January 2, 2024

Submitted Electronically

The Honorable Lisa Gomez
Assistant Secretary
Employee Benefits Security Administration
U.S Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Re: RIN 1210–AC02 – Retirement Security Rule: Definition of an Investment Advice Fiduciary

Dear Assistant Secretary Gomez:

On behalf of a group of firm clients, Groom Law Group appreciates the opportunity to comment on the Department of Labor's (the "Department's") proposed revisions to its regulation interpreting the definition of an investment advice fiduciary under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the parallel regulation under section 4975 of the Internal Revenue Code (the "Proposal"). Our clients provide a range of products and services to ERISA plans, including products and services related to investment management, recordkeeping and pension risk transfers.

In each of these areas, our clients have significant concerns with the Proposal. As a result, we urge the Department to withdraw the Proposal and reconsider whether a regulatory amendment is necessary or wise in light of the potential negative consequences to plans of adopting such a sweeping change to the existing regulation, which has been in place for almost 50 years. To the extent the Department finalizes the Proposal, this letter discusses our clients' concerns and offers suggestions for improving the Proposal.

I. "Hire me" and Wholesaling Conversations Should not Trigger Fiduciary Status

Fund managers play an essential role in supporting ERISA fiduciaries with responsibility for reviewing, selecting, and monitoring plan investment options. Fund managers also serve as vital source of support to the intermediary community by providing information on what products to make available. DOL should provide a path for fund managers to continue to serve as a resource in "hire me" conversations and when wholesaling without creating a risk that the fund manager will become an advice fiduciary.

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a. "Hire Me" Conversations

Fund managers of all kinds – from managers of plan asset vehicles to managers of non-plan asset vehicles (*e.g.*, mutual funds) communicate with fiduciary counterparties and intermediaries of all kinds on a daily basis. These counterparties and intermediaries may include plan sponsors, consultants, registered investment advisers, other asset managers, managed account providers, recordkeepers, trust companies, and other service providers.

During these conversations, fund managers can play many roles. For example, in some cases, a fund manager may be presenting directly to a fiduciary committee of a plan and in other cases an asset manager may be "in the room" at another entity's request (*e.g.*, a target-date fund sponsor wants to have a mutual fund manager on hand to answer questions about a strategy that the target-date fund incorporates). Fund managers are frequently asked in these settings to describe their products, explain how they can be used, and to agree or disagree with the financial professional who believes that the product containing the building block can be an appropriate plan investment option. Intermediaries also commonly ask asset managers to respond to or assist with requests for proposals ("RFPs") or to participate in interviews as part of request for proposal processes.

Despite general statements in the preamble to the Proposal that indicate these activities should not be fiduciary in nature, the text of the Proposal does not make it clear that these fund manager activities would remain non-fiduciary. In fact, the language of the preamble that "when a recommendation to 'hire me' effectively includes a recommendation on how to invest or manage plan or IRA assets . . . that recommendation would need to be evaluated separately"[1] introduces further ambiguity.

Looking at the text of the Proposal, it could be asserted that these conversations trigger fiduciary status. Because of this potential, each communication by a fund manager would require a "facts and circumstances" assessment. Even with such an assessment, the text of the Proposal, as currently written, will lead to unnecessary litigation risk exposure with related potential for additional costs, including the costs associated with. Because of these risks, retirement plans will be harmed because fewer managers will be willing to serve as resources to plan fiduciaries with responsibility for evaluating the managers' respective funds. As a downstream effect, this outcome would be particularly harmful to participants and beneficiaries who are saving for retirement in plans because plan fiduciaries will be in a worse position to provide education and information about the funds that the fiduciaries make available.

The Proposal's ambiguity could also be counterproductive to the extent that the Department believes that participants are better served by having their retirement savings in a retirement plan as opposed to in a brokerage account outside of a plan. Less certainty for fund

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[1] 88 Fed. Reg. 75890, 75906 (Nov. 3, 2023).

managers about their non-fiduciary status and less interaction between asset managers and retirement system intermediaries will ultimately lead to less innovation in the 401(k) marketplace and fewer innovative solutions, such as lifetime income solutions specifically endorsed by Congress in the two SECURE acts, due to costs and risks. This would contribute to the trend of participants rolling out of their 401(k) plan to get access to funds and products that are currently unavailable through their plan.

Importantly, for managers with only one fund, the Department's articulation of a "hire me" style concept in the Proposal could prove unworkable. We understand that the Department is concerned that unsophisticated entities may not recognize the distinction between some "hire me" conversations and bona fide investment advice. However, clarification is needed where there are financial intermediaries and where plan fiduciaries are already represented by fiduciaries who are themselves responsible for providing advice to the plan. Without clarification from the Department, fund managers' day-to-day conversations with various intermediaries or investing plan fiduciaries may trigger fiduciary status – unbeknownst to and unintended by either party.

