September 24, 2015

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

RE: RIN 1210-AB32 – Conflict of Interest Rule

Dear Sir or Madam,

The American Benefits Council (the "Council") is pleased to have the opportunity to provide comments on the Department of Labor's (the "Department") proposed new definition of fiduciary investment advice, also known as the conflict of interest rule. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

We very much appreciated the opportunity to testify at the hearing. In our view, the dialogue between the Department and the witnesses during the hearing was very constructive and helpful. The four-day hearing is a tribute to the Department's openness to input on this critical set of issues. We look forward to continued dialogue with the Department.

We also really appreciate your statements during the hearing that it was not the intent of the Department to turn entities that sell health and welfare insurance policies or private exchange services into fiduciaries and they would not be covered by the rule. As stated in our July 10 comment letter, a formal and definitive clarification of this important issue would be beneficial to all parties.

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We wanted to follow up on the excellent questions posed to us by Department officials in the question and answer period following our testimony. Our thoughts on those questions are set forth below.

The concern from our plan sponsor members that the proposal could cover casual remarks by plan sponsor employees or call center personnel.

CALL CENTERS

Issue:

Our plan sponsor members have expressed concern that the current language of the proposal brings informal exchanges of information and casual statements by plan sponsor employees or call center personnel within the definition of fiduciary advice, creating fiduciary exposure and, in the case of the call centers, prohibited transactions. For example, assume that a participant asks a human resources employee of the plan sponsor whether the investment options he selected seem to be the type of investments that other similarly situated employees choose. The human resources employee responds by saying that she is not an expert by any means but the investments do seem similar to what others have chosen and seem to make sense.

Is this a recommendation?

Under the proposal, the definition of a recommendation is "a communication that . . . would reasonably be viewed as a ***suggestion*** that the advice recipient engage in or refrain from taking a particular course of action" (emphasis added). The statement by the human resources employee could be viewed as a suggestion that the participant go forward with his selected investment options. The selected options make sense and are similar to what others are doing. That seems to clearly fit within the definition of a recommendation.

The advice relates to the advisability of acquiring securities and is individualized (or at the very least is "specifically directed to" the participant). These elements of the investment advice definition under the proposal seem clearly satisfied.

The advice is provided "for consideration." Almost any statement is provided for consideration, and this statement is not an exception.

How to address this issue:

Our plan sponsor members are very concerned that under the proposal, the casual conversation and exchange of information described above would be treated as the provision of fiduciary advice by the human resources employee, subjecting the

employer to likely indemnification obligations and co-fiduciary liability, an outcome that would unduly restrict plan participants' access to information about the choices available under their plan. During our testimony, we provided additional examples which we believe raise the same concerns and which further reflect the breadth of the problem and the need to address the issue. During the question and answer period following our testimony, we were asked how to address this issue. We believe that this likely unintended result can be addressed though two clarifications of the proposal.

- **Excluding casual conversations:** The definition of fiduciary advice should clarify that casual conversations not involving any expectation of material reliance are not fiduciary advice. Thus, in our view, a fiduciary relationship should not be treated as existing unless:

    - Based on the circumstances, it is clear both parties understand that an individualized recommendation is being provided in connection with a plan or IRA that:

        - Will play a significant role in the recipient's decision-making, and

        - Reflects the considered judgment of the advisor.

  Under the proposal, any "suggestions" offered "for consideration" are sufficient to trigger fiduciary status. This is too low a bar and too broadly defined. In order for communications to be considered fiduciary advice, they need to be more than the provision of general information about what others have done or offhand suggestions by the advisor; they need to be reasonably viewed by both parties as intended to be relied on in proposing a specific action and as reflecting the "considered judgment" of the advisor. The rule should not cover general information about the plan or other communications offered for casual consideration or that provide basic guidance; it should include only information provided in a context where the advisor would reasonably expect the recipient to place significant reliance on the information to take a specific action. As we noted in our discussion at the hearing, the provision of illustrative examples may be very helpful.

