RETIREMENT ADVISOR COUNCIL

Monday, July 20, 2015

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

Ref: RIN 1210-AB32

Dear Sir or Madam:

The Retirement Advisor Council ("The Council") is grateful for the opportunity to comment on the Department of Labor's proposed definition of the term "Fiduciary"; Conflict of Interest Rule as it relates to retirement investment advice.

The Council advocates for successful qualified plan and participant retirement outcomes through the collaborative efforts of experienced, qualified retirement plan advisors, investment firms and asset managers, and defined contribution plan service providers. The Council accomplishes this mission by its focus on:

- Identifying duties, responsibilities and attributes of the professional retirement plan advisor
- Sharing our professional standards with plan sponsors who are responsible for the success of their plans
- Providing collective thought capital to decision makers, product providers, legislators and the public
- Giving voice to the retirement plan advisor community
- Offering tools to evaluate advisors, ensuring the quality of services needed for successful retirement outcomes.

First, we commend the Employee Benefits Security Administration for taking on the task of clarifying the term "fiduciary" under the Employee Retirement Income Security Act of 1974 (ERISA). In our comments in response to the proposed rule publicized in the Federal Register (75 FR 65263) dated October 22, 2010, the Council urged the Department of Labor to initiate a full review to identify rules and regulations that deprive participants of access to the one source of advice that will help them achieve a successful retirement. To achieve a successful retirement, the vast majority of participants require some sort of professional help, particularly at the critical time of distribution when the potential loss of retirement readiness is great. Professional Retirement Plan Advisors are in a unique position to deliver the assistance participants need at the time of a distributable event because of their knowledge of the plan, of the participants and, their commitment to abide by established professional standards. For this reason, the Council argues that participant guidance provided at the time of a distributable event by Professional Retirement Plan Advisors that have a relationship with the plan should be exempt

from prohibited transaction status. The current proposal gives close attention to this issue and we are grateful for the clarifications. On the other hand, we believe the final regulation needs to be enhanced from the current proposal in nine areas:

1. Recognize the full scope of the fiduciary duties of a Professional Retirement Plan Investment Advisor
2. Acknowledge that the evaluation of investment options involves more than price comparison
3. Overcome the preconceived notion that advisors are necessarily conflicted
4. Acknowledge that fiduciary investment advice is a process delivered over time, not a one-time transaction
5. Modify the proposed Best Interest Contract exemption so the contract is required only at the time of transaction
6. Expand on the distinctive practices for small plans and large plans
7. Recognize the full scope of participant education including investment product information, and QDIAs that mirror asset allocation models
8. Expand on the situation of plan sponsors who do not use the services of a fiduciary plan advisor and rely exclusively on the services of their recordkeeping service provider for investment advice, investment array construction, participant education or participant advice
9. Address the impact (if any) of sub-transfer agent compensation for providing shareholder services on the fiduciary status of investment managers

Recognize the full scope of the fiduciary duties of a Professional Retirement Plan Investment Advisor

The Council recognizes the need for professional standards regarding the recommendations fiduciary advisors make to retirement plan participants at the time of a distributable event. Our comments to the Department of Labor regarding the 2010 rule stated "*Clearly, professional standards need to be established that denounce rollovers not in the best interest of participants.*

The Council does not condone advisor recommendations to roll over retirement plan assets for the sole purpose of increasing compensation; it is fair to require (1) information and education about all distribution options available to eligible participants (2) affirmative participant election to rollover assets to an IRA, (3) a demonstrable retirement benefit for each and every rollover transaction." However, we do not believe the duties of a Professional Retirement Plan Investment Advisor can be reduced to standards regarding advice provided at the time of distribution. It is troubling the proposed regulation defining the term "Fiduciary" does not address ongoing duties plan sponsors and plan advisors consider essential today such as:

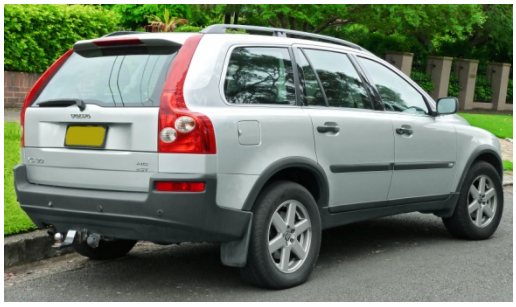
- Gaining a thorough understanding of the plan as well as the plan sponsor's circumstances and benefits philosophy
- Supporting the plan sponsor with investment provider due diligence, by reviewing specific investment options periodically, and helping to formulate an Investment Policy Statement
- Supporting the plan sponsor with service provider due diligence, by monitoring the fulfillment of services by the service provider and ensuring that the plan is administered according to applicable laws, regulations and stated policies
- Assisting with the design, implementation and review of the fiduciary process

- Helping the plan sponsor understand the fees charged by service providers, investment providers and other plan partners
- Ensuring that plan participants have access to the education, communication, and services they need in order to make informed decisions

