Plan Sponsor Council of America
Serving retirement plan sponsors for over 60 years

July 21, 2015

VIA EMAIL
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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 (ZRIN 1210-ZA25)

Dear Sir or Madam:

The Plan Sponsor Council of America ("PSCA") appreciates the opportunity to comment on the Department of Labor's ("DOL") proposed changes to the definition of a "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the Internal Revenue Code of 1986, as amended ("Code"),[1] and its proposed "Best Interest Contract Exemption" (the "BIC Exemption")[2] (collectively referred to as the "Proposed Rule").[3]

PSCA was established in 1947 and is a diverse, collaborative community of employee benefit plan sponsors, working together on behalf of more than six million employees to solve real problems, create positive change and expand on the success of the voluntary employer-sponsored retirement system. Representing employers of all sizes and industries, we offer a unique forum for comprehensive dialogue. It is from this perspective that PSCA is providing its response to the Proposed Rule.

I. <u>Background</u>

Over the past 40 years, the way in which Americans save for retirement has evolved dramatically. As a result, the market for retirement advice has also changed. According to DOL statistics, taken from a period ending in 2007 that nonetheless illustrates current trends,

[1] 80 Fed. Reg. 21,927 (Apr. 20, 2015).
[2] *Id.* at 21,960.
[3] *Id.* at 22,004; *Id.* at 22,010; *Id.* at 22,021; *Id.* at 22,035.

employer-sponsored retirement plan participation grew 102.1 percent (from 42.7 million to 86.3 million) between 1977 and 2007.[4] During this time, the number of participants in defined contribution plans increased 358 percent (from 14.6 million to 66.9 million), while participants in defined benefit plans *decreased* 31 percent (from 28.1 million to 19.4 million).[5]

During this era of rapid growth, the total value of employer-sponsored retirement plans grew substantially from approximately $325 billion in 1977 to more than $7 trillion in 2012. Much of this growth can be attributed to increased worker participation, as well as significant investment returns during the 30-year period, according to a 2010 report by the Treasury Inspector General for Tax Administration.[6]

Additionally, we have seen significant growth in IRAs – in both the number of accounts and in total account balances. Between 2004 and 2007, an average of about 15 million working-age Americans saved for retirement through individual retirement plans.[7] This is about eight percent of the working age population.[8] By the end of the third quarter of 2014, IRAs held more than $7 trillion in assets, representing 30 percent of total retirement market assets in the U.S., compared to 18 percent two decades ago.[9]

Amid this changing landscape, the role of a fiduciary is even more critical. PSCA applauds the DOL's continued efforts to update this standard to reflect the evolved investment and savings landscape. Moreover, PSCA appreciates that the DOL carefully considered – and took into account – many of the comments and recommendations PSCA has made on this very important topic over the years (including during the review stage for this prior version of this proposed rule).

II. <u>Overview of PSCA Comments</u>

PSCA supports the core approach of the Proposed Rule in extending the protection of ERISA's fiduciary standards. Indeed, we believe our retirement system will be greatly strengthened by ensuring that investment advice is provided in the recipient's best interest consistent with those fiduciary standards and that any financial conflicts are disclosed. Nevertheless, after many weeks of discussions amongst our members, there remains uncertainty about the distinction between "investment advice" and "recommendations," as well as mere "neutral, informative descriptions" of plan or IRA operations and "factual comparisons" of investment options or taxation of those options. Our concern is that this uncertainty may potentially impact the availability of valuable plan administration and investment education services.

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[4] Copeland, Craig, "Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2012," EBRI Issue Brief, no. 392, November 2013.

[5] Treasury Inspector General for Tax Administration, Final Report on Statistical Trends in Retirement Plans, *available at* http://www.treasury.gov/tigta/auditreports/2010reports/201010097fr.html.

[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

While we fully support the DOL's efforts to protect plan participants by extending ERISA's fiduciary standards in appropriate circumstances, we hope that this objective can be met without compromising the ability of plan sponsors to obtain the broad array of services that fit the needs of their plan participants. For instance, we want to ensure that the Seller's Exception and carve-outs for platform providers do not unintentionally limit access to robust platforms and other important services that are particularly important for small plan sponsors.

We also hope a formulation can be found that ensures plans of all sizes will continue to offer meaningful investment education to participants. We believe that investment education is a critical component to ensuring the success of today's current retirement savings landscape. In this regard, PSCA supports the continued use of 29 C.F.R. Section 2509.96-1 ("IB 96-1") as the framework for the carve-out, without the proposed limitations designed to deny IB 96-1 protection if education addresses a plan's specific fund line-up. We believe that IB 96-1 has worked well over the years and has provided participants and plan sponsors with a workable and reliable distinction between what is investment education and what is investment advice. At the very least, the limitation should not apply where the provider of investment education lacks a conflict with respect to any of the funds in the plan's line-up.

