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

Office of Exemption Determinations  
Employee Benefits Security Administration  
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**

Ladies and Gentlemen:

Automatic Data Processing, Inc. (“Automatic Data”), is pleased to provide these comments with respect to the Department of Labor’s (the “Department’s”) notice of proposed rulemaking concerning the definition of the Term “Fiduciary” of an employee benefit plan (the “Proposed Regulation”)<sup>1</sup> and the related proposed Best Interest Contract Exemption (the “BIC Exemption”).<sup>2</sup>

With nearly \$12.2 billion in revenues and over 630,000<sup>3</sup> clients worldwide, Automatic Data is one of the largest providers of a broad range of transaction processing and information-based business solutions. ADP<sup>®</sup> Employer Services (ES), a division of ADP, LLC (“ADP”), a wholly owned indirect subsidiary of Automatic Data, offers a very wide range of human resource, payroll, and benefit administration solutions from a single source to meet the business needs of employers worldwide.

ADP Retirement Services, part of the Employer Services division, is one of the largest independent retirement plan recordkeepers in the United States. It provides non-discretionary recordkeeping and administrative services to approximately 32,000 tax-qualified defined

<sup>1</sup> 80 FR 21928 (April 20, 2015)

<sup>2</sup> 80 FR 21960 (April 20, 2015)

<sup>3</sup> Source: Automatic Data Processing, Inc. for Fiscal Year ended June 30, 2014.



contribution retirement plans.<sup>1</sup> Of these plans, over 29,000 have fewer than 100 participants.<sup>2</sup> ADP also separately markets and/or provides money movement services in connection with two IRA institutions for more than 15,000 SIMPLE IRA Plans.<sup>3</sup> In total, it provides comprehensive retirement services to over 47,000 clients and 1.5 million plan participants in plans with approximately \$51 billion in assets.<sup>4</sup> While ADP offers retirement plan products and services primarily to small employers, it does service a number of larger plans with up to tens of thousands of participants.

As a provider of recordkeeping and administrative services primarily to small participant-directed defined contribution plans, ADP Retirement Services has substantial experience with the small plan market, through its interactions with both plan sponsors and employers considering adopting a retirement plan. The number of defined contribution plans maintained by employers dropped precipitously in 2008. The growth rate in the number of plans since then has not recovered to pre-2008 levels and has been relatively flat since 2012.<sup>5</sup> Overall, retirement plan coverage among small employers in particular is a significant issue facing the economy.<sup>6</sup> ADP and a number of similar service providers specialize in finding a retirement solution for “micro” (with ten or fewer employees) and small (with 100 or fewer employee) businesses and have been aggressively endeavoring to broaden adoption of these plans. Notwithstanding this issue, in each of the past three years ADP has enabled over 10,000 clients to establish a new 401(k) or SIMPLE IRA plan.

While the Department is understandably focused on the issue of “conflicted” advice and its impact on the retirement savings of individual investors, based on our experience in the small plan market, we are concerned with the potential impact of the Proposed Regulation on opportunities for individuals to save through workplace-based plans, where the likelihood of savings for retirement (through the benefit of payroll deduction and employer matching contributions) is greatest. As discussed below, we believe that the Proposed Regulation may have a deleterious impact on plan formation by small businesses and continued plan maintenance, as well as (perhaps to a lesser extent) on the establishment of accounts by participants within existing plans. We also are concerned about the Proposed Regulation’s effect on the ability of large service providers, such as ADP Retirement Services, to leverage economies of scale and make available the services of investment advisors to both plan sponsors and plan participants at prices that they might well not be able to obtain on their own. Clearly, the Proposed Regulation must balance the need to protect participants from the conflicts of interest that parties providing advice may have against the potential deterrent to retirement savings the Proposed Regulations may pose.

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<sup>1</sup> Source: ADP Retirement Services as of December 31, 2014.

<sup>2</sup> Source: ADP Retirement Services as of December 31, 2014.

<sup>3</sup> Source: ADP Retirement Services as of December 31, 2014.

<sup>4</sup> Source: ADP Retirement Services as of December 31, 2014.

<sup>5</sup> Total Private Defined Contribution Plans 2002-2018E, from Cerulli Reports: Retirement Markets 2014.

