Business Roundtable℠

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

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712
U.S. Department of Labor
200 Constitution Avenue, NW
Suite 400
Washington DC 20210

Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice (RIN 1210-AB32)

Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)

Dear Sir or Madam:

The Business Roundtable is an association of chief executive officers of leading U.S. companies. Together, our member companies employ nearly 16 million individuals and provide retirement, healthcare and other employee benefit coverage to over 40 million American employees, retirees and their families. Business Roundtable is committed to providing quality retirement plans to our employees. I am writing on behalf of the Business Roundtable in response to the Employee Benefits Security Administration's (EBSA) April 14, 2015 proposed regulation, "Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Investment Advice," which would reinterpret the long-standing definition of "fiduciary" under the Employee Retirement Income Security Act of 1974 (ERISA).

OVERVIEW

Financial professionals should be required to act in the best interests of employee benefit plan participants when providing investment advice to a retirement plan or its participants. While we appreciate the EBSA addressing this issue, we urge the EBSA to reconsider some elements of its proposed definition of fiduciary and the related proposed prohibited transaction exemptions.

As currently formulated, the proposed definitional changes are broad and subjective, and the proposed carve-outs and exemptions are narrow and complex.

If finalized without changes, the proposed regulations could have negative consequences for employee benefit plans and their participants. For example, the proposed regulations' new investment advice fiduciary standard would apply to activities, interactions and relationships that should not be considered "investment advice" under ERISA. Important investment education that is currently being provided to retirement plan participants would be directly and unnecessarily limited by the proposal, and the overall impact of the complex new regime will have a chilling effect on the willingness of retirement plan sponsors to allow the delivery of investment education and investment advice necessary for plan participants. In addition, the proposed requirements and prohibited transaction exemptions have the potential to sweep plan sponsors and their employees into unwarranted litigation alleging fiduciary or co-fiduciary liability under ERISA.

KEY CONCERNS AND RECOMMENDATIONS

Some key concerns of Business Roundtable member companies are highlighted below, focusing primarily on employee benefit plan issues.

Effect on Critical Investment Education: Narrowing the definition of permitted investment education and increasing the uncertainty around the types of communications that would be considered investment advice could have a chilling effect on critical investment education currently provided to plan participants. Clarification regarding the line between investment education and investment advice is needed so plan sponsors know which activities are permitted and which are not. Leaving this line undefined could cause plan sponsors to be overly conservative in their offerings, leading to plan participants' decreased access to investment education.

We recommend the following changes:

- Defining investment education so that it would not limit education to general discussions of investment theory without any plan-specific context.
- The proposed definition of investment advice should be clarified to ensure routine interactions or suggestions not involving investment advice do not create a fiduciary relationship. We recommend modifying the proposed rule to make clear that "suggestions" provided "for consideration" are not considered investment advice under ERISA; rather, an investment advice recommendation involves a call to action or advocacy for a particular approach.

Unworkable Rules on Provision of Investment Advice: The requirements of the Best Interest Contract (BIC) and other proposed prohibited transaction exemptions are complex and could burden a retirement plan seeking to provide participants with access to investment advice. The volume of required disclosure by financial institutions wishing to utilize the BIC exemption is unprecedented; even small errors could result in prohibited transactions and potential litigation.

For investment advice provided to ERISA plans maintained by employers, many of the conditions and limitations of the BIC exemption are particularly concerning. For example, the exemption's requirement of a detailed written contract is unworkable in the context of communications and advice provided to plan participants. Moreover, the proposed requirements would create state law causes of action that could draw plan sponsors into unwarranted litigation as co-fiduciaries as a result of small errors by an investment advice provider hired by the plan sponsor. This result was not anticipated under ERISA, where Congress expressly determined those acts that would be subject to private rights of action and available remedies. For the above reasons, we recommend a separate prohibited transaction exemption for investment advice with respect to ERISA plans. Similar to other proposed exemptions, the new exemption would ensure that investment advice provided to plan participants by investment advice fiduciaries is prudent and in the advice recipient's best interest. However, the contractual requirements of the proposed BIC and other exemptions (including private rights of action) would not be incorporated. Any additional disclosure beyond that already required under EBSA regulations should be minimal.

Protecting Plan Sponsor Employees: The proposed regulations provide a helpful carve-out from fiduciary status for plan sponsor employees who provide investment advice to plan fiduciaries, as long as they receive no compensation for the advice beyond their normal compensation as employees. However, the exception is inadequate to protect all plan sponsor employees who are merely communicating with or otherwise assisting plan participants. In order to protect those employees from potential fiduciary liability, we suggest that the existing carve-out be broadened to make it clear that plan sponsor employees (other than those acting as plan fiduciaries) would not be deemed to be providing investment advice "for a fee or other compensation," as long as they receive no compensation for the advice beyond their normal compensation as employees.

Application to Health Savings Accounts (HSAs): The proposed regulations' application to HSAs was not taken into account in the Regulatory Impact Analysis. HSAs are different from individual retirement accounts (IRAs), with different goals, different parties and different relationships. The revised investment advice fiduciary standards (which were crafted for retirement plans) should not be applied to HSAs. At a minimum, changes in the rules governing HSAs should be delayed and addressed in a separate notice and comment regulation.

Application to Welfare Benefit Plans: In the case of an ERISA welfare benefit plan, it appears that employer-provided health, long-term care, life and disability insurance contracts may, in certain cases, be covered by the broadened definition of investment advice. We understand that their inclusion may have been unintentional, as it is not discussed in the preamble to the proposed regulations or addressed in the Regulatory Impact Analysis. To eliminate any ambiguity, we recommend that the proposed regulations make it clear that discussions with and recommendations to a plan sponsor or plan participant regarding the establishment of, maintenance, or participation in a welfare benefit plan (including discussions regarding insurance contracts supporting the plan) are not investment advice under ERISA, unless the advice relates to a specific asset investment.

Scope of the Seller's Carve-Out: The proposed regulations provide a carve-out for incidental advice provided in connection with an arms-length transaction between a person and a "large plan fiduciary" with investment expertise. This carve-out is critical for plan sponsors and should be retained. However, we recommend streamlining the carve-out to eliminate unnecessary paperwork (e.g. to remove requirements for written representations by the plan fiduciary). In addition, we recommend extending the seller's carve-out to all plan fiduciaries and individuals who have the expertise to assess the quality of investment advice they are provided and the potential fees involved. This expansion should include communications with most plan fiduciaries currently excluded from the seller's carve-out because of their plan size and individuals with sufficient income and/or net worth, (as is the case under the Security and Exchange Commission's Accredited Investor rules).

Broad and complex regulatory reinterpretations, like EBSA's proposed investment advice fiduciary redefinition, have the potential to cause great disruption in existing relationships and practices, particularly when they involve changes to a long-standing definition. While change may be appropriate, changes of this magnitude warrant a robust discussion among stakeholders and time for affected plans and advisors to draft new agreements and institute compliance procedures.

We applaud the EBSA's efforts to protect the interests of employee benefit plan participants. On behalf of the Business Roundtable, I thank you for the opportunity to comment on these important issues and thank you for your consideration. If you would like to further discuss our recommendations, please do not hesitate to contact Maria Ghazal at 202-496-3268.

Sincerely,

Gary Loveman
Chairman
Caesars Entertainment Corporation
Chair, Health and Retirement Committee
Business Roundtable