[13] Unfortunately, although the definition of advice is limited to valuations in connection with transactions, this carve-out, by negative inference, seems to indicate that providing routine statements that are not required by law or regulation may be fiduciary advice. The Association requests that all routine reporting of values that are not for purposes of evaluating whether a plan or IRA should engage in a particular covered transaction be carved out from the definition – whether or not the report is required by law or regulation. This should include reporting a unit value for a pooled investment vehicle or separate account. If routine reports of value become a fiduciary activity, it will increase the costs to the plans and make such an option less viable.

Conclusion

The Association thanks the Department for the opportunity to comment on the Proposal. The Association supports the Department's overall goal of strengthening investor protections, expanding access to quality investment advice, and promoting retirement security. However, we are mindful of the Proposal's potential for unintended consequences and the adverse impact it may have on American workers and retirees. Additionally, because the Proposal would impose pressure to adopt fee-based rather than transaction-based account pricing models, it has the potential to increase the costs for IRAs and other types of small plans. Again, such an outcome would limit investor choice and increase the cost of saving for American workers and retirees. Therefore, the Association strongly urges the Department to seriously consider the issues raised in this letter – specifically, the Proposal's potential impact on the market for financial products and services.

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[11] Preamble to the Prop. Reg. 29 C.F.R. §2510.3-21, 80 Fed. Reg. 21939.
[12] Prop. Reg. 29 C.F.R. §2510.3-21(B)(5)(ii).
[13] Prop. Reg. 29 C.F.R. §2510.3-21(b)(5)(iii).

Though the Association appreciates the Department's continued efforts to improve and strengthen investment protections for plan sponsors, participants, and providers, we question whether some of the proposed regulations concerning financial advisors and markets are beyond the Department's jurisdiction. The Association appreciates the coordination of the Department with the SEC to date. We would, however, strongly urge the Department to reconsider promulgating an expanded fiduciary rule without significant coordination with the SEC. The Association would also encourage the Department to consider postponing the final rule until the SEC completes its own work on the fiduciary rule. If the Department should decide to go forward and finalize the Proposal, the Association requests the Department set the effective date for at least 24 months after publication of the rule.

We welcome the opportunity to further discuss the concerns and recommendations we raised in the above. If you have any questions, please do not hesitate to contact the undersigned at jgidman@loomissayles.com or (617) 748-1748.

On behalf of the Association of Institutional INVESTORS,

John Gidman
President