<sup>6</sup> Large employers adopt and maintain 401(k) plans, for example, at a much greater rate than small employers. According to a Retirement Research Institute (RRI) analysis, employers have adopted 401(k) plans at the following rates: 1-9 employees, 4.2%; 10-100 employees, 27%; and over 100 employees, 65%. From Retirement Markets 2015 report, Retirement Research Inc., April 2015.



Under current law, ADP Retirement Services does not serve in a fiduciary capacity with respect to its clients' retirement plans. All services ADP Retirement Services provides are ministerial and administrative in nature, and for tax-qualified plans include, but are not limited to: transaction processing and account maintenance; participant statements; trustee administrative services; plan document services; payroll-related services; investment-support services (e.g., making available an investment platform); compliance services (e.g. preparation of Forms 5500 and required Internal Revenue Code testing); tax withholding and reporting; client service support; inquiry, transaction and planning tool services; participant education services and participant enrollment services.

ADP Retirement Services has relationships with other unaffiliated companies and institutions so that it may make available to its retirement plan clients services that an employer may wish to utilize, or are necessary, to maintain a plan, but which ADP does not provide. For each such service, the client either separately engages or selects the service provider (i.e., ADP does not engage the institutions on the clients' behalf, nor are they subcontractors to ADP). For example, ADP makes available unaffiliated institutions that its clients can separately engage to serve as trustee of their plan, and makes available investment platforms that, depending on the program, consist of hundreds or even thousands of mutual funds and collective trust funds that clients may choose as investment options under their plan.

### **Absence of Carve-out or Exemption for Sales Activities in the Small Plan Market**

ADP believes that the absence of a carve-out or exemption from the Proposed Regulation that better enables service providers to support the establishment and maintenance of retirement plans by small employers could well have an unintended negative effect on overall retirement savings by participants in small employer plans. The Proposed Regulation appears to bring within the scope of fiduciary investment advice a wide range of basic sales activities engaged in by retirement plan recordkeepers with an investment platform who, today, are not considered to provide investment advice. These sales activities can occur with respect to a small business establishing a new participant-directed plan, or they can happen when the sponsor of an existing participant-directed plan seeks to "convert" (that is, transfer) to a new recordkeeper and map existing investments to investments on the new recordkeeper's platform. By necessity, these activities include discussions and proposals regarding potential investment fund lineups. However, neither the Proposed Regulation nor the BIC Exemption provide any carve-out or exemption for sales activities with respect to small plans.<sup>7</sup> Absent either a carve-out for small plan sales or a workable exemption, the Proposed Regulation imposes significant costs on the small plan sponsors that need those services (which, in turn, may be passed through to participants), imposes significant burdens on recordkeepers and similar providers of critical services in the small plan market, and may well drive some small plan service providers out of the market entirely. By excluding the small employer community from the carve-out and

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<sup>7</sup> The Proposed Regulation's "Counterparty/Seller's" carve-out (see paragraph (b)(1) of the Proposed Regulation) applies to plans with at least 100 participants or with a plan fiduciary managing more than \$100 million in assets. As proposed, the BIC Exemption is not available to participant-directed plans of any size. By "small plans," we refer to both participant-directed defined contribution plans and SIMPLE IRA plans (as distinguished from the underlying IRAs themselves) that fall outside the scope of the plans described in the Counterparty/Seller's carve-out.



exemptions, the new regulations will further exacerbate the coverage issues rather than help to solve the dilemma.

The most straightforward and preferable approach for dealing with this problem would be to broaden the Counterparty/Seller's carve-out to include small plan sales activity. However, it is critical that any such expansion recognize the unique nature of the small plan market. As proposed, the Counterparty/Seller's carve-out contains provisions/conditions that may make sense in the context of sales involving large plans, which occur less frequently than small plan sales. However, those conditions are not practical when applied to small plans. For example, requiring written representations from a prospective client *before* a sales conversation about investment options can occur is far more likely to have a chilling effect on the conversation occurring in the first instance for a small plan than for larger plans. Sales activities with larger plan sponsors commonly involve a number of stages of proposal and negotiation, in which requiring written representations before discussion concerning plan investments can occur may be accommodated with relative ease. For small plan sponsors, and small businesses considering the establishment of a retirement plan, however, the much more likely result of imposing such a condition is that these employers will be less likely to speak with service providers in the first instance, or that service providers in this market will not be successful in obtaining such representations very often, and will be forced to leave the market entirely. For these reasons, we would urge that the conditions of the Counterparty/Seller's carve-out be modified to permit the independent plan fiduciary's written representations to be delivered at any time up to the execution of the recommended transaction.

