



Via Electronic Submission to www.regulations.gov

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, N.W.
Washington, D.C. 20210

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712
U.S. Department of Labor
200 Constitution Avenue, N.W., Suite 400
Washington, D.C. 20210

Re: EBSA RIN 1210-AB32. Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice

**Re: EBSA-2014-0016; ZRIN: 1210-ZA25
Proposed Best Interest Contract Exemption**

Ladies and Gentlemen:

This letter is submitted by the Society of Human Resources Management (“SHRM”) in response to the request for comments by the Employee Benefits Security Administration (“EBSA”) on its proposal to revise 29 C.F.R. Section 2510.3-21(c) by expanding the definition of “fiduciary” who renders “investment advice” and to issue a Best Interest Contract Exemption (“BICE”).

Founded in 1948, the Society for Human Resource Management (SHRM) is the world’s largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and

subsidiary offices in China, India and United Arab Emirates. Many of our members perform in-house administrative and fiduciary activities for employer-sponsored pension plans. SHRM appreciates the Department's efforts to ensure protections for plan participants, sponsors, administrators and retirement plan providers. Creating an environment that encourages retirement savings while protecting pension plan assets is of utmost importance. Just as importantly, overly burdensome regulations can have unintended consequences, including higher costs, increased record-keeping requirements, as well as creating barriers to saving for retirement. As the Department considers comments to these proposed rules, it is imperative that the regulatory environment does no harm to the retirement system.

INTRODUCTION

SHRM agrees that the current regulations narrowing the statutory definition of fiduciary investment advice are outdated and do not adequately protect the interests of plan sponsors, plan participants and beneficiaries. Significant changes have occurred in the retirement plan landscape, including (i) the introduction of and growth in participant-directed individual account plans; (ii) the changes to and complexity of the various sales and distribution methods for retirement plans; (iii) the complexity of the compensatory arrangements with advisors, trustees and other service providers; and (iv) the increase in the types of investments products offered to plan sponsors, plan participants and beneficiaries. These circumstances justify the revocation of the current five-part test used to determine whether a person is a fiduciary by reason of rendering investment advice to plan sponsors, plan participants and beneficiaries. These plan participants should be able to receive much needed expert advice from advisers who acknowledge their fiduciary status and such advice should be unbiased and free of conflicts of interest.

SHRM's specific comments follow below.

COMMENTS ON THE CONFLICT OF INTEREST RULE – RETIREMENT INVESTMENT ADVICE

(1) THE EXPANSION OF THE GENERAL DEFINITION OF INVESTMENT ADVICE INCREASES PROTECTION TO PLAN SPONSORS, PLAN PARTICIPANTS AND BENEFICIARIES, AND IRA OWNERS.

The proposed definition eliminates many conditions placed on the advice contained in the 1975 regulations that allowed advisers to easily avoid fiduciary status - - the proposal provides that the advice does not have to be made on a regular basis, does not need to be given under a mutual agreement that the advice will serve as a primary basis for investment decision, and does not need to be individualized based on the particular needs of the plan. Rather, the proposed definition provides that the advice either be individualized or specifically directed to the advice recipient, and also that the advice needs to be considered by the recipient in making investment decisions. SHRM believes that this new definition better conforms to the statutory definition of "fiduciary" found in Section 3(21) of the Employee Retirement Income Security Act of 1974

(“ERISA”) and Section 4975(e)(3) of the Internal Revenue Code of 1986 (“Code”). Moreover, it increases the likelihood that investment advisers will be deemed fiduciaries required to act in the best interests of their retirement investors.

(2) THE EXPANSION OF THE INVESTMENT ADVICE TO INCLUDE RECOMMENDATIONS TO TAKE BENEFIT DISTRIBUTIONS AND RECOMMENDATIONS ON INVESTMENT OF ASSETS TO BE ROLLED OVER OR OTHERWISE DISTRIBUTED FROM PLANS OR IRAS INCREASES PROTECTION TO PLAN PARTICIPANTS AND BENEFICIARIES AND IRA OWNERS.

