



AMERICAN BENEFITS

COUNCIL

July 21, 2015

Office of Regulations and Interpretations
Employee Benefits Security
Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AB32 - Conflict of Interest Rule

Dear Sir or Madam:

The American Benefits Council (the “Council”) is pleased to have the opportunity to provide comments on the Department of Labor’s (“Department”) proposed new definition of fiduciary investment advice, also known as the conflict of interest rule. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

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 the redefinition on large plan sponsors and their participants. In light of the scope of this proposal, more issues may well be identified as we move forward, so we may be making further comments after the hearing.

We appreciate the importance of ensuring that the fiduciary rules keep pace with innovation in plan design and evolution of the marketplace and that the Department is trying to address concerns about potential conflicts of interest. However, in gathering comments from sponsors, we have heard a consistent concern that the proposed new rules, as written, are at odds with the direction that employers are moving and the pressing needs of participants in terms of facilitating employee engagement. Employers

report that the combination of the breadth of the redefinition of fiduciary advice and limited nature of the exemptions will force employers to significantly pull back 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 to enhance education and encourage more effective consumerism.

It is notable that the Council's strategic report, *A 2020 Vision*, includes a specific recommendation regarding enabling employers to better provide financial education and investment advice, including through advisers affiliated with plan investment offerings, along with appropriate participant protections. This recommendation reflects our view of the importance of a balanced regulatory approach that supports the valued interaction between plan participants, sponsors and service providers without unnecessary complexity or risk of liability.

We encourage the Department to keep in mind that employers are a critical source of 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 to be able to do this 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 redefinition could hurt the very people it is intended to protect.

SECTION 1: INVESTMENT ASSISTANCE

Investment assistance

Today, call centers operated by plan recordkeepers are generally available to provide basic information regarding the investments offered under many participant directed individual account plans. Most large plan sponsors have committed to providing their employees with access to call centers to provide basic information and respond to questions because this is typically the most effective way of engaging with employees regarding important 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 unduly and unnecessarily constrain call center personnel from providing any direct discussion of investment issues specific to the plan, especially where, as is commonly the case, the recordkeeper is a financial institution. The overall negative consequences for participants resulting from this

limitation would lead to less effective investment decisions with long term outcomes that would far outweigh any potential benefits of the proposal.

This is because almost *any* investment-related information now provided by call-centers would meet the proposed standard for becoming fiduciary advice under the proposal, i.e., that individualized information is provided “for consideration.” Although generic information would still be permitted to be provided as non-fiduciary education, we are concerned the types of education permitted under the proposal will be insufficient to optimize the value of retirement plans for 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. In addition, the proposal would make it much harder for plan sponsors to provide targeted education such as responding when participants with pre-existing investment allocations are not in what would appear to be age-appropriate investments or are unaware of the potential negative effects of splitting their investments among various target date funds. Moreover, if the financial institution maintaining the call center is deemed to be a fiduciary with respect to the information it provides, any investment related information provided by it 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. The employee describes her situation and asks what similarly situated employees are investing in. 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.
 - **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 outcomes. Plan sponsors are in the best position to track outcomes and determine the best 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 of the very narrow definition of investment education.
 - Because the call center is maintained by a financial institution which 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 outcomes depending on what the employee does with her money.

- The proposed “Best Interest Contract Exemption” (“BICE”) technically could apply to this fiduciary advice, but sponsors report that they anticipate that their providers would be unable to meet the requirements for the exemption and even if they could meet the requirements, the requirements would add unnecessarily higher costs for sponsors and participants and compliance concerns for the employer. Our expectation is that the increase in these costs would exceed the value of the information and therefore substantially reduce or eliminate the willingness of plan sponsors or participants to pay for the information.
 - For example, under the exemption, financial institutions are required to disclose – and update on at least a quarterly basis – all direct and indirect compensation received with respect to all assets of all retirement customers of the financial institution and all affiliates for the past 365 days as well as the same information with respect to every asset that a retirement customer could possibly purchase (excluding only certain assets that are not commonly purchased).
 - Also, under the exemption, even if all the burdens could be met, each call center representative who might talk to an employee would have to enter into a contract with each employee in order to be ready to respond to each employee. This will reduce uptake on the tools plan sponsors are using to engage employees so that the employees are getting the most out of their plan participation.
- **Participants left on their own:** We are concerned that the end result will be that many plan sponsors will feel the need to alert participants that they will need to seek information on the investment alternatives from their own advisors at their own cost even though the plan sponsors would rather provide investment education through their plan services. These sponsors have expressed concern that the cost of outside advisors will be prohibitive for many employees, that these services may not be available if the account is too small and that many employees simply will not seek help and will make less effective decisions and be less engaged in their retirement security.

