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Submitted Electronically

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
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Washington, DC 20210
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Re: **Definition of the Term “Fiduciary” (RIN 1210-AB32)**
Best Interest Contract Exemption (ZRIN 1210-ZA25)

Ladies and Gentlemen:

We appreciate the opportunity to comment on the Department of Labor’s proposal to redefine the term “fiduciary” and adopt or modify related prohibited transaction class exemptions (the “proposal”). Our focus in these comments is on the proposed re-definition and on the proposed Best Interest Contract class exemption (“BICE”).

Stadion Money Management, LLC (“Stadion”) is a privately owned money management firm based in Watkinsville, Georgia. Stadion has been in business since 1993. Stadion is an investment adviser registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940. Stadion offers portfolio management for investment companies, portfolio management for individuals and/or small businesses and portfolio management for businesses or institutional clients. These services are offered through Stadion’s Institutional Account Management Program, Retirement Account Management Program and Separate Account Management Program. Stadion currently manages more than \$4.3 billion. Its Retirement Account Management Program includes relationships with over 6,500 retirement plans and provides its managed account service to over 120,000 participant accounts.

Stadion’s Retirement Account Management Program offers discretionary money management services to participants in 401(k) and similar retirement plans. Its Retirement Account Management services are offered in 3 ways: 1) QDIA arrangements with various 401(k) recordkeeping and administration firms; 2) relationships directly with employers and plan sponsors; and 3) direct agreements with employees. Stadion also provides investment recommendations and advisory and sub-advisory services to other registered investment advisers and separate accounts, including separate accounts of insurance companies (“Insurance Separate Accounts”) and collective investment funds of trust companies (“Collective Investment Funds”).

In cases where Stadion serves as adviser or sub-adviser to an Insurance Separate Account or Collective Investment Fund, the Account or Fund is generally offered as a managed account option under the insurance company's 401(k) platform.

Executive Summary

The following is a summary of our recommendations. A detailed explanation of the reasons for these recommendations follows this summary.

1. The "platform carveout" in the proposed regulation should be expanded to include investment services and other customary and/or appropriate ancillary services (for ease of reference "ancillary services") offered on a provider's platform by unrelated third parties.
2. An additional "platform carveout" should be added for the offering of investments and investment advisory and other ancillary services to IRAs. We refer to this as the "IRA platform carveout."
3. The proposed regulation should be clarified to indicate that financial institutions and fiduciary advisers may provide "platform" information (that is, information about investments, investment services and ancillary services) to plans, participants and IRA owners without the communication being considered investment advice.
4. The proposal should be modified to clarify that "wholesalers" are permitted to communicate with fiduciary advisers and with responsible plan fiduciaries, participants or IRA owners, to explain the products or services their entity offers without being considered fiduciaries. The different circumstances in which this communication could be provided and conditions related to this suggestion are discussed in our detailed comments.
5. The proposal should be clarified to permit fiduciary advisers to provide information about their services without this being considered fiduciary advice, so long as no specific recommendations are made regarding investments or investment services.
6. The definition of "Asset" in BICE should be modified to include discretionary investment advisory and other ancillary services. Alternatively, the preamble to the final regulation could indicate that if a plan, participant or IRA owner engages a discretionary investment manager, this does not preclude reliance on BICE.
7. BICE should also be amended to expand the scope of "Retirement Investors" to extend the exemption to plans of all sizes and to participant directed plans.

Preliminary Observations

In these comments, when we use the term "investment services," we are referring to non-discretionary investment advice given to plans, responsible plan fiduciaries and IRAs, non-discretionary investment advice given to participants and IRA owners, discretionary investment

management provided to plans and IRAs, discretionary investment management provided to participant accounts and IRAs and investment education, principally provided to participants and IRA owners.

We also refer to other “customary and/or appropriate ancillary services” (or “ancillary services”). We believe that over time, the services offered to plans and participants will change, and we believe there is a need for the Department to make the rules broad enough to permit innovation in the future.

Finally, these comments are not intended to address the provision of any of these services by Affiliates of platform providers, since the provision of services by platform provider Affiliates may raise conflict and prohibited transaction issues that could require compliance with separate prohibited transaction exemptions.

Comments

1. *The “platform carveout” in the proposed regulation should be expanded to include investment services and other customary and/or appropriate ancillary services offered on a provider’s platform by unrelated third parties.*

The Proposal: The platform carveout in the proposal applies when a “person merely markets and makes available to an employee benefit plan (as described in section 3(3) of the Act), without regard to the individualized needs of the plan, its participants, or beneficiaries, **securities or other property** through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives....” [Emphasis added]

The Issue: Many platform providers, principally plan recordkeepers, also make available on their platforms investment advisory and other ancillary services that are provided by independent third parties. These are included on the platform as an added service, so that plans and responsible plan fiduciaries may, if they choose, engage a non-discretionary investment advisor or discretionary investment manager for the selection of the plan investment menu. They may also be chosen by a plan to provide investment assistance to plan participants who elect to make use of such a service. And, in the case of discretionary investment management, the service may be available for selection as a plan’s qualified default investment alternative (QDIA). These services are, like the investment alternatives themselves, offered without regard to the individualized needs of any plan, its participants or beneficiaries.