Further, the inclusion of favorable mentions of potential investment menus or investment managers would appear to trigger fiduciary status[2] under the Proposal and therefore, force small managers to make the decision between facing extreme costs far outstripping that contained in the Proposal's regulatory impact analysis to implement compliance with an exemption or leave the ERISA plan marketplace. As this challenge would inhibit the functioning of the retirement marketplace and reverse years of bipartisan progress that has encouraged small businesses to enter and compete in the retirement system, this outcome cannot be the Department's aim. We encourage the Department to make the broad scope of the "hire me" exception to fiduciary status for fund managers clear in any final regulation, including by specifically including the examples contained in section I(c) of this letter.

b. Wholesaling

A related area where the Proposal should be clarified and revised relates to "wholesaling." The preamble provides "[i]n the context of 'wholesaling' activity, which involves communications by product manufacturers or other financial service providers to financial intermediaries who then directly advise plans, participants, beneficiaries, and IRA owners and beneficiaries, the Department believes that communications to financial intermediaries would typically fall outside the scope of the proposed paragraph (c)(1)(ii) because they would not involve recommendations based on the particular needs or individual

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[2] We further urge the Department to recognize that the Fifth Circuit held that selling activity is distinguishable from fiduciary advice. *See Chamber of Com. of United States of Am. v. United States Dep't of Lab.*, 885 F.3d 360 (5th Cir. 2018), *judgment entered sub nom. Chamber of Com. of Am. v. United States Dep't of Lab.*, No. 17-10238 (5th Cir. June 21, 2018).

circumstances of the plan or IRA serviced by the intermediary."[3] While this language appears intended to define an outer limit on the "contagiousness" of fiduciary status, the phrase "would typically fall outside the scope" of triggering fiduciary status is vague and in need of clarification and refinement. This vagueness is likely to limit the appetite of asset managers to provide their necessary support to intermediaries and plan fiduciaries. This also is likely to further stifle the market.

PTE 2020-02 would not provide a workable path for fund managers to mitigate the risk of becoming an advice fiduciary. Fund managers receive fees for managing their fund. They do not consider other funds, many do not have information on specific participants and beneficiaries, and, with some funds, ERISA fiduciaries and the manager subsequently negotiate a side letter. In short, these interactions are not the transactions the Department appears to have concerns about; and these are not relationships where the Department's "solution" (PTE 2020-02) would work.

c. Examples for Inclusion in Final Regulations

Examples of asset manager non-fiduciary status in any final regulations should include the following:

Example #1: A an employee of a fund manager (M) is on an email chain with consultant (C) and plan fiduciary (P) of an employer defined contribution plan (Plan). C is a fiduciary investment advisor to P that makes non-discretionary recommendations to P for the Plan. C asks M for an overview of the different funds that M offers to defined contribution plans and for an overview of how those funds would be expected to perform under various market conditions. M responds to C's email answering C's questions and adds that it would be great to work with P and the Plan.

Example #2: M emails C to ask how M can get on C's core investment list. C emails a list of questions to M and M responds to those questions. The questions include questions asking M to describe the investment funds M would like on C's core investment list and describing plan types for which M believes each investment fund would be most beneficial.

Example #3: C emails M to ask M to respond to a request for information issued by P to three managers offering growth funds as part of its evaluation of whether to replace the current growth fund in the Plan. C emails a list of questions to M and M responds to those questions. The questions include questions describing the product and describing why M's fund would be appropriate for the Plan.

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[3] 88 Fed. Reg. at 75907.

Example #4: M is speaking at a conference attended by C. After M finishes speaking, C goes up to M and describes the investment needs of one of its plan clients and suggests that M's funds would be a good addition to P's plan. M verbally agrees that its fund could be a good fit for P.

Example #5: M's funds team manages a fund that the Plan invests in. M's fund has underperformed for three review periods and has been flagged for regular review by C at future regularly scheduled meetings with P and other plan fiduciary clients. C asks M what steps M is taking to avoid continued underperformance and whether C should recommend that the plans it advises, including the Plan, should keep M's fund in their lineup. M responds by explaining the benefits of keeping M's fund in plans generally and specifically with respect to the Plan.

Example #6: C asks M to attend a meeting with P where P will be making a decision about whether to add one or more new funds to the Plan's lineup. C, in its role as a fiduciary, is recommending adding M's fund to the Plan's lineup but wants M to be available to answer questions. During the meeting P provides information about the Plan and M responds to questions, including questions about:

(a) Current market conditions;
(b) Appropriate benchmarks for M's fund;
(c) If the fund should be added;
(d) Why M's fund is better than another manager's fund; and
(e) An illustration of how outcomes for similar plans would have been improved by the inclusion of M's fund.

Example #7: C asks M to attend a meeting with P where P will be making a decision about whether to add one or more new funds to the Plan's lineup. C, in its role as a fiduciary, is recommending adding M's fund to the Plan's lineup but wants M to be available to answer questions. Because M has attended a number of these meetings, M sends advance materials to C and P describing topics that frequently come up. The advance materials include:

(a) Current market conditions;
(b) Appropriate benchmarks for M's fund;
(c) If the fund should be added;
(d) Why M's fund is better than another manager's fund; and
(e) An illustration of how outcomes for similar plans could have been improved by the inclusion of M's fund.

Example #8: M is speaking with a discretionary allocator (A) about the role that M's fund could play as a sleeve inside of A's target date fund. A asks a series of questions to M and M responds to those questions by describing M's fund and explaining why M's fund would be appropriate for A's target date fund.

