ABA RETIREMENT FUNDS
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July 21, 2015

By Email: e-ORI@dol.gov and e-OED@dol.gov

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

Re: RIN 1210-AB32 - Comments on Proposed Regulations Relating to the Definition of "Fiduciary"; ZRIN 1210-ZA25 – Proposed Best Interest Contract Exemption

Ladies and Gentleman:

The ABA Retirement Funds ("ABA RF") respectfully submits these comments in response to the Department of Labor's request for comments regarding its proposed regulation defining the term "Fiduciary" (the "Proposed Regulation"). ABA RF commends the Department's intent to "replace the 1975 regulations with a definition of fiduciary investment advice that better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty." As explained below, ABA RF also seeks to provide a retirement program to adopting employers that meets this goal and wants to ensure that it can continue to operate as it has for over fifty years.

ABA RF CONCERNS

As discussed in more detail below, the mission of the ABA RF is to make available a retirement solution to the legal community. The ABA RF has made the ABA Retirement Funds Program (the "Program") available since 1963 and currently serves over 3,700 participating plans, covering nearly 37,000 participants with over $5.6 billion of assets. As explained below, the ABA RF acts as fiduciary to plans after an Employer adopts the Program and selects and monitors the service providers to the Program with the goal of obtaining the best services and investment options at competitive fees. Because the Program has a significant pool of assets, the Program gets access to institutional services and pricing which would not be available to the majority of plans participating in the Program due to their smaller size. The ABA RF believes that the Program is exactly the type of arrangement that addresses the Department's expressed concerns about certain products offered in the market. As explained below, the Employers and participants in the Plans have fiduciaries representing their interests and no conflicts exist in the Program structure that would result in the types of activities about which the Department is concerned.

The ABA RF is concerned that, if the Proposed Regulation and related proposed Best Interest Contract Exemption (if applicable to the Program) is finalized as proposed, the Program may not be able to continue its operations with respect to all of the Plans and Employers it now serves and hopes to continue to serve in the future. For example, the platform provider carve-out, as proposed, does not apply to a platform for non-ERISA plans and the Best Interest Contract Exemption does not apply to plans that permit participants to self-direct the investment of their plan accounts. Without changes to the Proposed Regulation, many small law firms and

solo legal practitioners will have to look elsewhere for a retirement solution that does not offer the same unique advantages as the Program.

BACKGROUND

The ABA RF is an Illinois not-for-profit corporation formed by the American Bar Association ("ABA") as a professional association for the purpose of providing a retirement solution for adoption by individual lawyers and law firms who are members of the ABA or members of state or local bar associations represented in the ABA's House of Delegates. This retirement solution is provided through the Program, which is a comprehensive program that provides adopting eligible employers, acting as plan sponsors ("Employers"), administrative, investment and fiduciary services, including the provision and maintenance of tax-qualified retirement plan documents, a fixed menu of diversified investment options, a brokerage window and related recordkeeping and administrative services. Different types of plans are available under the Program ("Plans"). Most Plans are self-directed 401(k) plans or profit sharing contribution plans but certain Employers maintain defined benefit plans or other types of plans with respect to which the Employer directs investment of the Plan assets.

Employers that are eligible to adopt the Program are defined in the applicable Program documents as any (a) sole practitioner, partnership, corporation, limited liability company or association engaged in the practice of law that employs or includes at least one individual who is a member or associate of the ABA or any organization of lawyers represented in the House of Delegates of the ABA, (b) organization of lawyers represented in the House of Delegates of the ABA or (c) organization that does not engage in the practice of law but is closely associated with the legal profession, that receives the approval of ABA RF, and that has as an owner or a

member of its governing board a member or associate of the ABA or any organization of lawyers represented in the House of Delegates of the ABA or the ABA. Because an Employer may be a sole practitioner with no employees, certain of the plans participating in the Program are not subject to ERISA. In addition, most of the plans have less than 100 participants and currently, none of the plans has more than $100 million in assets.

ABA RF is both a fiduciary and a service provider to each Plan after a sponsoring Employer adopts the Program. Pursuant to the terms of the Program documents, the Employers delegate to ABA RF, acting as a named fiduciary as described in section 402(a)(1) of ERISA and pursuant to section 405(c)(1)(B) of ERISA (regarding the allocation of fiduciary responsibilities among named fiduciaries), the authority to engage, monitor and terminate the various other service providers to the Program. Those service providers are a trustee (the "Trustee"),[1] that acts as a discretionary trustee of the Plan's assets held in the Program's collective trust (the "Program's Collective Trust") and the directed trustee of the Plan assets invested through the brokerage window; a recordkeeper (the "Recordkeeper"),[2] that provides ministerial administrative/recordkeeping services to the Plans and markets the Program to eligible employers, in both cases, by using a dedicated team of personnel that offers no other services to any other customers; and a brokerage window provider (the "Brokerage Provider"),[3] that provides the Program's brokerage window. Each of the service providers, including ABA RF, receives compensation from the Program's Collective Trust that is fully disclosed to eligible

[1] Currently, the Trustee is The Northern Trust Company.

