AMERICAN BENEFITS COUNCIL

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Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1210-AC02 – Definition of Fiduciary
Application No. D-12057 – Proposed Amendment to PTE 2020-02
Application No. D-12060 – Proposed Amendment to PTE 84-24
Application No. D-12094 – Proposed Amendments to PTE 75-1, 77-4, 80-83, 83-1, 86-128

Dear Sir or Madam:

The American Benefits Council ("the Council") is pleased to have the opportunity to provide comments on the U.S. Department of Labor's (DOL) proposed new definition of fiduciary investment advice for purposes of the Employee Retirement Income Security Act (ERISA) and parallel regulations under the Internal Revenue Code ("Code").[1] This letter also incorporates our comments on the DOL proposed amendments to Prohibited Transaction Exemption (PTE) 2020-02.

The Council is a Washington, D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

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[1] 88 Fed. Reg. 75,890 (Nov. 3, 2023) ("Fiduciary Proposal").

As a plan sponsor organization, we believe we can best contribute to the overall dialogue by focusing on what we believe will be the most significant impacts of redefining fiduciary investment advice on plan sponsors and plan participants. We appreciate the importance of ensuring that the fiduciary rules keep pace with innovations in plan design and the evolution of the marketplace and that DOL is trying to address its concerns about potential conflicts of interest.

In gathering comments from plan sponsors, we have heard a consistent concern among sponsors that the proposed new rules, as written, are at odds with the direction in which employers are moving and the pressing needs of participants in terms of facilitating employee engagement with their benefit plans. Employers report that the combination of the breadth of the redefinition of fiduciary advice and the challenging nature of the exemptions as proposed will force employers to remove tools that provide important benefits to plan participants. The new rules will make many plan operations more difficult and more expensive because they will add uncertainty, cost, and potential liability for employers at a time when plan sponsors are trying to efficiently utilize internal and outside resources so they can continue to provide meaningful employee benefits for their employees.

It is very important to have a balanced regulatory approach that supports the valued interactions between plan participants, plan sponsors, and service providers without introducing unnecessary complexity, uncertainty, or risk of liability, and that continues to recognize when plan sponsors are acting as a settlor with respect to their plan rather than as a fiduciary. We encourage DOL to be mindful that employers are not required by law to provide retirement benefits to their employees. Additionally, employers who voluntarily provide such benefits are a critical source of much of the innovation that has enabled our retirement savings system to evolve to meet the changing needs of American workers. To continue to fulfill this role, employers need flexibility to work with their participants and service providers, and to be able to do so in the most cost-efficient manner. Without a clear and workable definition of fiduciary investment advice and set of associated exemptions that are able to achieve the best combination of costs, benefits, and risks, the Council is concerned that the proposed redefinition of an investment advice fiduciary could hurt the very people it is intended to protect.

The Council expresses no view on the validity of the proposals in light of the Fifth Circuit's invalidation of the 2016 rule.[2] Some of our members have expressed concerns that the proposals are very similar to the 2016 rule and raise the specter that they also will be invalidated, causing unnecessary and costly disruption. We simply ask DOL to be conscious of the impact of such a result.

The Council's specific comments on the DOL proposal are described below.

[2] *Chamber of Com. of U.S. of Am. v. U.S. Dep't of Labor*, 885 F. 3d 360 (5th Cir. 2018) (*Chamber*).

Plan Sponsor Employees and Financial Wellness Programs

Plan Sponsor Employees

We strongly support an exclusion from investment advice fiduciary status for human resources employees and all other employees of a plan sponsor,[3] including leased workers,[4] with respect to providing assistance to plan participants. In the preamble, DOL states:

> Similarly, the human resources employees of a plan sponsor would not be considered investment advice fiduciaries under the proposed regulatory definition, because they do not regularly make investment recommendations to investors as part of their business. [Footnote states:] DOL 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.[5] [Emphasis added.]

This language should be added to the regulation and made clearer and more categorical in its exclusion of human resources employees and all other plan sponsor employees, including leased workers, from investment advice fiduciary status with respect to assistance provided to plan participants. The language based on the frequency of recommendations would not be helpful in cases where human resources employees regularly provide small amounts of assistance to plan participants. The language treating human resource employees' salaries as not being covered is based on the human resources employees solely providing educational services and materials. This language has no effect because educational services and materials are not fiduciary advice by definition.