Example #9: M is speaking with a discretionary allocator (A) about the role that M's fund could play as a sleeve inside of A's target date fund. M says to A that, based on M's specific analysis of A's target date fund, M's fund should replace one of A's target-date fund's underlying funds.

Example #10: M is speaking with a discretionary allocator (A) about M's views on the appropriate amount that A should allocate to the fund managed by M inside of A's target date fund. M states to A that, based on M's specific analysis of A's target date fund, A should allocate between 10% and 20% of the target date fund to M's fund.

(a) A's target date fund already allocates to M's fund; or
(b) A's target date fund does not invest in M's fund at the time of the conversation.

Example #11: M is speaking with a discretionary allocator (A) about the role that M's fund could play as an underlying component to A's managed account offering. A asks a series of questions and M responds to those questions by describing M's fund and describing why M's fund would be appropriate for A's managed account offering.

Example #12: M meets with the fiduciary committee (F) of a large defined benefit plan (DB P). At the meeting, M recommends that, based on M's analysis of the particular needs of the plan, F should allocate a portion of the DB P to M's fund. M indicates that in managing M's fund M functions as a fiduciary and acts in the best interests of the fund's limited partners. M includes in its presentation and at the end of the slides that it uses to present that investors should not rely on its presentation as the basis for investment decisions and that they should conduct their own diligence. F invests in M's fund:

(a) Shortly following the presentation and completes the fund subscription agreement without counsel input;
(b) After working with counsel to complete the subscription materials; or
(c) After asking a series of diligence questions and completing the subscription materials.

II. The Definition of a "Retirement Investor" Should not Include Individuals and Entities that are Sophisticated and/or Intermediaries.

As written, the Proposal defines a "retirement investor" as a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary, or IRA fiduciary. This definition is overly broad. The Department should narrow the definition of "plan fiduciary" to mean the "named fiduciary" of a plan. The Department should also presume that certain conversations with "retirement investors" are non-fiduciary. Specifically, the Department should acknowledge that a fiduciary investment advice relationship does not arise where the retirement investor is

itself a financial institution or where a plan fiduciary manages a plan or plans that in the aggregate have more total assets than the threshold to qualify as a "qualified institutional buyer" (currently $100 million). That is, the Department should state that a non-fiduciary buy/sale transaction rather than an investment advice transaction characterizes interactions between sophisticated parties.

The Proposal indicates that the Department is "unaware . . . of compelling evidence that wealth and income are strong proxies for financial sophistication or inconsistent with a relationship of trust and confidence."[4] Securities regulators, however, have repeatedly concluded otherwise.

Notably, Securities and Exchange Commission (the "SEC") Regulation D provides that accredited investors are individuals or entities that meet certain minimum sophistication, qualification, and wealth requirements.[5] For example, 17 C.F.R. § 230.501(a)(5) and (6) provide that an individual with a particular net worth or income, respectively, is an accredited investor. Additionally, Congress explicitly recognized (and authorized the SEC to consider) that certain individuals, due to their "financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management," qualify as an accredited investor.[6] Furthermore, the definition of qualified purchasers[7] and qualified institutional buyers[8] turn on the amount of assets and securities that individuals or entities hold and/or invest. Finally, the Department recognizes that total assets is a useful proxy for financial sophistication in PTE 84-14 (the "QPAM Exemption") which requires that an asset manager be above a certain size. An entity's total investable assets is a commonly and effectively used metric for financial sophistication.

Based on this, the Department, consistent with its stated intent to align with other regulators, should follow the lead of the primary regulators of investment advisers and securities markets by adopting a presumption that a sophisticated buyer does not believe that it is receiving advice from a financial sales professional or fund intermediary.

III. Platform Providers and Pooled Employer Plans

Entities providing plan recordkeeping and other third-party administrative services, including to single-employer plans and to pooled employer plans established and maintained for

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[4] 88 Fed. Reg. 75890, 75907 (Nov. 3, 2023).

[5] 17 C.F.R. § 230.501(a).

[6] 15 U.S.C. § 77(b)(15)(ii).

[7] 15 U.S.C. § 80a-2(51)(A).

[8] 17 C.F.R. § 230.144A(a)(1).

the purpose of providing benefits to employees of two or more employers as authorized under the SECURE Act ("PEPs"), are extremely concerned by the absence of any provisions under the Proposal that would clearly distinguish between non-fiduciary communications relating to the sale of services and communications that could give rise to the provision of investment advice.

A related, equally significant concern relates to the risk that the participant-level call center support services that recordkeepers provide to assist plan participants who are engaged in a plan interaction could be viewed as giving rise to fiduciary investment advice under the Proposal.

Below, we provide further detail on the nature of these concerns, along with suggestions as to how the language of the Proposal might be modified in order to address those issues.

a. Sales of Plan Services

The market for the provision of recordkeeping services to Plans is highly competitive. Plans considering a change in their recordkeeping service vendor frequently do so under an RFP process under which several potential vendors are furnished with basic information about the Plan (*e.g.,* its current provider, investment line-up, and related administrative and investment expenses) and are asked to furnish a proposal, including pricing information, a proposed successor investment line-up, and the terms and conditions under which it could be available to assume the role of recordkeeping service provider to the Plan. Even if no formal RFP process is conducted by the Plan, its representatives typically seek to "shop the market" for available vendors who are asked to submit their thoughts as to how the Plan's situation might be improved and the particular services the vendor could provide.