While the Department understandably is concerned with protecting "retail" investors, excluding small retirement plans from a Counterparty/Seller's carve-out is likely to result in less of availability of plan services in the marketplace and decreased establishment and maintenance of employer-based plans. A reasonable approach that provides for a Counterparty/Seller's carve-out for small plans while still providing for the plan sponsor's consent to and understanding of the nature of the transaction, without undue burden for either the selling party or the plan sponsor seems to be in order. Given the economics of servicing a very small plan, it may not be reasonable to expect advisers to endeavor to service them in any great measure, nor for small plan sponsors to be able to search for and afford to engage those advisers. Because of the economies of scale that large recordkeepers can bring to bear given the breadth of their resources, it appears much more likely that large recordkeepers will be willing and able to provide affordable, high quality assistance to small plan sponsors if a reasonable carve-out is extended to them.

Absent an expansion of the Counterparty/Seller's carve-out, the BIC Exemption should be expanded to include transactions with small plans (whether participant-directed or not). If expanded, however, it is critical that certain requirements of the BIC Exemption be revised in their application to retirement plan service providers, in particular, recordkeepers and other retirement plan service providers subject to the investment disclosure requirements of the 408(b)(2) regulations. In this context, three provisions of the BIC Exemption are particularly troubling:

- The requirement that the required agreement be signed *before* a recommendation is provided. As discussed above, it is exceedingly unlikely that small businesses



will take the time to engage in lengthy pre-sale discussions with a potential service provider that would afford the opportunity to satisfy the condition that a “best interest contract” be entered into prior to the delivery of a recommendation. The salesperson at that point will not have had the opportunity to explain to the small employer why they should spend the time and resources to consider providing a retirement plan to their employees, or to transfer their plan to a different service provider’s platform. The salesperson will ordinarily only have one opportunity to start the sales discussion with a small employer; imposing this condition will create a significant barrier to small employers even considering the establishment of a retirement plan for its employees.

- The requirement that the agreement be signed not only by the financial institution entering into a transaction with the plan, but also by the “Adviser.” In the context of a sale of services by a recordkeeper or similar service provider with an investment platform, there could be any number of employees involved in sales activities that could constitute fiduciary investment advice under the Proposed Regulation. As discussed later in this comment, the possibility that any (or all) of the employees of the service provider could be considered advice fiduciaries creates significant issues. The impracticality of such a construct expands exponentially when one considers that, once a plan is in place and being serviced, any one of potentially hundreds of employees could interact with plan representatives and/or participants and engage in activities that might constitute fiduciary investment advice under the Proposed Regulation. This is particularly so in the small plan marketplace, where the economics of a recordkeeper’s service offering do not justify having a dedicated team of employees servicing a plan, and where employees frequently leave and are replaced by new employees. It simply is not practical to have all employees who will, or may, interact with a client sign an agreement before any sales activities occur.
- Disclosure requirements. Assuming the BIC Exemption were expanded to cover small participant directed retirement plans, the disclosure requirements are a particular cause for concern, as they would apply to recordkeepers and other retirement plan service providers subject to the investment disclosure requirements of the regulations under section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) (the “408(b)(2) regulations”). The effort to come into compliance with the service provider disclosure requirements, including the investment disclosure requirements, under the 408(b)(2) regulations took many service providers the better part of two years and required a significant allocation of human and financial resources to implement. The BIC Exemption’s point of sale and annual disclosure requirements overlap to some extent with the investment disclosure requirements of the 408(b)(2) regulations, yet include a number of additional or different elements.<sup>8</sup> We anticipate that the implementation of these additional disclosure

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<sup>8</sup> For example, the point of sale and annual disclosure requirement requires that “total cost” and fees and expenses associated with a given investment be expressed as a dollar amount. When the Form 5500 Schedule C and 408(b)(2) regulations were under consideration, there was significant commentary about the difficulty of expressing