Financial Wellness Programs

Many of our plan sponsor members outsource financial wellness programs that help their employees manage all elements of their financial situation, including, for example, retirement, health, consumer debt, college debt, and home purchases. We urge DOL to include outsourced financial wellness programs in the same exclusion applicable to plan sponsor employees when the programs are (1) simply providing information based on well-established retirement savings principles, such as the principles of compound interest, the effect of hardship distributions on retirement savings, and

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[3] As used in this comment letter, the term "plan sponsor" includes participating employers that adopt multiple employer plans and pooled employer plans.

[4] Plan sponsors may contract with a leasing agency for temporary workers during annual enrollment to handle increased call volume from participants.

[5] Fiduciary Proposal at 75,902.

generalized discussions regarding risk and diversification, and (2) paid for the assistance on a basis that is not affected by participant investment decisions.

FINANCIAL EDUCATION

We strongly support the full preservation of DOL's position on investment education, as reflected in Interpretive Bulletin (IB) 96-1.[6] We also commend DOL for extending IB 96-1 to IRAs and for indicating that it may also apply to distribution education. We ask DOL to make the latter point clearer.

CALL CENTER ASSISTANCE

Today, call centers operated by plan recordkeepers are generally available to provide basic information regarding the investments offered under participant-directed individual account plans. Most plan sponsors have committed to providing their employees with access to call centers to provide that basic information and respond to employees' questions because this is typically the most effective way of engaging with employees regarding the decisions workers need to make with respect to their participation in the employer's retirement plans. The information provided by these call centers is essential to enable employees to make effective decisions about a variety of aspects of their participation in the plan so they can get maximum value out of those plans.

The proposal, as written, would unnecessarily constrain call center personnel from providing any discussion of investment issues specific to the plan, especially where, as is commonly the case, the recordkeeper is a financial institution. This will occur because the discussion of plan-specific investment issues would trigger fiduciary status under the proposal and likely a prohibited transaction. This would make meaningful call center assistance prohibitively risky and expensive and generally reduce the investment strategy or other information currently available to retirement plan participants from their retirement plan providers. The overall negative consequences for participants resulting from this limitation would lead to less effective investment decisions with long-term negative outcomes that would far outweigh any potential benefits of the proposal.

As noted, almost any investment-related information now provided by call centers would meet the proposed standard for becoming fiduciary advice under the proposal. Although generic information would still be permitted to be provided as non-fiduciary education, we are concerned that the types of generalized education permitted under the proposal will be insufficient to optimize the value of retirement plans for

[6] Fiduciary Proposal at 75,911.

participants because there won't be a specific framework adequately relevant to the participants' circumstances to which they can relate the information and that will assist them in making good decisions. Moreover, if the financial institution maintaining the call center is deemed to be a fiduciary with respect to the information it provides, then any investment-related information provided by the financial institution would generally result in a prohibited transaction if it earns different compensation on different investments, as is often the case.

These issues are discussed below in the context of a common fact pattern.

Call Center Information About Investments

Assume that an employee calls the call center maintained by the recordkeeper (which is a financial institution) for her employer's 401(k) plan. The employee asks about the options she has with respect to investing her 401(k) account balance. The employee describes her situation and asks how similarly situated employees are investing. She also asks for examples of the types of funds that she should consider, and whether she should invest more in some funds than others, including an applicable target date fund.

- ***Inability to effectively respond to participant questions:*** Plan sponsors recognize the importance of the services provided by call centers and recognize that these services can often be the most important contribution to participant satisfaction and can dramatically improve retirement savings outcomes. Plan sponsors are in a unique position to track outcomes and determine what constitutes meaningful support for their employees. We are concerned that:
    - Any direct response to the above questions would be deemed to be fiduciary advice, not education.
    - Because the call center is maintained by a financial institution that may earn different amounts of compensation based on which options the employee ultimately selects, regardless of the impact of any information received, any fiduciary advice regarding investments would constitute a prohibited transaction because the financial institution has differential compensation outcomes depending on how the employee invests her money.
    - In most cases, proposed PTE 2020-02 technically could apply to this fiduciary advice, but it is unclear if compliance with PTE 2020-02 could be achieved cost-effectively in this context. Our expectation is that the increase in such costs would substantially reduce or eliminate the willingness of plan sponsors or participants to pay for the information.

