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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210
Attn: Definition of Fiduciary - RIN 1210-AC02

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210
Attn: Application No. D-12057

Re: RIN 1210-AC02 (Definition of Fiduciary) and Application No. D-12057 (Proposed Amendment to PTE 2020-02)

Ladies and Gentlemen:

Osaic, Inc. ("**Osaic**") appreciates this opportunity to provide comments to the U.S. Department of Labor ("Department") pursuant to its review of the Department's proposed amendments to its "investment advice fiduciary" regulation and Prohibited Transaction Exemption 2020-02 (collectively, the "**Proposed Fiduciary Rule**").

Osaic (formerly known as Advisor Group) is one of the nation's largest providers of wealth management services supporting over 10,500 financial professionals as well as servicing over $500 billion in client assets. Moreover, our clients are based throughout every region of the country, representing virtually every demographic amongst the general population. Due to our firm's expansive reach and experience with retirement investors, we believe we are well-positioned to offer comments on the Proposed Fiduciary Rule, including the concerns we have relating to the challenges and obstacles that substantially all retirement investors will face if the Proposed Fiduciary Rule is adopted in its present form. We respectfully hope that our comments and insights will be instructive in demonstrating why a withdrawal of the Proposed Fiduciary Rule would be in best the interest of retirement investors.

<u>Overview</u>

We support the Department's policy goal of ensuring that retirement investors benefit from the services of "trusted advice providers". However, we are unable to support the Proposed Fiduciary

Securities and investment advisory services are offered through the firms: Osaic Wealth, Inc., Triad Advisors, LLC, Osaic Institutions, Inc., and Woodbury Financial Services, Inc., broker-dealers, registered investment advisers, and members of FINRA and SIPC. Securities are offered through Securities America, Inc., American Portfolios Financial Services, Inc., and Ladenburg Thalmann & Co., broker-dealers and member of FINRA and SIPC. Advisory services are offered through Arbor Point Advisors, LLC, American Portfolios Advisors, Inc., Ladenburg Thalmann Asset Management, Inc., Securities America Advisors, Inc., and Triad Hybrid Solutions, LLC, registered investment advisers. Advisory programs offered by Osaic Wealth, Inc., Securities America Advisors, Inc., Triad Advisors, LLC., and Woodbury Financial Services, Inc., are sponsored by VISION2020 Wealth Management Corp., an affiliated registered investment adviser.

Rule due to its incongruency with federal regulations already in effect and governing the provision of services to retirement investors and its potential to limit access to services made available to retirement investors. As further discussed below, this proposed rulemaking is inconsistent with the existing regulatory environment created by the adoption of Regulation Best Interest[1] ("**Reg BI**") by the U.S. Securities Exchange Commission (the "**SEC**"), including its related interpretation[2] regarding the standard of conduct for investment advisers as well as its accompanying rules requiring broker-dealers and investment advisers to provide relationship summaries on Form CRS to retail investors. Reg BI became effective on June 30, 2020, and covered firms have already made substantial investments in their processes and compliance programs to implement the regulatory safeguards that are required under these rules for retail investors, including those who are also retirement investors. Because of the conflicts between the Proposed Fiduciary Rule and Reg BI, our firms would be unable to devise a reasonable system of supervision and compliance that could effectively allow it to comply with both regulations.

We understand that the Department intends for the Proposed Fiduciary Rule to be more narrowly tailored than the Department's previous 2016 fiduciary rule (the "**2016 Final Rule**"), which was ultimately vacated by the U.S. Court of Appeals for the Fifth Circuit in 2018. However, we are deeply concerned that the Proposed Fiduciary Rule remains overly broad and, as presently constituted, will create a "chilling effect" that negatively impacts individuals and families and their access to the guidance, products, and services that they depend on to support their future income and financial security needs. Further, the apparent expansive reach of the Proposed Fiduciary Rule would inhibit our firm's ability to devise an adequate system of supervision and compliance that could adequately guide a financial professional as to whether or not he or she is a fiduciary and if so, what conduct could be undertaken with a current or prospective retirement investor.

Finally, the abbreviated comment period, along with the unprecedented holding of public hearings by the Department during this comment period, has deprived us of the time necessary to study the full impact of the Proposed Fiduciary Rule. Therefore, our comments must necessarily be general in nature as we are unable to determine all the consequences of this sweeping regulation, including determining the costs of implementation of supervisory and compliance systems, and expect that the Department will be wholly uninformed of such potential consequences due to its denial of an expansion of the comment period.

