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May 26, 2015

U.S. Department of Labor
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: Proposed Fiduciary Regulations (RIN 1210-AB32)

Dear Sir(s) and/or Madame(s):

I hereby comment with respect to the fiduciary definition regulations. I believe the portion of the regulations stating that a recommendation that a benefit be distributed or rolled over is a fiduciary act is unlawful because such a thing does not fall within the plain English language meaning of "investment advice." The investment advice rule supplies the basis for inclusion.

Case law holds that any agency can only draw its authority from law created by Congress. In Louisiana Public Service Comm. v. FCC, 476 U.S. 355, 374 (1986), the U.S. Supreme Court said: "[A]n agency literally has no power to act unless and until Congress confers power on it." *See also* City of Arlington v. FCC, 133 S. Ct. 1863, 1869 (2013). Thorne v. Maggio, 765 F. 2d 1270, 1274 (5th Cir. 1985), provides: "Whatever is not forbidden on our blessed shores is permitted." Numerous U.S. Supreme Court cases hold that a statute must be interpreted using ordinary English language, with words and phrases taken in proper context. Food & Drug Admin. v. Brown & Williamson Tobacco, 529 U.S. 120 (2000); MCI Telecommunications Corp. v. American Telephone, Telegraph Co., 512 U.S. 218 (1994). The authority granted by ERISA §505, which does not apply to Title 26 of the U.S. Code (including IRC §4975), does not override these authorities. *See* Loving v. Internal Revenue Service, 742 F. 3d 1014 (D.C. Cir. 2014), wherein the U.S. Court of Appeals for the District of Columbia struck down the IRS's stretch of statutory language beyond its ordinary English meaning.

Applying the foregoing authorities, it is unlawful to include the provision of distribution or rollover advice in the definition of fiduciary. The issue is significant because financial advisors, CPAs and attorneys often advise clients regarding these matters without any thought of particular investments. For example, many years ago, I advised a client regarding whether he should take a distribution of company stock that he held in his employer's retirement plan (and receive beneficial tax treatment under IRC §402(e)(4)(B)) or roll the assets over to an IRA (from which all distributions would be ordinary income). I did not advise him with respect to alternative investments. Under the proposed definition, I could not provide the advice without committing a prohibited transaction, unless I took actions necessary for my advice to fall under the BICE exemption. It would be very difficult to fall under the exemption.

As an attorney, I have a duty to act in the best interest of a client. For the particular client mentioned above, that would mean giving him my thoughts and recommendations, and not simply educating him on the distribution and rollover options and implications. While I generally try to educate my clients and let them make decisions, they often ask for a recommendation. It is unlawful to put an attorney in a place such as I was in with respect to my client in the position proposed. The provision is contrary to the position taken in Adv. Op. 2005-23A. The fact that the existing regulations do not extend power to the maximum extent lawful does not permit an excessive interpretation at this time to "make up" for the past shortfall.

I understand the concern about people steering individuals to take actions so that they can "get access" to their money, in terms of being able to draw compensation by making investment recommendations, etc. following a distribution or rollover. Perhaps making distribution recommendations or rollover recommendations when the person making the recommendation will draw compensation from the post-transaction assets when held in an IRA could *possibly* fall within the definition. However, I'm certain that simply making recommendations regarding taking a distribution or rolling over assets does not constitute giving investment advice. The law is what it is, and cannot be expanded beyond what it is for any reason.

Please change the rule to be consistent with the statute. Thank you.

Sincerely,

Allen Buckley

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