- **"For a fee or other compensation":** During the question and answer period after our testimony, we were asked if it would help for the Department to (1) clarify that employees of a plan sponsor who are not paid any extra compensation with respect to advice are not giving fiduciary advice because they are not receiving "a fee or other compensation" for any advice given, and (2) provide the same clarification regarding call center employees. ***These clarifications would be extremely helpful and would be very much welcomed by our plan sponsor***

members. This would address a whole set of potential issues that our plan sponsor members are concerned about.[1]

- **Our technical concern:** We had not read the proposal in the manner described in the question posed to us, especially because Proposed Regulation § 2510.3-21(b)(2) provides a special carve-out for certain plan sponsor employees who only receive their normal compensation. There would be no need for the special carve-out and certainly no reason to limit the carve-out to certain plan sponsor employees if plan sponsor employees only receiving their normal compensation cannot be fiduciaries due to the "fee or other compensation" requirement. So we ask for the special carve-out to be deleted and replaced with a clarification that no plan sponsor employee would be a fiduciary with respect to assistance provided to a participant, beneficiary, or plan fiduciary unless such employee receives additional compensation for the assistance. As noted, this would apply to all plan sponsor employees, including, for example, human resources employees responding to questions and managers providing requested assistance to employees working for them.

- **Application to call center personnel:** During the question and answer period following our testimony, the point was made to us that call center personnel may be treated as receiving a fee or other compensation where they receive additional compensation based on referrals of participants to providers or specific investment products.

    - It should be clarified that referral fees would not make call center personnel fiduciaries if the referral fees are only for referrals to service providers that provide education, rather than fiduciary advice.

    - Also, as noted above, it would be extremely helpful if it could be clarified that if call center personnel simply receive their normal compensation and do not receive additional compensation that is based on the choices that participants make or for referring participants to an investment product or fiduciary service, such personnel are not receiving "a fee or other compensation" and thus are not giving fiduciary advice. Call center assistance is very important to our plan sponsors, so this type of clarification would provide great help.

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[1] The "fee or other compensation" is a much broader issue with effects in many contexts. Our focus in this letter is primarily on the two issues posed to us at the hearing, both of which are very important to large plan sponsors.

- **Additional clarification needed regarding call centers:** In order for such a call center clarification to have the desired effect, the compensation received by the financial institution employing the call center employee must also not trigger fiduciary status for the financial institution. In other words, unless call center personnel are acting on directions from the financial institution, compensation received by the financial institution in connection with the assistance provided by the call center should not cause the financial institution to be treated as having received a fee or other compensation for that assistance.

    - If this point is not included in the rule, clarification about the call center employee has little beneficial effect. In other words, if the call center employee suggests consideration of an investment offered by the financial institution, and the financial benefit flowing to the financial institution is deemed to be a fee or other compensation (despite the fact that the call center employee receives no direct benefit and therefore should not be construed to have a potential conflict of interest), then the financial institution is a fiduciary. If the financial institution is a fiduciary, then assistance by the call center employee would generally be a prohibited transaction. This would mean in turn that the financial institution would need to instruct the call center employee not to provide the assistance. So nothing would be gained by clarifying that the call center employee does not receive a fee or other compensation.

- **Application to additional areas:** As noted in Footnote 1, the fee or other compensation issue has broad implications beyond just plan sponsor employees or call center personnel. For example, trade association employees answering investment and distribution questions from plan sponsor members could be treated as fiduciaries if DOL were to take the position that part of the trade association's dues is for the trade association to be responsive to member questions. This clearly inappropriate result can be addressed by applying the plan sponsor employee rule to all service providers – in the absence of additional pay for the advice, the advice is not for a fee or other compensation and thus is not fiduciary advice.

- **Related issue:** The trade association issue noted above raises for us a related issue. Retirement trade associations commonly ask industry experts to speak to their members, including investment experts. If such an expert were to address a group, any discussion about investment trends or patterns would not be individualized and thus would not be treated as fiduciary advice. But if a trade association member were to ask

a follow-up question after the presentation, any answer would be individualized and could be treated by DOL as being for a fee or other compensation if it leads to work with the expert. This is an inappropriate and we believe unintended result, which would inhibit the healthy exchange of ideas at industry meetings. We ask that informal discussions at trade meetings among parties with no existing relationship not be subject to the fiduciary rule. Such a rule would reflect the reality that there is no reliance on casual give and take after a public program.