After listening to comments from other groups and members of the provider community, it appears that many concerns rest upon an overly broad reading of the Proposed Rule's scope. In clarifying that scope as limited to persons or entities rendering investment advice for a fee, it may be helpful if the final regulation includes additional examples or model language that sharpens the distinction between investment "recommendations" and mere "neutral, informative descriptions" of plan or IRA operations, investment options or taxation.

The remaining portions of this letter focus on the specific aspects of the Proposed Rule on which PSCA wishes to comment. To the extent PSCA identifies any additional concerns or insights with respect to the Proposed Rule, PSCA may provide the DOL with additional comments.

III. <u>Revised Fiduciary Investment Advice Definition</u>

The Proposed Rule replaces the current five-part test for determining whether a person is deemed to render "investment advice" within the meaning of ERISA Section 3(21)(A)(ii). Specifically, the Proposed Rule defines a fiduciary as a party that provides investment recommendations, investment management recommendations, appraisals of investments or recommendations of persons that 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 if they either acknowledge fiduciary status or provide their 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.[10]

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

A. PSCA supports repeal of the five-part test but is concerned with the broad nature of the Proposed Rule.

PSCA supports the repeal of the current five-part test and agrees that the current regulation is outdated and no longer reflects the current retirement landscape. Moreover, a revised regulation is consistent with PSCA's general support for the core approach of the Proposed Rule and the extension of fiduciary status under appropriate circumstances. More specifically, many PSCA members regard the proposed revision as beneficial in solving a crucial problem in their efforts to help employees save for retirement. While 98% of plan sponsor respondents in PSCA's 57th Annual Survey indicated that lump sum distributions were one of the retirement distributions offered, only 41.4% of those same plan sponsors provided education to participants taking a retirement distribution beyond the required government notices. PSCA views this proposed revision as a means to protect pre-retirees and retirees as they near the point at which they begin the de-accumulation phase. Nevertheless, PSCA has concerns about the broad nature of the Proposed Rule.

To be considered an investment advice fiduciary under the Proposed Rule when a person does not acknowledge fiduciary status, such person must "[r]ender the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions . . . ."[11]

PSCA appreciates that the DOL provided clarification in the preamble that this provision "avoids treating recommendations to the general public . . . as investment advice and thus addresses concerns that the general circulation of newsletters, television talk show commentary, or remarks in speeches . . . would result in the person being treated as a fiduciary."[12] However, our members have raised concerns that the preamble does not provide enough specifics in typical situations. One example is how the rule might apply to employee call centers. The broad and undefined nature of the phrases "individualized to" and "specifically directed to" could lead to confusion and unintended consequences. Accordingly, PSCA recommends that the DOL provide additional clarification on the intent and scope of this definition.

B. PSCA supports repeal of advisory opinion 2005-23A and requests revision of the term "recommendation."

As part of its new definition, the Proposed Rule defines investment recommendations to include a recommendation to take a distribution from a plan or IRA, as well as a recommendation as to the investment of assets distributed or rolled over from a plan or IRA.[13] Consequently, the Proposed Rule would supersede existing DOL guidance in Advisory Opinion 2005-23A, holding that a party does not give fiduciary investment advice when it makes a recommendation as to distribution options even if that recommendation includes a

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[11] Prop. Reg. 29 C.F.R. §2510.3-21(a)(2)(ii).
[12] 80 Fed. Reg. at 21, 940.
[13] Prop. Reg. 29 C.F.R. §2510.3-21(a)(i).

recommendation as to the investment of the distribution.[14] PSCA previously recommended this approach and, subject to the concerns set forth below, generally supports this revised position.

The Proposed Rule defines the term "recommendation" to mean "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."[15] PSCA is concerned about the breadth of this definition and that almost any information provided to a participant can be interpreted as a "recommendation." This concern is particularly relevant in the context of IRA rollovers, in which the much-needed dissemination of basic information (e.g., plan distribution options, taxation considerations and other related implications of a distribution and/or rollover) should not be treated as an investment recommendation for this purpose.

The Proposed Rule asks whether the DOL should adopt some or all of the standards developed by FINRA in defining communications that rise to the level of a recommendation for purposes of distinguishing between investment education and investment advice under ERISA.[16] PSCA agrees with these principles inasmuch as they help to further distinguish between recommendations and non-recommendations not on the existence of a mere suggestion, but instead on whether there has been a "call to action."[17] Accordingly, PSCA recommends that the DOL revise the definition of the term "recommendation," by including the concepts that the recommendation rises to the level of a "call to action" as set forth in FINRA's Policy Statement 01-23, in order to be treated as a recommendation for purposes of determining whether investment advice has been rendered.

