November 5th, 2023

Honorable Lisa M. Gomez
Assistant Secretary,
Employee Benefits Security Administration,
U.S. Department of Labor

Reference: Newly Proposed Regulation Amending 29 CFR § 2510.3-21(c)

Dear Assistant Secretary Gomez,

The U.S. Department of Labor ("DOL") must reject issuing the proposed regulation that DOL published in 88 FR 75977 (the "Proposed Regulation"), which seeks to amend 29 CFR § 2510.3-21(c) to change the meaning of fiduciary as defined in the Employee Retirement Income Security Act of 1974 ("ERISA"), for the following compelling reasons:

1. <u>The Proposed Regulation's Preamble Contains False Assertions that Misleads the Public.</u>

DOL implies that the term fiduciary "is of central importance," and in support of such view DOL states that "Title II…<u>prohibits fiduciaries from engaging</u> in conflicted transactions on many of the same terms as [in ERISA] Title I." [Emphasis supplied]. 88 FR 75891. However, as detailed below, ERISA Title II does not prohibit a fiduciary's conduct.

To explain further, Congress mandated in ERISA [Title I] section 406(a) that "…**[a] fiduciary with respect to a plan <u>shall not cause the plan</u> to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect**…" followed by enumerated conduct that do not contain additional prohibitive language. [Emphasis supplied]. The terms "<u>shall not cause the plan"</u> in ERISA section 406(a) is language that objectively prohibits conduct.

Similar to ERISA section 406(a), Congress also included objectively prohibitive language in ERISA [Title I] section 406(b), which states in part that: "**[a] fiduciary with respect to a plan shall not**…" followed by enumerated conduct that do not contain additional prohibitive language. [Emphasis supplied].

However, Congress did <u>NOT</u> include prohibitive language in Title II of ERISA, as codified in section 4975 of the Internal Revenue Code ("IRC"), that would objectively prohibit a fiduciary's physical conduct when engaging in specific conduct with respect to a plan.[1] Contrary to DOL's assertion, IRC section 4975(c)(1) lacks prohibitive terms like <u>shall not cause</u> or <u>shall not</u>.

[1] IRC section 4975(c)(1) refers to a disqualified person instead of just a plan fiduciary while ERISA Title I bars only "fiduciary" conduct. Further, IRC section 4975(e)(2) defines a disqualified person to include a fiduciary amongst other enumerated persons and/or entities whereas ERISA Title I, sections 406(a) and (b) bars only fiduciaries.

IRC section 4975(c)(1) only defines the term "prohibited transaction" as it is used throughout other subsections within IRC section 4975, including as the term is used in the excise tax provisions of IRC sections 4975(a) and (b).

IRC section 4975(c)(1) provides in part that: "[f]or purposes of this section, the term 'prohibited transaction' means any direct or indirect…" followed by enumerated conduct between a plan and a disqualified person that do not contain additional language that objectively prohibits conduct.[2]

DOL attempts to support its false assertions by misquoting a Supreme Court case for the proposition that <u>"[t]he prohibited transaction provisions of ERISA, including Title II of ERISA…</u> <u>**'categorically bar[]' plan fiduciaries**</u> from engaging in transactions deemed 'likely to injure the pension plan." 88 FR 75891, citing *Harris Trust Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241-42 (2000). [Emphasis supplied].

In *Harris* the Supreme Court did not state that ERISA Title II bars fiduciaries from engaging in transactions. To the contrary, the *Harris* court did not provide any holding or views as to a fiduciary's duties under ERISA Title II – DOL agreed that ERISA Title II does not impose fiduciary duties as in [Title I] ERISA section 404(a). Therefore, it is clear that DOL intentionally seeks to misinform the public by failing to provide the full context of the *Harris* court's opinion, which stated in relevant part that:

> "Responding to deficiencies in prior law regulating transactions by plan fiduciaries, Congress enacted ERISA § 406(a)(1), which supplements the fiduciary's general duty of loyalty to the plan's beneficiaries, § 404(a), <u>**by categorically barring certain transactions deemed 'likely to injure the pension plan,**</u>'" *Harris* at 241-42, citing *Commissioner v. Keystone Console Industries*, 508 U.S. 152, 160 (1993). [Emphasis supplied].