requirements could take as much, if not more, resources and time than were required to implement disclosure requirements of the 408(b)(2) regulations. Where a provider of recordkeeping services is already subject to the investment disclosure requirements of the 408(b)(2) regulations, we respectfully suggest that subjecting such service providers to an additional point-of-sale and annual investment disclosure regime to utilize the BIC Exemption for the same activities is unnecessarily duplicative and expensive, and will tie up significant programming and other resources of recordkeepers that could otherwise be used to provide additional services and enhancements to products to produce better retirement outcomes for participants. Similarly, the Web page disclosure required under the BIC Exemption goes far beyond anything that the 408(b)(2) regulations require. For example, the requirement that the webpage display compensation information for every asset that *could* be purchased through an adviser could, in an open fund architecture environment, require disclosure of information regarding literally thousands of investment alternatives and share classes within each alternative.<sup>9</sup> This level and magnitude of information, in our experience, will overwhelm a small plan sponsor, and thus not only will be ineffective as a disclosure, but also probably will be counterproductive (for example, discourage the plan sponsor from establishing a plan). Moreover, while ADP has long supported complete and accurate disclosure and fair dealing between service providers and plan fiduciaries, the burden of building and maintaining a public Web page covering all funds in which a plan sponsor could invest is excessive and unduly burdensome. We respectfully suggest that an obligation for a service provider to respond in a timely manner to inquiries from prospective and current retirement plan clients regarding such potential investments would be a far more proportionate and reasonable approach.

Unless sufficient modifications are made to make the BIC Exemption workable, the only option available to small plan service providers that receive variable compensation appears to be a fee-leveling arrangement where “hard-dollar” recordkeeping and administrative fees are offset by variable investment-related compensation (for example, 12b-1 fees) related to the activities that constitute fiduciary investment advice. Fee leveling, however, is likely to result in the first instance in higher hard-dollar fees for retirement plan services to absorb the offset for variable compensation. These arrangements will provide less certainty to plan sponsors, who will not know from one billing cycle to the next what their retirement plan services will actually cost out-of-pocket, as they will be billed for the net of the hard dollar fee, reduced by the variable investment-related compensation. The time it would take for service providers who, as non-fiduciaries, have not had to implement a fee leveling compensation structure to reprogram billing

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plan-level investment expenses and associated compensation as a dollar amount (due in part to the fact that this compensation is often calculated and paid at a combined “superomnibus,” rather than a plan, level) and, ultimately, the Department permitted both Schedule C compensation reporting and disclosures under the 408(b)(2) regulations to be expressed in the form of a formula. In the context of the BIC Exemption, however, the Department is taking a more restrictive approach to what is in many ways duplicative disclosure as applied to service providers covered by Schedule C reporting and subject to the investment disclosure requirements of the 408(b)(2) regulations.

<sup>9</sup> ADP Retirement Services, for example, has over 11,000 distinct investment options under contract on its investment platform that could be selected by a plan sponsor participating in the “direct-sold” (i.e., sold by an ADP salesperson) version of our service offering.



systems could take significantly longer than the eight months the current proposal would allow before the regulation becomes applicable. Moreover, where a (currently non-fiduciary) service provider does not have such arrangements in place with existing clients today, it would take significantly longer than eight months to renegotiate client contracts to change existing compensation arrangements.<sup>10</sup>

### **Status of Individual Employees/Licensed Representatives.**

Large recordkeepers such as ADP Retirement Services interact with potential and existing clients in a variety of ways. Sales associates interact directly with potential clients. Sales support associates perform “back office” work to put together proposed investment fund lineups. Existing clients are serviced by individual client service representatives. Depending on plan size, these representatives may be “dedicated” (i.e., assigned to a plan). Our largest plans are also additionally serviced by relationship managers. Participants in client plans have access to a participant call center, which is staffed by individual associates who may be dedicated representatives depending on plan size, but more often are not. Other examples of employees who interact with plan sponsors and/or participants include plan implementation specialists and participant education specialists.

The BIC Exemption provides relief to investment advice fiduciaries who are both individual “advisers” and the “financial institutions” that employ or otherwise contract with them. The BIC Exemption defines an “adviser” as an employee, independent contractor, agent, or registered representative of a financial institution who satisfies applicable law and licensing with respect to the receipt of the compensation. Outside of the context of the BIC Exemption, however, the DOL has not clearly stated, in either the Proposed Regulation or its preamble, that if a business is considered a fiduciary under the Proposed Regulation, whether its individual employees will also be considered fiduciaries. This implies that the DOL quite possibly has taken the position that such individual employees will be treated as fiduciaries, but nowhere in the Proposed Regulation is this clearly stated and, if so, which employees would be so treated. We respectfully request that this point be clarified.