Responses to RFP requests require careful balancing of the Plan's administrative servicing and investment needs and the vendor's need to arrive at an acceptable price for its services. Importantly, while the vendor is almost always asked to propose an investment line-up for the Plan's consideration, both parties are fully aware that the investment line-up proposal is being delivered within the context of an arms' length business negotiation under which each is engaged in an effort to arrive at a mutually acceptable set of terms and conditions to govern any potential future business relationship. The investment line-up proposals advanced by recordkeepers within such a framework seek to address the Plan's needs but may also be influenced by vendor pricing considerations, including the availability of revenue sharing from investments to offset recordkeeping and administrative expenses.

Recordkeepers are understandably concerned that the definition of "recommendation" appearing in section 3-21(f)(10) of the Proposal could be read to sweep in proposals of investment line-ups to Plan representatives occurring within the context of sales conversations as described above. The Department's accompanying preamble explanation indicates that where a recordkeeping services provider advances a proposal relating to its platform of investments, the

presence or absence of a covered recommendation that could give rise to fiduciary investment advice will turn on the degree to which a communication is "individually tailored" to the Plan's needs, and that providing a list of investments as having been selected for and appropriate for the Plan would give rise to a covered recommendation, subject to a limited allowance for investments identified using "objective third-party criteria (e.g., expense ratios, funds size or asset type identified by the Plan.")[9]

The problem is that investment line-up proposals advanced by a recordkeeper within the context of a sales conversation often reflect the recordkeeper's thoughts as to how an individually tailored line-up of proposed investment alternatives might be of interest to the Plan, while at the same time addressing recordkeeper revenue and other business needs. Because the other provisions of the Proposal generally assign fiduciary status to all who provide covered recommendations to Plans, the language of the Proposal will undoubtedly have a chilling effect on the ability of Plans to shop the market for competitive recordkeeping products and services. That result is unlikely to serve the needs of plan participants and beneficiaries as it will lead to diminished levels of vendor competition and make more difficult Plans' efforts to procure information from prospective vendors.

To address these concerns, we believe the language of section 3-21(f)(10) could be improved by adding an exclusion (bolded and underlined, below) as follows –

> (10) The phrase ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property'' means**,** **subject to the platform provider sales exclusion set forth in sub-paragraph (iv),** recommendations:
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> (i) As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;
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> (ii) As to the management of securities

[9] 88 Fed. Reg. 75890, 75907-75908.

or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and

(iii) As to rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution **provided that;**

(iv) Proposals of investment line-ups or menus by recordkeeping services investment platform providers, when made within the context of a request for proposal or other vendor selection process or where the platform provider's communications clearly indicate that the proposal is being advanced in connection with a negotiation for the terms of a potential future business relationship shall not give rise to a ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property''.

b. Sales of PEPs

Recordkeepers that provide services to PEPs may engage in marketing and sales efforts to promote PEP adoption by employers. Depending on an employer's circumstances, it may not have previously adopted a retirement plan covering its employees or may have previously adopted a single employer Plan which could be merged into a PEP. In either case, the

recordkeeper's PEP marketing efforts generally involve the delivery of detailed information to the employer about the PEP, the Pooled Plan Provider or "PPP" responsible as a named fiduciary for PEP administration (which may be the recordkeeper itself or an affiliate), the section 3(38) investment manager, if any, appointed by the PPP to manage the PEP's investment line-up and the current investment line-up for the PEP itself, among other things. Employers who are considering adopting a PEP will naturally inquire about the investment line-up and the PEP's process for selecting, monitoring, de-selecting and replacing the PEP's line-up of designated investment alternatives.

The preamble explanation accompanying the Proposal expresses the view that the same analysis applicable to whether a covered recommendation has been made by a platform provider to a single employer Plan – "whether the provider presents the investments on the platform as having been selected for and appropriate for the investor (i.e., the plan and its participants and beneficiaries)" is likely to apply in the case of PEP.[10] The preamble further explains that "when a PPP or another service provider interacts with an *employer* about investment options, whether they have made a recommendation under the proposal will turn, in part, on whether they present the investments as selected for, and appropriate for, the plan, its participants and beneficiaries."[11] In our view, this preamble explanation mistakenly assumes that when a PEP recordkeeper and/or a PPP are engaged in communications with an employer for purposes of soliciting interest in PEP adoption, the employer is functioning as a fiduciary rather than in its non-fiduciary, settlor capacity. Employers who have already sponsored a single-employer Plan, but are considering merging that Plan into a PEP are engaged in the settlor function of amending the terms of an existing Plan and replacing it with the terms of a newly adopted PEP. In the case of employers who have not previously sponsored a retirement plan, but who may be considering adopting a PEP to provide retirement plan coverage for their employees, communications between PEP service providers, including the recordkeeper and the employer, are similarly being conducted with an employer in its non-fiduciary, settlor capacity, since the act of adopting a plan is a well-recognized settlor function.

