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

## **Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary**

To Whom It May Concern:

The Church Alliance is submitting this letter as a public comment to the proposed amendment to the regulation defining “investment advice fiduciary” (“the Regulation”) for certain purposes under Titles I and II of the Employee Retirement Income Security Act of 1974 (“ERISA”). The proposed amendments were issued by the Department of Labor (“DOL” or “Department”) on November 3, 2023 (“Proposed Amendments”).

The Church Alliance appreciates the opportunity to comment on issues related to the definition of investment advice fiduciary. As an organization representing multiple-employer church plans, we can offer meaningful input in areas specifically requested by the Department.

### **I. The Church Alliance**

The Church Alliance comprises 35 denominational benefit organizations, covering mainline and evangelical Protestant denominations, three Jewish entities, and Catholic schools and institutions. These organizations provide employee benefit plans, including retirement and/or health coverage, to nearly one million participants (clergy, lay workers, and their families), serving

approximately 155,000 churches, parishes, synagogues, and other faith-based organizations. Plans of these denominational benefit organizations (“denominational plans”) are “church plans” under Section 3(33) of ERISA and Section 414(e) of the Internal Revenue Code (“Code”).

## **II. Given the Church Plan Exemption from ERISA, the Regulation Should Clarify that Church Plans Are Not Within Its Scope.**

The Department’s proposal seeks to amend the definition of investment advice fiduciary for purposes of Titles I and II of ERISA. In the case of church plans, they are exempt from the provisions of ERISA to which the Proposed Amendments relate<sup>1</sup>.

When Congress enacted ERISA, it intended for church plans to be exempt from such government entanglement. For example, in 1973 the Senate Committee on Finance stated: “The committee is concerned that the examination of books and records that may be required in any particular case as part of the careful and responsible administration of the insurance system might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities.”<sup>2</sup> Also, Representative Barber Conable later stated: “In 1974, when we enacted the Employee Retirement Income Security Act of 1974, popularly called ERISA, we exempted church plans from the provisions of the act to avoid excessive Government entanglement with religion in violation of the first amendment to the Constitution.”<sup>3</sup>

We understand that the Department is concerned about plan participant protection. Church plans, many of which have existed since before the creation of ERISA, rely on strong denominational oversight to provide necessary protections to the clergy and lay workers that participate in our plans. In light of the ERISA exemption, we ask that the Department explicitly clarify that the Regulation does not apply to plans exempted from ERISA or to participant transactions involving those plans, including rollovers into or out of a church plan.

## **III. Church Benefit Organizations Play a Unique Role**

Church Alliance benefit organizations (referred to as “church benefit organizations”) sponsor Code section 403(b) and other retirement plans. These plans are structured as multiple-employer denominational plans and offer robust savings options for clergy and lay workers of churches and other faith-based organizations.

Church plans are typically operated by a church benefit organization within the denomination, often separately incorporated as a not-for-profit organization. Parallel to a Taft-Hartley multiemployer plan, a church plan will be operated through a separate dedicated office with staff serving the plan’s participants and employers that adopt the plan.

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<sup>1</sup> Church plans are exempt from Title I of ERISA, and the prohibited transactions rule of Title II of ERISA, codified in Section 4975 of the Code. See ERISA sec. 4(b)(2) (29 U.S.C. sec. 1003(b)(2)), and Code section 4975(g)(3).

<sup>2</sup> S. Rep. No. 93-383, at 81 (1973).

<sup>3</sup> 124 Cong. Rec. 12106(1978).

We see no inherent conflict of interest in church benefit organization employees responding to daily questions from participants, including questions about rollovers and other factual and operational matters, as long as these employees are instructed to refrain from providing investment advice as to specific investment funds. In case the Regulation does not broadly clarify that church plans are outside its scope, the Proposed Amendments should recognize the unique role of such benefit organization and plan sponsor employees and clarify that such employees engaging in such ordinary course activities are not investment advice fiduciaries under the Regulation.

**A. Investment advice is not given by benefit organization employees.**

The preamble to the Proposed Amendments clarifies that Human Resource (HR) Department staff in organizations with defined contribution plans are not deemed fiduciaries providing investment advice to plan participants. This principle should equally apply to church benefit organization employees. The vast majority of churches lack the resources for a dedicated HR department or staff specialized in these matters. Employees of church benefit organizations effectively assume this role, paralleling the function of an HR department in other employers.

Frequently, new employees enrolling in a 403(b) plan inquire about transferring funds from a previous 401(k) or 403(b) into their new employer's plan. The role of church benefit organization employees who handle these queries is not to advise on specific investments but to offer operational details about the plan and general education. Our survey of member organizations revealed that their staff that interact with participants are consistently trained to avoid discussing specific plan investments. Any investment-related inquiries are redirected to a designated plan investment advisor, typically associated with the plan recordkeeper's office.

**B. No fees or other compensation is received by benefit organization employees.**

The Department recognized a distinction between regular salary and other compensation in the Proposed Amendments:

*“The Department also would not consider salaries of human resources employees of the plan sponsor to be a fee or other compensation in connection with or as a result of the educational services and materials that they provide to plan participants and beneficiaries.”*

*“Under the terms of the proposal, the compensation is treated as paid ‘in connection with or as a result of’ the provision of advice only if it would not have been paid but for the recommended transaction or the provision of advice, or if the investment advice provider’s eligibility for the compensation (or its amount) is based in whole or part on the recommended transaction or the provision of advice.”*

Employees of church benefit organizations should be able to address factual and operational inquiries without the risk of triggering fiduciary status. Their salary and fixed compensation, which remain constant regardless of the types of questions they respond to daily, should not be construed as fees for providing investment advice.