- ***Additional concern for home office plan participants:*** While most providers of investment assistance in this scenario technically could rely on PTE 2020-02 (cost concerns aside), reliance on PTE 2020-02 is not even an option if the investment assistance triggers fiduciary status and the provider of such assistance is an employer or affiliate of the employees covered by the plan or the plan's named fiduciary or administrator. This puts employees in the financial services industry in particular at a disadvantage and disregards the relationships that frequently exist with participants in retirement plans sponsored by record keepers, broker-dealers, and other plan service providers. We urge DOL to remove this exclusion so that employees of plan sponsors in the financial services industry are not worse off—both in the call center context described above, or even in their ability to seek and receive fiduciary investment advice as a service provided by their employer or an affiliate.

- ***Participants left on their own:*** We are concerned that the proposal will drive many plan sponsors to notify participants that they will need to seek information on plan investment alternatives from their own advisors at their own cost, even if the plan sponsors would rather provide investment assistance through their plan call center services. The cost of outside advisors will be prohibitive for many employees, and these services may not even be available if an employee's account is small. So, many employees simply will not seek help or not be able to seek help and will make less effective decisions and be less engaged in their retirement security.

- ***More cash-outs and more missing participants:*** If meaningful call center assistance is not available to terminated participants, we anticipate two results. First, more terminated participants who don't want to leave their money in their former employer's plan will be unaware of rollover opportunities and will cash out their savings which could well lead to significantly less retirement savings. Second, terminated participants with smaller account balances who don't cash out their vested account balances will likely not be given assistance on rolling them over, leaving employers with more small accounts that will exacerbate plan sponsors' missing participant problems. (Participants with larger plan account balances will generally receive third-party assistance on rolling over.)

In short, here are some significant effects of the proposal on the plan sponsor:

- ***Less information provided through the plan sponsor for participants:*** Plan participants are likely to get less value from the plan.

- ***More monitoring of call centers:*** The employer would have a fiduciary duty to monitor the call center to ensure that call center employees do not provide direct information regarding investments and thereby provide prohibited advice (unlike under current law in which such information would be non-fiduciary assistance). This could trigger difficult and costly negotiations with the service providers providing the call centers. Call centers may also need to enter into indemnification agreements with their employees. This additional liability and the corresponding insurance costs would ultimately be passed on to participants.

- ***Co-fiduciary liability regarding call centers and human resources employees:*** If the call center crosses the line and provides investment advice, it would become a fiduciary under the proposal. This would heighten the plan sponsor's obligation to monitor the call center and could expose the plan sponsor to co-fiduciary liability for fiduciary breaches by the call center if the plan sponsor's oversight of the call center was insufficient.

The solution to the above issues is to follow the Fifth Circuit's *Chamber* decision: limit fiduciary status to relationships of trust and confidence, which would certainly exclude isolated calls for assistance to an unknown person at a call center.

SAFE HARBOR FROM CO-FIDUCIARY LIABILITY FOR PLAN SPONSOR

Under a safe harbor that we ask DOL to include in the rule, a plan sponsor would not have co-fiduciary liability for the acts of any plan service provider if the plan sponsor:

- Establishes and communicates a clear written policy that plan service providers are prohibited from providing fiduciary advice regarding plan investments, unless such advice is provided in connection with a fiduciary program or service offered by the service provider where the plan sponsor has contracted for or agreed to (or, if applicable, the plan participant has elected or enrolled in) the provision of such fiduciary services; and

- Takes appropriate steps to ensure future compliance with the policy upon discovering instances where it was not being followed. A de minimis number of instances where the policy is not followed should not cause an employer to lose the protection of the safe harbor.

RESPONSES TO REQUESTS FOR PROPOSAL

The Council is concerned that the DOL proposal will often result in fiduciary status for persons responding to a plan sponsor's request for proposal (RFP) with respect to a plan, in some cases requiring the use of PTE 2020-02. This will:

- Deter the submission of RFP responses for some vendors that will be unwilling to use PTE 2020-02 or unwilling to spend the time to provide responses to RFPs that don't require the use of PTE 2020-02 and are correspondingly less informative and effective.

- Reduce the quality and substance of RFP responses for other vendors that decide to submit RFP responses but attempt to avoid fiduciary status.