In this regard, courts and the Department have long recognized the distinction between activities undertaken by employers acting in their capacity as fiduciaries, and those activities undertaken on their own behalf as employers. This second category of activities is generally referred to under the term "settlor functions." The metaphor that employers may, depending on the circumstances, wear one of two hats (either a fiduciary hat or a settlor hat) was first popularized by the Second Circuit Court of Appeals in *Amato v. Western Union Intl., Inc.,* 773

[10] *Id.*

[11] *Id* (emphasis added).

F.2d 1402, 1416-17 (2d Cir. 1985) where the origin of the term was credited to the district court.[12] There, the Court, referring to the District Court's decision, stated –

> Judge Spizzo concluded that ERISA permits employers to wear "two hats," and that they assume fiduciary status "only when and to the extent" that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA…. We agree. [Western Union's] officers acted on behalf of a corporate employer and not as Plan fiduciaries in amending its pension plan.[13]

Subsequently, in an information letter to John Erlenborn (who had been one of the principal sponsors of ERISA while in Congress), the Department endorsed this same analytical framework, writing –

> First, in light of the voluntary nature of the private pension system governed by ERISA, the Department has concluded there is a class of discretionary activities which relate to the formation, rather than the management of plans. These so-called "settlor" functions include decisions relating to the establishment, termination and design of plans and are not fiduciary activities subject to Title I of ERISA.[14]

Several U.S. Supreme Court decisions confirm that employers do not act as fiduciaries when they adopt, amend or terminate employee benefit plans.[15] Among these cases, the Court's decision in *Lockheed Corp. v. Spink* elaborates on the rationale for and underlying logic of the settlor doctrine. In that decision, the Court recognized that employers sponsor pension plans because they expect that their business will benefit from plan sponsorship. Such anticipated benefits include "attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily."[16]

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[12] Vanderploeg, *Role-Playing under ERISA: The Company as "Employer" and "Fiduciary,"* 9 DePaul Bus. L.J. 259 (Spring/Summer 1997) at 273.

[13] *Id.*, quoting *Amato v. Western Union Intl., Inc.,* 773 F.2d 1402, 1416-17 (2d Cir. 1985).

[14] Department of Labor Information Letter to John N. Erlenborn (March 13, 1986).

[15] *Hughes Aircraft v. Jacobson*, 119 S. Ct 755 (1999); *Lockheed v. Spink*, 517 U.S. 882 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

[16] 517 U.S. at 890.

In light of the well-developed body of law recognizing that employers do not wear their fiduciary hat when they engage in plan adoption, amendment and termination decisions, there is no basis for assigning fiduciary status to employers who are engaged in the process of considering the adoption of a PEP, including under circumstances that may involve the merger of an existing single employer Plan into a PEP. Accordingly, we urge the Department to clarify the preamble language referenced above to reflect this body of law and remove any implication that solicitations of employers to adopt a PEP, which will generally include delivery of information about the PEP, including its service providers, fees and current investment line-up, could give rise to the provision of fiduciary investment advice.

Under the proposal, fiduciary investment advice may only arise where a covered recommendation is delivered to a "retirement investor" (i.e., a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary). An employer acting in its settlor capacity for purposes of considering the adoption of a PEP is *not* a retirement investor. That result is not changed merely because the employer as settlor receives information about a PEP, including the PEP's investment line-up. Clarification of the Department's preamble language is essential in order to avoid the potential for confusion over the roles of both service providers and employers when engaged in communications concerning PEP adoption. Absent the requested clarification that such communication should not be regarded as fiduciary in nature for either party, the preamble language risks frustrating the purpose of the SECURE Act's provisions authorizing PEPs, which seek to encourage the adoption of retirement plans by employers as a means of increasing levels of retirement plan coverage among American workers.

c. Servicing Employers who Have Adopted PEPs

Following the adoption of a PEP by an employer acting in its settlor capacity, as described above, the SECURE Act's authorizing provisions are clear that an adopting employer will generally be responsible as a fiduciary only for the limited purpose of monitoring the performance of the PPP and any other named fiduciary as a service provider in connection with that employer's employee base and will not be responsible for monitoring the investment and management of the portion of the plan's assets attributable to its employees where that responsibility has been delegated to another plan fiduciary (e.g. a section 3(38) investment manager). In this regard, section 3(43) of ERISA defines a pooled employer plan, in relevant part, as one under which the terms of the plan –

> (B)(iii) provide that each employer in the plan retains fiduciary responsibility for—
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> (I) the selection and monitoring in accordance with section 1104(a) of this title of the person designated as the pooled plan provider and any other person who, in addition to the pooled plan provider, is designated as a named fiduciary of the plan; and

(II) *to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of section 1104(c) of this title, the investment and management of the portion of the plan's assets attributable to the employees of the employer (or beneficiaries of such employees*);

(iv) provide that employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets of the plan in accordance with section 1058 of this title or paragraph (44)(C)(i)(II);

(v) *require—*

(I) *the pooled plan provider to provide to employers in the plan any disclosures or other information which the Secretary may require, including any disclosures or other information to facilitate the selection or any monitoring of the pooled plan provider by employers in the plan*;

(emphasis added).