C. PSCA recommends revising definition of "IRA" and addressing other non-ERISA accounts in separate guidance.

The preamble to the Proposed Rule notes that the term "IRA" is inclusively defined to include certain non-ERISA plans such as Health Savings Accounts, Archer Medical Savings Accounts and Coverdell Education Savings Accounts. The preamble also asks whether it is appropriate to treat these plans in a manner similar to IRAs and subject them to both the underlying rule and the applicable carve-outs as set forth in the Proposed Rule.[18] PSCA generally believes that the Proposed Rule should not apply to welfare plans. Instead, if the DOL

[14] *See also* 80 Fed. Reg. at 21, 939.
[15] Prop. Reg. 29 C.F.R. §2510.3-21(f)(1).
[16] 80 Fed. Reg. at 21,938.

[17] FINRA Policy Statement 01-23 (April 2001) ("As illustrated by the examples provided below, the "facts and circumstances" determination of whether a communication is a "recommendation" requires an analysis of the content, context, and presentation of the particular communication or set of communications. The determination of whether a "recommendation" has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether – given its content, context, and manner of presentation – a particular communication from a broker/dealer to a customer reasonably would be viewed as a "***call to action***," or a suggestion that the customer engage in a securities transaction.") (emphasis added).

[18] 80 Fed. Reg. at 21,947.

wishes to further consider the application of the Proposed Rule to these plans, PSCA believes that it would be more appropriate for the DOL to do so in separate guidance.

IV. Investment Education Carve-out

The Proposed Rule includes a similar exception for the same general types of information not treated as investment advice as under IB 96-1 (i.e., plan information; general financial, investment and retirement information; asset allocation models; and interactive investment material). While the Proposed Rule incorporates most of IB 96-1,[19] it does, however, make several major changes:

- It adds an explicit condition that the information cannot include any advice or recommendations as to specific investment products, investment managers, or the value of investments.[20]
- It does not incorporate paragraphs (d)(3)(iii) and (4)(iv) from IB 96-1. Therefore, education materials that include asset allocation models or interactive investment materials cannot identify specific investment alternatives available under the plan for those models or materials to come within the carve-out.[21]
- The scope of the carve-out is expanded to apply to IRAs and to ERISA plans that do not provide for participant-directed investment, and to cover communications to plan fiduciaries and IRA owners.[22]

A. Current guidance should be preserved.

PSCA believes that IB 96-1 in its entirety is the right framework for this carve-out. While the Proposed Rule's language provides some welcomed clarification that PSCA supports and wishes to become finalized, PSCA is concerned about the negative unintended consequences related to the Proposed Rule's failure to incorporate paragraphs (d)(3)(iii) and (4)(iv) from IB 96-1. Accordingly, PSCA recommends that the DOL preserve IB 96-1 in its entirety and amend the Proposed Rule to clarify that investment education materials that include asset allocation models or interactive investment materials can identify specific investment alternatives available under the plan.

1. There is no evidence of abuse.

The preamble states that the DOL is concerned that even when accompanied by a statement as to the availability of other investment alternatives, asset allocation models and interactive investment materials identifying specific investment alternatives function as "tailored,

[19] *Id*.

[20] 80 Fed. Reg. at 21,944.

[21] *Id.* at 21,945.

[22] *Id.* at 21,944.

individualized investment recommendations, and can effectively steer recipients to particular investments, but without adequate protections against potential abuse."[23] However, the Proposed Rule does not provide any studies and/or examples showing any abuse or harm since IB 96-1 was issued.

Instead, PSCA believes that IB 96-1 works well. We believe IB 96-1 provides a reliable and workable model with which plan sponsors, service providers, participants and other stakeholders are familiar. This familiarity and reliability would only become more important as the marketplace adjusts to the changes of the Proposed Rule.

2. Identification of specific investment options increases value, effectiveness of investment education.

While PSCA understands the DOL's concern about steering participants to particular investments, it believes that the identification of specific investment options in asset allocation models and interactive investment materials helps participants understand and "connect the dots" between general information on asset allocation and corresponding investment(s) in a plan. Importantly, one without the other runs the risk of failing to educate a participant on how to effectively use an employer's plan – a net detriment to his or her best interest. Accordingly, PSCA believes that the Proposed Rule could decrease the value and effectiveness of investment education.

