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401(k) SOLUTIONS

July 17, 2020

VIA ELECTRONIC UPLOAD at www.regulations.gov (Docket ID EBSA-2020-0001)

Ms. Jeanne Wilson, Acting Assistant Secretary
Employee Benefits Security Administration
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Comment on Request for Information (Z-RIN: 1210-ZA28)

Dear Acting Assistant Secretary Wilson:

Fisher Investments appreciates the opportunity to respond to the request for information issued by the Employee Benefits Security Administration (“EBSA”) relating to prohibited transactions involving pooled employer plans (the “Request”).¹ Although other commenters may request new or revised prohibited transaction exemptions, we write to express our view that additional or revised exemptions are not needed. Where conflicts can be avoided, exemptions and other limitations are not necessary. We urge that guidance issued by EBSA be carefully developed with this in mind to avoid imposing inadvertent or counterproductive limitations on pooled employer plans and pooled plan providers. Our more detailed comments below depend on two key concepts: (1) a single entity can serve as the pooled plan provider and the investment manager, without raising the need for additional prohibited transaction relief; and (2) not all proprietary investment products raise prohibited transactions.

Background

Fisher Investments is an investment adviser providing discretionary asset management services since 1979. Fisher Investments currently manages over \$125 billion in assets for over 75,000 clients—\$81 billion for 60,000 North American private investors, \$30 billion for 140 institutional investors, \$12 billion for 15,000 European private investors, and, through the Fisher Investments 401(k) Solutions business unit, more than \$1 billion for 500 small and mid-sized business retirement plans, representing approximately 29,000 participants.

Fisher Investments embraces its role as a fiduciary and the policy objective of enhanced retirement security. The firm’s vision includes a steadfast commitment to drive measurably better retirement outcomes for clients and their employees. This is accomplished by delivering unparalleled service, innovative participant engagement, and proactive sponsor education; always keeping “clients’ interests first” as the guiding principle. Fisher Investments has always operated subject to a fiduciary standard under the Investment Advisers Act of 1940. With clear disclosure and avoiding conflicts of interest central to being a fiduciary, Fisher Investments has intentionally structured its business lines to avoid many of the common conflicts of interest that plague the financial services industry.

When the 401(k) Solutions business unit launched in 2014, Fisher Investments similarly sought to avoid, rather than take advantage of, conflicts. Plans pay a single, plan-level fee. Funds advised by Fisher Investments do not generate any revenue for Fisher Investments. A fiduciary decision by

¹ Prohibited Transactions Involving Pooled Employer Plans Under the SECURE Act and Other Multiple Employer Plans, Jun. 15, 2020, 85 Fed. Reg. 36880 (Jun. 18, 2020).

Fisher Investments to include one of its own funds in a plan lineup does not generate any additional fee or the related conflicts.

Pooled Employer Plans and Pooled Plan Providers

Looking ahead to pooled employer plans, Fisher Investments is interested in serving as a pooled plan provider and as plan “investment manager.”² It is important that a single entity be able to serve in both roles with respect to a single plan, but only if in a manner that seeks to avoid all prohibited conflicts. Fisher Investments envisions doing so in a way that does not permit the pooled plan provider to cause itself to receive any additional fees. We respectfully ask that any guidance issued by EBSA not inadvertently and unnecessarily prevent one entity from serving as both pooled plan provider and investment manager. Serving a pooled employer plan in both fiduciary capacities—as pooled plan provider and investment manager—would allow Fisher Investments to expand and continue its commitment to enhancing retirement security in America. For more detail, please see the responses below to the specific questions raised in the Request.

Question II.A.1: What types of entities are likely to act as pooled plan providers?

Fisher Investments is likely to offer services to pooled employer plans that include acting as a pooled plan provider. Other investment advisers with experience working with small and medium-sized retirement plans may be similarly interested.

Question II.A.2: What business models will pooled plan providers adopt in making pooled employer plans available to employers?

Fisher Investments is considering serving as the pooled plan provider, as well as the investment manager. Fisher Investments would also provide a series of non-fiduciary consulting services, including participant education. To the extent the pooled plan provider’s services are delegated to third parties, Fisher Investments would delegate them to non-affiliates. See the responses to Questions II.B.1 and II.B.2 below for information about proprietary investment products.

Question II.A.3: What conflicts of interest would a pooled plan provider likely have with respect to the pooled employer plan and its participants?

Pooled plan providers that choose to use investment products that generate income for the pooled plan provider or its affiliates present clear conflicts of interest. Similar conflicts are present where pooled plan providers delegate services to affiliates and cause the plan to pay an additional fee to the affiliates.

Question II.A.4: To what extent will a pooled plan provider be able to unilaterally affect its own compensation or the compensation of its affiliates? What categories of fees will pooled plan providers and their affiliates be likely to receive, including through offering proprietary investment products?

A pooled plan provider should not be able to unilaterally increase its own compensation or the compensation of its affiliates. The pooled plan provider’s total fee should be clearly stated in the document that the plan sponsor signs to join the plan and hire the pooled plan provider. To the extent proprietary investment products are used, the product should not be a source of additional revenue for the pooled plan provider or an affiliate.

² See 29 U.S. Code § 1002(38) (defining “investment manager”).

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Question II.A.7: To the extent respondents do not believe additional prohibited transaction relief is necessary, why?

Conflicts of interest requiring additional prohibited transaction relief can and should be avoided. This can be done, for example, by charging a single fee based on the assets in the plan and using investment products, whether proprietary or otherwise, that do not generate additional revenue for the pooled plan provider or its affiliates.

Question II.B.1: What plan investment options do respondents anticipate will be offered to pooled employer plans?

Fisher Investments would likely create a fund lineup for its pooled employer plans that gives participants access to a range of high quality, low cost investment funds. In our experience, it is important to build in flexibility to meet the needs of a diverse participant base. At one end of the spectrum, participants that might be overwhelmed by too many options need educational tools to empower them to construct an appropriate portfolio from a limited number of models. In contrast, participants with more investment experience may want access to a large universe of investment options. Appropriate investment products would generally be limited to registered investment companies and bank-sponsored collective funds. To avoid conflicts of interest, the investment products used, whether proprietary or not, should not pay additional revenue to the pooled plan provider or its affiliates.

Question II.B.2: What role will the entities serving as pooled plan providers or their affiliates serve with respect to the investment options offered in pooled employer plans?

As with its current 401(k) plan clients, Fisher Investments would likely use a mix of proprietary and independent funds in the lineup available to pooled employer plans. When proprietary funds are used, they are proprietary in the sense that Fisher Investments serves as investment adviser or manager. None of these funds, however, causes Fisher Investments to receive any additional fee, which is the key concept in avoiding prohibited conflicts. We note that not all proprietary funds involve prohibited transactions, so we respectfully ask that any guidance issued by EBSA not inadvertently and unnecessarily capture all proprietary investment products.

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Thank you for the opportunity to submit comments and for your consideration. We are available to serve as a resource as EBSA works through these important issues.

Sincerely,

Nathan Fisher
Senior Executive Vice President 401(k) Solutions