July 20, 2015

Submitted Electronically – e-ORI@dol.gov and e-OED@dol.gov

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Re: Definition of the Term "Fiduciary" (RIN 1210-AB32);
Best Interest Contract Exemption (ZRIN 1210-ZA25)
Amendment of PTE 84-24 (ZRIN 1210-ZA25)

To Whom It May Concern:

The Small Business Council of America (SBCA) appreciates this opportunity to comment on the above referenced regulatory package published by the U.S. Department of Labor ("DOL" or the "Department") on April 20, 2015, and the impact that these proposed regulations would have on small businesses and the small business retirement plan system.

The SBCA fully supports the DOL's goal of protecting private retirement plan participants and ensuring that plans and their participants and beneficiaries have access to, and receive, quality and unbiased financial guidance. However, the structure of these proposed rules are likely to have a significant negative impact on the small business retirement plan system and could result in a decline in small business plan formation.

The SBCA urges the DOL to reconsider and revise those portions of the proposed regulations, discussed below, that we believe will hinder, rather than promote, the availability of retirement plans for small business employees.

<u>About the SBCA:</u>

The SBCA is a national nonprofit organization that has represented the interests of privately-held and family-owned businesses on federal tax, health care and employee benefit matters since 1979. The SBCA, through its members, represents well over 20,000 enterprises in retail, manufacturing and service industries, virtually all of which provide health insurance and retirement plans.

Areas of Primary Concerns:

- **Small Plans Should Not be Excluded from the Seller's Carve-Out**

Unfortunately, a significant part of the proposed rule, the "Seller's Carve-Out", appears to have been crafted under the erroneous assumption that the size of a plan reflects the sophistication of the plan's fiduciaries. In other words, the Seller's Carve-Out, as proposed, is unreasonably biased against small plans.

The Seller's Carve-Out, as set forth in the current proposed rules, provides an important exception from the definition of a fiduciary and the rules and obligations that come along with being classified as a fiduciary. The Seller's Carve-Out would, under certain restrictions, allow advisors who market retirement savings vehicles to continue to provide important information to plan fiduciaries, without themselves being classified as a fiduciary. The Department's 2010 version of the proposed rules also included a similar exception from fiduciary status for those selling products in instances where there was no reasonable expectation of a fiduciary relationship.[1] However, unlike the current rule, the exception in the 2010 rule applied the sale of products to plans of all sizes as well as to plan participants and IRA owners. To the contrary, the current proposed rule only provides an exception for sales to plans with over 100 participants or with assets in excess of $100 million. A $100 million plan is a very large plan. Most 100 participant plans would be considered to be a small to medium size plan. Further, small businesses as a group, are very careful with the investments inside the retirement plans they sponsor because the owners look to the plan to provide their own retirement security. This is not true for most big businesses.

If the rule is finalized as proposed, large plans will continue to be able to have non-fiduciary relationships with advisors and thereby maintain their ability to choose their advisors and payment structures. On the other hand, all advisors to small plans would be classified as fiduciaries and have to comply with the fiduciary rules, which will require many, if not most, of these advisors to either alter their fee arrangements or take costly steps to qualify for the Best Interest Contract Exemption (discussed below).

By making it more difficult and costly for advisors to market retirement savings vehicles to small plans than large plans, the proposed rules will hinder the introduction of small plans and likely result in a decrease in the number of small plans being sponsored. Given the significant number of individuals employed by small businesses, any decrease in the number of small plans being offered would have a significant impact on retirement savings overall.

The Department has offered no evidence or support for its apparent belief that fiduciaries of small plans are less able or sophisticated than fiduciaries of large plans, despite the fact that all fiduciaries share the same legal obligations. There is simply no basis for this assumption. Our members know full well that size is immaterial to, and surely not indicative of, the financial expertise of a plan's fiduciary. As such, the distinction between small plans and large plans with

[1] *See* 75 Fed. Reg. 65263 (Oct. 22, 2010)

respect to the Seller's Carve-Out has no rational basis. In fact, we perceive this distinction as an insult to small business owners and their fiduciaries.

As outlined in the proposed rule, to qualify for the Seller's Carve-Out, advisers to plans with under $100 million in assets would be required to disclose that they are being paid to sell a product and are not providing financial advice and to receive written representation from the plan fiduciary that the fiduciary has sufficient expertise and will not rely on the advice. These same types of protections that have been established for large plans, would also be appropriate and sufficient to protect small plans.

Accordingly, instead of simply cutting small plans out of the Seller's Carve-Out, the proposed rule should be expanded to allow advisors to both small and large plans to qualify for the Seller's Carve-Out if they comply with certain disclosure requirements. In this way, both small and large plans will still be able to choose their advisors and payment structures, while the disclosure requirements will ensure that all parties have the same understanding of the relationship.