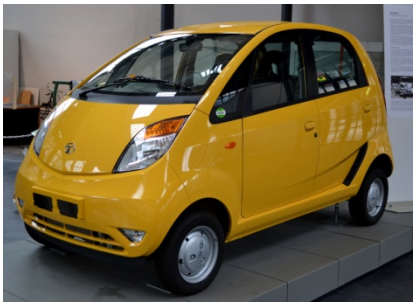
Focusing on the advice provided at the time of a distributable event establishes a lowest common denominator to which we believe service will gravitate in the absence of a professional code of conduct that establishes broader but stricter standards of practice. We urge the Department of Labor to elevate the standards of professional practice required of fiduciary advisors and to recognize the importance of generally-accepted standards of fiduciary practice.

Acknowledge that the evaluation of investment options involves more than price comparison

The proposed definition places emphasis on the valuation or appraisal of investment funds offered in the plan or an IRA. The Council is concerned this emphasis may steer retirement investors toward riskier assets less suitable for retirement investing at the time of distribution, when they are most vulnerable to market risk. Cheaper is not necessarily better when considering product substitution. Risk considerations are particularly important for participants eligible for a distribution of plan assets upon involuntary termination, disability, or at retirement. The occurrence of an automotive vehicle accident is similar to a distributable event in that it provides an opportunity for the owner to replace a vehicle declared a total loss with another vehicle that meets her needs. The vehicle could be identical to the one the driver owned prior to the accident or a different model. In today's environment, drivers have the complete freedom to choose any vehicle they deem suitable, and many choose a safer vehicle. The proposed regulation would be equivalent to limiting the selection of vehicles an insurance company can offer to the victim of an accident to a cheaper option regardless of risk tolerance. For instance upon an accident, the driver of a Volvo XC90 might be offered a Tata Nano on the premise that that the Tata Nano is a less expensive vehicle to operate, and therefore a better choice. However, the client would likely choose a safer vehicle.



BEFORE
VOLVO XC90[1]



REPLACEMENT
TATA NANO[2]

[1] This work has been released into the public domain by its author
[2]By High Contrast (Own work) [CC BY 3.0 de (http://creativecommons.org/licenses/by/3.0/de/deed.en)], via Wikimedia Commons

Is the Tata Nano an acceptable replacement for the Volvo XC90 because it is cheaper and cheaper to operate? How would a claims adjuster explain to the victim of a car accident that the Tata Nano offered in replacement of the Volvo XC90 the driver owned prior to the accident is a better choice? Who is to decide that the cost to own and operate the vehicle trumps safety in the selection of the replacement vehicle?

Similarly, in the decision to roll over a 401(k) plan account or to retain the balance in the 401(k) plan, who is to decide if a self-directed IRA invested in a low-cost Exchange-Traded Fund (ETF) is a superior choice to retaining the assets in a plan offering a full array of low-volatility actively-managed funds? Who is to decide if a laid-off long-tenure employee should stay invested in a plan offering low cost investment option managed by a financially distressed organization or roll over her account to an IRA offering stable value options, a lifetime distribution option, or income guarantees? Does the suitability of these options vary with the facts and circumstances of the individual investor such as her life expectancy, outside assets, marital status, age, employment status, or the financial stability of the plan sponsor? We believe the selection is best left to the plan participant in discussion with her advisor and that participants will be better served if the relative merits of price and other factors are left out of regulations.

Overcome the preconceived notion that advisors are necessarily conflicted

In several instances the proposed regulations imply that advisor recommendations are inherently conflicted. Compensation mode is mentioned as the primary driver of recommendations. For instance, one paragraph states that "*Many of the consultants and advisors who provide investment-related advice and recommendations receive compensation from the financial institutions whose investment products they recommend. This gives the consultants and advisers a strong bias, conscious or unconscious, to favor investments that provide them greater compensation rather than those that may be most appropriate for the participants.*" These assertions are provided with no supporting evidence, they are conjectural in nature, and we believe regulation should not be grounded in prejudice but based on facts.

Acknowledge that fiduciary investment advice is a process delivered over time, not a one-time transaction

Like the 2010 proposal, and unlike the 1975 regulation, the new proposal does not require that advice be provided on a regular basis. Investment advice meets the requirements of the proposal, even if provided only once under the newly proposed regulation. We take exception with this decision. Indeed, we believe a fundamental difference exists between advice provided under the Advisers' Act of 1940 and Fiduciary Advice provided under ERISA. We believe fiduciary advice is a process delivered over time that cannot be reduced to a single act. Indeed, the maintenance of a plan's investment policy, the maintenance of an investment array compliant with the policy, the ongoing monitoring of funds available in the array are just as important as the one-time recommendation made at the time of a distributable event. We could envision fiduciary investment advice constrained to a specific time period (e.g. a calendar

year contract), but reducing fiduciary advice to a one-time transaction would be detrimental to the quality of plan advice available in the retirement plans market.