This lack of clarity could lead to significant issues for individual employees of an administrative services provider that engages in sales, sales support, implementation, participant education, client service, and participant call center activities. This raises concerns in several respects. First, the BIC Exemption (if it were expanded to cover service providers to participant-directed plans of any size), as proposed, requires the recipient of fiduciary investment advice to sign a contract with both the financial institution and the individual adviser before the activities that constitute fiduciary investment advice are undertaken. Given the number of individual employees that could interact with a plan fiduciary or plan participant in a way that constitutes fiduciary investment advice, or provide support to such activities, this alone could render the BIC Exemption unworkable. Second, because fiduciaries may be personally liable for breaches of their fiduciary duties under section 409 of ERISA, this could create an untenable situation for service provider employees, such as call center representatives. Clarification on this point is critical. A reasoned approach that recognizes the many ways in which a service provider

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<sup>10</sup> As noted at the outset, ADP Retirement Services is currently a service provider to 32,000 tax-qualified defined contribution retirement plans and more than 15,000 SIMPLE IRA Plans.



interacts with plan representatives and participants through its employees is even more important.

### **Making Third-Party Service Providers Available to Plan Sponsors**

ADP acts as an independent recordkeeper that is not a registered investment adviser, does not sponsor mutual funds and is not a trust company or bank. Accordingly, it cannot provide all the services that an employer may find necessary or desirable to maintain a retirement plan. ADP therefore makes available certain services to employers through its relationships with various independent third parties (together with ADP's services, referred to herein as "ADP programs"). ADP enters into a relationship agreement with the service provider, which agrees to provide services to adopting employers in the ADP program. ADP clients that want the service for their plan sign a separate service agreement with the third-party provider, to which ADP is not a party. Through this approach, for example:

- ADP makes available a low cost investment advisory firm that employers can separately choose to engage in order to obtain advice and recommendations in selecting investment options for their plan. In some ADP programs, the investment adviser independently recommends to the employer investment funds from among the broad array of funds ADP makes available in any particular ADP program. In one service offering for employers with fewer than ten employees, an employer that wishes to purchase the service offering will appoint the investment advisory firm as an investment manager with full discretion over the plan's investment options.
- ADP also makes available another investment advisory firm that an employer may engage to provide investment advisory or management services directly to plan participants, at a very low cost to the employer and/or its plan and participants. The employer executes an agreement directly with the investment advisory firm to which ADP is not a party.

ADP's agreement with its clients clearly discloses, and clients acknowledge in writing, that ADP does not recommend these investment advisers and/or that the client has not relied on any advice of ADP in deciding to retain the adviser. ADP does not receive any compensation from the advisers; it only charges fees to employers (which may charge the fees to their plan, if they so choose) for administrative services ADP performs in making the investment advisers available. ADP is not otherwise involved in the investment adviser's recommendations or selection of investment funds by or for plans. We believe that these or similar arrangements are fairly common in the recordkeeping industry.

The Proposed Regulation, as currently written, could be interpreted so broadly as to provide that by simply making available to employers these investment advisers, an independent recordkeeper would be recommending the advisers to the employers, thereby causing the recordkeeper to be a fiduciary. We believe that this is not necessarily what the DOL intended, nor that this result is favorable for small employers. Small employers often do not have the expertise to select the investment funds for their plans. However, many do not have the resources to locate an investment adviser on their own, and find that the fees charged by advisers





they select on their own are usually quite substantial. Independent recordkeepers, by creating economies of scale for the investment advisers, are able to enter into business arrangements under which the investment advisers are economically able to offer their services to small employers at a very low cost. This is particularly true because the recordkeeper is able to defray a portion of the investment adviser's administrative costs of providing investment advice to employers by facilitating the implementation of their services. Without the availability of such investment advisory service arrangements, many small employers without investment expertise will not establish retirement plans for their employees at all. Those that do establish a plan may be forced to engage investment advisers at a very high cost to the plan. Others will forgo this substantial cost and will select investment funds without the benefit of the services of an investment professional, thereby potentially selecting funds without the ability to properly fulfill their own fiduciary duties. Perhaps most importantly, it is quite possible that if recordkeepers are deemed investment advice fiduciaries solely because they make available participant investment advisory services offered by an independent advisor, some (or potentially many) recordkeepers will no longer make available reasonably priced investment advice services for participants. Participants often do not participate in participant-directed defined contribution plans because they are unable to make, or are uncomfortable making, investment decisions. Like small employers, participants are similarly often not well-positioned to locate and pay the fees of investment advisers.