While the *Harris* court did explain the prohibitory terms that Congress mandated in ERISA Title I, section 406(a)(1), ["*shall not cause*" as mentioned above], the court did <u>**NOT**</u> hold that ERISA Title II prohibits fiduciary conduct. Contrary to DOL's misleading assertion, the *Harris* court cited in *dicta* a proposition it previously took in *Commissioner* when, for purposes of the tax court imposing the excise tax due in IRC 4975(a), it held that IRC section 4975(c)(1)(A) applies to a transfer of property in satisfaction of a monetary obligation, and in so holding the *Commissioner* court simply stated that "[t]he foregoing construction is necessary to accomplish § 4975's goal to bar categorically a transaction likely to injure the pension plan." *Commissioner* at 152.

The *Harris* court did <u>**NOT**</u> state that the goal of IRC section 4975(c)(1)(A) is to bar a fiduciary from causing some conduct; rather, it seeks to bar the transaction regardless of who caused it.

DOL must interpret [ERISA Title II] IRC section 4975(c)(1) by utilizing the guidelines that the *Harris* court provided, which held that: "[i]n ERISA cases, as in any case of statutory construction, our analysis begins with the language of the statute…And where the statutory language provides a clear answer, it ends there as well." *Harris* at 254, citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (citation and internal quotation marks omitted).

[2] IRC section 4975(e)(2) defines the term "disqualified person" to mean a number of individuals and/or entities, which definition is not limited only to fiduciaries.

Because IRC section 4975(c)(1) does <u>not</u> contain language that prohibits fiduciary conduct, DOL's assertion is false.

In *Neil* the U.S. Court of Appeals for the Ninth Circuit explained that:

> "A prohibited transaction under [ERISA Title I, Section] 406(a)(1)(A) is similar to, **<u>but not the equivalent</u>** <u>of a prohibited transaction under 26 U.S.C. § 4975(c)(1)(A)</u>. The Internal Revenue Code imposes its penalties in strict fashion, without any inquiry into the subjective state of mind of the taxpayer; however, ERISA [Title I] requires that the taxpayer either know or should know that the transaction is taking place. Thus, different statutes were involved in the IRS and DOL..." *Neil M. Baizer v. Commissioner*, 204 F.3d 1231 (9th Cir.2000). [Emphasis supplied].[3]

Additionally, in *O'Malley* the U.S. Court of Appeals for the Seventh Circuit held that:

> "[t]he basis for liability of a disqualified person for the excise tax under [ERISA Title II, IRC] section 4975(a) and (b), i.e., participation, is not the same as the basis for liability of a fiduciary under [ERISA Title I] section 406(a). A fiduciary is liable under section 406(a), ERISA, if he or she knowingly **<u>caused the plan to engage in a transaction</u>** which is described in section 406(a)(1), ERISA. Liability under that [Title I] section <u>is predicated upon a fiduciary's act on behalf of the plan which causes the plan to enter into the transaction and not upon the fiduciary's participation in the transaction itself</u>… **Under [IRC] section 4975(a) and (b)**, a disqualified person is liable for the excise tax if…she participates in the transaction. Participation in [IRC] section 4975 occurs any time a disqualified person is involved in a transaction <u>other than as fiduciary action only as such</u>." *O'Malley v. C.I.R*, 972 F.2d 150, 154 (7th Cir. 1992). *See also Pearland Investment Company v. Commissioner*, 62 T.C.M. (CCH) 1221, 1224-25 (1991) (Section 406 of ERISA prohibits fiduciaries from causing plans to enter into "prohibited transactions.").