SHRM agrees with the Department of Labor (“DOL”) that an adviser who makes recommendations to a participant or beneficiary to take a distribution from a plan (whether or not combined with a recommendation on how to invest those assets) constitutes “investment advice” as long as the adviser gets direct or indirect compensation for that advice. A participant who terminates his/her employment has the choice to keep their account balance in the plan until retirement or receive a distribution that may be rolled over into another qualified plan or an IRA or receive a cash distribution. Thus, advice to take a distribution (whether in-serve or after termination) relates to how those monies should be invested. Moreover, advice provided regarding where to invest those assets outside of the plan (whether provided while those assets remain in the plan or not) likewise constitutes investment advice.

(3) PROFESSIONALS WHO PROVIDE APPRAISALS AND FAIRNESS OPINIONS REGARDING THE VALUE OF SECURITIES AND PROPERTY IN CONNECTION WITH SPECIFIC TRANSACTIONS SHOULD NOT BE DEEMED FIDUCIARIES.

The DOL’s current proposal limits the provision of appraisals and fairness opinions by professionals as investment advice to those provided in connection with a specific transaction or a transaction involving the acquisition, disposition, or exchange of securities or other property by the plan. One of the “carve-outs” proposed in the regulation excludes from the definition of fiduciary investment advice appraisals, fairness opinions, or statements of value if they relate to: (i) Employee Stock Option Plans (“ESOPs”); (ii) collective investment funds; and (iii) reporting and disclosing obligations under ERISA, the Code, or other federal or state laws.

While SHRM appreciates that the DOL has limited the 2010 proposal (which included all appraisals, fairness opinions, and valuations as to the value of securities or property held by the plan), SHRM continues to believe that the imposition of ERISA (or other fiduciary duties) on appraisers, financial experts and other professionals who render fairness opinions will assuredly drive up the cost of experts and reduce the number of experts who will agree to provide services to plan fiduciaries.

Moreover, by making an appraiser or other expert an ERISA fiduciary, it would change the current framework of the federal common law governing ERISA fiduciary duties. Under current ERISA law, an appraisal or fairness opinion is obtained by plan fiduciaries to assist them

in deciding the value of assets which may be held in a plan. The plan fiduciary has the primary obligation to reasonably investigate the merits of any particular financial transaction and if the plan fiduciary lacks the expertise to make such a determination, he/she is obligated to obtain the assistance of any expert. However, even when an expert is retained to provide expert assistance to the plan fiduciary, the plan fiduciary must still exercise his/her independent judgment regarding the transaction. The plan fiduciary cannot rely solely on expert advice. Rather, the plan fiduciary must evaluate the expert's report, ask questions, assess the responses and ultimately make the judgment whether to rely on the appraisal or valuation.

Under the proposed regulation, the plan fiduciary will not be retaining professional advice to make decisions with respect to transactions, but rather will be hiring a fiduciary to render a decision on behalf of the plan. Nothing in the ERISA definition of fiduciary supports a wholesale revision of the law as developed by the federal courts. SHRM believes that the professional standards under which the experts operate ensure that the appraisers and valuation experts are conducting fair and reasonable valuations. SHRM recommends instead that the DOL enact regulations (similar to IRS regulations under Code Section 409A relating to the valuation of employer stock that is not readily tradable on an established securities market) setting standards for valuations of plan assets.

(4) THE "COUNTER PARTY" OR "SELLER'S" CARVE-OUT SHOULD APPLY TO SMALL PLANS AS LONG AS THE PLAN FIDUCIARY ACKNOWLEDGES THAT HE OR SHE HAS SUFFICIENT FINANCIAL EXPERTISE TO EVALUATE THE TRANSACTION AND DETERMINE IT TO BE PRUDENT AND IN THE BEST INTEREST OF THE PARTICIPANTS AND BENEFICIARIES.

SHRM believes that the counterparty carve-out from the definition of fiduciary investment advice is beneficial to plan sponsors. It allows individuals and entities to sell their products and other investment opportunities to independent plan fiduciaries. The person must: (i) obtain written representation that the independent fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity; (ii) inform the independent plan fiduciary of the existence and nature of the person's financial interests in the transactions; (iii) not receive a fee or other compensation directly from the plan or plan fiduciary for the provision of investment advice (as opposed to other services); and (iv) know or reasonably believe that the plan fiduciary has sufficient expertise to evaluate the transaction. Advisers to small plans (less than 100 participants) have been excluded from the carve-out unless the independent plan fiduciary has at least \$100 million in plan assets under management.