[2] The Recordkeeper is Voya Institutional Plan Services, LLC and its affiliates.

[3] The Brokerage Provider is TD Ameritrade, Inc.

employers prior to the time they adopt the Program. The compensation paid to the ABA RF and other service providers is asset-based, although the fees paid to the ABA RF currently is capped.

The Board of Directors of ABA RF seeks to ensure that the services provided by the Program's service providers, and the fees paid by the Plans, are beneficial and competitive in the marketplace. The Directors are volunteers who receive no compensation for their services and have no conflicts that would interfere with ABA RF's goal of providing to Plans with the best services available at competitive fees. In fact, the Board maintains a strict conflict of interest policy so that a Director cannot discuss, or vote on, major decisions involving a Program's service provider if the Director has certain relationships to the service provider (such as working for a law firm that provides material legal services to the service provider). Neither the ABA RF nor its Directors seek to profit from the Program.

The investment options available to Plans are (a) all of the investment funds offered by the Program's Collective Trust, and (b) the brokerage window available through the Brokerage Provider. Unlike other platforms, Employers do not select, among a menu of investment options, the investment funds that will be offered under their particular Plans. Instead, the Trustee is responsible for establishing the investments funds that are available to all Plan participants. An Employer can choose not to offer the brokerage window under its Plan but no Employer can decide not to offer under its Plan one or more of the investment funds available under the Program's Collective Trust. An Employer does have responsibility for selecting the qualified default investment alternative provided under its Plan.

Prior to the adoption of the Program, an Employer receives materials containing detailed information regarding the services, including the fiduciary services, provided by ABA RF and other Program service providers to a Plan. These materials provide that Employers may reduce

their fiduciary liability by delegating certain fiduciary responsibilities to ABA RF, the Trustee, the Recordkeeper and the Brokerage Provider.[4] The Program's marketing materials indicate that the structure of the Program leaves to the Employer only the fiduciary responsibility of deciding to adopt and to continue to participate in the Program.[5] If, at any time, an Employer desires to stop participating in the Program for any reason, it may terminate its participation in and withdraw its Plan from the Program without advance notice to, or penalty imposed by the Program.

CARVE-OUTS

The Proposed Regulation contains several carve-outs pursuant to which the provision of advice or other communications will not cause person to be treated as a fiduciary under the new rule.

I. Platform Provider Carve-Out. (a) Description. One carve-out, set forth in DOL Proposed Regulation § 2510.3–21(b)(3), provides a carve-out for a platform provider that "merely markets and makes available to an employee benefit plan (as described in section 3(3) of [ERISA]), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts". ABA RF believes it should be considered the platform provider for purposes of this carve-out. In the case of the Program, the

[4] See The ABA Retirement Funds Fiduciary Solution (May 15, 2015), available at www.abaretirement.com/about-the-program/fiduciary-benefits.

[5] Id.

Recordkeeper, an unaffiliated entity, is responsible for marketing the platform to eligible employers and, therefore, the ABA RF believes the Recordkeeper also should be within the scope of the carve-out. References below to the "platform provider" in the case of the Program are intended to mean both the ABA RF and the Recordkeeper.

This carve-out is helpful for certain platform providers. However, certain issues are raised for other platform providers, such as the Program, as described below.

1. First, this carve-out applies only to plans defined in Section 3(3) of ERISA and, therefore, is not available for non-ERISA plans, such as Keogh plans.

2. Second, it does not appear that this carve-out is available to plans the assets of which are invested by persons other than participants and beneficiaries.

3. Third, it appears that the platform provider carve-out is available with respect to platforms with a fixed menu of investment alternatives but the language does not appear to be specific on this point.

4. Last, the Department requested comments as to whether the platform provider carve-out should be limited to small plans similar to the scope of the "seller's carve-out" discussed below, therefore, suggesting that the Department may limit the scope of the platform provider carve-out.

The following is a discussion of ABA RF's recommendation with respect to these issues.

(b) Recommendations.

