



Plan Sponsor Council of America

Serving retirement plan sponsors for over 60 years

September 24, 2015

VIA EMAIL (e-ORI@dol.gov)

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: Definition of the Term “Fiduciary;” Conflict of Interest Rule (RIN 1210-AB32)

Dear Sir or Madam:

The Plan Sponsor Council of America (“PSCA”) submitted written comments on the United States Department of Labor’s (“DOL”) proposed changes to the definition of a “fiduciary” under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and the Internal Revenue Code of 1986, as amended (“Code”),¹ and its proposed “Best Interest Contract Exemption” (the “BIC Exemption”)² (collectively referred to herein as the “Proposed Rule”).³ Our comments were submitted on July 21, 2015. Subsequently, on August 10, 2015, PSCA’s Board Chairman Stephen McCaffrey offered testimony on behalf of the PSCA before the DOL’s Employee Benefits Security Administration at its hearing on the Proposed Rule. The PSCA appreciates these opportunities to express our views on the Proposed Rule, and, as we have noted previously, particularly appreciate the willingness of the DOL to consider those views.

The PSCA was established in 1947 and is a leading consumer advocate for employers offering defined contribution and non-qualified deferred compensation plans to their employees.

¹ 80 Fed. Reg. 21,927 (Apr. 20, 2015).

² *Id.* at 21,960.

³ *Id.* at 22,004; *Id.* at 22,010; *Id.* at 22,021; *Id.* at 22,035.

The PSCA is a diverse, collaborative community of employee benefit plan sponsors and related service providers working together on behalf of millions of employees to ensure the success of the voluntary employer-sponsored retirement system. Representing employers of all sizes and industries throughout the country, we offer a unique and valuable perspective on issues regularly confronted by that system.

As noted in our initial written comments, and as expressed by Mr. McCaffrey in his testimony, the PSCA supports the core approach of the Proposed Rule in extending the protection of ERISA's fiduciary standards and commends the DOL for its efforts to carefully construct a balanced approach in this context. We appreciate and support the view that extending ERISA's protections in situations that function in a fiduciary capacity would provide meaningful protection for both plan participants and plan sponsors. We have stated our belief that our country's retirement system will be greatly strengthened by ensuring that investment advice is provided in the recipient's best interest consistent with those fiduciary standards and that any financial conflicts are disclosed. In that regard, we previously noted that many PSCA members regard the proposed revision as beneficial in solving a crucial problem in their efforts to help employees save for retirement. While we appreciate and support the DOL's efforts to protect plan participants by extending ERISA's fiduciary standards in appropriate circumstances, this objective should be met without compromising the ability of plan sponsors to obtain the broad array of services that fit the needs of their plan participants. Striking the proper balance is very important. Those concerns have been set forth in our previous comments and testimony, and generally will not be repeated herein.

The PSCA continues to believe that the final rule should be formulated in a manner that ensures that plans of all sizes will be able to offer meaningful efficient and cost effective investment education to participants. We have set forth our views on how to obtain that goal in our previous comments and testimony.

Our review of submitted comments and offered testimony indicates that many adverse comments are based on concerns that the scope of the rule, as proposed, may be overly broad. The PSCA generally shares this concern and believes that greater clarity can be achieved by adding to the rule additional examples, lists and/or model language that would sharpen the distinction between what would be considered investment "recommendations" and mere "neutral, informative descriptions" of plan or IRA operations, investment options or taxation. Attached hereto as Exhibit A is a partial list, which is not meant to be exclusive, of the type of information that the PSCA believes should be disseminated without crossing the line into investment advice. In this regard, the PSCA believes that its members possess valuable practical experience in these matters, and would welcome the opportunity to actively work with the DOL in constructing additional examples, lists and/or model language.

The PSCA recognizes the DOL's concern about steering participants to particular investments. However, we continue to believe that the identification of specific investment options in asset allocation models and interactive investment materials helps participants understand and "connect the dots" between general information on asset allocation and

corresponding investment(s) in a plan to enable them to make an informed decision on their investments. Moreover, the PSCA's independent, unbiased research suggests the Proposed Rule potentially would increase burdens on plan sponsors that rely on (a) vendors to provide participant education and (b) bundled, diversified asset allocation products (e.g. target date funds, balanced funds, lifestyle funds) to improve plan participation (particularly among rank and file employees). As such, PSCA is concerned that the Proposed Rule inadvertently could decrease the value and effectiveness of investment education. Without the tie-in to specific investment options available under a plan, the risk that a participant fails to fully appreciate, learn from the education and actually participate in the plan increases.

