THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

ANDREW BANDUCCI
Senior Vice President, Retirement and Compensation Policy

Submitted Electronically

January 2, 2024

Office of Regulations and Interpretations
Employee Benefit Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: RIN 1210-AC02 – Retirement Security Rule: Definition of an Investment Advice Fiduciary; ZRIN 1210–ZA32; and Other Related Exemptions

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to comment on the proposed rule (NPRM or proposal) from the Department of Labor (DOL or Department) entitled "*Retirement Security Rule: Definition of Investment Advice Fiduciary*" and related proposed amendments to prohibited transaction exemptions published in the Federal Register on November 3, 2023.[1]

We expect other commenters will comprehensively address the procedural, legal, and economic questions raised by the proposal, including the short comment period and the potential consequences for retirement savings. **As discussed below, ERIC writes to recommend improvements to enhance the ability of large plan sponsors to provide meaningful benefits to tens of millions of working Americans.**[2]

By way of background, ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state, city, and Congressional district.

[1] 88 Fed. Reg. 75890 (Nov. 3, 2023).
[2] The Department asked for comments about whether the proposed effective date of 60 days after the final rule is published in the Federal Register is sufficient. In our view, it is not. To the extent that plan service-providers will again need to amend policies and procedures, implement those changes, communicate them to plans, participants, and other retirement savers, 60 days is an insufficient period, and at least a year may be necessary.

ERIC's comments will be filed on the docket for RIN 1210-AC02 but should be considered in connection with the other aspects of the regulatory package, including ZRIN 1210–ZA32, "*Proposed Amendment to Prohibited Transaction Exemption 2020-02*," 88 Fed. Reg. 75979 (Nov. 3, 2023), and the other related exemptions included in the proposed regulatory package.

Background

After more than a decade of controversy,[3] the Department has again proposed amending the definition of "fiduciary" under the Employee Retirement Income Security Act (ERISA). As relevant here, fiduciary status begats the obligation under ERISA to discharge duties with the "exclusive purpose" of providing benefits to benefit plan participants and defraying reasonable expenses of administering the plan, and "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," and in accordance with the plan documents.[4]

Under the statute, a person or entity is a fiduciary with respect to an employee benefit plan to the extent the person exercises discretionary authority or control respecting plan management or disposition of assets, renders "investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so," or has any discretionary authority or discretionary responsibility in the administration the plan.[5]

The Department elaborated on the "investment advice" prong of the definition in 1975, creating a five-part test.[6] It is this definition that the NPRM proposes to change. Under the proposed definition, a person renders "investment advice" to the extent:

> (1*) the person provides investment advice or make an investment recommendation to a retirement investor (i.e., a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary, or IRA fiduciary);*[7]
>
> (2) *the advice or recommendation is provided ''for a fee or other compensation, direct or indirect,'' as defined in the proposed rule*; and,
>
> (3) the advice or recommendation occurs in one of the following contexts:

[3] *See id.* at 75893-75896 (reciting the regulatory history).
[4] ERISA Sec. 404.
[5] ERISA Sec 3(21)(A).
[6] 29 CFR 2510.3-21(c).
[7] For these purposes, the retirement investor definition includes plan fiduciaries and the plan. The Department should clarify, however, that a plan sponsor acting in a settlor capacity (e.g. when making plan design decisions) is not a retirement investor under the definition.

- *The person either directly or indirectly has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;*

- *The person either directly or indirectly makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or*
- *The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations*.[8]

This proposed definition, without further elaboration, would raise questions about whether routine interactions and investment education would newly trigger fiduciary status. As discussed below, the Department has attempted to address these issues, but further clarity is needed.

The Department Should Not Change the Obligations of Employer Human Resources Services

ERIC member companies administer retirement programs for their employees in accordance with their existing fiduciary duties. However, the Department has noted the possibility of various routine interactions that may occur between company employees and retirement plan participants that do not –and ought not – rise to the level of fiduciary interactions. The NPRM states that certain investment recommendations may qualify as fiduciary investment advice if the recommendation is made "on a regular basis as part of [the recommendation-maker's] business…"[9] In this regard, the preamble to the NPRM states:

> *"the human resources employees of a plan sponsor would not be considered investment advice fiduciaries under the proposed regulatory definition, because they do not regularly make investment recommendations to investors as part of their business."*[10]

It is helpful that the Department acknowledges that those providing human resources functions are not in the business of providing investment advice. Similarly, in a footnote, DOL explains that *"[t]he Department also would not consider salaries of human resources employees of the plan sponsor to be a fee or other compensation in connection with or as a result of the educational services and materials that they provide to plan participants and beneficiaries."*

[8] Proposal, *supra* note 1, at 75900.
[9] *Id.* at 75900-75902.
[10] *Id.* at 75902.