In *O'Malley*, the court explained that ERISA Title II liability is imposed under IRC sections 4975(a) and (b) regardless of who causes a transaction; logically, IRC section 4975(c)(1) does not impose any liability because it does not prohibit any conduct.[4] Notwithstanding, the excise tax provisions in IRC 4975(a) and (b) do not apply to a fiduciary only acting as such.[5] Congress defined fiduciary in IRC section 4975(e)(3), but the term "fiduciary" appears for purposes of imposing liability <u>only</u> under IRC sections 4975(a) and (b), which latter IRC provisions DOL lacks authority to regulate.[6]

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[3] As detailed below, the IRC imposes excise tax liability under IRC sections 4975(a) and (b) for transactions that IRC 4975(c)(1) defined as prohibited transactions, but such excise tax does not apply to "fiduciaries acting only as such." See IRC sections 4975(a) and (b).

[4] Under the Reorganization Plan No. 4 of 1978, Section 102, DOL's authority is subject to Section 105 thereunder ["*Except as otherwise provided in Section 105 of this Plan*"], and Section 105 states in pertinent part that DOL's authority in Section 102 "shall not affect the ability of the Secretary of the Treasury…to enforce the excise tax provisions of subsections 4975(a) and (b) of the [IRC]…" Thus, DOL cannot define the term fiduciary under ERISA Title II that would affect the enforcement authority of the Treasure Secretary.

[5] See "<u>(other than a fiduciary acting only as such)</u>" language in both IRC sections 4975(a) and (b).

[6] See Section 102 of the Reorganization Plan No. 4 of 1978 in which DOL's authority covers IRC section 4975 "<u>EXCEPT</u> for (i) subsections 4975(a), (b), (c)(3)…" [Emphasis supplied].

2. The Proposed Regulation Contravenes Congressional Mandates.

Congress defined the term fiduciary in ERISA section 3(21)(A) and IRC Section 4975(e)(3) to mean, in part:

> "…a person is a fiduciary with respect to ***a plan*** to the extent
>
> (i) he exercises any discretionary authority or discretionary control respecting management ***of such plan*** or exercises any authority or control respecting management or disposition of its assets,
>
> (ii) he 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
>
> (iii) he has any discretionary authority or discretionary responsibility in the administration ***of such plan***…" [Emphasis supplied].

Furthermore, Congress defined the term "plan" to mean "…an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan" [ERISA section 3(3)]; however, Congress did not define the term "*plan*" to also mean each of the individual participants and/or beneficiaries ***of such plan***.

As explained below, Congress distinguished between a plan and an individual account plan by providing definitions to each, and Congress defined investment advice that a fiduciary provides to individual participants or beneficiaries of "such plan" pursuant to ERISA section 3(21)(A)(ii) and IRC section 4975(e)(3)(B).

However, contrary to Congress' wish, the Proposed Regulation seeks to define the term investment advice to expand what Congress mandated in both ERISA section 3(21)(A)(ii) and IRC section 4975(e)(3)(B) in which sections a fiduciary applies only with respect to a plan.

The Proposed Regulation states in relevant part that:

> "…a person renders 'investment advice' with respect to moneys or other property of a plan or IRA if the person makes a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment…to the plan, **plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary** (retirement investor)…" and the person satisfies at least one of the following three (3) criteria:[7]
>
> "(i) The person either directly or indirectly…has discretionary authority or control…with respect to purchasing or selling securities or other investment property for the retirement investor;

[7] The term IRA means an individual retirement account.

> (ii) the person…makes investment recommendations to investors on a regular basis as part of the business <u>and the recommendation is provided under circumstances indicating that the recommendation **is based on the particular needs or individual circumstances of the retirement investor**</u> 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
>
> (iii) the person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations." [Emphasis supplied].

The Proposed Regulation seeks to add individual retirement investors to the meaning of a plan, thereby defying Congress' legislative act that a fiduciary under both ERISA section 3(21) and Code section 4975(e)(3) applies only "with respect to a plan" and to the conduct pertaining "of such plan" but it does not mean a specific plan participant's own "particular needs or individual circumstances."