1. Application to Non-ERISA Plans. We respectfully recommend that the platform provider carve-out be expanded to cover non-ERISA plans, such as a plan maintained by a sole owner or only owners of a business or partnership with no employees. We are not commenting on whether the carve-out should apply to IRAs because the Program does not, and under

securities law cannot, provide a platform for IRAs. In the case of plans for sole practitioners or other owners of a business or partnership, the same platform may be provided to them as is provided to plans covering employees. This is the case with the Program. There does not appear to be any reason that a platform provider should be a fiduciary to a plan maintained for an owner of a business or only partners of a partnership but is not a fiduciary to a plan that covers one employee and the business owner or partners of a partnership when the platform is identical for both types of plans. Moreover, a business owner or partner of a partnership has to make many decisions regarding how to run his or her business or partnership and should be presumed to be sufficiently competent to make a decision about selecting a platform provider for his or her retirement plan without needing the types of protections that the Department is seeking to provide in other situations. In addition, as discussed under paragraph 4 below, excluding these types of non-ERISA plans from the platform provider carve-out could result in platform providers prohibiting these types of plans from adopting the platform which seems like an unintended negative consequence.

If the Department decides not to extend the platform provider carve-out to all non-ERISA plans maintained by one or more business owners or partners, the ABA RF suggests that the Department refer to 17 C.F.R. § 230.180 ("Rule 180") issued by the Securities and Exchange Commission, relating to the exemption from registration of interests in connection with certain H.R. 10 plans (Keogh plans). Under Rule 180, an issuer (such as a collective trust) is not required to register, under the Securities Exchange Act of 1933 (the "1933 Act"), the interests issued by the issuer if certain conditions are satisfied, including that the issuer "shall have reasonable grounds to believe and, after making reasonable inquiry, shall believe immediately prior to any issuance that: (i) The employer is a law firm, accounting firm, investment banking

firm, pension consulting firm or investment advisory firm that is engaged in furnishing services of a type that involve such knowledge and experience in financial and business matters that the employer is able to represent adequately its interests and those of its employees...."[6] The ABA RF respectfully recommends that, at a minimum, the Department extend the platform provider carve-out to non-ERISA plans maintained by the types of employers described in Rule 180.[7]

2. Application to Plans that are not Participant-Directed. We recommend that the carve-out be expanded to apply to defined contribution plans and defined benefit plans where the investment decisions are made by an employer or other fiduciary and not only by participants and beneficiaries. As the Department may be aware, the Internal Revenue Service recently announced a significant change in the determination letter request program which will eliminate periodic determination letters as to the qualified status of individually designed plans. At the same time, the Service is expanding the types of plans that can be prototype or master or volume submitter plans. These actions can be expected to expand the use of platforms and their pre-approved plan documents by employers who may adopt cash balance plans or other types of plans that do not provide for participant-directed investment of account balances. This already is the case with the Program which offers defined benefit plans and other types of plans that do not provide for participant investment direction. There does not appear to be any reason to exclude these types of plans from the platform exception where the platform is identical to the platform available to a participant-directed plan. If the employer does not need fiduciary protection in selecting a platform provider when participants and beneficiaries make the decisions as to how to

[6] 29 C.F.R. § 230.180(a)(a)(3)(i).

[7] In the case of the Program, the SEC issued a no action letter in 2013 pursuant to which the Program's Collective Trust is not required to register under the Securities Exchange Act of 1933 (*see*, SEC No Action Letter dated November 25, 2013 relating to the ABA RF and the Program's Collective Trust). Therefore, it is not necessary for the Program's Collective Trust to specifically rely on Rule 180.

invest their assets, there does not appear to be any reason that the employer should need protection where the employer, and not the plan participants, makes the investment decisions with respect to plan assets.

3. Clarification that the Carve-Out Applies to Platforms with Fixed Menu. It appears that the platform provider carve-out is intended to apply to platforms with a fixed menu of investment options available to the adopting plans if the other conditions of the carve-out are satisfied. However, we respectfully request that the Department clarify that position in either the preamble to the final regulation or in the text of the regulation itself. ABA RF believes this is the correct position because an employer that makes the fiduciary decision to adopt a platform with a fixed menu of investment options also makes the decision that that fixed menu of investment options is prudent for the employer's participants and, furthermore, must monitor those investments. When the platform provider provides sufficient notice of changes to those investment options and permits the plan sponsor to terminate its plan with the platform provider without notice or penalty, the platform provider should not be treated as a fiduciary with respect to the employer's decision to select or retain the platform provider's plan and investment options.[8]

4. Application to Small Plans. We respectfully recommend that that the carve-out apply to all plans and not be limited to small plans similar to the scope of the "seller's carve-out." Platforms, such as the Program, provide a simple way for all plans, and specifically small plans, to access the retirement plan market. Many small employers do not have resources to draft their own plan documents and separately hire service providers for their plans. In addition, small plans do not generate the amount of revenue to service providers as do larger plans. That is one

[8] [8] *See*, DOL Advisory Opinion 2003-09A.

of the reasons that the Program was established for the legal profession. The Department should encourage the provision of platforms to small plans to increase the likelihood that all employers can easily establish a retirement plan. Making platform providers fiduciaries to small plans and not large plans may cause some platform providers to prohibit small plans from adopting their platform. Moreover, the disclosure requirements of the platform provider carve-out will inform employers that the platform provider is not acting as a fiduciary with respect to a decision to adopt a plan provided by the platform so there should be no expectation otherwise.