As currently proposed, the platform carveout would not permit these services to be offered without raising a concern that this would be viewed as fiduciary investment advice, since the definition of fiduciary advice includes recommendations of investment managers and investment advisers. Such a result would be inappropriate.

Proposed Change: The proposal should be modified to make it clear that the platform carveout applies to the marketing and availability of investment advisory and other ancillary services provided by independent third parties in addition to “securities or other property.”

The Department previously recognized the concept of a “designated investment manager” or “DIM” in Q-4 of Field Assistance Bulletin 2012-02R. As the Department seems to have acknowledged in the FAB, this service is especially valuable to participants who do not have the experience, expertise, time or inclination to manage the investments in their own accounts. Even for more sophisticated participants, professional management of their accounts may provide a valuable service to those who do not want to manage their own investments or who may not have the time to do so.

If investment management services are not available from the plan provider, however, it will almost certainly be more difficult for a plan fiduciary to offer the service to participants. And plan providers may be reluctant to include these services on their platforms, since, absent a carveout, the referral of an investment adviser or manager would be considered fiduciary investment advice. This would deprive participants of a valuable service.

Further, since discretionary investment management services are an approved QDIA, platform providers would need to be able to identify these services on their platforms for them to be available for selection by plans. Without an expansion of the definition of the platform carveout, this would not, in most cases, be possible because it could be considered a fiduciary recommendation.

We recognize that certain limitations will need to apply if this concept is added to the carveout. First, it should be clear that the carveout does not apply to the recommendation of any of these services, but only to making them available on the platform. A fiduciary adviser, if selected by a plan or participant, would need to separately comply with the requirements of the proposal, including any applicable prohibited transaction exemptions that might be required.

Second, in some instances, a fiduciary adviser offering the service is paid by the provider, though in most cases, a separate fee is paid to the adviser or investment manager by the plan or participant’s account. In either case, the provider will retain or receive a portion of the fiduciary adviser’s fee to cover its expenses of making the service available, analogous to payments retained by a provider from investments offered on the platform to make them available. (It is possible that a portion of this payment to the provider may represent profit.) Nevertheless, in the plan context, because a responsible plan fiduciary must decide whether to offer the service and to determine whether the fee paid to the fiduciary adviser and the portion of the fee received by the provider are reasonable, participants should be adequately protected.

2. ***An additional “platform carveout” should be added for the offering of investments and investment advisory and other ancillary services to IRAs.***

The Proposal: The platform carveout in the proposal applies when a “person merely markets and makes available to an employee benefit plan (as described in section 3(3) of the Act)....” By referring to section 3(3), the proposal specifically excludes IRAs.

The Issue: There are providers of IRA platforms, similar to those for plans, that participants are able to use to select investments and fiduciary advisory services, as well as other ancillary services. These platforms include a large number of investment alternatives (typically far larger

than those offered to plans), as well as services that are not tied to the specific needs of any IRA owner. The platform of investments and services is a commercial offering and not a recommendation of any particular investments or service providers. Nevertheless, given the breadth of the proposed redefinition of fiduciary investment advice, a provider that makes these investments and services available could be considered to be making a “recommendation” and thus acting as a fiduciary. We submit that this should be changed.

Proposed Change: We suggest that an additional IRA platform carveout be added or that the existing carveout be expanded to permit IRA providers to make investments and investment advisory and other ancillary services available without being considered to be providing fiduciary investment advice. Limitations similar to those described in our proposal regarding the expansion of the platform carveout would also apply.

The value of such a carveout is two-fold. First, when participants elect to rollover their accounts to an IRA, they need to be able to obtain information about what is available in the marketplace in order to make an informed decision about investments, services and costs that are appropriate for their needs. Absent such a carveout, it could be more difficult for them to obtain this information without entailing the creation of a fiduciary relationship. Second, in our view, it is inappropriate to put providers of these services in a position where they cannot make participants aware of their investments and services in a general sense without possibly creating a fiduciary relationship.

3. ***The proposed regulation should be clarified to indicate that financial institutions and fiduciary advisers may provide “platform” information (that is, information about investments, investment services and ancillary services) to plans, participants and IRA owners without the communication being considered investment advice.***

The Proposal: The proposal defines advice to include a “recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property....” It also includes “a recommendation as to the management of securities or other property....”