- Decrease the quality of services for plans and plan sponsors where plan sponsors cannot get full responses to their RFPs.

- Increase the cost of services to the extent that some vendors need to use PTE 2020-02 to respond to an RFP.

The following three examples illustrate our concern in the context of RFP responses:

- **RFP for investment management services:** If, in response to a plan sponsor's RFP for investment management services, an asset manager simply describes its past work and provides references, that response would fall within the "hire me" exception described by DOL in the preamble, which states:

  > [T]he Department does not intend to suggest . . . that a person could become a fiduciary merely by engaging in the normal activity of marketing themselves as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation of a securities transaction or other investment transaction or any investment strategy involving securities or other investment property. Touting the quality of one's own advisory or investment management services would not trigger fiduciary obligations.[7]

  Yet, if the asset manager discusses any of its ideas regarding investment issues, strategy, or trends (as is common in responses to RFPs), that appears to fall within the definition of fiduciary advice under the proposal and in some cases could trigger a prohibited transaction. The following passage from the preamble threatens this very narrow reading of the "hire me" exception:

  > An investment advice provider can recommend that a retirement investor enter into an advisory relationship with the provider without acting as a fiduciary. But when the investment advice provider recommends, for example, that the investor pull money out of a plan or invest in a particular fund, ***that advice may be given in a fiduciary capacity even if part of a presentation in which the provider is also recommending that the person enter into an advisory relationship***. As proposed, the complete facts and circumstances surrounding each piece of advice would be considered.[8] [Emphasis added.]

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[7] Fiduciary Proposal at 75,906.

[8] *Id.*

DOL further states in the preamble that, under its proposal, the complete facts and circumstances surrounding each piece of advice would be considered in the above regard.[9] But rather than risk a facts and circumstances analysis, as noted, we are concerned that the threat of committing a prohibited transaction will result in fewer and less helpful responses to RFPs.

- **RFP for plan service provider.** Plan service providers may respond to an RFP to provide bundled services to a plan, including investment options. Similar to the analysis provided above with respect to the asset manager example, if the service provider's RFP response touches on any investment issues, the "hire me" exception would not be available. Thus, for example, if the service provider shares its investment platform in a favorable way (which would be typical in an RFP response), that would be a fiduciary act and would often be a prohibited transaction.

- **RFP for actuarial services.** If, in response to an RFP for actuarial services, an actuarial firm discusses its ideas on de-risking defined benefit plans through investments or liability-driven investment (LDI) strategies, that again would be fiduciary advice and possibly a prohibited transaction.[10]

- **RFP for pension risk transfers.** If, in response to an RFP regarding a pension risk transfer, an insurer provides information on the annuities that would be provided to the plan, that could be fiduciary advice and possibly a prohibited transaction.

As illustrated by the above examples, we find that the 2023 proposal with respect to RFPs is more concerning than the 2016 fiduciary rule. Under the 2016 fiduciary rule, there was a workable but narrow "sophisticated fiduciary" exception that allowed some RFP responses to avoid falling within the definition of fiduciary investment advice.[11] The 2023 proposal's version of an intermediary exception, however, would often not be available in the context of an RFP response if the intermediary requested a proposal that is tailored to a particular plan (which is almost always the case for large plans), even if the RFP response is provided to a plan adviser.[12] We see no reason why responses to

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[9] *Id.*

[10] Separate from the RFP context, we are further concerned that discussing LDI issues with a plan sponsor will generally be fiduciary advice under the proposal and possibly a prohibited transaction in some cases.

[11] Under the 2016 fiduciary rule, in general, advice provided to a plan fiduciary was not fiduciary advice if (1) the plan fiduciary is a bank, insurer, RIA, or broker-dealer, or (2) the plan fiduciary is an independent fiduciary that oversees at least $50 million of assets.

[12] DOL describes the intermediary exception in the 2023 proposal as follows: "In 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,

RFPs would be fiduciary advice and request a blanket exception for such responses from the definition of a fiduciary. Under the *Chamber* case, selling is not a fiduciary act.