5. Alternative Recommendation. Another way that the Department could address the specific issues applicable to platforms similar to the Program is to add an additional carve-out for platforms that are established by providers that are not-for-profit entities that are organized for the sole purpose of providing a retirement solution to a specific industry group or members of a trade association. This carve-out would be available where the platform provider does not have a profit motive and, therefore, has no conflict in setting up the platform. The Program would be an example of this type of platform. Plan sponsors that are offered a platform like the one provided by the Program do not need fiduciary protection where the platform provider does not have "direct and substantial conflicts of interest, which encourage investment recommendations that generate higher fees for the advisers at the expense of their customers and often result in lower returns for customers even before fees" as explained in the preamble to the Proposed Regulation as being a problem under the existing regulation.

II. Seller's Carve-Out. (a) Description. Another carve-out, set forth in DOL Proposed Regulation § 2510.3–21(b)(1), provides a carve-out for advice made to a plan in an arm's length transaction where there is generally no expectation of fiduciary investment advice, provided that specific conditions are met, including that the plan has 100 or more participants or

the independent plan fiduciary has responsibility for managing at least $100 million in plan assets.

If the platform provider carve-out is not modified in the manner recommended above, it appears that the seller's carve-out, as proposed, also will not apply with respect to the Program because the majority of Employers considering adopting the Program are small plans that do not meet the conditions of the seller's carve-out.

(b) Recommendation. ABA RF recommends that the Department expand the seller's carve out to apply to all plans or, at a minimum, expand the carve-out to apply to small plans where the plan sponsor is described in Rule 180 (see discussion above relating to 29 C.F.R. § 230.180). The ABA RF believes that the disclosure requirements included in the seller's carve-out provide adequate protection to plan sponsors and should apply with respect to all plans, not just large plans. Persons engaging in arm's length transactions should not expect the counterparty to be acting as a fiduciary with respect to the plan, especially where specific disclosure is provided regarding this fact. If the Department does not agree, the ABA RF recommends that the seller's carve-out apply if the plan sponsor is the type of entity described in Rule 180. In this case, the SEC has determined that those types of entities do not need the protections of registration under the 1933 Act presumably because they are competent to make decisions without those protections. The ABA RF believes those types of entities do not need the protection contemplated by the Proposed Regulation.

CLARIFICATION THAT BEST INTEREST CONTRACT EXEMPTION IS NOT NECESSARY FOR A PLATFORM WHERE THERE IS NO CONFLICT

No Conflicts Involved in the Offering of the Program. (a) Description. As explained above, the ABA RF is a not-for-profit entity and has no profit motive. As also explained above, all fees payable to the ABA RF and the Program service providers are clearly disclosed to

Employers before they adopt the Program. The Recordkeeper has a dedicated team of personnel who market only the Program and no other retirement products or services. Neither the Recordkeeper personnel nor the ABA RF have any conflicts when marketing the Program and, thus, there should be no potential for a prohibited transaction. Moreover, after an Employer adopts the Program, the ABA RF acts as a fiduciary to the Employers in reviewing and monitoring the fees and services provided by the Program's service providers. The ABA RF's sole concern is benefitting the Program Employers and their employees.

(b) Recommendation. If the Department does not modify the platform provider carve-out as suggested above, the ABA RF respectively requests that the Department clarify that a platform provider selling a single retirement solution where no conflicts are present does not engage in a prohibited transaction and does not need to rely on any exemption, including the so-called Best Interest Contract Exemption (the "BIC Exemption"). If the Program were required to rely on the BIC Exemption, it would not be able to operate for the benefit of the prospective clients and their employees. First, the BIC Exemption would not apply in all cases applicable to the Program. For example, the BIC Exemption would not apply to advice given to the sponsor of a participant-directed plan. Second, even if the BIC Exemption did apply, the conditions for the BIC Exemption would make marketing the Program difficult as a result of the contract requirement and more costly to the detriment to the plan sponsors the Program seeks to serve. Last, there should be no reason for a platform provider to have to rely on an exemption where it does not have any conflicts "which encourage investment recommendations that generate higher fees for the advisers at the expense of their customers and often result in lower returns for customers even before fees."

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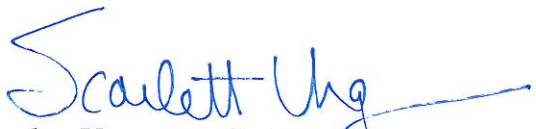
On behalf of the ABA Retirement Funds, we thank you for considering our comment. If you have any questions or need additional information, please let us know.

Sincerely,



Scarlett Ungurean, CFA, CPA CA
ABA Retirement Funds, Executive Director