PSCA's 57th Annual Survey results show that the most common reasons for providing education among plans (of all sizes) were to increase participation (77.5 percent), increase appreciation for the plan (72.9 percent), and increase deferrals (74.9 percent). For plans with 1-49 participants, 78.1 percent of respondents indicated that plan education was provided to increase appreciation for the plan. We believe that without the tie-in to specific investment options under a plan, the risk that a participant fails to fully appreciate, learn from the education, and actually use the plan would increase.

Our concern is best demonstrated by the following anecdote given by one of our plan sponsor members:

> We hired XYZ to provide investment education services to our employees. They offer a robust program that tailors the educational opportunities for early-, mid- and late-career employees. One thing we really like about the program is that if a participant wants to learn more than just the general information from online and various program seminars, he or she can schedule a telephone call with an XYZ certified financial planner and talk about factors specific to the employee. For example, benefit opportunities inside and outside of the employer, prior marriages, etc. The certified financial planner uses this information, as well as the employee's risk tolerance and time horizon to help construct a broad asset allocation model based on the employee's personal circumstances. What we have noticed when we have looked in the past at IB 96-1 is that the XYZ representative

[23] *See* 80 Fed. Reg. at 21,945.

> would be able to utilize our plan's investment options to provide examples of what the plan currently offers to satisfy an allocation in the model provided to the participant. For example, "the asset allocation model suggests investing x% in large cap equities; the plan currently offers these funds as large cap equity options . . ." We believe that this last step – connecting the asset allocation model with specific investment options under the plan – ties it all together for the participant. In our experience, participants are well aware that the references to specific investment options are intended to constitute education, not advice. We are concerned that the proposed regulation would prohibit our educational service provider from helping the participant connect the dots.

3. Plan sponsors are concerned with potential unintended consequences.

PSCA members are concerned that a narrowed IB 96-1 could have unintended consequences that would be particularly harmful to small employers and participants. For instance, in addition to decreasing the value and effectiveness of investment education (as discussed above), plan sponsors are concerned that the availability of educational services will be limited or become more costly. That is, if what is currently available as education becomes "investment advice," providers may no longer offer these services or will impose advisory-level fees, making the information unattainable for many employees.

Additionally, participant outcomes for smaller plan sponsors may be jeopardized because of the additional burdens imposed on sponsors and their participants. For instance, our survey indicates that of plans with 50-199 participants that offer retirement planning education, only 27.1 percent of plan sponsors created the education themselves. Instead, 70.6 percent rely on a third-party. Conversely, of plans with 5,000 or more participants, 57.7 percent of plan sponsors offered investment education themselves, and 54 percent indicated relying on a third party. Imposing the burden of developing these programs without the help of their providers could impact small employers' willingness to establish or maintain plans. Also, the absence of these helpful asset allocation models and interactive investment materials would increase decisions required of participants during plan enrollment and investment selection processes. This, in turn, would undermine sponsors' efforts to increase appreciation for and participation to the plan.

While any discussion about a proposed regulation's potential impacts in the marketplace necessarily involves a degree of speculation, PSCA nonetheless believes there are legitimate concerns regarding unintended consequences. Accordingly, PSCA hopes the DOL will be responsive to these concerns as it continues to refine this carve-out.

4. DOL concerns can be addressed without eliminating ability to identify specific investment options.

To the extent the DOL is unwilling to preserve IB 96-1 in its entirety, PSCA believes there are ways to permit the identification of specific investment options without risking the abuses described by the DOL if certain principles are taken into account. For example, proposals that are based on neutral, informative descriptions of the participant's options should be permissible under the carve-out. In providing this neutrality, the focus should be on the factually comparative nature of the information and whether it is being provided in a manner that does not rise to the level of a recommendation. PSCA offers to serve as a resource as the DOL continues to evaluate the right standard for this carve-out and is willing to work with the DOL to help identify solutions that address any concerns without eliminating the ability to identify specific investment options. In this regard, both the DOL and PSCA have been weighing the pros and cons of alternatives such as (this is not an exhaustive list):

- permit the identification of specific investment options when the education is paid for on a fixed and unconflicted basis;
- permit the identification of specific investment options when the education is provided by an independent third-party;
- permit the identification of specific investment options when the education discloses each available plan option in a given asset class; and/or
- permit plans to continue relying on paragraphs (d)(3)(iii) and (4)(iv) of IB 96-1, but do not extend this ability to IRAs (i.e., the marketplace for employee benefit plans is considerably different from the marketplace for IRAs since while IRA owners have access to an unlimited universe of investments, plan participants and beneficiaries select investments from a lineup selected by prudent plan fiduciaries.).