INVESTMENT EDUCATION

The proposal:

The Department's proposal would significantly restrict the type of investment education that can be provided without triggering fiduciary status and the prohibited transaction rules. Under current law (as reflected in Interpretive Bulletin 96-1), education includes (1) guidance on the extent to which an individual should invest in different asset classes (such as large and small cap equity funds, and long and short-term bond funds) based on her age, other retirement savings, and other factors, and (2) examples of investments that fit within such asset classes. This definition of education has worked very well for nearly 20 years and was permitted under the 2010 Department proposal. Under the 2015 proposal, providing examples of investments that fit within asset classes would, however, cause this kind of education to become fiduciary advice. This would severely limit the scope and usefulness of education programs that would be limited to abstract conversations about asset classes using terms – like large cap equity funds – that participants may not understand or find useful because they are not able to associate them with the investment choices they are offered.

Our view:

We believe that Interpretive Bulletin 96-1 has been a huge success, and should be preserved (as recognized by the 2010 Department proposal) and updated to ensure that the Interpretive Bulletin still works with respect to vital communications. As under the proposal, the principles of Interpretive Bulletin 96-1 should be extended to apply to assistance provided to plan sponsors and IRA owners, and with respect to distributions and rollovers.

Question posed to us:

At the hearing, we were asked for our views about addressing the investment education issue in the following manner: in the context of retirement plans (as opposed to IRAs), education could include (1) recommendations regarding asset classes, and (2)

a list of ***all*** plan investment options in the recommended asset classes. Set forth below are our thoughts on that approach.

- **Concerns about possible additional requirement:** First, at some points during the hearing it was suggested that in order to qualify as education, the type of assistance described above would need to be provided by an organization or person who has no financial stake in the plan investment options. Such a requirement would not be workable or appropriate.

    - The requirement is not workable because most providers of education are service providers that (1) provide education without any separate charges, and (2) can earn different amounts with respect to different investments, giving them a financial stake in the plan investment options.

    - Applying such a requirement is not appropriate because there is no reason to restrict any person from simply listing all plan investment options in a particular asset class.

- **Response to the question:** Assuming that the additional requirement described above is not applied, we would suggest consideration of the following issues in crafting a workable framework. In some cases, requiring the identification of all plan options in an asset class would work very well, provided that only designated investment alternatives are taken into account (as opposed to options available through a brokerage window, for example). Most companies have moved to having a short list of investment options, and in such cases we see no problem listing all options in a particular asset class.

    However, in some cases, plans will have an extensive list of designated investment alternatives. In such cases, it could be counterproductive to list 50 or 75 available large cap funds, for example. An emerging body of research indicates that addressing too many choices actually limits individual's willingness to make choices. Participants seeing such an extensive list might simply put the communication aside rather than try to work through a list of 75 funds.

    We continue to believe that the current rule in Interpretive Bulletin 96-1 should be preserved. We did not see anything in the Department's Regulatory Impact Analysis documenting that there have been any problems under 96-1. If the Department has concerns about the use of examples, a more targeted rule should be considered. For instance, 96-1 could be modified to provide that if fewer than three examples are provided with respect to any asset class, one of the following two conditions must be met: (1) the examples represent all plan investment options in that asset class, or (2) the examples are selected in a

manner that is not based on the financial interest of the organization or person providing the education.

Important additional point:

Our plan sponsor members have specifically raised one point of concern. Even if they list all plan investment options in an asset class or a significant number in a class, some plan sponsors find it very helpful to explain each asset class in the context of a particular option. For example, education might include the four large cap funds offered by a plan. But many participants do not know what a large cap fund is. So a plan sponsor may explain what a large cap fund is by using one large cap fund as an example, then also listing the other three large cap funds available under the plan. This practice was highlighted to us as an important element of the education process, which should be preserved as education under the new rule.

CONCLUSION

The fiduciary proposal raises many issues for plan sponsors, participants and those providing services to support the plans which involve potential significant additional costs and liabilities. We think these issues need to be addressed so that the proposed rules do not inadvertently hurt participants and undermine the voluntary private employer-sponsored system that provides enormously important and valued retirement security.

We very much appreciated the opportunity to testify at the hearing and would be happy to discuss further any of the issues raised in our comment letters, our testimony, or this letter.

If you have any questions, please contact the undersigned at 202-289-6700 or ldudley@abcstaff.org. Thank you for considering the issues outlined in this letter.

Sincerely,

Lynn Dudley
Senior Vice President,
Global Retirement and Compensation Policy