If the Regulation does not clarify that church plans are outside its scope, we ask that the Regulation affirmatively state that set salary or other fixed compensation paid to individuals working directly for a church benefit organization or church plan does not constitute fees or other compensation for rendering investment advice.

#### **IV. Rollover Discussions Considered as Either Investment Education or Investment Advice**

Not every plan representative who answers a question about a rollover, whether in or out of a plan, qualifies as an investment advice fiduciary. Typically, the information provided leads to retirement funds *staying in or being transferred into* a retirement plan. The Proposed Amendments are too inclusive, presuming that any rollover advice involving an IRA constitutes investment advice by default.

*“Under proposed paragraph (f)(10) the phrase ‘recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property’ is defined as recommendations:”*

\*\*\*\*\*

*“As to rolling over, transferring, or distributing assets from an employee benefit plan or IRA, including recommendations as to whether to engage in the transaction, and the amount, the form, and the destination of such a rollover, transfer, or distribution.”*

*“The Department continues to believe that advice provided in connection with a rollover decision, **even if not accompanied by a specific recommendation on how to invest assets**, should be treated as fiduciary investment advice.” [emphasis added]*

*“Further, in the Department’s view, the evaluation of whether a recommendation constitutes fiduciary investment advice should be the same regardless of whether it is a recommendation to take a distribution or make a rollover to an IRA or a recommendation not to take a distribution or **to keep assets in a plan**.” [emphasis added]*

The Department’s position in the Proposed Amendments is contrary to its views expressed in Interpretive Bulletin 96-1 (“IB 96-1”), where it encouraged education about rollovers:

*“The Department, therefore, encourages educational service providers to emphasize that participants should: (1) participate in available plans as soon as they are eligible; (2) make the maximum contribution possible to the plan; and (3) if they change employment, refrain from withdrawing their retirement savings, and opt instead to directly transfer or roll over their plan account into an IRA or other retirement vehicle. Such information relating to plan participation is specifically encompassed within the safe harbor in paragraph (d)(1) of IB 96-1.”*

The Church Alliance wishes to highlight to the Department the prevalent misconceptions about handling plan accounts upon employment termination. Many retirees mistakenly believe that they **are required to** remove their plan accounts when they leave an employer. It is critical that

retirement educators (including employees of church benefit organizations) can clearly communicate rules relating to rollovers, plan terms, general financial and investment information, and available distribution options. This guidance is vital for informed decision-making by retirement investors, helping them avoid misconceptions, in each case, consistent with the principles of IB 96-1.

There is a significant difference between a commissioned insurance broker, investment advisor, financial planner or wealth manager advising an investor to transfer retirement savings into a retail IRA annuity, and a church benefit organization employee educating about the possibility of rolling over an IRA or plan account from a previous employer into a new employer's church plan, or about the option to retain an account in the existing plan post-employment.

Therefore, we ask that the Regulation distinguish investment education, in accordance with IB 96-1, from investment recommendations. If the Regulation does not clarify that church plans are outside its scope, it should clarify that when church benefit organization employees provide factual and operational information about rollovers, distribution options, and plan terms, this information is investment education and not advice, as long as specific fund investments are not part of the discussion.

## **V. The Department's Request for Comments Relating to IB 96-1**

IB 96-1 defines the role of a financial educator, emphasizing that providing investment statistics and information sources does not equate to giving investment advice. However, the Proposed Amendments, with their increased emphasis on IRA rollover advice, seem to classify even general advice about the benefits of retaining retirement funds in a retirement plan as opposed to an IRA, as investment advice.

The Department recognizes the need for individuals to receive some form of coaching to remain committed to saving for retirement:

*“One important example of investment education is the provision of information about the benefits of increasing contributions to an employee benefit plan. Under IB 96-1, the provision of information on ‘the benefits of plan participation’ and ‘the benefits of increasing plan contributions’ are both examples of ‘plan information’. The Department confirms that, for purposes of the proposal, the provision of such information would not trigger fiduciary status.”*

These topics are crucial for retirement investors. Equally important is understanding the option to retain funds in a retirement plan after leaving employment, given the potential benefits of lower-cost funds, ongoing fiduciary oversight and administrative services, which are typically more advantageous than those available in an IRA. Currently, there appears to be no clear distinction between the accepted educational message to “invest more,” and “keep your money in the plan,” which is per se investment advice under the Proposed Amendment. We recommend that the Department update IB 96-1 to expressly cover general discussions about rollovers into or out of employee retirement plans. This clarification should be integrated into the finalized Regulation.

## VI. Conclusion

The Church Alliance is grateful for the opportunity to provide these comments, and requests that the Regulation clarify that church plans are outside its scope. We welcome the opportunity to serve as a resource, particularly in the arena of issues that impact church plans. Please do not hesitate to contact us with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karishma Shah Page', written over a horizontal line.

Karishma Shah Page  
Partner  
K&L Gates LLP  
On behalf of the Church Alliance