Each of these alternative solutions may address the concerns raised by the DOL and would permit plan sponsors to continue (albeit potentially at a greater cost) to provide valuable education in certain instances. However, as noted above, PSCA believes that service providers should be able to identify specific investment options under the principles established in IB 96-1 although it may be that certain service providers should be subject to additional conditions to ensure the neutrality described. Forcing plan sponsors in all cases to use an independent third party to provide education could increase plan costs as well as make it potentially more complicated for the participants. Again, PSCA welcomes the opportunity to work with the DOL as it considers these and other alternatives.

5. PSCA supports additional language clarifying the carve-out's scope.

The Proposed Rule includes language intended to clarify that the Investment Education carve-out (i) applies equally to information provided to plan fiduciaries as well as to participants, beneficiaries, and IRA owners, (ii) applies equally to participant-directed plans as well as to other plans, and (iii) applies without regard to whether the information is provided by a plan sponsor, fiduciary, or service provider.[24] Additionally, the Proposed Rule includes language clarifying that fiduciary status would not arise from the provision of general information about determining retirement income needs past retirement and any associated risks, as well as general methods for managing those risks both within and outside a plan.[25] PSCA believes that this language provides a welcomed clarification and accordingly, supports the inclusion of these provisions in the final rule.

[24] *Id.*
[25] *Id.*

V. Employee Carve-out

The Proposed Rule provides that employees of an ERISA plan sponsor would not be investment advice fiduciaries with respect to advice they provide to fiduciaries of the sponsor's plan so long as such employees do not receive compensation for the advice beyond their normal compensation.[26] This carve-out is intended to address concerns that internal employees of plan sponsors should not be treated as fiduciaries because their advice is largely incidental to their work duties and they receive no additional compensation for providing such advice.[27]

A. PSCA supports the employee carve-out and requests clarification on advice provided to non-fiduciary employees.

PSCA supports the employee carve-out. We agree with the DOL that employees of an ERISA plan sponsor should not be considered investment advice fiduciaries with respect to advice they provide to fiduciaries of their employer's plan so long as they do not receive compensation for their advice beyond normal compensation.

One issue raised during our review of this carve-out relates to a situation involving two or more non-fiduciary employees of an ERISA plan sponsor (e.g., Employee A and Employee B). In this situation, Employee A provides investment advice to Employee B. Then, Employee B provides that advice to the proper plan fiduciaries. Neither Employee A nor Employee B receives compensation beyond their normal compensation and such advice is largely incidental to their work duties.

The Proposed Rule states that the employee carve-out applies when "the person provides the advice ***to*** a plan fiduciary . . . ."[28] Thus, a strict reading of the Proposed Rule indicates that Employee B would satisfy the carve-out. However, it suggests that Employee A would not, despite the DOL's recognition that "internal employees, such as members of a company's human resources department, routinely develop reports and recommendations for investment committees and other named fiduciaries of the sponsors' plans, without acting as paid fiduciary advisers."[29]

Accordingly, PSCA recommends that the DOL clarify in the final regulation that the carve-out would apply broadly in this situation to cover individuals such as Employee A.

VI. Platform Providers, Selection and Monitoring Assistance

The Proposed Rule provides a carve-out for service providers (e.g., recordkeepers 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

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[26] Prop. Reg. 29 C.F.R. §2510.3-21(b)(2).
[27] 80 Fed. Reg. at 21,943.
[28] Prop. Reg. 29 C.F.R. §(b)(2).
[29] 80 Fed. Reg. at 21,943.

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.[30] 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 advance by the plan fiduciary and objective financial data and comparisons with independent benchmarks.[31]

A. PSCA supports platform provider carve-outs and requests clarification on ambiguities.

PSCA supports the Proposed Rule's carve-outs for platform providers. Indeed, the carve-out would ensure the continuation of a vibrant marketplace for service providers offering platforms for the selection of investment vehicles for individual-account plans – this is critically important for the plan sponsor community. As such, PSCA wants to ensure that these carve-outs do not unintentionally limit access to robust platforms for all plan sponsors. Despite its general support for these carve-outs, PSCA perceives certain proposed language to be ambiguous and seeks DOL's clarification as to their scope and applicability. Accordingly, PSCA is concerned about the harmful impacts that could arise from this uncertainty, particularly with respect to small plan sponsors.

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 . . . ."[32] Unfortunately, the preamble does not offer much help in understanding what it means to "merely" market or to make a platform or similar mechanism available without regard to "individualized needs."[33] Similarly, the carve-out for selection and monitoring assistance would apply if the person "***merely*** identifies investment alternatives that meet objective criteria"[34] or "***merely*** provides objective financial data and comparisons with independent benchmarks to the plan fiduciary."[35]

These carve-outs are intended to address common practices and recognize circumstances where the platform provider and the plan fiduciary both understand that the provider has financial interests with the offered investments, and where the plan fiduciary knowingly accepts that the platform provider is not purporting to provide investment advice.[36] However, having

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[30] Prop. Reg. 29 C.F.R. §2510.3-21(b)(3).
[31] Prop. Reg. 29 C.F.R. §2510.3-21(b)(4).
[32] Prop. Reg. 29 C.F.R. §2510.3-21(b)(3).