Accordingly, where responsibility for the investment and management of the plan's assets has been delegated to another fiduciary (e.g., a section 3(38) investment manager) by the PPP, an adopting employer is not responsible as a fiduciary for that delegated investment and asset management activity. Under such circumstances, an adopting employer remains responsible as a fiduciary, from and after the point of plan adoption, for selecting and monitoring the PPP and any other person designated as a named fiduciary of the PEP. Under sub-paragraph (B)(v)(I), the terms of the PEP must require the PPP to provide certain disclosures and such other information as the Department may require in order to facilitate the employer's selection and monitoring function. Although the Department has yet to adopt regulations specifying required disclosures and information, PPPs and PEP service providers commonly furnish adopting employers with information about the PEP's investment line-up including, as applicable, that the PEP investment line-up reflects a section 3(38) investment manager's exercise of discretion to select investment options that are appropriate for the plan (i.e., the PEP) and its participants and beneficiaries, including employees of the adopting employer.

The preamble language accompanying the Department's proposal inappropriately infers that PPPs and PEP service providers engaged in the function of furnishing such investment line-up information to adopting employers could be engaged in the provision of fiduciary investment advice when doing so. Where a section 3(38) investment manager has been delegated responsibility for investment option selection and monitoring, the investment manager has a duty to exercise its fiduciary investment authority prudently and solely in the interests of plan participants and beneficiaries as required by section 404 of ERISA. The mere fact that the PPP, the PEP recordkeeper or another PEP service provider communicates information regarding the PEP's investment lineup to adopting employers – who under such circumstances are responsible as fiduciaries only for the selection and monitoring of the PPP and any other PEP named fiduciaries – should not in and of itself cause the entity providing the information to be viewed as an investment advice fiduciary. We request that the Department include in any final rule appropriate clarifications to the relevant preamble language to reflect applicable provisions of the SECURE Act.

d. Participant Call Center Support Functions

Recordkeeper call center personnel provide vital support to plan participants and beneficiaries who need assistance on a variety of plan-related matters. Recordkeepers are keenly aware of this and are thus very reluctant to reduce current levels of support. At the same time, recordkeepers are extremely concerned that the sweeping nature of the proposed fiduciary definition is likely to categorize as fiduciary investment advice numerous ordinary course call center interactions that today fall outside of the I.B. 96-1 safe harbor covering investment education, but do not arise to a level that would satisfy the current regulation's five-part test of fiduciary status.

Under I.B. 96-1, call center personnel may take comfort in providing information to participants and beneficiaries that is purely educational in nature without giving rise to investment adviser fiduciary status. The problem is that plan participants and beneficiaries frequently make requests of call center staffers for help on matters not covered by I.B. 96-1. The investment education safe harbor covers the delivery of information that is particularly well-suited for delivery in written form, including as website content (e.g., general financial and investment information, asset allocation models and interactive investment materials). But those same categories are not particularly well suited as the only safe zones for a call center staffer to address when faced with a participant in need of immediate assistance. Consider the following situations as examples –

- On a day when the stock markets are in sharp decline, an anxious participant phones the call center to ask whether she should sell some or all of her plan investment holdings in hopes of avoiding further losses. Under I.B. 96-1, the staffer could avoid being deemed a fiduciary investment adviser when responding by framing their response in terms of generalized risk and return concepts and

explaining the historic rates of return between different asset classes, none of which is likely to be responsive to the needs of the participant at that point in time. Under the five-part-test applicable under the current rule, the staffer might go outside of I.B. 96-1 by counseling the participant to have patience, by noting that a single day's volatility merely marks a moment in time within the context of a long-term savings program, and by observing that over the long term, markets generally recover. That communication, although outside of I.B. 96-1 would not trigger fiduciary status under the five-part test but is likely to confer fiduciary status under the Department's proposal, as it would suggest an investment strategy or course of action to a retirement investor.

- A spousal beneficiary of a recently deceased plan participant phones into the call center in a highly emotional state. The beneficiary, in tears, explains to the call center staffer that he is in a state of shock, does not know how he will cope with the strain of the loss he has suffered, and inquires about taking an immediate distribution of the plan account balance – not because he needs the cash, but because he can't handle the stress of managing an investment account. Under the I.B. 96-1 safe harbor, the call center staffer may avoid acquiring fiduciary status by limiting the conversation to a discussion of the plan's features. Under the five-part test of the current rule, an empathetic call center staffer might counsel the beneficiary to wait before making such an important decision so immediately after having suffered a deep personal loss, without acquiring fiduciary status, but under the Department's proposal fiduciary status would likely attach by virtue of having delivered a "hold" recommendation.

- An elderly plan participant phones into the call center to explain that he is having difficulty navigating the website that displays the plan's investment options. The participant explains that he needs help identifying a plan investment option with a "moderate level of investment risk." Under I.B. 96-1, the call center representative could safely describe each of the plan's available investment options without reference to the appropriateness of any one of those options. That level of response would likely leave the participant's needs unaddressed. Under the five -part test of the current rule, the call center representative could venture further by pointing out that the plan's target date series of funds includes an income fund designed to meet the needs of participants who have attained retirement age through a balanced allocation to fixed income and equity holdings and that is identified as presenting a moderate level of investment risk without becoming a fiduciary investment adviser. But under the Department's proposal, the act of identifying the income fund – which is exactly responsive to the participant's needs – would likely be deemed a recommendation and would confer investment adviser fiduciary status.

