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United States Senate

COMMITTEE ON FINANCE
WASHINGTON, DC 20510-6200

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August 7, 2015

The Honorable Thomas E. Perez
U.S. Department of Labor
200 Constitution Ave.
Washington, D.C. 20210

**Re: Comments on Proposed Regulations on Definition of the Term “Fiduciary” –
RIN 1210-AB32**

Dear Secretary Perez,

We are writing today to comment on the recently re-proposed Department of Labor (the “Department”) regulations defining who is a “fiduciary” of an employee benefit plan or individual retirement plan under the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code (“Code”) as a result of giving investment advice to a plan, individual retirement account (“IRA”) or its participants or beneficiaries. We appreciate your leadership on this important issue and we share your interest in developing a rule that protects Americans against conflicted advice and helps families prepare for a financially secure retirement, while preserving access to investment education and professional guidance. We also appreciate the efforts and thoughtfulness that went into the re-proposed rule, and the Department’s engagement with Congress, the Treasury Department, the Securities and Exchange Commission, and industry leaders before re-proposing your rule.

It has been over 40 years since the Department issued regulations on what constitutes “investment advice” under ERISA. Since then, there have been considerable changes in the retirement plan world, including a shift from defined benefit to defined contribution plans. As 401(k) plans and IRAs continue to replace professionally-managed pension funds, investment advisers play an increasingly important role in helping employers choose investments for their retirement plans – and in advising participants and IRA holders on how best to invest their savings to ensure a financially secure retirement.

The Department deserves great credit for highlighting both these changes in the retirement landscape and the need to update the fiduciary rules. We also applaud the Department’s focus on ensuring that savers receive advice that is in their best interest. Suitability is not a sufficient standard. ERISA requires that we place the interests of savers and retirement plans above those of their advisers.

In its report, *The Effects of Conflicted Investment Advice on Retirement Savings*, the White House asserts that conflicted advice may significantly reduce workers’ retirement savings.

For example, the White House found that “conflicted advice earns roughly one percentage point lower each year.” With approximately \$1.7 trillion of IRA assets invested with brokers with conflicts, the White House estimates that “the aggregate annual cost of conflicted advice is about \$17 billion each year.”

For these reasons, we support the Administration’s efforts to update the fiduciary rules to ensure that advisers of 401(k) and IRA investors act in the best interest of their clients. The reality is that today most Americans already believe that their financial professionals are acting under a best interest standard – and they have never heard of suitability standards and differing fiduciary standards. A best interest standard is key to ensuring American families receive financial advice they can trust.

However, we are hearing a number of thoughtful concerns from stakeholders about the re-proposed rules and we believe that the guidance can be improved and enhanced. For example, it is critical that any guidance not restrict access by small businesses to advisers who promote access to retirement plans. It also is important that the regulations not limit advisers from assisting plan participants and investors with rollover or investment education and that the new rule and its exceptions and exemptions take into account existing state regulations, the risk attributes of the products to be purchased, and the risk attributes of the industries potentially subject to the proposal.

Accordingly, as the Department works to finalize its guidance, we offer the following thoughts on important aspects of the proposal that we urge you to retain and on issues of concern that we ask you to consider further.

Clarifications

We appreciate the Department’s openness to clarifying language where it is being misinterpreted. For example, it is our understanding that the Department intended that the best interest contract exemption (“BIC exemption”) apply to distributions and rollover advice. However, the current language provides some uncertainty. Therefore, we appreciate your openness to clarifying this language.

We also hear frequently that many are concerned that under the proposed rules, investment advisers must obtain a signed contract before providing investment recommendations. This requirement is particularly problematic in the call center environment where there are potentially thousands of service representatives and in 401(k) plans where service providers do not normally contract with participants. It also could be expected to mean there is a requirement of a signed contract prior to sitting down for the first time with a potential client to discuss their services related to the client’s retirement accounts. On this issue as well, we have heard informally that this was not the intent of the Department and we appreciate your openness to making the contract requirement more workable, including consideration of the creation of an enforceable commitment without requiring a signed, written contract.

Finally, the definition of assets under the BIC exemption does not include listed options. We believe that retirement accounts of all sizes should continue to have the choice to use options to exercise appropriate risk management to protect accounts during times of market volatility. Therefore, we encourage the Department to clarify this issue.

Investment Education

The re-proposed regulations provide a new rule with respect to investment education that will supersede and replace Interpretive Bulletin (“IB”) 96-1. Although very similar to IB 96-1, the new rule includes a few significant changes. For example, one very helpful change is extending the guidance to include IRAs.