[33] 80 Fed. Reg. at 21,943 ("The carve-out ***merely*** makes clear that persons would not act as investment advice fiduciaries simply by marketing or making available such investment vehicles, ***without regard to the individualized needs*** of the plan or its participants and beneficiaries, as long as they disclose in writing that they are not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.") (emphasis added).

[34] Prop. Reg. 29 C.F.R. §2510.3-21(b)(4)(i).
[35] Prop. Reg. 29 C.F.R. §2510.3-21(b)(4)(ii).
[36] 80 Fed. Reg. at 21,943.

affordable access to robust platforms is extremely important to the plan sponsor community. Since 2002, PSCA plan sponsor survey data reflects an expansion of investment options offered by plan fiduciaries (from 14 to 19). Thus, PSCA is concerned that the expanding array of investment options that have become so common may decline or become more expensive without more specificity. Accordingly, PSCA requests that the DOL provide more certainty within the language of the final regulation (or its preamble).

B. PSCA requests clarification regarding RFPs and "Mapping."

Several of our members noted that the ambiguity contained in the carve-outs would create problems in responding to a plan sponsor's request for proposal ("RFP"), where the service provider merely prepares a sample line-up in response to such an RFP. While plan sponsors sometimes will provide specific criteria from which to create a proposed investment line-up, in many situations plan sponsors at this point in the process provide no criteria at all. Similarly, plan sponsors seeking to replace funds within their investment line-up tend to request information for "mapping" alternatives from their providers. In both scenarios, the investment alternatives identified by the provider serve as a starting point for review and decision by the plan fiduciaries. Without an ability to continue these practices, plan sponsors would be faced with the burden of analyzing the full platform of their provider, or of the multiple providers from whom they request a proposal. PSCA urges the DOL to provide clarification for providers with respect to the RFP and fund replacement processes.

C. PSCA believes carve-outs should not be limited to large plan sponsors.

PSCA recommends retaining the current construct of the carve-out so that it applies to plan sponsors of all sizes. PSCA does not support limiting the platform provider carve-outs to large plan sponsors for several reasons. As further described below, extending the carve-out to plans of all sizes would be more consistent with core ERISA fiduciary principles, would recognize that small plan sponsors are equally capable of understanding when a platform provider has financial interests, and would avoid the imposition of difficult administrative issues and added costs that could prove harmful to small plan sponsors and their plan participants.

As the DOL is aware, ERISA provides that a fiduciary must discharge his responsibility "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[37] The scope of this duty is not conditioned upon the relative size of the plan sponsor. Rather, it applies equally to plan sponsors of all sizes. Thus, applying the carve-outs regardless of size simply is more consistent with this fundamental ERISA obligation.

PSCA believes a decision by the DOL to exclude small plans from the platform provider carve-out would create confusion in the marketplace and potentially create an undue burden to certain small plan sponsors. Limiting the carve-out to large employers would in essence make every platform available to a small employer an advisory product. PSCA believes that small

[37] ERISA §404(a)(1)(B).

plan sponsors who want to use a platform but do not need to obtain related investment advice should not be subjected to the related increased costs of an advisory platform. In practical terms, PSCA agrees with the DOL that some small plan sponsors may not be as sophisticated as large plan sponsors and that those small plan sponsors should be protected when they obtain investment advice from a service provider. However, and as noted above, plan sponsors of all sizes are obligated to understand and uphold their fiduciary duties. There clearly are many small plan sponsors who – for various reasons – would benefit from having the same platform provider carve-out option that large plan sponsors have.

Importantly, investment sophistication is a matter of sophistication – not size. For example, a small plan sponsor that employs a sophisticated Chief Financial Officer may prefer to work with a service provider with access to a platform of investment options. If the plan fiduciary for that employer is comfortable making investment selection decisions and does not need the investment advice from the service provider, then excluding that small employer from the platform provider carve-out exposes that employer to the risk of greater administrative burdens and costs without a corresponding gain. Today's marketplace makes investment advice available to those sponsors who need it. The disclosures required by the carve-out will help any size plan sponsor understand that investments presented within a platform are not intended to be fiduciary recommendations. Solidifying this understanding will help employers, who need this assistance, realize they must seek it through already available, but separate, services.

