ERIC The ERISA Industry Committee
The Only National Association Advocating Solely for the Employee Benefit and Compensation Interests of America's Largest Employers
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Office of Regulations and Interpretations (Room N–5653)
Office of Exemption Determinations (Suite 400)
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210
Attention: Conflict of Interest Rule and D–11712

RE: RIN 1210–AB32 (Conflict of Interest Rule)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to submit this supplemental response to the request of the U.S. Department of Labor ("DOL") for comments regarding its proposed rule and proposed prohibited transaction exemptions and related amendments concerning conflicts of interest in retirement investment advice (collectively the regulation and the exemptions are referred to as the "Conflict of Interest Rule"). The proposed Conflict of Interest Rule was published in the *Federal Register* on April 20, 2015.

ERIC is the only national trade association advocating solely for the employee benefit and compensation interests of the country's largest employers. ERIC supports the ability of its large employer members to tailor health, retirement, and compensation benefits for millions of employees, retirees, and their families. ERIC's members provide comprehensive retirement benefits to tens of millions of active and retired workers and their families.

ERIC believes that employees, retirees, and their families who wish to receive advice with respect to how to invest their retirement accounts or education to help them achieve their retirement savings goals should continue to have meaningful opportunities to do so. ERIC submitted a comment letter on July 21, 2015 outlining our recommendations on the Conflict of Interest Rule. As we indicated in our letter, ERIC appreciates that the DOL considered our prior comments and addressed, in the current proposal, many concerns of large employers that ERIC raised in its comments on the DOL's earlier proposal.

Specifically, ERIC appreciates the DOL's position that non-individualized communications, such as in newsletters or generalized proxy statements, do not fall within the fiduciary definition. In addition, ERIC believes that the carve outs for "Counterparties to the Plan" (the "Seller's Carve Out"), "Employees of the Plan Sponsor" (subject to certain clarifications), "Swap and Security Based Swap Transactions," and "Financial Reports and Valuations" will be helpful to large plan sponsors and

appropriately address large employer and plan activities that do not raise the conflict of interest concerns that are at the core of the Conflict of Interest Rule.

DOL Hearing: August 10 – August 13, 2015

As follow up to the DOL hearing on the Conflict of Interest Rule held August 10 – August 13, 2015, ERIC is submitting additional comments based on the statements made and discussions held over the course of the hearing including comments submitted for the record. We wish to highlight the discussions as applicable to our recommendations included in our July 21st letter as follows:

ERIC recommendation: The investment education carve-out should not prohibit references to specific plan investment options.

At the DOL hearing, there was much discussion concerning the proposed rules changes to the definition of education under Interpretive Bulletin 96-1. Under the current proposal, the education carve-out would prohibit references to specific plan investment options. ERIC has serious concerns if the DOL takes this approach in its final regulation. During the hearing, various witnesses discussed possible changes to the education carve-out.

One approach was discussed specifically -- if the final rule allowed advisors (in the context of providing education to participants in a 401(k) plan) to reference specific plan investment ***IF*** the advisor referenced every investment option under each class of investments discussed under the auspices of the education conversation. ERIC would support this change to the regulation with two exceptions. First, we recommend that the DOL carve-out brokerage windows from this requirement. It would not be reasonable (or plausible) to expect investment advisors to reference every option available under a brokerage window alternative when discussing generally accepted investment principles and general investment strategy with a participant. Second, we recommend that if the DOL adopts this approach to the education carve-out, it also clarify that a target date fund is considered a single investment option (and not a loose association of the various funds under the target date fund umbrella investment product).

ERIC recommendation: The regulation should make clear that discussions among co-workers should not constitute fiduciary investment advice.

ERIC's comment letter included a recommendation that the final regulation should make it clear that comments of employees of the plan sponsor to their co-workers should not constitute fiduciary investment advice where the comments are not within the scope of the employees' duties for the plan sponsor and the employees are not providing the comments in exchange for a fee or other compensation. ERIC's comment letter provides detailed analysis regarding how the current draft of the proposed regulation could be interpreted to include these types of employee-to-employee discussions in the definition of fiduciary investment advice. During the DOL hearing, it was made clear that it was not the intent of the proposed regulation to cover these types of discussions. We strongly support changes to the final regulation that will clarify the point that such discussions among co-workers do not constitute fiduciary investment advice.

ERIC recommendation: The regulation should narrow the definition of the term "recommendation."

ERIC's comment letter stated that a mere "suggestion" should not constitute fiduciary investment advice, absent some "endorsement" or "encouragement." Throughout the hearing, DOL representatives used the term "call to action" to further clarify what it meant by the term "recommendation" for purposes of the regulation. In our comment letter, we note that although the DOL appears to rely on the definition of recommendation under FINRA, the proposed regulation does not define the term "recommendation". In fact, FINRA Rule 2111 does not define the term "recommendation." By using the term "call to action" throughout the hearing as a substitute for the term "recommendation", it is clear that the DOL is leaning towards a definition of the term "recommendation" that is more than a mere suggestion. We support a more narrowed definition of the term "recommendation" Including the use of the term "call to action."

ERIC recommendation: Employers with limited involvement in a Health Savings Account (HSA) (as under current guidance) should not be deemed fiduciaries under the rule.

Existing DOL guidance provides that HSAs generally will not constitute ERISA employee welfare plans due to the "limited involvement" of the employer. To ensure consistency with this guidance, ERIC recommended in its comment letter that the final regulation state explicitly that employers do not become investment fiduciaries or co-fiduciaries as to an HSA by virtue of having "limited" involvement with the HSA within the meaning of the existing HSA guidance. At the hearing, representatives of the DOL stated that it was the intent of the proposed regulation to apply the current guidance to arrangements involving an HSA where the employer provides a vendor with a platform to invest HSA contributions and has limited involvement or no involvement with investment decisions made by the participant. ERIC supports this position and recommends that the DOL further clarify this position in the final regulation.

ERIC appreciates the opportunity to provide additional comments on the proposed regulations. If the DOL has any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Respectfully,

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