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

- **Less information through the plan sponsor for participants:** As a result, plan participants are likely to be frustrated and get less value from the plan.
- **More monitoring of call centers:** The employer would be required to monitor the call center, if that service is available at all, to ensure that call center employees do not provide direct information regarding investments and thereby provide prohibited advice (unlike under current law under which such information would be non-fiduciary education). Plan sponsors have indicated that this could trigger difficult and costly negotiations with the service providers providing the call centers. And call centers would likely need to enter into indemnification agreements with their employees. This additional liability and corresponding insurance costs would ultimately be passed on to participants.
- **Monitoring of human resources employees:** Many employees will call the employer's human resources department for help. If the human resources employees provide specific answers, they become fiduciaries. So monitoring and training of the human resources employees to ensure that they do not provide direct information regarding investments would be necessary, as would enhanced fiduciary insurance. This would also be a frustrating experience for participants who would not be able to have their questions answered, and for human resources personnel who want to – but cannot – help those participants. In addition, it is likely that the plan sponsor would need to enter into indemnification agreements with respect to human resources employees.
- **Co-fiduciary liability regarding call centers and human resources employees:** If the call center or human resources employees cross the line and provide investment advice, they would become fiduciaries under the proposal, triggering possible co-fiduciary liability for the plan sponsor.

SECTION 2: SOLUTIONS TO INVESTMENT ISSUES

We believe that the definition of education regarding investments should be broadened and that Interpretive Bulletin 96-1, discussed in Sections 3 and 4 below, should be preserved, not narrowed as in the proposed regulation.

In addition, it is very important to exclude insignificant discussions from the definition of fiduciary advice. Part of the reason that plan sponsors will be exposed to more liability and cost is the fact that the proposed definition of fiduciary advice includes individualized advice that is provided *for consideration*, an easily tripped standard. No mutual understanding concerning the advice is required. Under the

revised definition, off-hand comments by a human resources employee – a portion of whose compensation could be viewed as the “fee or other compensation” necessary to establish fiduciary status – about common employee practices or by a call center employee about what she did in the same situation would become fiduciary advice, which is not an appropriate outcome for this type of discussion. In our view, a fiduciary relationship should not be treated as existing unless:

- There is a mutual understanding that the individualized recommendations being provided in connection with a plan or Individual Retirement Account (IRA):
 - Will play a significant role in the recipient’s decision-making with respect to her retirement account, and
 - Reflects the considered judgment of the advisor.

Even with this revised rule, employers would be exposed to very material additional liabilities. Accordingly, the following safe harbors are needed:

- **Safe harbor from co-fiduciary liability for plan sponsor:** Under a safe harbor, a plan sponsor would not have co-fiduciary liability for the acts of any employee or plan service provider if the plan sponsor:
 - Establishes and communicates a clear written policy that employees and 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;
 - Establishes and follows reasonable procedures to ensure that such policy is being followed, provided that with respect to service providers, the employer would be permitted to rely on certifications from such providers that they have established and followed such procedures, and provided further that with respect to employees, no monitoring of discussions would be required; 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.
- **Safe harbor for plan sponsor employees:** Plan sponsor employees would not be treated as fiduciaries by reason of providing fiduciary advice if:
 - The plan sponsor has a policy described above; and
 - The employee has not intentionally violated that policy or violated the policy more than a de minimis number of times.