As illustrated by the above examples, the Department's proposed regulation is likely to force recordkeepers to constrain the authorized content of call center communications with ERISA plan participants and beneficiaries to the limits of I.B. 96-1 in order to avoid the risks of liability and costly prohibited transaction exemption compliance measures that would likely otherwise result from engaging in conversations that would be far more responsive to participant needs, but that would likely give rise to fiduciary status. We suggest that results for participants and beneficiaries would be improved if the Department's proposal were moderated by including a specific exclusion for ordinary course call center support delivered in response to participant requests for assistance. Specifically, we suggest re-designating paragraph (d) Execution of securities transactions as paragraph (f) and advancing the designations of subsequent paragraphs accordingly and adding the following new paragraph (f) to the final rule –

> (f) *Participant and Beneficiary Call Center Support.* Notwithstanding other paragraphs of this section, a person who provides participant call center support services on behalf of a recordkeeper or other administrative services provider to a plan shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code with respect to a plan or an IRA solely because such person recommends a securities or investment transaction or any other investment strategy where such recommendation is limited to unbiased suggestions, consistent with generally accepted investment principles and sound plan administrative practices, that are directly responsive to a request for assistance initiated by a participant or beneficiary.

IV. Recommendations by Insurers of Pension Risk Transfer Annuity Products to Plan Fiduciaries Should be Explicitly Excluded from the Department's Final Rule

The Proposal is sufficiently sweeping in scope to raise a question as to whether pension risk transfer ("PRT") providers and their employees – when engaged in ordinary course business marketing and sales activities – could be categorized as ERISA fiduciaries. Such a result would be profoundly disruptive and harmful to the PRT marketplace and could curtail availability of PRT products to defined benefit plans that require them in order to terminate or to de-risk by transferring certain of the plan's benefit payment liabilities to a regulated life insurance company. For the reasons discussed below, it is imperative that the Department's final rulemaking expressly exclude PRT providers from the definition of those who may deemed to function as fiduciaries to plans by providing "investment advice" within the meaning of ERISA section 3(21)(A)(ii).

a. PRT Products are not Securities or Investment Property

Under the Proposed Rule, investment advice fiduciary status may attach to persons or entities who provide a "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property" to a retirement investor, including a plan fiduciary. Paragraph (f)(10) assigns the following meaning to above-quoted phrase –

> recommendations:
>
> (i) As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;
>
> (ii) As to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (*e.g.,* account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and
>
> (iii) As to rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.

Paragraph (f)(11) further clarifies that the term "investment property," as used in paragraph (f)(10) does not include any of the following –

> health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.

PRT products provide a mechanism for a retirement plan to discharge its benefit liability obligations to identified participants and beneficiaries through a transaction that results in the insurer's assumption of those liabilities. That transfer of liabilities from the plan to the insurer is perfected by the insurer's delivery of an irrevocable commitment (typically in the form of a certificate) to pay a specified stream of fixed annuity benefits to each such participant and

beneficiary. In exchange for its agreement to relieve the plan of benefit liabilities through its provision of guaranteed annuity benefits, the PRT provider receives an agreed upon premium consideration paid by or on behalf of the plan. Premium obligations may be satisfied by a payment of cash, a transfer of in-kind assets or some combination of the two. Importantly, plans that purchase PRT products have no expectation of receiving any future investment return. A PRT product provides streams of life contingent annuity benefits to identified former participants and beneficiaries. Those annuity benefits do not vary in amount and are provided in quantities that are known to both parties at the time the transaction is entered into. PRT providers take certain mortality, interest rate and other assumptions into account for purposes of determining required premium amounts. However, it is the PRT provider and not the plan that bears all of the risk associated with those assumptions. The plan, for its part, is relieved of a set of definitely determinable benefit liabilities in connection with a PRT transaction, but has no expectation of receiving any future investment return from the product.

In the landmark case *SEC v. W.J. Howey Co.,* 328 U.S. 293 (1946), the U.S. Supreme Court held that for purposes of the Securities Act of 1933 (the "'33 Act"), an "investment contract" is present under a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. Plans that acquire PRT products have no expectation of profits based on the efforts of the PRT provider on any other person. PRT products are not securities.

Nor are PRT products "investment property" within the meaning of paragraph (f)(11) since they lack any investment component. In addition to PRT products, the life insurance industry makes available fixed accumulation guaranteed annuity products to plans, which products are excluded from treatment as securities under section 3(a)(8) of the '33 Act. These products may be considered as containing an investment component, given their function of providing plans a means of accumulating assets to fund benefits owed by the plan to participants and beneficiaries. As distinguished from those fixed accumulation vehicles, PRT products contain no asset accumulation vehicle. And the streams of income paid under PRT products are directed not to the plan, but to the former participants and beneficiaries to whom the PRT provider has guaranteed the payment of an annuity.

