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Submitted by email to e-ORI@dol.gov

September 24, 2015

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

Re: RIN 1210-AB32

Ladies and Gentlemen:

The American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") is pleased to submit these comments to the Department of Labor ("DoL" or "Department") on the Notice of Proposed Rulemaking regarding the definition of the term "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and of a plan under Section 4975 of the Internal Revenue Code of 1986 (the "Code") as a result of giving investment advice ("Proposed Rule")[1]; the Notice of Proposed Class Exemption regarding the Best Interest Contract Exemption ("BICE")[2]; and the Notice of Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption

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1 The Notice was published in the Federal Register on April 20, 2015 (80 Fed. Reg. 21928)

2 The Notice was published in the Federal Register on April 20, 2015 (80 Fed. Reg. 21960) and is available at http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf.

(PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters.[3]

The broad interest of working people, including union members, in this rulemaking is detailed in both of our earlier written comments and in our testimony at the hearing on the Proposed Rule and the BICE on August 10, 2015. In this submission, we would like to supplement the record on several issues. Most of these relate to the broader question of whether the final rule and PTEs should include loopholes that allow financial institutions and the advisers they employ to continue harmful practices and business models, either directly or just renamed with the same impact on retirement investors. In our view, allowing such loopholes would defeat the purpose of the proposed reforms and undermine the retirement security of the people our private pension and retirement savings system was designed to serve.

Investment Recommendations Related to Certain Health Savings Accounts and Welfare Plan Assets

At the hearing, Mr. Canary posed two questions to me about the scope of the Proposed Rule and its application to recommendations regarding: (1) the investment of assets in Health Savings Accounts ("HSAs")[4]; and (2) the investment of assets in funded welfare plans.[5]

It is our view that investment recommendations regarding HSA assets should be treated as fiduciary advice under the proposed rule. Significantly, because of their tax advantages[6], HSA accounts increasingly are being marketed as a vehicle for accumulating retirement savings, in addition to savings in retirement plans, such as 401(k)s and IRAs.[7] Just this month the *New York*

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3 The Notice was published in the Federal Register on April 20, 2015 (80 Fed. Reg. 22010) and is available at http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08837.pdf.

4 A health savings account is a trust or custodial account established exclusively to pay qualified medical expenses of an account beneficiary covered by a high-deductible health plan. *See* 26 USC § 223.

5 A welfare plan (or employee welfare benefit plan) is a plan established or maintained by an employer or by an employee organization (such as a union), or both, that provides health care or other specified types of benefits, including sickness, vacation, and apprenticeship benefits, among others, for participants or their dependents directly or through insurance, reimbursement, or otherwise. *See* 29 USC § 1002(1).

6 HSAs are not subject to federal income tax and any growth is tax free, as is any distribution used toward qualified medical expenses which include premiums for long-term care insurance.

7 See, for example, Jody Dietel, "Using an HSA for Retirement Savings," *benefitspro* (Sept. 19, 2013), available at http://www.benefitspro.com/2013/09/19/using-an-hsa-for-retirement-savings; Elizabeth O'Brien, "Health Savings accounts Gain Acceptance as Retirement Tool," *Market Watch* (May 28, 2015), *available at*

Times reported on a financial planner who advises clients to pay for current medical costs using other funds and let their HSA contributions grow for future use. In the adviser's words, "You'll be happy to have that money, when you're older."[8] Like retirement savings plans, HSAs may hold both employee and employer contributions; employees can rely on investment returns accumulating over many years; and differences in fees and returns affect the final benefit. Unlike 401(k) plans, however, HSAs are not subject to disclosure requirements about their widely varying account and investing fees. Given this, we see no reason why HSA owners receiving advice for a fee regarding the investment of their HSA assets should be accorded fewer protections or owed a lower duty of care under the law than retirement plan investors receiving advice regarding the investment of pension and other retirement plan assets. If the final rule were to create a loophole excluding recommendations related to the investment of these accounts from the definition of fiduciary advice, financial institutions and advisers undoubtedly would exploit it by encouraging more and more retirement investors to substitute these accounts, at least in part, for IRAs and other accounts covered by the fiduciary definition.

In an effort to minimize the significance of HSA investment accounts in the retirement income landscape, Jon Breyfogle testified at the August hearing that such accounts comprise just 6% of all HSAs.[9] What Mr. Breyfogle failed to note, however, is that this translates to hundreds of thousands of accounts out of the nearly 14 million HSAs that existed at the end of 2014.[10] These HSA investment accounts already hold an estimated \$3.2 billion.[11] Further, analysts expect HSA investments to increase greatly in coming years as more HSAs are opened and more investment firms and advisers focus on HSAs as investment vehicles. According to one estimate, HSA investments will total \$40 billion in 2020.[12]

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http://www.marketwatch.com/story/health-savings-accounts-gain-acceptance-as-retirement-tool-2015-05-28; Megan Elliot, "Hidden Retirement Savings Opportunity in Health Savings Accounts," *Retirement Cheat Sheet* (Mar. 25, 2015), *available at* http://www.cheatsheet.com/personal-finance/hidden-retirement-savings-opportunity-health-savings-accounts.html/?a=viewall.