SECTION 3: INVESTMENT EDUCATION

Investment education would have to be materially limited.

The Department proposal would significantly restrict the type of investment education that can be provided without triggering fiduciary status and the prohibited transaction rules. Under current law (as reflected in Interpretive Bulletin 96-1), education includes (1) guidance on the extent to which an individual should invest in different asset classes (such as large and small cap equity funds, and long- and short-term bond funds) based on her age and other factors, and (2) examples of investments that fit within such asset classes. This definition of education has worked very well for nearly 20 years and was permitted under the 2010 Department proposal. Under the 2015 proposal, providing examples of investments that fit within asset classes would, however, become fiduciary advice. Education would be limited to abstract conversations about asset classes using terms – like large cap equity funds – that participants may not understand or find useful because they are not able to associate them with the investment choices they are offered.

Participants would very understandably and very predictably ask a call center or a human resources employee about which plan funds fall in which category. In this context, all the issues regarding call centers and human resources employees – regarding monitoring, liability and less help for participants – would arise here too. At best, participants will receive answers that will not specifically address questions that are likely to need to be answered to make good decisions, perhaps along with an explanation as to the limitations of the call center or human resources personnel in providing specific information. Participants may be advised to consult an outside advisor or other sources of general education. This will likely be a frustrating experience for the participant and result in participants being less engaged, exacerbating the potential for poorer decisions being made. In some cases, due to these risks and burdens, plan sponsors anticipate that certain call center services likely would no longer be made available to the plan and the participants.

SECTION 4: SOLUTION TO EDUCATION ISSUE

Interpretive Bulletin 96-1 has been a huge success, and should be preserved, as recognized by the 2010 Department proposal, and updated to ensure that the Interpretive Bulletin still works with respect to vital communications. As under the proposal, the principles of Interpretive Bulletin 96-1 should be extended to apply to assistance provided to plan sponsors and IRA owners and with respect to distributions and rollovers. With respect to the distribution element, we would also ask that plan sponsor arrangements that facilitate lifetime income, such as target date funds that

involve rolling over lifetime income investments, not create fiduciary status in such a restrictive way as to inhibit the growth of these innovative arrangements.

SECTION 5: ROLLOVERS AND DISTRIBUTIONS

Summary of the proposal

Under the proposal, advice regarding distributions or rollovers from plans and IRAs would be treated as investment advice, thus making any party providing advice on the potential merits of taking a rollover or its disposition a fiduciary.

Call center information about distributions and rollovers

Assume that a participant terminates employment and calls the call center maintained by the recordkeeper (which is a financial institution) for her employer's 401(k) plan. The participant asks about the options she has with respect to her 401(k) account. The call center representative identifies the options available. The participant follows up with a request for specific information, such as how to compare the options or what financial institutions are available to accept her rollover. Any answer that is specifically directed to the request for additional information would be fiduciary advice, not education under the proposed rules.

- Because the call center is maintained by a financial institution, any fiduciary advice regarding distributions and rollovers would be a prohibited transaction because the financial institution has an interest in what the participant does with her money – whether keeping it in the plan so that the institution continues to earn recordkeeping fees versus rolling to another vendor or to the institution's own IRA product with a fee structure that may be different from the plan's fee structure. This is true even if the financial institution provides IRA advice on a flat fee basis because the financial institution benefits more if the participant pays the financial institution a flat fee than if the participant pays another financial institution.
- Although the Department has informally indicated the BICE exemption would apply to advice regarding rollovers, this is not clear. The language of the BICE appears to be limited to advice regarding the purchase or sale of assets, and what is being discussed goes beyond a purchase or a sale of an asset. Even if it is the case that rollover advice is included in the BICE, we remain concerned that the costs and complexity of compliance with the BICE will raise substantial problems and result in a reduction of available services.

Information from other financial professionals

The participant in the above example cannot get information from the call center, so she calls a financial professional for answers to her questions.

- **Prohibition on providing information:** For the same reasons noted above, the financial professional would not be able to specifically answer the questions posed by the participant without providing what would be deemed fiduciary advice and engaging in a prohibited transaction.

Many of the issues that arise in the context of investment advice are also present in supporting good decisions regarding distributions. We are concerned that in an effort to address conflicts of interest, the proposed rules (1) go too far with the result that participants will have less information and will be less empowered to make good decisions for themselves, and (2) give plan sponsors less flexibility in shaping their benefits programs. That is not to say we do not understand the concerns that have been raised about providing participants the information they need to make educated decisions at distribution. Some plan sponsors have a desire to maintain assets under management and believe it is in the best interest of their participants to leave their money in the plan. Other plan sponsors want to make sure that participants have all the options fully explained to them but do not want to steer participants in any particular direction. And yet other plan sponsors have plans that provide for automatic cash out of vested benefits of \$5,000 or less, as permitted by law. Sponsors may or may not be comfortable offering services to their participants that include being able to discuss distribution options with a service provider representative from a financial institution that is providing the investment options and that also offers IRA services. Plan sponsors are best situated to understand the needs of their workforce, to appreciate the options their plans offer and to work with their providers to meet their employees' needs.

SECTION 6: SOLUTIONS TO ROLLOVER ISSUES

We recommend the following changes:

- **Broaden the definition of education regarding distributions and rollovers:** In order to allow terminating employees to be able to obtain the information they believe they need regarding distributions and rollovers, the definition of distribution and rollover education should be broadened to include the following basic information:
 - Factors to consider in making decisions regarding rollovers and distributions, such as specific information regarding net returns, fees, investment choice, screening of investment options and services available

(such as modeling for retirement readiness). For a helpful discussion of factors, please see FINRA Notice 13-45.

- Examples of specific multiple IRA options and their features, accompanied by clear disclosure that these are just examples.
- **Safe harbor from co-fiduciary liability for plan sponsor:** Under a safe harbor, a plan sponsor would not have co-fiduciary liability for the acts of any employee or plan service provider if the plan sponsor:
 - Establishes and communicates a clear written policy that employees and plan service providers are prohibited from providing fiduciary advice regarding distributions and rollovers 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;
 - Establishes and follows reasonable procedures to ensure that such policy is being followed, provided that with respect to service providers, the employer would be permitted to rely on certifications from such providers that they have established and followed such procedures and provided further that with respect to employees, no monitoring of discussions would be required; 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.)
- **Safe harbor for plan sponsor employees:** Plan sponsor employees will not be treated as fiduciaries by reason of providing fiduciary advice if:
 - The plan sponsor has a policy described above; and
 - The employee has not intentionally violated that policy, or violated the policy more than a de minimis number of times.
- **Extend the seller's exception to all assets and services and to all recipients:** We see no reason why a service or investment provider should not be able to promote its own services and products to anyone without becoming a fiduciary, provided it is clear that the service or investment provider is acting as a seller. Accordingly, we urge you to adopt a rule under which a seller of products or services will not be treated as a fiduciary with respect to any individual, business, or other recipient, if such seller makes it clear that it is selling, not advising. As under the 2010 Department proposal, there is no need for written representations from the recipient, which would prove unworkable in many contexts.

- In the specific context of distributions and rollovers, the rule as proposed would simply deprive terminating employees of needed information regarding services and products available to them.
- This issue can affect large employers in another way too. Many requests for proposals (“RFPs”) are sent “blind” whereby the service provider sends the materials to an intermediary without knowing who the plan sponsor is until the bid process is finished. Thus, service providers may not be able to respond to blind RFPs for fear of incurring fiduciary liability and committing a prohibited transaction, thus taking away an important tool for large plan sponsors in finding service providers. Broadening the seller’s exception, as described above, and modifying the definition of fiduciary advice, as described in Section 2, would address the RFP issue in a way very broadly and strongly favored by our members. (At a minimum, an intermediary should be able to attest to the fact that the recipient of the RFP meets the large plan status requirements, but this approach would, of course, only address a portion of the issue and would not help participants in need of rollover and distribution information.)
- **Guiding principle: support and empower employees:** One theme discussed in the preamble to the proposal gives us particular concern – the notion that employees are “unable to assess the quality of the advice they receive.” This theme was used to support making the seller’s exception inapplicable to individuals, thus effectively eliminating individualized marketing to employees. Our plan sponsors believe that we need to continue to empower employees to make their own informed choices, rather than cut them off from information that is needed or can assist them in making their choices. Individuals must make many choices throughout their lives and are best able to make good decisions that reflect their individual circumstances and needs when they are provided with information and support. We need to focus our energies on helping them with those choices on a knowledgeable basis, not shielding them from information.

SECTION 7: HIGHER COSTS AND RISKS REGARDING ROUTINE AGREEMENTS

Many routine investment-related agreements and decisions could give rise to fiduciary status.

Although the preamble to the proposal states that the proposal was clarified to exclude “attorneys, accountants, and actuaries” providing “professional assistance,” the regulatory language itself does not contain any language that would exclude them. In fact, the proposed regulation includes within the proposed definition of “investment advice” the following: “A recommendation as to the management of securities or other

property.” The preamble to the original 2010 proposal explained this language as follows:

This would include, for instance, advice and recommendations as to the exercise of rights appurtenant to shares of stock (e.g., voting proxies), and as to selection of persons to manage plan investments.

The 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 unless an exception applies. Here are some examples of the potential treatment of various individuals who work on agreements:

- **Outside attorneys and other outside experts could be fiduciaries:** Outside attorneys and other outside experts providing help with respect to the investment management agreement could be providing “recommendations regarding the management of securities,” thus triggering fiduciary status. No exception would apply under the new rules as written.
- **All internal decision-makers could also be fiduciaries:** Any employee of the plan sponsor with final sign-off authority with respect to any aspect of the investment management agreement would be a fiduciary. So, for example, if the employer’s general counsel, chief compliance officer, treasurer and tax director have to sign off on an investment management agreement with respect to issues for which they are responsible. These employees would be fiduciaries by reason of making a decision regarding the management of securities.
- **Some other plan sponsor employees helping the decision-makers may become fiduciaries:** Some such employees may be excluded under the carve-out for plan sponsor employees providing advice to a plan fiduciary, but if Employee A is providing assistance to Employee B who assists a plan fiduciary but is not himself a plan fiduciary, Employee A may not fall within the carve-out as currently written. Also excluded from the carve-out would be employees who are providing these services but who are employed by an affiliate of the plan sponsor.

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 including for minor missteps that have no impact on the outcome.

SECTION 8: SOLUTION TO THE ISSUES REGARDING INVESTMENT-RELATED AGREEMENTS

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. For example, the carve-out for plan sponsor employees providing advice to plan fiduciaries should be clarified to apply to advice provided *directly or indirectly* to plan fiduciaries. In addition, it should be clarified that the carve-out for plan sponsor employees also applies to employees of affiliates of the plan sponsor.

SECTION 9: HIGHER COSTS AND RISKS REGARDING PLAN VALUATIONS

The valuation rule could materially increase plan sponsor costs.

There are a number of concerns regarding the position in the proposed regulation that, subject to certain narrow exceptions, asset valuations are fiduciary acts. The issues raised by the proposal are varied, but below are some examples of valuations that would be fiduciary acts under the proposal:

- Valuation of annuity contracts, separate accounts, GICs and other assets without a readily ascertainable value in order to determine the required minimum distributions (“RMDs”) that must be made under Section 401(a)(9) of the Internal Revenue Code).
- Valuation of defined benefit plan assets to determine the plan sponsor’s funding obligations, as well as for purposes of applying the various benefit restrictions applicable under ERISA Section 206(g) and Code Section 436. These benefit restrictions include restrictions on a plan’s ability to pay benefits in certain forms, such as lump sums.
- Valuation of any portion of a participant’s defined contribution plan account that holds an interest in an asset such as a separate account, a GIC, an annuity contract, assets in a collective investment fund or another asset without a readily ascertainable market value. In order to determine the amount payable to a terminating participant, it may be necessary to value such assets.

If these routine valuations give rise to fiduciary status, holding many types of common assets in plans would, at the very least, become much more expensive by reason of (1) the significant additional liability assumed by the person valuing the asset, and (2) the fact that many service providers will cease providing valuations due to the potential liability. In fact, it is very possible that the current prohibited transaction rules would preclude many investment product providers from valuing their own products.

In addition, persons performing routine valuations would be forced to engage in new and difficult legal analyses. For example, in valuing assets for purposes of the RMD rules, what would it mean for a fiduciary to act prudently and in the best interest of the participants? Should the fiduciary be “conservative” so as to minimize the value and thus preserve as much as possible in the plan? Should the fiduciary be “conservative” in another way and maximize the value to avoid possible plan disqualification and/or participant excise tax problems? In valuing assets for purposes of funding determinations, is there a duty to be conservative and minimize the value so as to increase funding obligations? Or is there a duty to the plan not to be so conservative so as to avoid the application of funding based restrictions on distributions and benefits? Or should the appraiser be concerned that lump sums could drain the plan of assets, and make the valuation conservatively low?

In addition to sharply increased costs and litigation risk, the proposed regulation would create extremely difficult new issues, like the ones noted above and including the situation in which a provider merely passes along valuations provided by a plan sponsor selected third party. Routine plan operations will be thrown into question and many service providers may simply refuse to provide such routine valuations, at least without full indemnification by the plan sponsor. Plans may even find that many helpful investments become effectively unavailable to them by reason of the fiduciary issues involved in the valuation.

SECTION 10: SOLUTION TO VALUATION ISSUES

We are unaware of any problems or negative consequences that have been identified with respect to asset valuations that would warrant the burdens described above and the costs that they would generate. Moreover, valuations should be accurate and impartial. Impartiality is in direct conflict with a fiduciary duty requiring the fiduciary to act in the exclusive interests of the plan and favor the plan over any other party. The concept that fiduciaries are to be impartial is antithetical to the entire structure of ERISA (and the common law of trusts upon which it is based). Accordingly, if a plan has a fiduciary duty to value assets in a manner favorable to the plan, then other parties may need to retain fiduciaries to value assets in the contrary manner, leading to more disputes and more costs.

We urge you not to treat appraisals and valuations as fiduciary acts. We may provide additional comments on this issue.

SECTION 11: 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 liability driven investing.
- 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 these discussions cuts the plan sponsor off from information that would be beneficial to the plan and to the participants. The plan sponsor employees interacting with the financial professionals understand the limits of conversations like these – they inform but do not steer, they help the plan fiduciaries be more informed and better able to make well-grounded decisions.

SECTION 12: SOLUTIONS TO THE INFORMAL ASSISTANCE ISSUE

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.

SECTION 13: PLANS MAINTAINED BY FINANCIAL INSTITUTIONS AND WEBSITE-BASED ADVICE

We see no reason why website-based advice is ineligible for the BICE. Website-based advice is an important part of the menu of advice options available to participants and IRA owners. The rationale for this exclusion given in the preamble is that website advice generally does not seem to need an exemption. We do not think this is sufficient with respect to a market that is in its early stages, as confirmed by the Department itself: “robo-advisers have not been tested in a bear market. . . . Although it is too early to precisely predict how the investment market will evolve over time, the Department expects the number of low-cost automated investment services to increase” (DOL Regulatory Impact Analysis at 231). As noted initially, plan sponsors are an enormous source of innovation and we believe it imprudent to specifically exclude website-based advice from the BICE because it will chill development of what could provide cost-efficient and effective tools for participants.

Similarly, we are troubled by the fact that the BICE is inapplicable to a financial institution with respect to its plan for its own employees. It does not make sense for a financial institution in the business of providing investment advice to hire a competitor to provide advice to its own employees. The Department has recognized in the past that financial institutions should be permitted to utilize their own products and services in connection with their own plans. Examples include the exemptions permitting a financial institution to offer its own mutual funds as investment options in its 401(k) plan and with respect to in-house asset managers.

SECTION 14: SOLUTIONS TO THE FINANCIAL INSTITUTION AND WEBSITE-BASED ADVICE ISSUES

We recommend that, in addition to being made workable, the BICE should be made applicable to website-based advice and to advice provided by a financial institution with respect to its own plan.

SECTION 15: HEALTH AND WELFARE PLANS

There has been very little consideration by plan sponsors of the effect of the proposal on health and welfare plans, some elements of which were discussed in our letter dated July 10. This may be attributable in part to the fact that all discussions of this proposal have been in the retirement space, including the Department’s substantive

economic discussions. In this context, we urge you to exempt health and welfare plans, as well as Health Savings Accounts from the rules.

SECTION 16: EFFECTIVE DATE AND TRANSITION RULES

Effective date

The regulations are proposed to be applicable within eight months of finalization. That is not enough time. These regulations could cause portions of the investment advice industry serving the plan sponsor community to be restructured or eliminated. For example, in some cases, advisors may need to alter the type of education and guidance they provide or possibly eliminate certain services in order 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 the Department 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.

SECTION 17: SOLUTIONS TO EFFECTIVE DATE AND TRANSITION ISSUES

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

- To avoid disruption, there needs to be a sufficiently long transition period.
- Existing agreements should be protected from the application of the new rules for an extended period of time in order to avoid forced terminations of agreements needed by plan sponsors to serve their participants.

SECTION 18: POTENTIAL ISSUES

As noted, we have focused on the large plan issues arising under the Department proposal. We, however, recognize that there are many other issues, including those that affect services available to plans or the process for obtaining services. Many of these issues could have significant effects on large plan sponsors and on the private retirement system generally. We are continuing to review these issues and may provide further comments on them after the hearing. For example:

- There continues to be concern that plan providers will not be able to assist any size employer with the selection of an investment menu of options to be offered to employees, which could undermine plan formation, especially among small employers.
- Consistent with studies that have emerged, we are concerned that small businesses and small investors may find their access to investment assistance very limited by the proposed rules, leading to a decrease in Americans' retirement readiness.
- In order to limit the need for advice, investment choices for employers and employees may be materially limited, which could undermine flexibility, which is one of the strengths of the voluntary system.
- We would like to further consider the interaction between the QDIA rules and the ERISA section 404(c) rules, on the one hand, and the fiduciary proposal, on other hand. The former are structured to enhance the provision of information to participants so that they can make the best decisions, taking into account their own circumstances. We are concerned that the proposed fiduciary rule could work against this important objective.
- In order to preserve plan sponsor flexibility, we would like to consider a possible rule permitting a service provider to a plan sponsor to be treated as a non-

fiduciary to the extent that the plan sponsor enters into an agreement treating such service provider as a non-fiduciary.

- We are concerned that the increased potential liabilities attributable to a very broad definition of fiduciary will add material costs that will be ultimately borne by individuals.
- As noted, our members report that the BICE is not workable for numerous reasons, and we may offer specific suggestions for modifications based on existing disclosure regimes.
- There is great uncertainty regarding which service provider employees interacting with clients could be fiduciaries. If the net is cast too wide, the rendering of services to plans and individuals could be very adversely affected.
- The scope of potential service provider co-fiduciary liability deserves further consideration.
- Plan recordkeepers often make available advisory services through an unrelated firm without endorsing such other firm. If the recordkeeper were to be treated as a fiduciary in this situation, plans could lose a helpful and efficient service. A similar situation arises when the two types of services are marketed together.
- Many questions have been raised about the statutory requirement that in order to be an investment advice fiduciary, the advisor must be providing the advice *for a fee*. The meaning of the fee requirement deserves more consideration, where, for example, no incremental compensation is received.
- The extremely broad definition of a “recommendation” merits further discussion.

CONCLUSION

The fiduciary proposal raises many issues for plan sponsors, participants and those providing services to support the 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.

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

Sincerely,

A handwritten signature in black ink that reads "Lynn Dudley". The signature is written in a cursive style with a large, prominent "L" and "D".

Lynn Dudley
Senior Vice President,
Global Retirement and Compensation Policy