Therefore, the Proposed Regulation seeks to unlawfully rewrite the statutory provisions that Congress enacted in both ERISA section 3(21)(A) and Code section 4975(e)(3) by adding the terms "plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary (retirement investor)" as applicable to either ERISA Title I or Title II.

3. <u>DOL lacks authority to impute fiduciary duties on individual account plans.</u>

<u>For purposes of ERISA Title I</u>: To the extent that DOL believes it can regulate an individual account plan under Title I of ERISA,[8] the Reorganization Plan No. 4 of 1978 expressly provided that DOL has the authority to issue "regulations, rulings, opinions, and exemptions under [IRC] 4975…<u>EXCEPT</u> for…(iii) exemptions with respect to transactions that are exempted by subsection 404(c) of ERISA from provisions of Part 4 of Subtitle B of Title I of ERISA." ERISA section 404(c) provides in part that:

> "In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account…(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, **and** (ii) **<u>no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach</u>, which results from such participant's or beneficiary's exercise of control,** except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary." ERISA § 404(c)(1)(A).

[8] ERISA section 3(34) defines "individual account plan" to mean "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

ERISA section 404(c)(1)(A) exempts all fiduciary duties otherwise prescribed in ERISA section 404(a) and Part 4 of ERISA Title I when a participant or beneficiary has complete discretion and control over an individual account plan. Logically, Part 4 of Title I of ERISA does not apply to individual account plans when such participants have control and discretion over their individual accounts.

Further, if such individual account falls within the purview of IRC section 408(q), then ERISA section 4(c) removes all Title I jurisdiction over such individual account even if that account was created under an ERISA Title I employee benefit plan.

However, the Proposed Regulation seeks to impute Title I fiduciary duties upon such individual plans in violation of ERISA sections 4(c), 404(c)(1)(A), and Section 102(a)(iii) of the Reorganization Act No. 4 of 1978.

To be clear, under ERISA section 404(c)(1)(A), DOL cannot deem an investment adviser to be an investment adviser fiduciary under ERISA section 404(a) when the participant account owner has complete control and discretion over the individual account plan; the Reorganization Plan No. 4 of 1978 did not authorize DOL to regulate such individual plans. Yet, the Proposed Regulation seeks to impute such non-fiduciary conduct as if that adviser was a fiduciary when providing investment advice to an individualized participant's own account.

<u>For purposes of ERISA Title II</u>: To the extent that DOL believes it can regulate an individual account plan under Title II of ERISA, the Reorganization Plan No. 4 of 1978 expressly provided that DOL has the authority to issue "regulations, rulings, opinions, and exemptions under [IRC] 4975…<u>EXCEPT</u> for…(i) subsections **4975(a), (b), (c)(3)** ..." [Emphasis supplied].

IRC section 4975(c)(3) provides a special rule for IRAs, which provision states in part that:

> "An individual for whose benefit an individual retirement account is established and his beneficiaries shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be an individual retirement account by reason of the application of section 408(e)(2)(A) or if section 408(e)(4) applies to such account."

DOL does not have the authority to wonder into the realms of IRC sections 408(e)(2)(A) and (e)(4), which IRC provisions renders IRAs as non-existent retroactively by operation of law if such IRAs have engaged in any transaction that are defined in IRC section 4975(c)(1). Therefore, the Reorganization Plan No. 4 of 1978 mandates that DOL cannot issue any regulation that would affect the IRAs' special rule provided in IRC section 4975(c)(3) nor affect the excise tax provisions in IRC sections 4975(a) and 4975(b).

DOL cannot define the term fiduciary in a way that affects other provisions of the IRC to which DOL lacks the authority to govern, such as IRC sections 4975(a), 4975(b), and 4975(c)(3).

4. The Proposed Regulation Contradicts Congress' Definition Fiduciary Investment Advice

Having shown above that DOL does not have the authority to regulate individual account plans because no fiduciary duties exist under ERISA section 404(a) for individual accounts that fall within the purview of ERISA section 404(c)(1)(A), the Proposed Regulation seeks to define the term fiduciary advice under the term "fiduciary" when Congress defined the term "fiduciary advice" under both ERISA Title I and Title II when such advice is directed to participants or beneficiaries of a plan.