8 Carrns, Ann, "Health Savings Accounts Growing, Especially among the Better Paid," *New York Times* (Sept. 11, 2015), *available at* http://www.nytimes.com/2015/09/12/your-money/health-savings-accounts-growing-especially-among-the-better-paid.html?_r=0.

9 See August 10, 2015, testimony of Jon Breyfogle on behalf of America's Health Insurance Plans and the Blue Cross Blue Shield Association.

10 Devenir Research, "2014 Year-End HSA Market Statistics & Trends: Executive Summary" (Feb. 11, 2015) at 2, *available at* http://www.devenir.com/devenirWP/wp-content/uploads/2014-Year-End-Devenir-HSA-Market-Research-Report-Executive-Summary.pdf.

11 Id.

12 Todd Berkley, HSA Consulting Services, LLC, "The Coming HSA Investment Wave," (June 23, 2015) at 2, *available at* https://askmrhsa.com/wp-content/uploads/2015/06/White-Paper-The-Coming-HSA-Investment-Wave-Final-6-23-15.pdf.

It is also our view that the Proposed Rule applies to advice regarding the investment of welfare plan assets as proposed Section 2510.3-21(f)(2)(i) defines "Plan," in relevant part, to mean "any employee benefit plan described in section 3(3) of the Act."[13] Perhaps the most common funded welfare plan is a collectively bargained multiemployer plan.[14] These plans typically provide health benefits, but they also deliver other kinds of welfare benefits, such as vacation, supplemental disability or unemployment benefits. Contributions to these plans are held in trust and may be invested, along with investment earnings, to fund future benefits. While the unique liquidity needs of such plans may lead to investment advice and investments that differ from those of pensions and other plans with longer-term investment horizons, we do not see any need to distinguish between welfare plans and pension plans in the definition of fiduciary investment advice or the terms of the proposed prohibited transaction exemptions.

<u>Best Interest Contract Clauses Mandating Binding Arbitration to Resolve Disputes</u>

The provision in the BICE allowing for mandatory binding arbitration clauses received much attention at the hearing, and we reiterate our strong opposition to it here, consistent with existing AFL-CIO policy.[15] Unions have extensive experience with arbitration, as it is the

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13 ERISA Section 3(3), in turn, includes employee welfare benefit plans and employee pension benefit plan.

14 More recently, so-called stand-alone retiree health plans have used trusts qualified as voluntary employees' beneficiary associations established under Code Section 501(c)(9) as the funding mechanism for the ongoing provision of retiree health benefits. These plans are typically funded by one or more payments from the former employer of the retirees and hold significant assets for investment. The UAW Retiree Medical Benefits Trust, for example, is currently estimated to hold $50 to $60 billion. *See* "The UAW's Health Care Trust Is a Wall Street Activist," *Detroit Free Press* (Sept. 21, 2015) *available at* http://www.freep.com/story/money/business/2015/09/20/uaws-health-care-trust-wall-street-activist/71898626/.

15 The "AFL-CIO Executive Council Statement on Investors Must Have Access to the Courts to Prevent Corporate Wrongdoing," adopted in July 2014, provided in part:

> The ability of America's workers to invest with confidence is threatened by the increasing use of pre-dispute, forced arbitration clauses in investment-advisor contracts and corporate bylaws. These clauses prevent Americans from exercising their constitutional right to bring their claims before a jury, and instead force all shareholder disputes into private arbitrations. These private arbitrations are controlled by the very same corporations against which the claims are being brought.
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> The AFL-CIO urges the SEC to exercise its congressionally granted authority under Section 921 of the Dodd-Frank Wall Street Reform and Consumer Protection Act to restrict mandatory pre-

primary, if not sole, means to resolve disputes under collective bargaining agreements. The setting in which we operate, however, differs significantly from one concerning an agreement among a financial adviser, financial institution and individual retirement investor. In collective bargaining, an employer and the union come together on relatively equal footing to negotiate the terms of each contract. When disputes arise, the union represents the individual worker. In contrast, the retirement investors to whom the BICE applies (i.e., individual plan participants, IRA owners, and small plan sponsors) typically are given a take-it-or-leave-it offer of contract terms drafted by financial institution lawyers. Unlike collective bargaining between an employer and workers' union representatives, there is no negotiation to set the contract terms, and when a dispute arises, the individual investor must retain an outside lawyer who was not party to the contract negotiation.

We ask that the Department give serious consideration to the hearing testimony of James Keeney, who not only has represented individual investors in securities arbitration, but also is, himself, a FINRA arbitrator. Based on his vast experience, Mr. Keeney details the many ways in which permitting mandatory arbitration clauses in BICE contracts defeats the very purpose of the exemption. David Certner, who testified at the August hearing on behalf of AARP, had it exactly right when he characterized the DoL's proposal to permit BICE contracts to include mandatory binding arbitration clauses as a "huge concession" to the financial services industry—one for which we see no persuasive justification.