Modify the proposed Best Interest Contract exemption so the contract is required only at the time of transaction

Although proposed regulations outline the requirement to state acceptance of fiduciary responsibility in a contract with the plan sponsor or the participant, regulations do not adequately address the process fiduciary advisors must follow with participants to ensure compliance with other regulations, in particular as it relates to suitability. We recommend the regulation be amended to require a best interest contract only if and when the participant or plan sponsor accepts the Advisor's recommendations and agrees to move forward with implementation.

Expand on the distinctive practices for small plans and large plans

The proposed regulation makes a distinction between plans with 100 or more covered participants and other plans. The proposed regulation also makes a distinction between plan fiduciaries responsible for managing $100 million in employee benefit plan assets and others. However, we believe the regulation would benefit of a greater distinction in permitted practices between large plans and small plans that recognizes the distinct levels of service economically feasible in each segment. On the one hand, the proposed regulation submits small plans to stringent requirements that will impair small employers' ability to offer retirement benefits to their workforce and adversely affect worker access to these benefits. On the other hand, the proposed regulation makes assumptions on the level of expertise of large plan sponsors, many of whom rely on their advisor to meet fiduciary obligations. We recommend the regulation be amended to address these shortcomings with further guidance to be provided in an interpretive bulletin at a later date.

Recognize the full scope of participant education including investment product information, and QDIAs that mirror asset allocation models

The proposed regulation significantly restrains the type of education and communication material currently available to participants under IB 96-1. In particular, the new regulation restrains participant access to investment product information. However, we believe product information is critical to sound participant decisions, in particular as it relates to Qualified Default Investment Allocation options. We believe the regulation needs to be edited to specify that participant education may mention investment products available, and also the circumstances under which investment product information should be made available.

Paragraph (b)(6) of the proposed regulation replacing IB 96-1 narrows the definition of "education" even further for multi-asset investment products that incorporate an asset allocation model – with or without a glidepath. It is common for participant education to focus on asset allocation over investment selection. Education is often provided to sensitize participants to the importance of diversification. Models may demonstrate asset allocation for specific horizons to retirement or for specific lifestyle / risk tolerance levels. Over the last

decade, investment products and services have been developed to mirror models used in the delivery of education – for message consistency and effectiveness. Target-date funds, lifestyle funds, custom asset allocation portfolios are examples of such products, often used as Qualified Default Investment Alternatives. In a tide-defying twist, the proposed regulation would exclude from participant education any information about asset allocation models identical to that of investment products offered in the plan. Under the proposed regulation, information about the asset allocation of multi-asset class products offered in a plan would be considered advice – regardless of whether the multi-asset class product is custom-built or ready-made. The effect of such a change would be to limit the appeal and popularity of products ideally suited for retirement plan participants. This move would baud well for multi-asset products with more flexible investment policies, and handicap investment managers with stricter policies and easier to monitor target-date or target-risk series. Small plans with limited access to custom models would find themselves at a competitive disadvantage in the labor market, unable to provide counseling to participants, possibly slowing down coverage and job creation in the small employer market.

Expand on the situation of plan sponsors who do not use the services of a fiduciary plan advisor and rely exclusively on the services of their recordkeeping service provider for investment advice, investment array construction, participant education or participant advice

Several studies, including four to which the Retirement Advisor Council has immediate access document benefits of partnering with a Professional Retirement Plan Advisor for plan sponsors and their participants. However, not all plan sponsors have access to or choose to avail themselves of a Professional Retirement Plan Investment Advisor. Some plan sponsors who do not partner with a specialized plan advisor rely exclusively on the services of their recordkeeping service provider for investment advice, investment array construction, participant education or participant advice. As an alternative to making a determination on whether participant communication is advice or education based on the comparison between asset allocation in models and that of the products offered, we suggest basing the determination on the availability of a third-party advisor meeting pre-determined professional standards to assist with array construction and investment monitoring, and use of third-party participant education and advice. Independence of the source – rather than product becomes the determining factor.

Address the impact (if any) of sub-transfer agent compensation for providing shareholder services on the fiduciary status of investment managers

Finally, because compensation is central in the definition of fiduciary advice in the proposed regulation, we believe the final regulation needs to address more clearly the situation of recordkeeping service providers receiving sub-transfer agent compensation from investment managers to provide shareholder services that would be incumbent upon the investment manager outside an omnibus trading platform. Conceptually, the division of labor between investment manager and recordkeeper for accounting and compliance services falls under the definition of an administrative exemption but the proposed regulation is not explicit on this issue, leaving room for interpretation. Clarity on this topic would alleviate concerns.

We are grateful for your consideration of our comments on the proposed definition of the term "Fiduciary"; Conflict of Interest Rule as it relates to retirement investment advice. We are available to meet with you to discuss our comments. For additional information, please contact me at (860) 653-1705.

Respectfully,

Eric Henon
Executive Director
Retirement Advisor Council