The Proposed Fiduciary Rule is Inconsistent with Reg BI

Reg BI established an elevated "best interest" standard of conduct for broker-dealers and their associated persons and fundamentally advanced the protections in place for transactional retail investors, including those who are retirement savers. It also formalizes a standard for the recommendation of the type of an investment account that previously was not specifically included in industry regulation. It supplements the fiduciary standard of conduct registered investment advisers are already subject to under the Investment Advisers Act of 1940. Reg BI generally applies whenever transactional (as opposed to ongoing advisory) investment recommendations are made to retail customers, but also governs recommendations as to the type of account (e.g., to open an IRA or other brokerage account, or an advisory account), as well as recommendations to roll over or transfer assets from one type of account to another. This best interest obligation is comprised of separate disclosure, care, and conflicts-related obligations. The disclosure obligation was formalized by a requirement that both broker-dealers and investment advisers

[1] Exchange Act Release No 86031, 84 FR 33318 (June 5, 2019).
[2] Investment Advisers Act Release No. 5248, 84 FR 33669 (June 5, 2019).

provide relationship summaries on Form CRS to retail investors. Form CRS was intended to, and in our estimation accomplishes the goal of, distinguishing the duties and obligations of, the compensation arrangements related to, and conflicts arising from, a firm's status as a broker-dealer and/or investment adviser. Form CRS is a prescribed form that allows prospective clients to easily compare the services offered by different firms. Under Reg BI, the disclosure of conflicts alone will not satisfy a firm's obligation to act in the retail investor's best interest. Among other requirements, a covered firm must maintain policies and procedures reasonably designed to identify and mitigate any conflicts associated with recommendations that create an incentive for its associated persons to place their interests ahead of the retail investor's interest. Importantly, Reg BI was thoughtfully designed to ensure that clients retained the ability to choose the type of services they desired and not result in the demise of transaction services, which the SEC and the industry agreed were appropriately preserved. Reg BI was the product of years of study by the SEC and significant comment and participation by regulated firms as well as other interested parties such as consumer groups, and broker-dealers and investment advisers have made significant changes and enhancements to their policies, procedures and compliance programs to implement the required safeguards for clients.

The Department's Proposed Fiduciary Rule, if adopted, would subject the covered firms and their associated persons to a separate set of complex and costly regulatory requirements that, in many cases, would be inconsistent with the robust and significant requirements they are already subject to under Reg BI. Reg BI and the Proposed Fiduciary Rule employ fundamentally different regulatory approaches. For example, while Reg BI requires covered firms to adopt and maintain appropriate policies and procedures reasonably designed to comply with the rule, the Proposed Fiduciary Rule goes well beyond this requirement, further mandating that firms conduct retrospective compliance reviews, obtain certifications from senior management, detect violations, and report such violations to the Department. To the extent that the Proposed Fiduciary Rule effectively requires compliance with laws that the Department does not directly enforce but would provide grounds for the Department to initiate actions against such persons, it also appears that the Department intends to become the primary functional regulator of firms and financial professionals to the extent their clients are retirement investors. Such a result creates regulatory and jurisdictional conflicts.

The purview of the Proposed Fiduciary Rule is technically limited to retirement investors only (e.g., plan and IRA clients), but since retail investors generally own one or more retirement accounts in addition to their other investment accounts, the Proposed Fiduciary Rule would, in operation, impact virtually all retail investors. When broker-dealers and investment advisers make recommendations to any given retail client, in theory, they would need to comply with (i) Reg BI when making recommendations with respect to the client's non-retirement accounts, and (ii) both Reg BI and the Proposed Fiduciary Rule when making recommendations to the same client's retirement accounts. Requiring firms to comply with two fundamentally different and conflicting sets of regulatory requirements when providing substantially similar services on behalf of the retirement and non-retirement accounts of the same retail client would be unduly burdensome as well as confusing for both investors and firms alike.

The Department has commented publicly that the Proposed Fiduciary Rule is largely intended to address the same types of retail conflicts that are addressed by Reg BI (i.e., conflicts that arise when covered firms and their associated persons make investment recommendations to retail investors). Considering, however, that firms are already operating under compliance programs designed to address such conflicts in accordance with the requirements of Reg BI and have been since 2020, there would be little benefit to requiring firms to incur additional costs under the

Proposed Fiduciary Rule in order to address the same conflicts. Therefore, we must assume that the Department intends for the Proposed Fiduciary Rule to impose different standards to the same conduct, and by default, that logically must result in conflicting regulatory regimes.