Application of the Definition of Advice to Distribution Recommendations

One of the most troubling aspects of the Department's current narrow definition of investment advice is that it leaves individual retirement investors unprotected in almost all cases in which they receive recommendations related to retirement plan distributions. For many working people, deciding whether and how to take a distribution and what to do with it are once-in-a-lifetime choices that can have significant, even life-altering, consequences. Given the importance of distribution decisions, we ask the Department to clarify in the final rule the circumstances in which distribution recommendations are to be treated as fiduciary advice. In our view, the final rule should treat such recommendations as fiduciary advice to the maximum extent permitted under the law. Further, the final rule should anticipate and prevent efforts by financial advisers and financial institutions making distribution recommendations to evade fiduciary status and responsibility in ways that undermine the statutory text and purpose.

It is unclear under the Proposed Rule whether an adviser will be considered to be rendering investment advice when she recommends that a client take a distribution from a governmental or other non-ERISA benefit plan, and invest that distribution through an IRA. The final rule should clarify that the scope of fiduciary advice regarding the management of IRA

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dispute arbitration provisions in agreements between investors and brokers, dealers and investment advisers.

assets will include such a recommendation if the distribution will be the source of some or all of the IRA assets for which the adviser makes investment recommendations.

We are aware that some financial adviser and financial institution representatives are exploring how they might structure such recommendations in ways that evade fiduciary status for a distribution recommendation. For example, some are suggesting this could be accomplished by artificially separating the advice into two separate recommendations, one covering the distribution and one covering the investment of the IRA rollover assets. The final guidance issued by the Department must make it clear that these kinds of subterfuges will not work.

Limiting Availability of the Seller's Carve-Out

Financial service representatives used the hearing as an opportunity to argue that the seller's carve-out for advice provided to large pension plans should be extended to smaller plans, plan participants and beneficiaries, and IRA owners. Many took issue with the rationale for the carve-out—that fiduciaries of large plans are better able than their small plan and individual counterparts to distinguish between conflicted sales recommendations and conflict-free advice—and suggested that the rule as drafted unfairly limits small investors' right to choose services and products that fit their needs. We strongly disagree.

Limiting the seller's carve-out to certain large- and medium-size plan fiduciaries with sufficient expertise to evaluate a transaction and conflicted investment recommendations is entirely appropriate and necessary to protect the rights and interests of individual retirement investors and plan participants and beneficiaries. It is clear that large plan fiduciaries have many more resources than small plan fiduciaries, as well as ready access to unconflicted financial experts. As noted by the ERISA Industry Committee in comments calling on the Department to make a similar distinction between large retirement plans and smaller plans when considering amending the ERISA Section 408(b)(2) disclosure regulations, "Fiduciaries of plans sponsored by America's largest employers generally have a team of sophisticated professionals and access to independent expert advice to help them analyze plan fees. Smaller plan sponsors typically have limited resources to expend analyzing plan fees and less information readily at their disposal."[16] Further, far from curtailing investor choice, the proposal reflects a great accommodation to a broad range of business practices through the BICE.[17] We urge the Department to hold firm on the carve-out as currently written, rather than bow to industry requests to expand it, thereby creating a loophole that swallows the underlying rule.

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16 Comments of Kathryn Ricard, Senior Vice President, Retirement Policy, ERISA Industry Committee, to the Department of Labor on the "Proposed Information Collection Request Submitted for Public Comment; Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements," May 12, 2014, *available at* http://www.dol.gov/ebsa/pdf/1210-AB53a-007.pdf

17 We oppose broadening the BICE exemption in the final rule to cover small, participant-directed plans.

Advice Regarding Certain Annuity Contracts

We support the Department's proposed revisions to PTE 84-24. The purchase by an IRA of a variable annuity contract or other annuity contract that is a security under federal securities laws or of mutual fund shares should be treated in a manner that is consistent with how similar investments in securities are dealt with under the proposed package of reforms as a whole. It is important, therefore, to exclude the purchase of these investments from the transactions covered by PTE 84-24. Instead, financial professionals with a conflict of interest should have to rely on the BICE in order to engage in these transactions. We are not persuaded by the broad-brush argument of insurance industry representatives that the proposed changes will inhibit the sale of annuity contracts to the detriment of individual retirement investors. While we agree that guaranteed lifetime income is a critical component of retirement income security, the principles-based approach at the heart of the proposed BICE not only provides sufficient flexibility to accommodate advice about such products, but also protects the interests of retirement investors.

Thank you for your consideration of our views, and please do not hesitate to contact me with any questions you have about them. We commend you for moving forward with this important rulemaking.

Very truly yours,

/s/ Shaun C. O'Brien

Shaun C. O'Brien
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