The Issue: Arguably, under this definition, if a financial institution or fiduciary adviser provides information about investments and investment management services available on a platform – that is, merely identifies a platform that contains a large number of investments and makes available a number of investment advisory and other ancillary services – but without recommending any specific investments or services, this could be considered fiduciary investment advice. This seems inappropriately broad when the goal of the financial institution or adviser is merely to introduce to prospective clients the products and services offered on the platform, the platform does not address the particular needs of any plan, participant or IRA owner, and there is no specific recommendation respecting individual securities or other property or specific service providers.

Proposed Change: The proposal should clarify that, when a financial institution or fiduciary adviser (whether or not affiliated with the platform provider) does no more than give information about what is available on a platform to a prospective client, it would not be considered to provide investment advice. As part of this clarification, it should be made clear that this

exception would only apply so long as the advisory firm or adviser does not, directly or indirectly, make a recommendation regarding specific securities or services. This change could be done by way of comments in the preamble to the final regulation or by adding a statement in the platform carveout.

This change should apply to advisory firms and fiduciary advisers regardless of whether they are affiliated with the platform provider. We recognize that there is some potential for conflict where the firm or adviser is an Affiliate of the platform provider, but so long as the “no specific recommendation” limitation is observed, in our view, this should still be acceptable.

There could be situations in which the range of investments presented is so narrow as to amount to a “recommendation” as defined in the proposal. For this reason, we suggest that in presenting platform information, if the financial institution, adviser or platform provider certifies that the alternatives available are sufficiently broad to meet the needs of retirement investors generally, and that the advisory firm or fiduciary adviser is not making a recommendation as to any specific investments, this should qualify for the exception. (The certification would be similar to that described in Section IV of BICE.)

4. *The proposal should be modified to clarify that “wholesalers” are permitted to communicate with fiduciary advisers and with responsible plan fiduciaries, participants or IRA owners, to explain the products or services their entity offers without being considered fiduciaries.*

The Proposal: The proposal states that a person renders investment advice if the person “provides, directly to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner” certain types of information.

The Issue: Financial institutions market their investments and services to other service providers through representatives commonly called “wholesalers.” For example, Stadion markets its participant investment management services to fiduciary advisers through wholesalers. But, in general, the wholesaler does not make a recommendation directly to a plan or responsible plan fiduciary or to participants or IRA owners. Instead, the wholesalers make fiduciary advisers aware of the services Stadion offers and the pricing of those services.

Nevertheless, since the plan advisers would likely be considered fiduciaries, under the proposed definition, Stadion could be viewed as making a recommendation of management services to a “plan fiduciary” and thus be deemed to be giving fiduciary investment advice.

Proposed Change: We understand that the Department has received other comments on the “wholesaler” concept. Stadion generally supports those suggestions, particularly in the context of introducing discretionary investment management services to fiduciary advisers. By “introducing” these services, we mean this to include providing specifics of what Stadion does, how Stadion uses specific investment classes, how it manages glidepaths in an effort to protect against downside loss, etc. Stadion joins in the request that the proposal be modified to clarify that the information and analysis provided by wholesalers should not be considered fiduciary advice.

That said, there are three situations in which the “wholesaler” issue might arise. Each of these should be covered in the modification to the proposal:

- A wholesaler meets with a fiduciary adviser and discusses the services being offered by the wholesaler’s firm (which we refer to as the “wholesaler’s services” later in this section). They do not discuss any specific plan, though the adviser has a number of existing plan clients he or she serves as a fiduciary. This should not be viewed as fiduciary investment advice because it does not involve a recommendation related to a specific plan, but is provided as education to the fiduciary adviser about the services of the company the wholesaler represents.
- A wholesaler meets with a fiduciary adviser who is interested in obtaining information about the wholesaler’s services for a specific plan. Even though this is related to a specific plan, it should not be viewed as fiduciary investment advice for two reasons. First, the discussion is still for the purpose of educating the fiduciary adviser about the wholesaler’s services. Second, the fiduciary adviser has the sophistication to understand and evaluate the information and make an informed, prudent decision about whether to recommend them to his or her plan client.
- A fiduciary adviser asks a wholesaler to accompany the adviser to meet with a specific plan to explain the wholesaler’s services. This also should not be considered investment advice because the wholesaler’s function is to educate the responsible plan fiduciaries about the wholesaler’s services, and the responsible plan fiduciaries will be looking to the plan adviser for a recommendation of whether or not to offer the wholesaler’s services.

In modifying the proposal to clarify a “wholesaler carveout,” all three of these situations should be addressed.