However, the new rule also restricts the identification of specific products or investments available within retirement plans or IRAs in asset allocation models. This limitation would mean that financial professionals could, for example, tell individuals about different categories of investments, and the advantages of diversification, but could not name specific examples in any category or it would no longer be investment education. This is the case even in general communications. We find that to be a troubling result because for most investors and participants, specific examples are extremely helpful.

We certainly understand the Department’s concern that, for example, if a financial professional points to one particular fund in a plan, that appears to be financial advice and not investment education. However, if instead, the financial professional was required to name a few funds as examples, subject to certain standards, that seems more like investment education and not advice. This is especially the case when the examples are chosen from the menu of investment options in a qualified plan where all the options were chosen by a fiduciary. Investment education is an important issue and we hope that the Department will look to find middle ground in this area.

Small Businesses Retirement Plans

Encouraging small businesses to sponsor retirement plans presents unique challenges. In 2013, the Government Accountability Office (GAO) testified before Congress and highlighted the shortage of retirement plans among small businesses, and the reasons why some small employers are reluctant to sponsor plans. GAO’s research found that one-third of all private employees work for employers with fewer than 100 employees. Among these small employers, only 14 percent sponsor a retirement plan for their employees. Many small employers report that they feel overwhelmed by the number of plan options, plan administration requirements, and fiduciary responsibilities.

The reality is that retirement plans for small businesses are sold, not bought – and it is important that any rule take this factor into account. We appreciate the Department’s willingness to critically examine your proposed rule to ensure that it does not result in fewer new small plans being created and it allows financial professionals the ability to help small businesses set up plans and select investment options.

BIC Exemption

We applaud the Department for thinking outside of the box and developing a structure that allows current business and compensation practices to continue, even as financial professionals become fiduciaries under the proposed regulation. However, we recommend that the Department critically examine the BIC exemption to ensure that it is operational. If from a practical perspective financial professionals cannot use the exemption, we worry about the impact that may have on small businesses and moderate income savers. For example, it may be very difficult for service providers to show that their own compensation is reasonable without guidelines and safe harbors to follow.

Furthermore, the disclosure requirements seem excessive. For example, the BIC exemption requires financial professionals, prior to the execution of the purchase of an asset, to provide a chart that provides the total cost to the plan, participant, or beneficiary account, or IRA, of investing in the asset for 1-, 5-, and 10-year periods, expressed as a dollar amount. The exemption would require the chart to include disclosures of total costs, including acquisition costs, on-going costs, distribution costs, and 'other' costs.

As you know, it's a balance when it comes to participant and investor disclosures. Investors need appropriate information to make informed decisions. However, if too much information is provided, it gets ignored. Unfortunately, it appears to us that these disclosure requirements will overwhelm participants and investors. We also think it will be very difficult for financial institutions to comply with these requirements. Therefore, we urge the Department to revisit the BIC exemption disclosure requirements. We also encourage you to "piggyback" off of relevant rules from your own guidance and that of other regulators that are currently in place and that serve the intended purpose.

Rollover Advice

The proposed rule provides that a person is a fiduciary if he or she provides advice regarding distributions and rollovers. As noted in your guidance, rollovers will total more than \$2 trillion over the next 5 years. This is a key period of time when an employee leaves his employer and needs to decide what to do with his retirement assets. The serious threat of "leakage," which undermines retirement security, make this time a point at which appropriate financial advice is critical. Therefore, we applaud the Department for expanding the rule to include distributions and rollovers in the definition of fiduciary advice. However, we ask the Department to ensure that under the rule, plan participants will continue to have access to investment education from financial advisers during this transition period. It is important that educational conversations at the time of rollover not be considered fiduciary advice.

Plan Advisers with Level Compensation

The proposed rule generally encourages conflict-free compensation arrangements. However, under the guidance, plan advisers who receive level compensation from a retirement plan, and would receive level compensation for investment advice provided to an IRA rollover from a retirement plan, would be discouraged from working with plan participants

on rollovers. The problem arises because the level of compensation received from the IRA would usually be higher than that received from the plan if the adviser concludes that he will need to provide a higher level of service for the IRA. This situation would subject the adviser to the same difficult BIC exemption requirements faced by variable fee advisers as described above. We ask that this situation be addressed in a way that provides a level playing field for all advisers, regardless of whether they have a relationship to the plan and regardless of the fee structure they use.