Accordingly, we request that the Proposed Regulation be clarified to provide that if a recordkeeper merely makes available an unaffiliated advice provider for an employer to select, it should not itself be considered an investment advice fiduciary under the following conditions: (1) the employer enters into a separate agreement with the investment adviser; (2) the recordkeeper clearly discloses in writing that it is not recommending the investment adviser and the employer acknowledges this (also in writing), (3) the recordkeeper is not involved in the selection or recommendation of funds by the employer, other than in determining the funds to be made available on the recordkeeper's investment platform for the program the employer's plan participates in, and (4) the recordkeeper is not compensated by the investment adviser for making the adviser's services available.

### **Marketing and Selling Administrative Services Through, or With, Advisers**

In addition to its own sales force, ADP markets its recordkeeping and administrative services through or with unaffiliated third parties in several ways:

- In its "Access" offering, ADP compensates unaffiliated broker-dealer firms to market its basic ADP-branded retirement plan recordkeeping service offering, which includes an investment platform. The service offering is branded an ADP offering ("ADP Access"). ADP decides on the investment funds to include in the investment platform. ADP pays the broker-dealer firms based upon ADP's overall revenue derived from the client, including processing and administrative fees and other indirect investment-related compensation.
- In its "Alliance" service offerings, ADP enters into a marketing alliance under which an unaffiliated third party institution that sells the service offering jointly markets and/or brands the service offering, and selects the investment funds to be



made available on the investment platform. In general, it is the Alliance institution, not ADP, that is compensated by the investment funds (e.g., 12b-1 fees), and ADP is compensated by the Alliance institution for administrative and marketing support activities. ADP, LLC serves as the back-office recordkeeper for plans participating in the service offering. The Alliance institutions' sales force is primarily responsible for selling the service offering and discussing any investment funds with clients. ADP sales associates generally support the sale, if at all, by covering the non-investment part of the sale (e.g., discussing ADP's recordkeeping and administrative services).

- In another version of an Alliance service offering, ADP has entered into an arrangement with an IRA institution through which ADP and the IRA institution are currently jointly marketing a SIMPLE IRA Plan product. The service offering is jointly-branded. Clients who sign up for the SIMPLE IRA offering sign a service agreement with ADP under which ADP provides some administrative services required at the plan level (e.g., moving contributions from employers' bank accounts to the IRAs). By adopting the SIMPLE IRA Plan sponsored by the IRA institution, the client permits its employees to open and make contributions to IRAs, receive employer contributions, and invest their IRAs in the approximately 65 funds that the IRA institution makes available. ADP charges an administrative services fee to the client and receives asset-based payments based on IRA assets from an affiliate of the IRA institution. ADP does not provide recommendations or advice to participants on which of the IRA institution's funds to invest in.<sup>11</sup>

Under the Proposed Regulation, there is a real likelihood that many of the third-party institutions through or with which ADP's recordkeeping and administrative services are sold may be considered investment advice fiduciaries. In light of this, clarification is needed as to whether joint marketing and sales activities with these parties by ADP would constitute fiduciary investment advice, i.e., whether presenting a recordkeeping and administrative services offering through an investment fiduciary, or jointly marketing that offering with an investment fiduciary, will cause the recordkeeping and administrative services provider to be considered to have recommended the investment advice fiduciary. This is particularly critical in the situations described, where the third party is unaffiliated with the recordkeeping and administrative services provider and the latter is not in a position to control the activities of the selling partner or its individual employees/associated parties. Within the retirement industry, there are numerous marketing and sales arrangements that combine the back-office services of one service provider such as recordkeeping, administrative services or marketing support services together with the products or services of an adviser. ADP's arrangements are typical but by no means a complete representation of these arrangements. We respectfully, but strongly, suggest that treating recordkeepers and administrative service providers as investment advice providers solely because of third party sales and marketing arrangements is unnecessary and would unduly restrict the ability of service providers to sell their services, particularly to plan sponsors who need and seek the guidance of such advisers.

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<sup>11</sup> Moreover, individual participants may elect to establish their SIMPLE IRA at a financial institution other than the IRA institution that sponsors the SIMPLE IRA plan.



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ADP appreciates this opportunity to offer input on the Proposed Regulation and the related BIC Exemption proposal. If you have any questions, or if we can be of assistance in your consideration of our comments, please do not hesitate to contact us.

Very truly yours,

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