'HIRE ME' EXCEPTION

More generally, the "hire me" exception is too narrow and excludes wide ranges of normal selling practices that will hurt the growth of plans. For example, if a seller of a pooled employer plan (PEP), other multiple employer plan (MEP), defined contribution group (DCG), single-employer plan, or even a Health Savings Account (HSA) includes in its promotional materials or discussions any favorable mention of a plan investment menu or an investment manager, the selling of that plan becomes a fiduciary act and may require the use of PTE 2020-02 at great cost and risk. This would very adversely affect plan coverage among small employers. Congress, DOL, and the retirement plan community have worked hard on a bipartisan basis to expand coverage and increase retirement security, including through PEPs and DCGs. This proposal would undermine the ability of financial institutions to help small businesses adopt those types of retirement plans, thus undercutting the progress that has been made.

In light of the holding in the *Chamber* case that selling is not fiduciary advice, we ask that the selling of plans, including promotion of an investment menu and/or an investment manager, be excepted from the definition of fiduciary advice.

DISCRETIONARY FIDUCIARIES

DOL has proposed in paragraph (c)(1)(i) to expand the element of the 1975 rule that pertains to discretionary fiduciaries to encompass someone with discretion over any of a retirement investor's assets, even if those assets are outside a plan or IRA. The proposed expansion appears to include anyone managing a plan sponsor's non-plan corporate assets, whether directly or indirectly. We are concerned that the effect of this proposed expansion is far too broad. For example, an asset manager of non-plan corporate assets may decline to respond to an RFP to manage the plan sponsor's plan assets due to concerns that the existing non-plan relationship could cause the response to be investment advice. Or, a plan sponsor's chief financial officer could have discretion over plan assets, thereby triggering investment advice fiduciary status under paragraph (c)(1)(i) for all employees. The existence of a completely unrelated

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and IRA owners and beneficiaries, the Department believes that communications to financial intermediaries would typically fall outside the scope of proposed paragraph (c)(1)(ii) because they would not involve ***recommendations based on the particular needs or individual circumstances of the plan or IRA serviced by the intermediary***" [emphasis added]. Fiduciary Proposal at 75,907. Of course, we anticipate that DOL would also believe the converse to be true, which would result in turning many RFP responses into a fiduciary act.

discretionary fiduciary relationship in these respects should not transform non-fiduciary advice into fiduciary advice.

MERGERS AND ACQUISITIONS

The proposal raises numerous plan issues in connection with a business merger or acquisition. For example, it is common in merger or acquisition agreements for the parties to agree on how the integration of the different plans will work. In this context, we ask for the following guidance:

- Any agreement regarding the terms of the plans, such as requiring the buyer's plan to offer a rollover opportunity to participants in the seller's plan, and the resulting plan amendments are a settlor act not subject to the proposal.

- Generally, the plan sponsor takes actions – directly and/or through a third party – to help make the employees' transition from the seller's retirement plan to the buyer's retirement plan as seamless as possible. This could take various forms. For example, the buyer could notify the seller's employees of the opportunity to roll over their benefits from the seller's plan to the buyer's plan and could explain the benefits of doing so in terms of creating a seamless transition. Or the buyer might provide assistance to the seller's employees in finding investments in the buyer's plan that match up with what the employees had invested in under the seller's plan. To assign fiduciary status based on these types of normal transition assistance would raise costs and discourage such assistance. We ask that the proposal provide an exemption from fiduciary status for actions taken by, or at the direction of, the plan sponsor in helping employees transition from one plan to another in the context of a business transaction, such as a merger or acquisition. DOL could always revisit this issue in the future after it has had the time to give this specific topic the time and study it deserves.

HIGHER COSTS AND RISKS REGARDING ROUTINE AGREEMENTS

The proposed definition of a fiduciary includes broad language covering recommendations:

> 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;

This broad language raises many questions that concern plan sponsors. Assume, for example, that a plan decides to change investment managers, chooses a new investment manager, and begins negotiating an investment management agreement with the new investment manager. The plan asks for advice with respect to the terms of the investment management agreement from the plan sponsor's internal and external ERISA and contract attorneys, as well as personnel from the plan sponsor's finance, compliance, benefits/human resources and tax departments, as well as any outside experts used by such departments.

The investment manager is involved in the "management" of plan assets, and the terms of the investment management agreement affect that management. Thus, under the proposed regulation, anyone working on the investment management agreement would appear to be a fiduciary, as long as such work is a regular part of their business.

This issue could arise in many contexts, including agreements with trustees, investment agreements (such as in the context of swaps), and agreements with investment consultants. We are concerned that the regulation as proposed would make it much harder than necessary to find outside personnel and to compare and coordinate service providers required for efficient plan establishment and operations. It also exposes plan sponsors to substantially increased liability for the agreement process.