The PSCA is concerned that a narrowed IB 96-1 could have unintended consequences that would be particularly harmful to employers and participants. For instance, in addition to decreasing the value and effectiveness of investment education (as discussed above), plan sponsors are concerned that the availability of educational services will be limited or become more costly. That is, if materials and activities that currently are treated as education instead are characterized as investment advice, providers may cease offering these services or may impose advisory-level fees, making the information unattainable for many employees. As the submitted comments and testimony from other stakeholders amply indicate, the concern is shared by many.

For the reasons set forth in our previous comments, the PSCA continues to believe that the DOL should preserve IB 96-1 in its entirety. However, to the extent the DOL is unwilling to do so, the PSCA believes that there are other ways to permit the identification of specific investment options without risking the abuses cited by the DOL. Proposals that are based on neutral, informative descriptions of the participant's options should be permissible. In that regard, the focus should be on the factually comparative nature of the information and whether it is being provided in a manner that does not rise to the level of a recommendation. While not meant to be an exclusive list, the PSCA wants to highlight the following proposed alternatives in this regard:

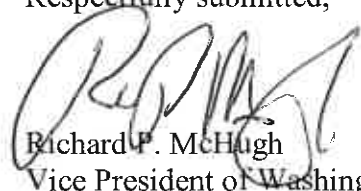
1. permit the identification of specific investment options when the education is paid for on a fixed and unconflicted basis;
2. permit the identification of specific investment options when the education is provided by an independent third-party;
3. permit the identification of specific investment options when the education discloses each available plan option in a given asset class; and/or
4. permit plans to continue relying on paragraphs (d)(3)(iii) and (4)(iv) of IB 96-1, but do not extend this ability to IRAs (based on the fact that the marketplace for employee benefit plans is considerably different from the marketplace for IRAs since while IRA owners have access to an unlimited universe of investments, plan participants and beneficiaries must select investments from a lineup selected by prudent plan fiduciaries).

Other stakeholders have made similar suggestions in their comments and/or testimony. The PSCA continues to believe that each of these alternative solutions address the concerns raised by

the DOL and still permit plan sponsors to continue (albeit potentially at a greater cost) to be confident in the value and effectiveness of the education provided -- which is a goal we all share. The PSCA would welcome the opportunity to work with the DOL as it considers these and other alternatives.

In summary, the PSCA recognizes and applauds the DOL's efforts to maximize fiduciary protection for plan sponsors, participants, beneficiaries and IRA owners while preserving flexibility within plans. We appreciate that the DOL has attempted to maximize this protection while mindful of the need to preserve and even encourage a vibrant investment education program. As in years past, PSCA wishes to be a resource to the DOL as this evaluation process moves forward to the issuance of a final rule. We appreciate the opportunity to comment and look forward to working with the DOL to achieve these goals.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Richard P. McHugh', is written over a circular stamp or watermark.

Richard P. McHugh
Vice President of Washington Affairs

Exhibit A

As we have noted, the PSCA is concerned that without clarification almost any information provided to a participant can be interpreted as an investment recommendation under the Proposed Rule. This concern seems particularly relevant in the context of IRA rollovers, when we believe dissemination of basic information (e.g., plan distribution options, taxation considerations and other related implications of a distribution and/or rollover) should not be treated as an investment recommendation for this purpose. The PSCA believes that the final rule should be clarified to make clear that the provision of the following forms of information would not be treated as providing investment advice:

1. Information about a plan's distribution options;
2. Taxation considerations;
3. Other practical implications of a plan distribution or rollover;
4. Practical implications of leaving account balances in a plan post-employment (e.g., fee and expense implications and any limitations of access to account balances);
5. Basic information regarding the ability to create a rollover IRA or to consider a plan-to-plan transfer to a plan sponsored by a successor employer;
6. General financial information related to estimating future retirement income needs and how those considerations are affected by plan distribution options; and
7. General information related to the purchase of an annuity product, whether within the plan or outside.