In addition, PSCA believes that an undue burden will befall plan sponsors if the platform provider carve-out is applied on a size basis as plans grow or decline in size since it is unclear how the use of platforms would be expected to change as the applicable threshold is crossed in either direction. Small plan sponsors are just as capable of recognizing that platform providers have financial interests with the offered investments and of understanding when they are providing investment advice. Moreover, the DOL already has promulgated regulations intended to address concerns about the ability of plan fiduciaries to evaluate service provider compensation and evaluate potential conflicts of interest.[38] PSCA understands that the DOL may have concerns with respect to extremely small plans that are akin to IRAs. As such, if the DOL is unwilling to retain the platform provider carve-outs to plans of all sizes, PSCA recommends that the DOL consider adopting a rule that only plans with a very small plan participation base (e.g., between 5 and 20 employees) be excluded from the carve-out.

VII. Financial Reports and Valuations

The Proposed Rule provides a carve-out for providers of valuations and fairness opinions for employer stock in connection with an ESOP and providers of appraisals and valuations for collective investment funds or pooled separate accounts that hold assets of multiple, unaffiliated plans. 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

[38] 29 C.F.R. §2550.408B-2(c) (requiring covered service providers to disclose information about services it provides and compensation it expects to receive in connection with a contract or arrangement with a covered plan).

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.[39]

A. PSCA supports final reports/valuation carve-out and requests clarification on investment funds carve-out.

PSCA generally supports this carve-out. However, some members have expressed confusion with respect to the carve-out related to valuations or appraisals provided to investment funds. Specifically, the preamble indicates that the investment fund carve-out 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***."[40] However, the language of the Proposed Rule 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."[41]

Accordingly, PSCA recommends that the final regulation clarify that only one plan or IRA is needed to qualify for the investment fund carve-out.

VIII. The Seller's Exception

The Seller's Exception 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.[42] 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 conducted 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."[43] The other applies to transactions with a plan represented by an independent fiduciary with responsibility for managing at least $100 million in assets.

A. PSCA supports Seller's Exception and recommends expanding to smaller plan sponsors.

PSCA applauds the DOL for including this exception in the Proposed Rule and agrees that such activities should not constitute the provision of advice. Rather, the described activities are more in the nature of a sales pitch. PSCA generally supports this carve-out. However, it

[39] Prop. Reg. 29 C.F.R. §2510.3-21(b)(5).
[40] 80 Fed. Reg. at 21,939.
[41] Prop. Reg. 29 C.F.R. §2510.3-21(B)(5)(ii).
[42] Prop. Reg. 29 C.F.R. §2510.3-21(b)(1).
[43] *Id.* at §2510.3-21(b)(1)(i)(B)(4).

recommends expanding it to plan sponsors of all sizes, or alternatively, to only exclude from the exception, plans with a smaller participant threshold (e.g., between 5 and 20 employees).

PSCA supports an expanded carve-out for the same reasons it does not support limiting the platform provider carve-outs to large plan sponsors. First, expanding the carve-out to plan sponsors of all sizes would be more consistent with core ERISA fiduciary principles, which apply regardless of plan sponsor size. Second, PSCA believes that small plan sponsors, aided by the service provider fee disclosure regulation, are equally capable of distinguishing between a sales pitch and advice. Lastly, imposing a limit may lead to difficult administrative issues that could prove costly and detrimental to small employers.

Like the carve-outs for platform providers, PSCA understands that the DOL has concerns with respect to extremely small plans that are akin to IRAs. As such, if the DOL is unwilling to extend the Seller's Exception to plans of all sizes, PSCA recommends that the DOL lower the threshold to smaller plans, such as between 5 and 20 participant plans.

IX. Best Interest Contract Exemption

The Proposed Rule's best interest contract exemption (the "BIC Exemption") would provide prohibited transaction relief for the receipt of compensation by investment advice fiduciaries and their affiliated financial institutions for services provided in connection with the purchase, sale, or holding of certain investments by participants and beneficiaries, IRAs, and certain plans with fewer than 100 participants (the "Retirement Investor"). Generally, the fiduciary adviser and affiliated financial institution would be required to enter into a written contract with the Retirement Investor prior to recommending any investment. Additionally, the BIC Exemption would require a number of disclosures to the Retirement Investor – including (1) a description of material conflicts of interest; (2) a statement informing the Retirement Investor that it has the right to obtain complete information about all fees related to its investment; and (3) a statement as to whether the financial institution offers any products or receives any third-party payments with respect to any underlying investments.

A. PSCA supports the BIC Exemption's principles-based approach but is concerned with the written contract and disclosure requirements.