We believe that the regulations should include provisions and examples under which advice regarding investment-related agreements is not fiduciary investment advice in the circumstances described above.

LOSS OF GENERAL ASSISTANCE FROM FINANCIAL PROFESSIONALS

Today, it is not uncommon at all for plan sponsor personnel to consult with financial professionals in considering new plan investment ideas. For example:

- Plan sponsor employees involved in plan investment issues might consult with an investment manager about investment and market trends that are not within the scope of the investment management agreement.
- A defined benefit plan sponsor might have preliminary discussions with its actuary regarding the issues and opportunities involved in LDI.
- The plan sponsor might simply ask a trusted advisor for names of potential advisors in a new area being considered for investment.

All of these discussions would become fiduciary advice under the proposal. Accompanied by this threat of fiduciary liability, these discussions would largely become unavailable. This is true for two reasons. First, the financial professional would not want to take on fiduciary liability with respect to a new area for which they may not be paid. Second, the financial professional will not want to risk incurring co-fiduciary liability with respect to any acts taken pursuant to the discussion with the plan sponsor.

The loss of the ability to have those discussions distances the plan sponsor from information that would be beneficial to the plan and plan participants. Under the current fiduciary rules, the plan sponsor employees interacting with the financial professionals understand the limits of conversations like these – they inform but do not steer, and they help the plan fiduciaries to be more informed and better able to make prudent and reasoned decisions.

Fiduciary advice should not include general investment strategy discussions with (1) an advisor that has been hired for other types of advice and is providing the supplemental general assistance either without an additional fee or with a clear understanding that the assistance is very preliminary, or (2) other financial professionals from whom a plan sponsor may receive informal assistance. Such general assistance would include, for example, (1) recommending possible professionals to provide services not furnished by the advisor, so that the advice recipient can make an educated choice, and (2) general input on market trends or possible scenario analyses. Moreover, fiduciary advice should not include discussions regarding general investment strategies such as the importance of diversification.

HEALTH AND WELFARE PLANS

We urge DOL to completely exempt health and welfare plans, products, policies, and benefits from the rulemaking. As DOL is aware, health and welfare plans can be complex, and they are fundamentally different than retirement plans. Despite this, the analysis and discussion supporting the proposal focuses almost entirely on retirement plans and fails to consider many of the unique issues and considerations relevant to health plans. Moreover, the accelerated comment period has not provided plan sponsors with sufficient time to analyze the impact of the proposal on health and welfare plans, and we are concerned about the risk of unintended consequences to the system if the health and welfare plans are not exempted entirely. Accordingly, we urge DOL to include in the final rule an express exemption for health and welfare plan-related products and policies. This will protect against the adverse consequences that could result to plan sponsors and their participants and beneficiaries from application of a final rule that fails to sufficiently address health and welfare plans, but does not include an express exemption.

We greatly appreciate DOL's attempt to limit the application of the proposal to health and welfare plans by excluding from the definition of "investment property" any product or policy that does not have an "investment component." However, many health and welfare policies and products have components that arguably could be considered "investment property." For example, some policies and administrative arrangements permit or contractually require the use of provider-facilitated disbursement accounts, and the assets held in those accounts may be invested (e.g., in short-term, low-risk funds) or subject to interest crediting while pending disbursement. Similarly, some Health Reimbursement Arrangements (HRAs) afford participants the right to grow their notional benefit by providing account interest crediting, the amount of which is sometimes based on an index or other market-based measure. These policy and product features – which generally benefit the plan and plan participants – could subject health and welfare plans to the rule, even where the (arguable) investment component is ancillary to the overall benefit or service.

We are also concerned that the proposal will likely cause many routine provider communications with employers and employees about Health Savings Accounts (HSAs) to be deemed fiduciary investment advice under ERISA, if applicable, and Section 4975 of the Internal Revenue Code. This would have a significant chilling effect on communications for the same reasons discussed above, but it is also problematic because the relief provided by PTE 2020-02 in not available to a large portion of HSA providers.