- **Application of the Best Interest Contract Exemption Will Increase The Costs for Small Plans**

Because advisors to small plans are not eligible for the Seller's Carve-Out under the current proposed rules, they will not be able to earn variable compensation for their services unless they qualify for the "Best Interest Contract Exemption." As many advisors to small plans presently rely on variable compensation arrangements, this will mean that they will either need to change their fee arrangement, take steps to qualify for the exemption, or simply cease offering advice to plans with fewer than 100 participants. The unavailability of the Seller's Carve-Out to small plans, combined with the rigor of the Best Interest Contract Exemption, will discourage advisors from working with small plans and make it more costly for small plans to obtain advice.

The proposed rules prohibit advisor-fiduciaries from recommending investments that pay them more than other investments or that are offered by an entity with which the advisor is affiliated. For the advisors, continuing to earn such variable compensation without qualifying for the Exemption would be deemed a prohibited transaction. Thus, because advisors to small plans have no way to avoid being classified as fiduciaries (because of the unavailability of the Seller's Carve-Out), they will have to start charging a flat fee for their services instead of a commission, so as not to engage in prohibited transactions. The only way for these advisors to continue to provide advice and be compensated on a commission basis is by qualifying for the Best Interest Contract Exception.

While the Best Interest Contract Exemption will allow advisors to continue to be paid on commission in certain circumstances, there are a number of concerns, particularly in the context of small business plans.

First and foremost, the Exemption is only available in the context of providing advice to (i) participants or beneficiaries of participant-directed plans; (ii) the beneficial owner of an IRA and (iii) the sponsor of non-participant directed plans with fewer than 100 participants. The

Exemption is not available in the context of advisors providing advice to the sponsors of small participant-directed plans. The vast majority of our members sponsor individually directed 401(k)/profit sharing plans. While these plans are individually directed, it is still critically important for the sponsors of these plans to have access to sound advice, particularly with respect to identifying what options will be available under the plan. The Department has requested comment on whether the Best Interest Contract Exemption should be expanded to the provision of advice to plans sponsors of small participant-directed plans. The SBCA would strongly urge the Department to adopt such an expansion. The stated purpose of the Best Interest Contract Exemption is to allow advisors to preserve their existing payment models to ensure the continued availability of advice while protecting of plan participants and fiduciaries. If advisors to plans with under 100 participants are to be excluded from qualifying for the Seller's Carve-Out (which we contend is not appropriate), it is important and consistent with the goals of the Best Interest Contract Exemption, that the Exemption be available to advisors to sponsors of any plan with under 100 participants, whether participant directed or not. To not include advice to sponsors of small participant-directed plans in the Exemption, would likely significantly limit the availability of advice to such sponsors, which would clearly not be in the best interest of the plan participants. This is particularly true because participant-directed plans are an extremely popular plan design choice for small businesses and their employees.

Additionally, to qualify for the Exemption, each advisor must have a written contract in place with the specific investor or sponsor that he or she is communicating with and must collect certain data and meet rigorous disclosure and recordkeeping obligations, which include the calculation and projection of future costs for each investment that is being recommended. For those advisors who may be in the position to qualify for the Best Interest Contract Exemption, the additional administrative burden and cost of qualifying for the Exemption will be significant. The costs to the advisors of either moving to a fee based arrangement or qualifying for the Best Interest Contract Exemption will in all probability be passed through to the participants and plan sponsors. Furthermore, many advisors may simply decide that the cost and effort is not worth it and simply stop working with small plans.

Increasing costs and decreasing the availability of advice is certainly not the way to stimulate the small business retirement plan system. Once again, allowing advisors to small plans to qualify for the Seller's Carve-Out would significantly alleviate these issues and avoid the application of the proposed rule that would unnecessarily stand in the way of plan advice and formation. If small plan advisors are not permitted to qualify for the Seller's Carve-Out, the Best Interest Contract Exemption must be extended to advice to sponsors of small participant-directed plans and the requirements to qualify for the Best Interest Contract Exemption should be scaled back significantly so as to not create such a substantial deterrent to advisors working with small plans.

Conclusion:

In order to avoid significant negative impacts on the small business retirement plan system, the proposed rule should be amended so that the Seller's Carve-Out is available for advisors of both small and large plans. As articulated above, not including small plans in the Seller's Carve-Out will make it more difficult for small business owners to obtain advice and to identify and purchase plans, and will increase the cost of the plans themselves. (In addition, carving out small businesses with an explanation that they are not as saavy as their counterparts who work in a larger business entity is insulting to say the least.) Given the important role that the small business retirement plan system plays in ensuring our nation's retirement security, the Department should take all necessary and appropriate steps to ensure that its rules promote, and do not unnecessarily hinder, the success of the small business retirement plan system.

On behalf of our members, we appreciate this opportunity to comment and look forward to working with the Department to ensure that the small business retirement plan system is not harmed by the proposed rules.

Sincerely,

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