Like the DOL, PSCA is concerned with plan participants' transition from qualified plans to retail investment vehicles. We believe it is crucial that plan participants receive sound and unbiased guidance on options available to them prior to making a decision that could have profound effects on their retirement nest egg. PSCA supports the idea of a flexible, principles-based framework for providing exemptive relief for investment advice fiduciaries. We agree with the DOL that doing so will permit plan sponsors to continue to rely on common fee practices while allowing such investment advice fiduciaries to continue to receive a wide variety of compensation.

The preamble states that "[i]t is intended that the [BIC Exemption] will ease compliance costs and reduce complexity while promoting the provision of investment advice that is in the best interest of Retirement Investors."[44] PSCA supports this concept and believes that this should be the guiding principle with respect to the BIC Exemption. However, PSCA is concerned that the BIC Exemption's written contract and multiple disclosure requirements may not fulfill the stated intent of easing compliance costs and reducing complexity.

1. *Written Contract Requirement*

As mentioned above, in order to receive exemptive relief under the BIC Exemption the adviser and his or her financial institution must enter into a written contract with the Retirement Investor prior to recommending any investment. The preamble indicates that the DOL intends for the written contract requirement to be the "cornerstone" of the BIC Exemption, creating a basis upon which its rights can be enforced by the Retirement Investor through a private right of action for breach of contract.

In addition to acknowledging fiduciary status, the written contract would require the adviser and his or her financial institution to agree to comply with certain impartial conduct standards, including a best interest standard defined to effectively mirror the ERISA Section 404 duties of prudence and loyalty. When combined with the various proposed warranties, disclosures and prohibited contractual provisions, the proposed written contract requirement indeed would create a basis upon which its rights could be enforced by the Retirement Investor through a private right of action for breach of contract. However, after listening to comments from other groups and the provider community, PSCA is concerned about the written contract requirement's complexity and potential expense, as well as the likelihood of significant practical difficulties.

As an alternative to the BIC Exemption's version of a written contract requirement, PSCA believes there are other, less complex measures that could accomplish the same goals, such as through a web-based or email-based exchange of information and consent that is paperless but still creates enforceable rights. Alternatively, the DOL could consider replacing the BIC Exemption's current contract requirement with a unilateral contractual arrangement that contains the same contractual provisions as currently required (e.g., the ability to bring a private right of action, the imposition of impartial conduct standards intended to effectively mirror the ERISA Section 404 duties of prudence and loyalty, etc.). Such a contract would be structured by the financial institution and agreed to by the Retirement Investor through performance. Importantly, such an arrangement would not require either party to provide a written signature.

We believe this approach meets the DOL's stated objectives for the BIC Exemption. Requiring an actual, written contract with signatures could preclude providers from offering, and Retirement Investors from accepting, innovative ways to engage in provider/customer relationships as the digital world continues to evolve. To align with other currently permitted electronic practices, the DOL might also consider a clause allowing Retirement Investors the ability to receive paper copies of the agreement or any required disclosures, at no charge to them.

[44] 80 Fed. Reg. at 21,966.

2. *Disclosure Requirements*

The BIC Exemption would create significant amounts of additional disclosure requirements for investment advice fiduciaries and their affiliated financial institutions. PSCA supports a disclosure regime that allows Retirement Investors the ability to access sufficient information related to the investment options recommended as well as other investments that might be available to them. We fear, however, that the level of material required under the BIC Exemption may overwhelm plan participants and become overly burdensome, making it unworkable for many service providers. For example, our members have concerns with the annual statement and whether it is even feasible to track whether a Retirement Investor has acted on the advice provided or simply chosen the investment for other reasons (as it is very common for Retirement Investors to not take any action at the time the advice is provided).

Additionally, our members suggest that, where possible, any potential disclosures required by the BIC Exemption leverage other established disclosure regimes. In this regard, PSCA recommends that the DOL consider relying on principles of existing regulations such as those under the ERISA Sections 408(b)(2) and 404(a) disclosures – rather than devising an entirely new set of disclosures that may not be useful and would present enormous complexity for those who would need to develop them. Lastly, as the DOL approaches these additional disclosures, we ask that the DOL and IRS electronic disclosure requirements be conformed into one requirement.

X. Conclusion

PSCA applauds the DOL's efforts to maximize consumer protection for plan sponsors, fiduciaries, participants, beneficiaries, and IRA owners while preserving flexibility within the plans. PSCA wishes to be a resource to the DOL and as we continue to further evaluate these rules, PSCA may provide additional comments for the DOL's consideration. We appreciate the opportunity to comment and look forward to working with the DOL to achieve these goals. If you have any questions, please do not hesitate to contact Tony Verheyen, Executive Director, at tony.verheyen@psca.org or (312) 419-1863.

Respectfully submitted,

Plan Sponsor Council of America