Specifically, HSAs are often held and administered by non-bank custodians or trustees (NBCs), and most NBCs are not the types of "financial institutions" that qualify for relief under PTE 2020-02. As background, Congress has provided the Internal Revenue Service (IRS) with authority to approve NBCs to administer HSAs. To be approved, an NBC must meet the requirements of the Internal Revenue Code, U.S. Department of Treasury regulations and IRS guidance.[13] They also must file an application with the IRS and satisfy the IRS that they can meet the same standards as similar financial institutions for the administration of HSAs. They are also subject to regular IRS audits to help ensure their compliance. Without including IRS-approved NBCs within the definition of "financial institution" in PTE 2020-02, the NBCs deemed to be providing advice would no longer be able to receive reasonable compensation for their services and, therefore, would no longer be able to provide those services. The likely result would be disruption for the many employers and all of their employees who currently utilize IRS-approved NBCs for HSAs, as they would need to find new HSA providers and transfer account balances to new custodians, likely with accompanying cost, liquidation of investments, and blackout periods. This also could result in further consolidation of the HSA service provider market, leading to less competition amongst providers, less choice for employers and, potentially, higher fees and less innovation and fewer helpful services for HSA account holders.

Given that NBCs are expressly authorized by Congress and approved by the IRS to administer HSAs, we believe that this may have been a simple oversight. In our view, the fact that this issue was not addressed in the proposal highlights the need for further study to ensure that any final rule does not result in unintended consequences.

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[13] Code § 223(d); Treas. Reg. § 1.408(e); IRS Rev. Proc 2023-04. *See also* https://www.irs.gov/retirement-plans/application-procedures-for-nonbank-trustees-and-custodians.

There is ample precedent to treat health and welfare plans differently from retirement plans. Congress and DOL have routinely chosen to regulate health and retirement plans under different sets of rules. For example, when DOL issued retirement plan fee disclosure rules, it declined to apply those rules to health plans, even though the statutory authority was the same for both types of plans. We urge DOL to follow a similar path with this proposal by completely carving out health and welfare plans from any final rule.

If DOL declines to do so, for the reasons noted above, we ask that DOL clarify what constitutes an "investment component" of a policy or arrangement and revise PTE 2020-02 to expand the definition of "financial institution" to include IRS-approved NBCs.

EFFECTIVE DATE AND TRANSITION RULES

Effective Date

The regulations are proposed to be effective and applicable within 60 days of finalization. That is not enough time. These regulations could cause portions of the plan services industry serving the plan sponsor community to be restructured or eliminated. For example, in some cases, advisors may need to alter the type of guidance they provide or possibly eliminate certain services to manage the consequences of changes in their fiduciary status. Additionally, advisors will need significant training on the new rules and how to comply with them. In other cases, advisors will become fiduciaries, and this may require restructuring their compensation packages, as well as the fee structures of their employer. Even if existing agreements are grandfathered (as suggested below), new agreements regarding investment services will need to be developed and negotiated. And potentially far more entities and persons will need to be insured as fiduciaries. All of this requires a substantial amount of time. A sufficiently long transition period following finalization of the regulation is critical to avoid periods when investment information is materially less available for plans and participants.

Protect Existing Agreements

In addition, we urge DOL not to disrupt existing agreements. For example, a plan sponsor may have an existing agreement with a consultant to provide non-fiduciary investment information regarding the plan's investment options as well as other investment options that could be offered to plan participants. It would be very disruptive to cause that agreement to be terminated prior to its expiration by reason of the fact that the new rules would transform the arrangement into a fiduciary relationship. It may not be possible to renegotiate a different agreement under the new rules with the same service provider; it may even be the case that, for a period of time, no service provider is prepared to provide services under the new rules. In this context, the forced termination of existing arrangements would certainly not be appropriate.

Other existing arrangements may raise even more difficult problems. For example, some investment agreements set out long-term financial and contractual obligations that cannot be modified without extensive and expensive renegotiations. The proposed regulations have the potential to force such renegotiations by, for example, treating services under typical agreements as fiduciary advice, which would, in turn, trigger prohibited transaction issues and termination provisions in the agreements.

Recommendations

We believe that the following changes would address the concerns described above:

- To avoid disruption, there needs to be a sufficiently long delay in the applicability date of at least one year.
- Existing agreements should be protected from the application of the new rules to avoid forced terminations of agreements needed by plan sponsors to serve their participants.

CONCLUSION

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

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

Sincerely,

Lynn D. Dudley

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy