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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
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Submitted by e-mail:
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Re: RIN 1210-AB32 & ZRIN 1210-ZA25
Proposed Definition of Fiduciary; Conflict of Interest Rule for Retirement
Investment Advice
Proposed Best Interest Contract Exemption
Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83, and 83-1

Ladies and Gentlemen:

I am an investment representative of a broker-dealer and have served individual investors for 20 years. I also provide non-fiduciary compliance and consulting services to 401(k) plans and their sponsors. My plan-level 401(k) consulting work is done for an hourly rate. I have three concerns about the proposed rules:

1. 401(k) plan and other qualified plan consultants should not be deemed fiduciaries merely because they recommend fiduciaries, such as ERISA 3(38) investment managers, to plan sponsors. Plan sponsors are in great need of consultants to help them with the burdensome fiduciary and compliance responsibilities of 401(k) plans and other qualified plans. Consultants who provide many of these non-investment services, such as assisting with plan committee meetings, participant education, discrimination testing, and match calculations, should not be drawn into the fiduciary world because they assist the plan sponsor with the interviewing and selection of true fiduciaries. If these services triggered a fiduciary status, I would no longer assist plan sponsors in the selection of ERISA 3(38) investment managers, a service they greatly need.

My opinion is in response to this sentence in the preambles to the Proposed Best Interest Contract Exemption and Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83, and 83-1 that lists the types of activities that constitute “investment

advice”: “(4) A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (1) through (3), above.” This sentence may have been written contemplating investment advisors or representatives who recommend mutual fund or managed account managers for qualified plans or IRAs. However, you can see how easily it could be interpreted to include non-fiduciary plan consultants who help sponsors interview and select ERISA 3(38) investment managers. The plan sponsor certainly is performing a fiduciary function in hiring an ERISA 3(38) investment manager. However, a consultant paid an hourly or flat fee to assist with the interview process and render an opinion on the merits of the candidates interviewed or the wisdom of retaining an existing ERISA 3(38) investment manager should not be deemed a fiduciary.

2. While other commenters have expressed their concerns about various aspects of the Best Interest Contract Exemption, I believe the key flaw in this exemption is the word “best.” “Best” is an unattainable standard, an unreachable limit on a hyperbolic curve. It would be one thing to have a “Retirement Investors Interest Contract Exemption” or a “Retirement Investors Interest First Contract Exemption,” but to use the word “best” is to guarantee litigation. Not only will the advisor never serve the best interest of the investor, but the investor will not even know what her best interest is. Ask an investor in 2007 whether they are more interested in growth or principal preservation, and they likely would have told you “growth.” The same investor in 2009 likely would have told you “preservation.” Investing is a complex process, as Section II(c)(1) of the proposed exemption recognizes in its attempt to define what is meant by “Best Interest.” Best is a toxic word that has no place in the proposed exemption. It is the fatal flaw in the proposed regulation; it improves the retirement only of litigators who shall feast on it.
3. This comment deals solely with IRAs and not qualified plans. Wherever this regulation goes from here, you must respect existing investments in IRAs. I realize that your Proposed Rule contains an “Exemption for Pre-Existing Transactions,” but this topic is so serious that you must be very careful that your proposed exemption eliminates any requirement for a Best Interest Contract in these circumstances. Many IRA owners own annuities in their IRAs, both fixed and variable. Variable annuities are popular for their lifetime income riders and death benefit guarantees. Other IRA owners have mutual funds in their IRAs. Regardless of the investment type, most IRA owners value their current investment representatives and advisors. The danger with any new IRA fiduciary definition and exemption regulation that does not respect existing investment vehicles through some type of grandfathering is that many IRA owners will lose their valued investment professional overnight when those professionals choose not to meet the requirements of the regulation. The regulation will create instant Retirement Orphans. In my practice, I have taken over the

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servicing of variable annuities sold by other investment professionals. These annuities have complex lifetime income riders that must be meticulously followed or the investors will lose their lifetime guarantees. What good has the Department done if I stop serving these individuals, because the cost and liability of the Proposed Rule is more than I wish to bear? Sometimes in life, change works best when it starts clean, rather than trying to reform the past. Tread very cautiously here, or you will cause much irreparable damage in the delicate relationship between the Retirement Investor and Adviser.

Please call me if I can provide more detailed information on these three concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Blake", with a stylized flourish extending to the right.

Blake Woodard

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