As further discussed below, it would be costly for firms to establish new compliance programs designed to meet the requirements of the Proposed Fiduciary Rule. Consequently, if firms expend the resources required to make these changes, the added costs will be passed on to their retirement clients. Alternatively, to avoid such added costs, firms will instead restrict the services and product offerings made available to retirement investors. Such restrictions would inevitably impair the access that individuals and families would have to the kinds of investment guidance, products and services that are necessary to save for retirement. Depriving individuals and families of professional financial advice seems contrary to the Department's mandate to protect retirement investors and ensure their access to advice that the Department has declared as necessary given the shift to defined contribution plans.

Fiduciary Status Should Only Arise in Client Relationships of "Trust and Confidence"

The 2016 Final Rule was invalidated and vacated *in toto* by the Fifth Circuit pursuant to its decision in Chamber of Commerce v. Department of Labor, 885 F.3d 360 (5th Cir. 2018). One of the key legal grounds for this decision was that the "fiduciary "definition under ERISA arises out of trust common law, and that fiduciary status "turns on the existence of a relationship of trust and confidence." However, the Proposed Fiduciary Rule is inconsistent with this reasoning because it would confer fiduciary status expansively on providers of investment recommendations even when there are no "trust and confidence" relationships. For example, if a broker-dealer were marketing its services to a prospective client, proposing a particular investment strategy as part of the marketing materials or sales presentation, the broker-dealer could be viewed as a fiduciary under the Proposed Fiduciary Rule even if the parties have never met before (i.e., have no pre-existing "trust and confidence" relationship). Moreover, unlike the 2016 Final Rule, there is no exclusion from the fiduciary advice definition for "hire me" recommendations or other marketing activity where there is no undertaking or reasonable expectation to provide impartial advice.

We noted above that substantially all retail investors hold retirement accounts, making virtually all providers of investment recommendations to retail investors subject to the Proposed Fiduciary Rule. By broadening the fiduciary "investment advice" definition to potentially include one-time recommendations as well as any sales discussions that include investment proposals, the Proposed Fiduciary Rule would make the Department a functional regulator of the core activities of broker-dealers and investment advisers, regulating their interactions with substantially all retail clients, current and prospective. This would cause irreconcilable conflict in the regulation of these firms and their financial professionals.

As highlighted in the Fifth Circuit opinion, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "**Dodd-Frank Act**") empowered the SEC to promulgate enhanced, uniform standards of conduct for broker-dealers and investment advisers in their dealings with retail customers. However, just as the 2016 Final Rule was held by the court to be in contravention of the Dodd-Frank Act, the Proposed Fiduciary Rule also conflicts with this federal statute. As noted in the Fifth Circuit opinion, the Department does not have the "statutory warrant" to broadly regulate broker-dealer activity, which is already overseen by the SEC as the primary regulator of such activity.

Proposed Amendments to PTE 2020-02 Would Have a "Chilling Effect" on Offerings for Retirement Investors

The Department is proposing extensive amendments to PTE 2020-02, which introduces unsettled regulatory standards that are not clearly defined as to how they would be applied. Together with the likely private right of action created by the declarations under PTE 2020-02 (discussed below), these unclear regulatory standards would invite meritless litigation claims that such standards were not followed in some way and that the exemptive relief under PTE 2020-02 was therefore unavailable. This creates uncertainty for firms seeking to comply with the proposed standards in good faith. To minimize their risk exposure to such claims, firms will be less willing to service retirement accounts. In this regard, the proposed amendments to PTE 2020-02 would likely have a "chilling effect" on firms and their offering of guidance, products, and services to retirement investors.

For example, a proposed revision to the "Impartial Conduct Standards" under Section II(a)(3) of PTE 2020-02 expands the prohibition against materially misleading statements so that it also covers (i) oral statements and (ii) omissions of information. Given the dynamic nature of oral conversations, nearly any oral conversation between a financial professional and a client, especially when viewed in isolation, could be susceptible to claims that material information was somehow omitted. As a result, parties would no longer be able to fully rely on written contracts or disclosures[3] as a means for coming to a definitive agreement on a firm's role and investment responsibilities when servicing a client's retirement account. This approach is fundamentally inconsistent with federal securities laws such as Section 205 and Rule 204 of the Investment Advisers Act of 1940 which mandate a written contract and disclosure to clients defining the conditions of the relationship and information that must be provided to prospects or clients.