SHRM recommends that small plans be included in the carve-out, even if the independent plan fiduciary does not have \$100 million or more in plan assets under management. We believe that required disclosures make clear to any plan fiduciary that the adviser is not acting as a fiduciary and is merely selling an investment or product. The independent plan fiduciary should acknowledge in writing before the transaction that he/she has sufficient expertise to evaluate the

transaction and determine whether it is prudent and in the best interest of the plan participants and beneficiaries. Even though recommendations to small plan sponsors/fiduciaries are routinely presented as advice or consulting services, we do not believe this will continue to be the case if clear disclosures are made as required by the carve-out. If the plan sponsor acknowledges in writing his/her expertise in being able to evaluate the transaction, that should be sufficient.

(5) THE “PLATFORM PROVIDER” CARVE-OUT SHOULD REQUIRE ACKNOWLEDGEMENTS BY THE PLAN FIDUCIARIES.

The platform provider carve-out allows platform providers to not be investment advice fiduciaries if they market or make available investment vehicles on their platforms, as long as such offerings are not tailored to the individual needs of the plan and its participants and beneficiaries and they disclose in writing that they are not undertaking to provide impartial advice or give advice in a fiduciary capacity. The carve-out also allows certain activities that platform providers may carry out to assist plan fiduciaries in selecting and monitoring investment alternatives.

While SHRM is supportive of this carve-out, we believe that, similar to the counterparty carve-out, the independent plan fiduciary should acknowledge in writing that he/she: (i) is the person assuming fiduciary duties under ERISA; and (ii) has sufficient expertise to evaluate the transactions and make selection of investment options that are prudent and in the best interest of plan participants on beneficiaries. Many times plan fiduciaries do not understand that platform providers have financial or other relationships with the offered investments and are not providing impartial investment advice. Platform providers sometimes provide “value added” services offering to the plan fiduciary an adviser (on a non-fiduciary basis) to assist in developing a diversified portfolio of investments. Some platform providers also offer to the plan fiduciary so-called “fiduciary warranties”, giving the distinct impression that the plan sponsor does not have to worry about fiduciary responsibilities. The acknowledgement by the fiduciary that he/she is the fiduciary and possesses expertise to make investment decisions would put plan sponsor/fiduciaries on notice of their fiduciary responsibilities.

COMMENTS ON BEST INTEREST CONTRACT EXEMPTION (BICE)

(1) THE EXEMPTION REDUCES THE PROTECTIONS FOR SMALL PLAN FIDUCIARIES AND PARTICIPANT AND BENEFICIARIES.

SHRM recommends that the BICE should be available exclusively for advisers in the IRA market. The exemption reduces the protections for small plans and plan participants and beneficiaries.

ERISA provides general fiduciary rules governing plan fiduciaries, along with prohibited transactions rules. There are statutory and class exemptions that allow fiduciaries to plans and those providing advice to plan participants and beneficiaries to receive differential and third party compensation under protective conditions.

Advisers to plan participants and beneficiaries are already allowed to receive differential and third party payments under ERISA for the provision of investment advice to plan participants and beneficiaries. The Pension Protection Act of 2006 (“PPA”) amended both ERISA and the Code to add a statutory exemption relating to the provision of participant investment advice. It was determined by Congress that the statutory exemption would be the best mechanism to ensure that fiduciary advisers provide impartial and unbiased advice to participants and beneficiaries. Specifically, PPA added a statutory exemption under ERISA Section 408(b)(14) and Code Section 4975(d)(17). ERISA Section 408(b)(14) applies to the provision of advice under an “eligible investment advice arrangement” as defined in ERISA 408(g)(2), to participants and beneficiaries of a defined contribution plan that permits them to direct the investment of their plan accounts. If the conditions of Section 408(g) are met, Section 408(b)(14) exempts from the prohibited transaction rules the provision of investment advice, the investment transaction entered into pursuant to the advice, and the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate in connection with the provision of the advice or the transaction pursuant to the advice. An “eligible investment advice arrangement” is an arrangement that either provides that any fees (including any commission or other compensation) received by a fiduciary adviser for investment advice or with respect to the investment of plan assets do not vary depending on the basis of any investment option selected, or uses a computer model under an investment advice program that meets the requirements of ERISA Section 408(g)(3).