Specifically, Congress mandated in IRC section 4975(f)(8)(A) and in ERISA section 408(g)(1) that:

> "The prohibitions provided in [ERISA section 406 or IRC 4975(c) as applicable] shall not apply to transactions described [ERISA section 408(b)(14) or IRC section 4975(d)(17) as applicable] if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement."

Both ERISA section 408(b)(14) and IRC section 4975(d)(17) provide the following statutory exemptions to ERISA sections 406, 407, and IRC section 4975(c), respectively:

> "Any transaction in connection with the provision of investment advice described in [**ERISA section 3(21)(A)(ii)** or **IRC section 4975(e)(3)(B)**] to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account…" [Emphasis supplied].

Because Congress expressly defined the term "fiduciary advice" for purposes of both ERISA Title I, section 3(21)(A)(ii) and ERISA Title II codified in IRC section 4975(e)(3)(B) with respect to personal advice to specific participants or beneficiaries, DOL does not have the authority to defy what Congress enacted.

5. The Proposed Regulation Violates ERISA section 514(d)–The Federal Savings Clause.

The Proposed Regulation seeks to alter, amend, modify, invalidate, impair, and supersede Congress' expressed mandates provided in both ERISA section 3(21)(A) and Code section 4975(e)(3)[9] by adding individual retirement investors to the meaning ***of such plan***, which if enacted then DOL would be violating ERISA section 514(d)[10], which federal savings clause states in pertinent part that:

> "**Nothing in this title** [meaning ERISA Title I] **shall be construed** to alter, amend, modify, invalidate, impair, or supersede **any law of the United States** (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law." [ERISA § 514(d)].

[9] As explained below, DOL lacks authority to issue regulations that affect IRAs

[10] ERISA section 514(d) is known as the federal saving clause in which DOL cannot construe anything in ERISA Title I to alter any law of the United States, including any statutory provision under ERISA Title I and the Code.

Because DOL seeks to construe the terms ***of such plan*** as used in ERISA section 3(21)(A)(i)-(iii) and IRC 4975(e)(3)(A)-(C) to also include individual retirement investors–which individuals Congress defined in separate ERISA provisions under both Title I and Title II that is apart from the definition of "plan"–such new meaning to the terms ***of such plan*** would be altering and modifying a law of the United States that Congress enacted under its legislative power, thereby violating ERISA section 514(d).

6. DOL Lacks Authority Under ERISA section 505 to Issue the Proposed Regulation.

DOL erroneously claims that it has the authority under ERISA section 505 to alter, modify, and amend the meaning of the language that Congress created in ERISA section 3(21) by adding individual retirement investors to mean the same as the term plan. See 88 FR 75977.

However, DOL lacks such authority because a regulation issue pursuant to ERISA section 505 cannot modify, alter, or amend any laws of the United States since DOL is permitted only to issue regulations that "…may define accounting, technical and trade terms…" and ERISA section 514(d) mandates that "nothing" in ERISA Title I "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States…"–ERISA section 3(21) is a law of the United States.

Because Congress already defined the term "plan" in ERISA section 3(3), which is not a vague term, DOL lacks authority under ERISA section 505 to define the term "plan" as used in ERISA section 3(21)(A) to mean also the "plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary (retirement investor)."

Notwithstanding, ERISA section 505 is subject to the statutory provisions in ERISA Title III, and as explained below, ERISA Title III provides in pertinent part that "[t]he Secretary of the Treasury and the Secretary of Labor shall consult with each other from time to time with respect to the provisions of IRC section 4975." Specifically, for purposes of fiduciary in Title II of ERISA, DOL has no authority to affect the meaning of the term fiduciary as used in IRC sections 4975(a) and 4975(b) because Section 102 of the Reorganization Act No 4. of 1978 did not authorize DOL to affect IRAs' excise tax provisions.