Additionally, the proposed revisions to the firm's disclosure obligation under Section II(b) of PTE 2020-02 would require written statements of (i) the "best interest" standard of care and (ii) the retirement investor's right to obtain specific information regarding the applicable costs and compensation, which must be materially accurate in scope and magnitude. Along with the proposed requirement that a firm definitively acknowledge its fiduciary status, a written document including language that the firm is undertaking to provide investment recommendations in accordance with the best interest standard would undoubtedly be used by plaintiffs' attorneys as evidence that private rights of action on behalf of retail clients could be pursued under applicable state law.[4]

The required level of specificity for the related disclosure of cost and compensation is also unclear under PTE 2020-02. The relevant standard for this cost and compensation disclosure obligation under PTE 2020-02 differs from the Department's 408(b)(2) fee disclosure regulations,[5] creating further uncertainty as to whether firms will now be required to provide greater levels of fee

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[3] It is unclear how this policy shift would apply to the Proposed Fiduciary Rule's own disclosure requirements and whether a written disclosure that meets the requirements of PTE 2020-02 would be rendered moot by a random and unscripted oral conversation.

[4] In vacating the 2016 Final Rule, the Fifth Circuit concluded that "[o]nly Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates [. . .] In ERISA, Congress authorized private rights of action for participants and beneficiaries of employer sponsored plans, [. . .] but it did not so privilege IRA owners under Title II. DOL may not create vehicles for private lawsuits indirectly through BICE contract provisions where it could not do so directly."

[5] 29 CFR Section 2550.408b-2.

disclosures than that contemplated under 408(b)(2). It is also unclear if transaction-specific dollar estimates that reflect all compensation elements (such as third-party payments) would be required under the Proposed Fiduciary Rule. If transaction-specific estimates are so required, we would note that it is not currently administratively practicable for firms to provide such dollar estimates in "real time" to retail clients. In contrast, Reg BI strikes a balance that requires disclosures of compensation and conflicts but is not so impractical that it effectively preempts the provision of transactional services, which could eliminate access to financial services for smaller investors.

To further illustrate our concerns, we note that Section II(d) of PTE 2020-02 would be revised under the Proposed Fiduciary Rule to require firms to update their policies and procedures to ensure they remain "effective" and "compliant" in addition to being prudently designed. Because these terms are undefined, this new standard (i.e., effective and compliant) creates unwarranted uncertainty for firms. The revised Section II(d) also requires a "Senior Executive Officer" of the firm to certify that Form 5330 excise tax returns have been filed with the Internal Revenue Service (the "**IRS**") for non-exempt prohibited transactions that are discovered in connection with the firm's required annual retrospective review. However, it would be an unprecedented practice for a Department class exemption to require a firm to report transactions that are not covered by such exemption to the IRS. The penalty for failing to report a prohibited transaction to the IRS should be governed by the relevant tax penalties under the Internal Revenue Code, as opposed to restricting a firm's ability to rely on PTE 2020-02 prospectively.

We would also like to comment on the proposed amendment to Section III(c)(2) of PTE 2020-02, which generally provides firms with a right to a hearing in the event that the Department issues a written warning alleging impermissible conduct in violation of the PTE's conditions. As stated in the Department's preamble to the Proposed Fiduciary Rule, a written ineligibility notice will then be issued after such hearing, if the Department determines "solely on its discretion" that a violation has occurred. The lack of procedural protections (i.e., due process) for firms is problematic in that it leaves them without any judicial recourse, if a determination is made by the Department prematurely or in an unreasonable manner. We concur with the comments made by the Securities Industry and Financial Markets Association on this topic and add that the uncertainty created by such a process, which is wholly subject to the discretion of the Department, would further the "chilling effect" that would adversely affect the availability of advice to retirement investors.

Finally, as noted in its preamble to the amendment proposal for PTE 2020-02, the Department is seeking comment on whether firms should be required to provide web disclosures to retirement investors and the investing public. The Department "contemplates" that such web disclosures would list all product manufacturers, disclose all third-party payment arrangements, and include either dollar values or reasonable ranges of value. It appears that the contemplated web disclosures are similar to the web disclosures that were required under the "BIC Exemption," which was issued in connection with the 2016 Final Rule (and which was similarly invalidated). We cannot support such a web disclosure requirement due to the disproportionate burden and costs that such requirements would impose on broker-dealers and investment advisers and the resulting conflict between regulatory regimes that would result. Retirement investors already receive numerous regulatory disclosures, including Form CRS, those required under the Advisers Act, and the existing disclosures required under PTE 2020-02 (in addition to 408(b)(2) fee disclosures in the case of ERISA plan clients). Web disclosures would either be new and conflicting requirements for firms that already are subject to disclosure requirements under applicable law, or if deemed by the Department to be merely duplicative, then such a requirement would impose unnecessary and unduly burdensome requirements to continuously maintain such a website for duplicative regulatory purposes. Such specific and detailed financial disclosures

may also raise anti-trust issues limiting the ability of firms to negotiate rates lower but inconsistent with those disclosed by other firms.