Given the complete absence on the part of plans that acquire PRT products of any expectation of profit or investment return, coupled with the complete absence of any asset accumulation feature under the products given their core function of relieving plans of benefit payment liability obligations, we believe paragraph (f)(11) should be revised to explicitly exclude PRT products as follows (bolded and underlined, below):

> (11) The term "investment property" does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do

not contain an investment component, **<u>including pension risk transfer annuity products</u>**.

b. Sales Consultations with Plan Representatives Concerning the Transfer of Plan Assets as PRT Premium Consideration are Clearly Non-Fiduciary in Nature and Should be Explicitly Recognized as Such in the Final Rule

The PRT provider community remains concerned that even if paragraph (f)(11) is clarified in the manner proposed above, under the Proposal PRT providers could nonetheless be regarded as investment advice fiduciaries in connection with consultation activities with plan representatives for purposes of determining the sources used to fund the plan's purchase premium payment obligation, including the acceptability to the PRT provider of any in-kind assets that may be transferred for that purpose. Depending on the size of a proposed transaction, and the composition of the plan's investment portfolio at the time a proposed transaction is under consideration, a pension plan may wish to explore the relative advantages and disadvantages of paying premium in cash, through a transfer of in-kind assets, or some combination of the two.

As noted above, section (f)(10) of the proposal defines covered recommendations in a manner that captures recommendations with respect to transferring assets from an employee benefit plan, including recommendations as to whether to engage in the transaction and the amount, form and destination of an asset transfer. The Department's accompanying preamble explanation indicates this approach reflects the Department's longstanding interest in protecting retirement investors in the context of a recommendation to roll over employee benefit plan assets to an IRA, as well as other recommendations to roll over, transfer, or distribute assets from a plan or IRA.[17]

Unfortunately, that particular phrasing – which is clearly directed at capturing retail investor rollover recommendations – is sufficiently broad that it could be interpreted to cover institutional investor discussions concerning transfers of plan assets from an employee benefit plan to a PRT provider, as well as discussions concerning assets within the plan's investment portfolio that could be acceptable to the PRT provider as an in-kind premium payment. Such an interpretation would have a chilling effect on PRT providers' willingness to engage in discussions with plans about in-kind premium payments in lieu of cash, even though in-kind purchase payments may result in plan savings and efficiencies by avoiding the costs associated with liquidating asset positions.

When a PRT provider engages in discussions with plan officials as to the choices a plan may have available to fund a purchase of a PRT product, it generally seeks, as any responsible vendor would, to be helpful. At the same time, the PRT provider's consultations are always undertaken with a view to serving the provider's own interests. When advising on the

[17] 88 Fed. Reg. at 75906.

acceptability or non-acceptability of plan holdings for purposes of funding an in-kind premium payment, for example, the PRT provider is of necessity reflecting its views as to which assets of the plan, if any, would be a fit for its own asset portfolio needs if accepted as an in-kind premium payment.

Re-positioning those conversations as fiduciary in nature -- as the Department's proposed language could do -- would place PRT providers in the impossible position of making recommendations that are solely in the interest of the plan in the face of their own business obligation to accept as in-kind premium only those assets that are a fit for the insurer's asset and liability management strategy. Accordingly, we urge that the relevant language of paragraph (f)(10)'s covered recommendation definition be revised as follows (changes bolded and underlined, below):

> (i) As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA**, exclusive of any recommendations by pension risk transfer annuity providers on the exchange or transfer of plan assets to such providers as premium purchase consideration**;

V. The Department Should Include a Sophisticated Purchaser Exception

The Department's preamble indicates a primary driver behind the proposal is the protection of retail investors who may reasonably expect to place their trust and confidence in the provider of a recommendation. At the same time, the Department acknowledges parties should be permitted to define the nature of their relationship, subject to the condition that any disclaimers of fiduciary status will not control to the extent that they are inconsistent with the person's other oral and written communications.[18]

Financial institutions that do business with fiduciaries in the institutional market, including PRT providers, seek a greater measure of comfort than Proposal affords concerning the ability to avoid the inadvertent acquisition of fiduciary status through ordinary course commercial business communications with plan representatives. A key source of this concern is that the only assurances regarding the reserved rights of parties to structure the contours of their relationship as non-fiduciary appear in the preamble explanation as opposed to the text of the rule itself.

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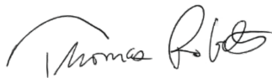
[18] 88 Fed. Reg. at 75977.

PRT products are typically purchased by plans with more than $100 million in assets. By virtue of their sheer size, such plans typically are represented by sophisticated fiduciaries independent of the PRT providers under consideration to receive placements of plan liabilities who are not likely to perceive a PRT provider as a source of impartial investment advice when recommending its products and/or when engaged in communications as to the sources and forms of premium that may be used by the plan to satisfy PRT premium obligations. We are sensitive to the controversy associated with the inclusion of a sophisticated investor exception in the Department's 2016 rulemaking set at the $50 million level, and for that reason are not proposing a dollar-based exception at this time. As an alternative, we are suggesting that a new subparagraph (c)(1)(vi) be added to the proposed rule language as set forth below --

> (vi) Subject to sub-paragraph (c)(1)(v), recommendations made to a plan fiduciary in the context of a communication or series of communications in which the seller of a product or service clearly indicates that such product or service provider has an interest in the transaction and that such plan fiduciary is responsible for independently evaluating and determining whether to enter into a transaction for the purchase of such product or service, including negotiating the terms of the transaction, shall not cause such seller to be deemed a fiduciary within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code.

We appreciate the opportunity to comment on the Proposal and would be happy to meet with the Department regarding any of the issues discussed herein.

Sincerely,



Thomas Roberts

Kevin L. Walsh