5. *The proposal should be clarified to permit fiduciary advisers to provide information about their services without this being considered fiduciary advice, so long as no specific recommendations are made regarding investments or investment services.*

The Proposal: The proposal provides that recommendations to plans, plan fiduciaries and others regarding identified services constitute investment advice. A “recommendation” is defined as a “communication that...would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.”

The Issue: The “particular course of action” referred to in the recommendation definition refers to actions of the type described in subsection (a)(1)(i) through (iv) of the proposed regulation, that is, a course of action that involves a fiduciary recommendation. Stadion’s concern is that a communication from a fiduciary adviser describing its services generically would be viewed as a “suggestion” about taking one of these specified actions. As noted earlier in the context of wholesalers, the adviser is providing information about services which is not individualized to the needs of the plan, participants or IRA owner at that point, or at least, that is the case where

there is no direct or indirect recommendation made regarding investments or investment services other than a generic description of the adviser's services. The proposal needs to recognize a level of communication that falls short of a fiduciary recommendation.

Proposed Change: The proposal should be modified to clarify that providing generic information about the fiduciary adviser's services, that is designed to educate the recipient and interest the recipient in considering hiring the adviser, should not be treated as fiduciary investment advice.

Consider, for example, a situation in which a plan sponsor is interviewing three fiduciary advisers as possible service providers to its plan. Each of these "finalists" makes a similar presentation, detailing its services, its pricing and possibly even describing a potential hypothetical (but not recommended) investment lineup for the plan. The plan sponsor selects one of the fiduciary advisers whose presentation would be considered a fiduciary recommendation as soon as the adviser receives compensation. But the other two advisers, who are not selected and do not get paid, would not be considered to have made a fiduciary recommendation, since the definition in the proposal of a fiduciary is one who makes certain types of recommendations for compensation.

As noted earlier, this is an inappropriate outcome and should be clarified in the final regulation. This might be done by way of a discussion in the preamble to the final regulation or through a "marketing carveout" in the regulation itself.

6. *The definition of "Asset" in BICE should be modified to include discretionary investment advisory and other ancillary services. Alternatively, the preamble to the final regulation could indicate that if a plan, participant or IRA owner engages a discretionary investment manager, this does not preclude reliance on BICE.*

The Proposal: BICE applies to transactions involving "Assets", which are defined to include various types of "investment products."

The Issue: Many providers and fiduciary advisers recommend discretionary investment management services as well as investment products to their clients, and those recommendations would constitute fiduciary investment advice under the proposed regulation. But firms and advisers are precluded from relying on BICE in making a recommendation of investment services. Since we believe that most Retirement Investors either need or would benefit from professional investment advisory services, this appears to be an inappropriate exclusion.

Proposed Change: It appears that many advisers and their firms will need to rely on BICE in the future to provide certain types of services to Retirement Investors. But under the current proposal, the restriction to "Assets" as defined makes it unavailable for the recommendation of non-discretionary investment advisory services or discretionary investment management services which many investors may want or need. Indeed, in the case of a recommendation of a managed account QDIA, an adviser would not be able to rely on BICE at all.

We submit that the limitation in BICE should be modified to either expand the definition of "Asset" to include investment management services or that the Department make clear in the preamble to the final regulation that there is no intention to make it unavailable for such recommendations. If the Department elects to limit the clarification to the preamble, this would appear to limit the ability of an investment adviser or manager to use "Assets" as currently defined in BICE.

7. ***BICE should also be amended to expand the scope of "Retirement Investors" to extend the exemption to plans of all sizes and to participant directed plans.***

The Proposal: BICE defines "Retirement Investors" to include participants in participant-directed plans subject to Title I of ERISA, IRA owners and the plan sponsor of a non-participant directed plan with fewer than 100 participants.

The Issue: The limitations in the definition of Retirement Investors means that a fiduciary adviser cannot rely on BICE to recommend investments or investment advisory services to many of the plans in which the service may be needed the most, *i.e.*, participant-directed plans and larger plans which may have a large number of unsophisticated investors that would benefit from having the service. Also, BICE would not be available for recommendation of this service to participant-directed plans, including large plans, as a QDIA. We submit that these limitations are inappropriate.

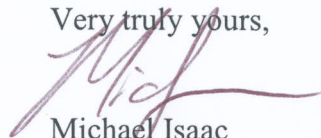
In addition, it is possible that for "large" plans, an adviser may prefer to comply with a prohibited transaction exemption and not assert the seller's carveout. As a result, BICE should be expanded to cover large plans as well.

Proposed Change: Our suggestion is straightforward: modify the definition of Retirement Investors to include all plans subject to Title I of ERISA, regardless of the type or size of the plan.

Conclusion

We would be pleased to discuss the issues raised in this letter or provide any further information you may need in order to consider our suggestions.

Very truly yours,



Michael Isaac
Chief Compliance Officer
Stadion Money Management, LLC