Inadequate Consideration of Proposed Fiduciary Rule's Adverse Impact

Based on our review of the regulatory impact analysis ("**Impact Analysis**") for the Proposed Fiduciary Rule, including certain cost assumptions that were made in connection with such analysis, we believe that the Department failed to adequately consider the adverse impact that the Proposed Fiduciary Rule would have on retirement investors. Given the brevity of the comment period for the Proposed Fiduciary Rule, we are also concerned that stakeholders have not been given sufficient time to supply the Department with all relevant information for its consideration. This comment period is scheduled to close on January 2, 2023, giving stakeholders only 39 business days to file their comments with the Department during a period that includes multiple federal holidays.

Although the Impact Analysis for the Proposed Fiduciary Rule asserts that there is an economic need for the Proposed Fiduciary Rule, this analysis fails to fully consider the protections that are presently available to retail investors under Reg BI. Covered firms have already made substantial investments in their compliance programs to implement the regulatory safeguards that are required under Reg BI. The Proposed Fiduciary Rule's Impact Analysis inappropriately relies heavily on studies that predate the implementation of Reg BI in 2020 and therefore call into question any conclusion that they support a need for Department rulemaking. For example, the vast majority of the studies that are referenced in the "Inexpert Customers" section of the preamble to the proposed fiduciary regulation are studies that were published prior to 2020, such as the following: (i) an October 2014 study from the Journal of Pension Economics and Finance, (ii) a 2019 study from the Journal of Political Economy, (iii) a June 2019 study from the Journal of Finance, (iv) multiple studies cited in connection with the 2016 Final Rule, (v) a FINRA 2018 study, (vi) a March 2005 study commissioned by the SEC, (vii) an October 2008 survey by the RAND Institute for Civil Justice, (viii) a 2017 survey by Pew Charitable Trusts, (ix) a 2014 study from an Australian School of Business Research Paper, and (x) a 2015 study by the Council of Economic Advisors.[6]

The Impact Analysis also makes numerous cost assumptions that substantially underestimate the time and resources that would be required of firms to comply with the Proposed Fiduciary Rule. For example, with respect to a retirement investor's right to obtain written descriptions of policies and procedures as well as specific information regarding the applicable costs and compensation under PTE 2020-02, the Impact Analysis assumes that firms would receive 10 such requests annually (on average) and that most firms already have such information available. It further assumes that it would take a clerical worker five minutes to distribute such materials, and that 5.8% of these materials would be mailed (requiring postage and printing costs).

However, our estimated costs significantly exceed the Department's estimates. Our firms have disclosed to clients that we opted-in to the conditions of PTE 2020-02. Even with current compliance with those conditions, cost estimates to implement the new requirements (such as software and systems updates and mailings costs) range between $2 to $5 million. We also estimate it could require between 1,000 to 2,000 full-time employee ("**FTE**") hours to implement the new requirements and at least an additional 500 or more FTE hours annually to conduct website/disclosure updates, retrospective reviews and additional ongoing compliance and

[6] See footnotes 177 through 195 of the preamble to the proposed fiduciary regulation, RIN 1210-AC02.

supervision requirements if the Proposed Fiduciary Rule were to be implemented in its current form. Given the limited opportunity to consider this Proposed Fiduciary Rule, we have not been able to conduct any detailed analysis that could more definitively measure the financial impact of this rulemaking.

If firms like ours were to incur similar costs to implement the Proposed Fiduciary Rule, the added costs would ultimately need to be passed on to retirement clients. Alternatively, these firms could seek to avoid these added costs by restricting the way their financial professionals engage with retirement investors, impairing such investors' access to investment guidance, products, and services.

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In its current form, the Proposed Fiduciary Rule would, in effect, limit the investment information, services, and products available to retirement investors, create disruption in the financial services industry in a manner that would likely harm retirement investors, and increase the risk of litigation. As a result, we strongly encourage the Department to withdraw its Proposed Fiduciary Rule.

We thank you for your attention to this matter and invite you to reach out to the undersigned if you have any questions or comments regarding this letter.

Best regards.

On behalf of Osaic, Inc.

Nina McKenna
Chief Legal Officer and General Counsel