However, the preamble language is limited to "human resources employees" and does not include contractors of the plan sponsor who are providing human resources services. The language should be expanded to encompass any person providing human resources services on behalf of the plan sponsor. It should also include other employees of the plan sponsor that regularly provide assistance to the plan's investment committee or plan administrator.

Additionally, a question has arisen about the human resources employees of a plan sponsor that is actually, itself, in the business of providing investment recommendations. Surely the human resources employees of an investment advisory firm were not the target of this expansion of the fiduciary definition, but the preamble would benefit from additional clarification. Finally, the Department should codify this human resources safe harbor in the operative text of the rule, not merely in the preamble.

The Investment Education Interpretive Bulletin Should Not Be Weakened

ERIC member companies invest in their employees' holistic financial wellness, including retirement plans, health and welfare plans, paid leave, financial education, and other benefits. As part of this, many employers provide investment education pursuant to DOL Interpretive Bulletin (IB) 96-1, "Interpretive Bulletin Relating to Participant Investment Education."[11] Under IB 96-1, information and material in the context of a participant-directed individual account plan is not fiduciary investment advice if it falls into one of four categories:

- Plan information
- General financial and investment information
- Asset allocation models
- Interactive investment models

According to the preamble, if the NPRM is finalized:

> "*the Department believes that the IB would continue to provide accurate guidance under the proposed regulation. If the proposed rule is finalized, the IB would continue to correctly describe the types of educational information and materials that should not be treated as ''recommendations'' subject to the fiduciary advice definition. Although the IB specifically applies in the context of participants and beneficiaries in participant-directed individual account plans, the Department believes that the analysis it presents is valid regardless of whether the retirement investor is a plan participant, beneficiary, IRA owner, IRA beneficiary, or fiduciary."*

There are myriad examples of 96-1-qualifying information that plan sponsors and service-providers routinely provide, such as information about plan participation, increasing

[11] *See* 85 Fed. Reg. 40589 (July 7, 2020) (reinstating IB 96-1 following the vacatur of the 2016 changes to the fiduciary rule by the U.S. Court of Appeals for the Fifth Circuit).

contributions, and strategies for managing assets in retirement. While generally reaffirming 96-1, the preamble includes cautionary language warning that a service-provider purporting to be engaged in investment education can cross the line into fiduciary investment advice if it relates to a "specific investment or investment strategy." **The Department should specify that this is not intended to weaken the safe harbor for educational asset-allocation models and interactive investment materials described in 96-1.** Finally, the operative language of the rule should specifically incorporate 96-1.

DOL Should Permit IRS-Approved Non-Bank Trustees to use PTE 2020-02

The NPRM expands the universe of investment advice fiduciaries and includes health savings accounts ("HSAs") in its scope. The fiduciary relationship may be created if compensation is received in connection with an HSA-related investment arrangement. As such, certain HSA service providers, like other investment advice fiduciaries, may need to use the provisions of PTE 2020-02 as proposed to receive reasonable compensation in connection with these services. Under that PTE, as proposed to be revised, financial institutions, investment professionals, and their affiliates and related entities may receive reasonable compensation as a result of providing fiduciary investment advice, provided the terms of the exemption are met.

The definition of "Financial Institution" under the proposed revisions to PTE 2020-02 includes registered investment advisers, banks, insurance companies, broker-dealers, and their employees, agents, and representatives.[12] The Department has requested comment on this definition and asked whether any other type of entity should be included.

This definition of Financial Institution should be expanded to include Internal Revenue Service (IRS)-approved nonbank trustees. These non-bank trustees are permitted to administer HSAs and are subject to numerous requirements under Treasury regulations and guidance. These IRS- approved nonbank trustees service a meaningful portion of the HSA market, and without eligibility to use PTE 2020-02, may be forced to exit the market. With reduced competition and fewer choices, costs to HSA plan sponsors and participants could increase. Ineligibility for this group does not appear to promote a policy goal and should be remedied by amending the definition of "financial institution."

[12] "Proposed Amendment to Prohibited Transaction Exemption 2020-02," 88 Fed. Reg. 75979, 76003 (Nov. 3, 2023).

Conclusion

Thank you for the opportunity to provide comments on this regulatory package. If the Department goes forward with this rulemaking, the operative text should address the recommendations contained herein to ensure that the participants of large retirement plans and HSAs do not receive fewer or more expensive services. We would be pleased to address any questions you may have regarding these comments.

Sincerely,

Andy Banducci