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May 8, 2015

VIA ELECTRONIC MAIL TO e-ORI@dol.gov
Office of Regulations and Interpretations
Employee Benefits Security Administration
ATTN: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
290 Constitution Ave., N.W.
Washington, DC 20210

Pamela D. Perdue, Esq.

Re: Comments on "Proposed Conflicts of Interest Rule"

Gentlemen and/or Ladies:

I am writing to you on behalf of myself, an attorney practicing in the area of employee benefits for over 25 years, as well as on behalf of several clients who are recordkeepers and/or third-party administrators of retirement plans.

In that capacity, I write to ask that the proposed regulations be revised or clarified to reflect the following:

- that an attorney licensed in the state in which he/she practices, recommending to a plan sponsor or to plan fiduciaries possible investment advisors or professionals is not making a recommendation of the type to which Prop. Labor Reg. Section 2510.3-21(a)(1)(iv) applies provided no special or additional compensation is received attributable to that recommendation;

- further clarifying the definition of "recommendation" in the context of investment education so that educational advice can be meaningful without crossing the line into investment advice. Because of the difficulty of getting some employees to actually make an affirmative selection, those conducting the investment education may attempt to make it clear that some investment options require less time and attention than others. For example, is either or both of the following statements considered

investment advice when provided in an educational meeting with multiple participants present:

> "those of you who do not wish to actively manage your investment—the target date fund is for you"
>
> "those of you who do not wish to actively manage your investment may wish to consider the target date fund?

- clarifying whether the carve-out for platform providers remains available where, for specified arrangements generally only available to small companies, less than all of the platform options are available to the plan; that is, when the plan sponsor or plan fiduciary selects that turn-key design, the plan sponsor or fiduciary is also deemed to have satisfied the requirement that a plan fiduciary select the investment options from the available platform within the meaning of Prop. Labor Reg. Section 2510.3-21(b)(3)

ATTORNEYS RECOMMENDING INVESTMENT PROFESSIONALS

The Proposed Regulations provide that a person will be a fiduciary if he/she makes a recommendation of persons to provide investment advice to a plan if there is an understanding that the advice is individualized or specifically directed to the recipient and the person making the recommendation receives a fee, direct or indirect.

Lawyers are often asked to make recommendations as to competent plan professionals including investment professionals. While there is of course, no separate fee payable with respect to the recommendation, the proposed regulations do not require a separate fee. Therefore, an attorney providing such recommendations during the course of a meeting with the client where a variety of issues are discussed and who then bills his/her normal rate will be deemed to have provided fiduciary advice. Such a result runs counter to the primary ultimate goal of serving the best interest of participants.

Employee benefit attorneys over time learn which investment professionals provide good, competent, objective investment advice and which ones do not. Often lawyers may know information that they are prohibited from revealing to clients, either because it was learned in a privileged context, or is part of a settlement agreement, or otherwise could not be disclosed because it could raise other issues. So, simply saying that lawyers can avoid making "recommendations" simply by steering clients away from certain advisors will not be sufficient.

Lawyers are subject to licensing requirements and bar oversight that already successfully govern their relationships with clients. Lawyers are required to act in the best interest of their clients and do so under the threat of losing their license. They need no further incentive. If lawyers fear that they may

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be sued if participants become unhappy with their investment options or cost will, this will hinder the lawyer/client relationship. Moreover, plan clients and their sponsors unnecessarily lose a reliable source of guidance. In turn, plan sponsors, particularly of small plans, will be left essentially to the influences of those who may not be subject to licensing oversight

CLARIFYING THE DEFINITION OF "RECOMMENDATION" IN THE INVESTMENT EDUCATION CONTEXT

The line between investment education and investment advice has never been entirely clear. While we applaud the DOL for attempting to clarify, we believe that additional clarification is warranted in order that investment education can be as meaningful as possible.

The proposed regulation defines the term "recommendation" as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."

Those who provide investment education struggle with the desire to always remain on the education side of the line while trying to make the education actually meaningful and helpful. This is particularly difficult in employee meetings where employees, lacking virtually any investment background, simply desire to be told something that will help them make their investment decisions. Simply sticking to a discussion of risk and return, or the effects of compounding is often just not enough.

In response, the industry has developed such that election forms and those leading employee meetings often try to match, as one aspect of the employee's decision making process, an employee's desired level of involvement with the investment of their account with various levels of investment styles. So, for example, in the context of an investment education meeting, the group might be told that:

> "those of you who do not wish to actively manage your investment—the target date fund is for you" or
>
> "those of you who do not wish to actively manage your investment may wish to consider the target date fund?

The proposed regulations should be clarified to provide that when such statements are said in the course of a group educational meeting, they do not constitute investment advice as the advice is not individualized nor directed to any particular recipient.

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PLATFORMS CARVE-OUT FOR LESS THAN FULL PLATFORM

In order to make 401(k) plans available to very small plan sponsors at an affordable price, an industry trend has been to provide a more turn-key approach where the plans have essentially the same design and use the same investment options. Under this approach, while 1000 funds may normally be available from the vendor's platform, for those sponsors that opt for this turn-key approach, the menu of funds that will be available under the plan and from which the participants may choose will be a significantly smaller universe, for example, 7 funds. In some arrangements, those may be all index funds. So, in this example, a small sponsor that chooses this option has also effectively chosen the 7 index funds as the investment options.

The sponsor always has the option to instead select from the universe of 1000 funds simply by forgoing the turn-key approach and opting instead for the standard plan arrangement.

Where the employer does in fact choose the turn-key approach resulting in essentially the employer or the plan's fiduciaries selecting the investment options that are a part of this turn-key approach, we ask that the proposed regulations clarify that such arrangements also qualify for the platform carve-out. This is because the plan sponsor or other fiduciary, having selected the turn-key approach, has also selected the investment options that come with that arrangement.

Should you have questions, please do not hesitate to contact me.

Very Truly Yours,

Pamela D. Perdue

PDP/no