The DOL, in December 2009, after much contentious debate, published final regulations and a class exemption from the prohibited transaction provisions. Those final regulations were withdrawn by the new administration, and new proposed regulations were issued in March 2010. After another thorough review, final regulations were promulgated in October 2011 without a prohibited transaction exemption. The BICE essentially undermines those regulations and the protections provided to participants and beneficiaries under the statutory exemption.

Also, SHRM notes that the DOL has promulgated regulations on fiduciary disclosures in participant-directed accounts. These disclosures include plan-related information, fee and expense information, and performance data. See 29 C.F.R. Section 2550.404a-5. The information is comprehensive and differs materially from the disclosure and information required to be disclosed to participants and beneficiaries under the BICE. If a fiduciary provides advice to plan participants and beneficiaries, would these fiduciary disclosures in the DOL Section 404 regulations continue to apply? The disclosures under the BICE are duplicative in many respects with those required under ERISA and are not as comprehensive.

The DOL has extended the BICE to advisers to plan fiduciaries of small non-participant-directed plans, but not to large plans or small participant-directed plans. DOL explained in the Preamble that advice providers to large plans are already accustomed to operating in a fiduciary environment and within the framework of existing prohibited transaction exemptions. Thus, to

include large plans in the BICE would have the undesirable effect of reducing protections provided under existing laws to these investors, without any offsetting benefits. SHRM believes that small plans (whether participant-directed or not) deserve the same protections of existing laws that large plans (for the most part) currently enjoy. The BICE reduces protections for these small plans, without any offsetting benefits.

The DOL has issued regulations under ERISA section 408(b)(2) at 29 C.F.R. Section 2550-408b-2, which provide extensive disclosures that must be provided to plan fiduciaries prior to entering into an arrangement with an adviser on behalf of a plan. The regulations also prescribe annual disclosures that service providers have to provide to plan fiduciaries. Although the BICE contains disclosure requirements, they are different from and less comprehensive than those in existing Section 408(b)(2) regulations. If a fiduciary provides advice to small non-participant-directed plans, would these Section 408(b)(2) disclosures continue to apply?

SHRM requests that DOL reconsider its position to extend the BICE to advisors to plan participants and beneficiaries and small non-participant directed plans. The ERISA requirements should apply to all plans, no matter what size, and the participants and beneficiaries should continue to receive the protections from conflicted advice from the statutory exemption.

(2) THE DOL SHOULD NOT ISSUE A STREAMLINED EXEMPTION AT THIS TIME.

The DOL is seeking comments on whether to promulgate an additional streamlined exemption that would apply to compensation received in connection with investments by plan fiduciaries, participants and beneficiaries, and IRA owners in certain “high quality, low fee investments,” subject to fewer conditions of the BICE. One such condition is that the impartial conduct standards would not apply. The DOL explains that such an exemption could achieve important goals of minimizing compliance burdens for advisors and their financial institutions when they offer investment products with little potential for material conflicts of interest.

SHRM is not supportive of an additional streamlined exemption. It has the potential for advisors to steer small plan fiduciaries, plan participants and beneficiaries, and IRA owners to certain investments that may be low fee, but otherwise may not provide comparable net returns or otherwise be inappropriate for retirement investors. Moreover, SHRM believes that all fiduciaries should be subject to ERISA’s fiduciary rules or the impartial conduct standards in the BICE.

CONCLUSION

SHRM supports DOL’s efforts in updating the definition of a fiduciary providing investment advice. Most of the proposed changes will provide much needed assurances that advisers to plan fiduciaries and participants and beneficiaries will not be able to easily evade ERISA’s (or the Code’s) fiduciary status. SHRM also believes there are some areas, as described

above regarding DOL's proposal of the BICE, which warrant further consideration and should be revised.

SHRM believes that improving access to retirement plans is a key component to ensure a financially sustainable retirement and we appreciate the opportunity to comment on these important regulations. Should you have any questions or need additional information, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Michael P. Aitken".

Michael P. Aitken
Vice President of Government Affairs
Society for Human Resource Management