Lifetime Income Options

Social Security is the foundation of Americans' retirement and provides families with an inflation-protected guaranteed stream of income throughout retirement. However, with the shift from employer-provided defined benefit to defined contribution plans, many retirees will no longer have a traditional pension with lifetime income to supplement Social Security. Nevertheless, lifetime income investments provide a stream of income throughout retirement that may help many retirees not outlive their savings. We recognize that a lifetime income option is certainly not the right investment for every family. But for some retirees, lifetime income products are a valuable or useful investment option.

We know that the Department shares our interest in lifetime income options and just recently issued guidance that should encourage more employers to offer lifetime income annuities as a benefit distribution option in their 401(k)-type plans. Therefore, we encourage you to carefully scrutinize your guidance to ensure that it does not disfavor lifetime income options over other investment options. We also note further that just because a product is "low-fee" does not always mean it is the best investment for a particular investor, particularly if the individual values and is willing to pay for the guarantees embedded in certain retirement income products.

Transition Issues

We applaud the Department for providing a transition rule for existing assets held by plans and IRAs. We agree with you that prior advice or actions should be protected. In this regard, we would ask you to consider further transition issues, including possible protection of (1) advice that was provided before the applicability date (but not acted on as of the applicability date) and (2) advice that was paid for before the applicability date but not provided until after the applicability date. We fully recognize that all transition rules need to be considered in light of the tension between two competing factors: (a) the desire not to disrupt existing arrangements that were entered into in reliance on the law in effect at the time, and (b) the need to implement new rules that will provide greater protections and improve the legal framework. We greatly respect the Department's efforts in this regard and ask that the Department consider the two situations noted above in light of these competing factors.

Internal Revenue Service ("IRS") Enforcement

Although IRAs are generally not subject to ERISA, Reorganization Plan No. 4 of 1978 provides that the Department has authority over the interpretation of the Code for purposes of the prohibited transaction rules. Therefore, the Department has the authority to issue guidance

related to prohibited transactions for IRAs – and that is the basis for this guidance. However, it is important to note that the Department does not have enforcement authority over IRAs – the IRS does. As such, we encourage the Department to continue coordinating with the IRS as you work to finalize this guidance.

Existing Advisory Programs and Online Tools

We share the Department's intention to promote advice that ensures that advisers are acting in the best interest of investors. We are aware of the existence of many advisory programs offered in the market today that provide fiduciary advice, as well as online educational tools that provide valuable, non-conflicted guidance to retirement investors. We encourage the Department to review the proposed rule carefully to ensure that the ability to make referrals to advisory programs is maintained and access to constructive online tools is not restricted. Both are examples of precisely the types of non-conflicted advice and guidance that the Department seeks to expand.

In conclusion, we strongly believe that workers and investors deserve advice that is in their best interest. That is a goal we all share. However, it is critical that the final rule be operational and one that in practice is useable. We also believe that it is important that any guidance enhance and not diminish savings opportunities for small businesses and moderate income families.

Your proposal represents an important step in making a best interest standard a reality. We also appreciate both your recognition that the proposed rule is only the first step in the process and your willingness to listen to concerns and adopt reasonable changes from all parties, including those in the hundreds of comment letters submitted with respect to the proposed rule. As revisions are made based on formal comments and the public hearing process, we hope the Department will continue an open and productive dialogue with stakeholders to ensure a smooth implementation.

Again we applaud your efforts and stand ready to work with you to help American families prepare for a financially secure retirement. If you have any questions or need additional information, please contact Kara Getz at 202-224-4515. Thank you for your consideration of this important matter.

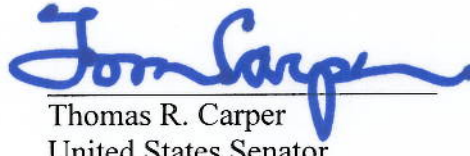


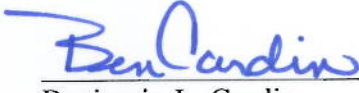
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United States Senator

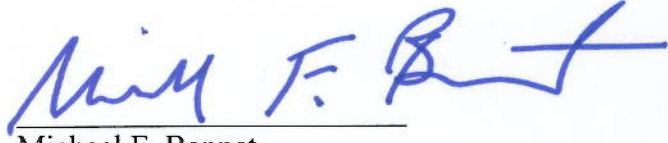


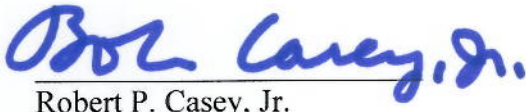
Debbie Stabenow
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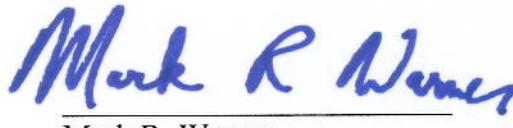

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