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July 15, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration ("EBSA")
Attn: Conflict of Interest Rule **via email to: e-ORI@dol.gov**
Rule N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Subject: Comments submitted by Resources Investment Advisors, Inc.
RIN 1210-AB32

Dear Secretary Perez,

The undersigned are principals of Resources Investment Advisors, Inc., an SEC registered investment advisor, as well as retirement plan advisors registered or affiliated with the firm. The signatories have well over a century of combined experience serving Main Street America by providing expert advice to hundreds of small businesses who are assisting their employees save for their retirement by sponsoring ERISA-qualified plans. The plans advised by the signatories include nearly a quarter million individual factory workers, farm hands, firemen, health care workers, secretaries, and other middle income Americans hoping to build a comfortable retirement nest egg.

The signatories are not part of Wall Street. They are owners and employees of small businesses in their own right and work for the following firms dedicated to helping their friends and neighbors save for retirement:

Bukaty Companies Financial Services (Leawood, Kansas; Greenwood Village and Littleton, Colorado; and Round Rock, Texas)
Channel Financial (Golden Valley, Minnesota)
Chepenik Financial (Orlando and Fort Lauderdale, Florida)
Englund & Lindsteadt (Hastings, Nebraska)
Oakeson Steiner (Hastings, Nebraska)
Pension Investment Services (Spokane, Washington)
SHA Retirement Group (Troy, Michigan)
SLW Retirement Plan Advisors (Santa Rosa and Lafayette, California)
401(k) Advisors Intermountain (Sandy, Utah)

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Furthermore, these firms have been recognized as leaders in the retirement plan industry as evidenced by their receipt of the following accolades:

"Top 100 Retirement Plan Adviser" – PlanAdviser/PlanSponsor Magazine (2006-2015)
"401(k) Advisor Leadership Award Semi-Finalist" – National Association of Plan Advisors (2014-2015)
"Top 401 Retirement Advisers" – Financial Times (2015)

In support of its proposed rule changes, the EBSA cited a number of reports from academics, think tanks, and governmental agencies. Unfortunately, though, these reports were primarily based upon dry statistical modeling driven by false assumptions. Therefore, the purpose of this letter is to provide insights from retirement plan professionals who work with plan sponsors, administrators, and participants on a daily basis and whose financial fortunes are directly tied to the success of their retirement plan clients.

As the signatories will explain more fully in this response, the EBSA's proposed rule changes will cause significant harm to the hard working Americans attempting to save for their retirement by:

- undermining the gains the EBSA has already affected in reducing conflicted advice through its prior rulemaking;
- making it more difficult for plan participants and IRA owners to obtain the professional investment advice they desperately want and the EBSA admits they need; and
- unnecessarily adding expense and confusion to individuals seeking professional investment advice.

The Development of the Retirement Plan Advisory Industry

In order to understand the current state of the retirement plan industry, it is important to look back at its development. As defined contribution (e.g., 401k) plans came into vogue in the 1980s, most were sold as group annuities by brokers who received a sales commission. These brokers often continued to advise the plan on its investment lineups, fiduciary duties, relationships with other service providers, etc. after the group annuity was purchased and were typically compensated through revenue sharing (i.e. 12b-1 fees) provided through the mutual funds offered as investment options within the plan.

As a result, the brokers often received what is commonly referred to in the industry as "unlevel compensation," which means the broker could vary his/her compensation based upon which investment products were recommended. In other words, the broker received more compensation if the plan opted the recommendation to use Fund A (which paid a sales commission of 50 basis points) over Fund B (which only paid 40 basis points).

Given the long-term relationships they established with the plans' sponsors and the reliance those sponsors placed on their investment recommendations, these brokers were in danger of being found to be providing

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This concern increased when the EBSA first indicated it would be reviewing the definition of a "fiduciary" nearly a decade ago. At the same time, brokers working with retirement plans faced increasing competition from investment advisors who marketed their services with the message, "I can represent that I will be acting in a fiduciary capacity when I recommend an investment option for your plan. Your broker cannot."

That pressure was amplified when the EBSA implemented changes to its regulations governing ERISA §408(b)(2) – the exemption necessary to allow retirement plans to pay the vendors who provide services to the plan. Those new regulations not only required service providers to disclose the compensation they would receive from plan assets but also mandated those service providers state whether they would be acting in a fiduciary capacity and require them to disclose any potential conflicts of interest. Finally, plan sponsors were forced to internalize those concerns when plaintiff's attorneys began to use that information to bring class action lawsuits against plan administrators based upon the allegation they had breached their fiduciary duties by paying excessive fees to brokers and failing to utilize mutual fund share classes that paid lower (and, in some cases, no) sales commissions.

As a result of these developments, most brokers who focus upon servicing qualified retirement plans have changed their business models to an investment advisory platform, embraced their status as a fiduciary, and accepted a "level fee" (i.e., one that will remain constant regardless of what investment products their plan clients decide to select). This is not to say that all brokers have converted their plan clients to an investment advisory platform. However, as fee litigation and competition increase, it is hard to find brokers who still collect unlevel compensation for making investment recommendations to qualified retirement plans on an ongoing basis.

Therefore, while the EBSA is correct in noting that much has changed since it issued its initial rule regarding what constituted the provision of fiduciary investment advice, it must be remembered that significant changes have also occurred in how investment advice is now provided to qualified retirement plans. Specifically, because of prior actions taken by the EBSA, as well as the effect of market and litigation forces, most of the industry has already adopted the unbiased investment advice model the EBSA claims its proposed regulations are designed to bring about. More importantly, the EBSA's implementation of regulations governing ERISA §408(b)(2) has been very effective in providing regulators, competitors, and attorneys with the information needed to weed out those who had previously provided conflicted investment advice to retirement plans.

Why Change the Rules When the EBSA Is Already Winning?

Unfortunately, rather than leveraging the disclosures already mandated under its regulatory enhancements – most notably 29 CFR §2550.408b-2(c) – to eliminate the remaining remnants of conflicted advice, the EBSA is proposing a completely new and untested regulatory scheme that will undermine the progress that resulted from

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its prior rule changes. As a result, advisers are dumbfounded as to why the EBSA has decided to propose a completely new regulatory scheme that will result in the proverbial 'one step forward, two steps back' approach.

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Under 29 CFR §2550.408b-2(c), brokers are already required to disclose what services they will be providing to a retirement plan, how they will be compensated, and whether they will be acting in a fiduciary capacity in providing those services. Furthermore, 29 CFR §2550.408b-2(e) provides,

> …(A) fiduciary may not use the authority, control, or responsibility which makes a person a fiduciary to cause a plan to pay an additional fee to such fiduciary (or to a person in which a fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary)…'

This language essentially requires anyone providing fiduciary investment advice to a retirement plan or participant to do so pursuant to a level fee. However, with its new best interest contract exemption ("BICE"), the EBSA is now making it possible to provide "fiduciary investment advice" to a retirement plan or participant and receive *unlevel* compensation directly from a recommended product. To make matters even more confusing, this exemption would only be available for advice provided to individual participants, IRA owners, and non-participant directed plans with fewer than 100 participants. This begs the question - Why is the EBSA establishing two tiers of "fiduciary investment advice" – one that is subject to 29 CFR §2550.408b-2(e) and one that is not?

The EBSA's proposal will lead to all sorts of contradictory – and seemingly nonsensical – results. For example, under the proposed rule, a broker would be prohibited from collecting an unlevel fee for recommending which funds a Fortune 500 company's participant-directed 401(k) plan should include as investment options. However, under BICE, that broker *could* collect an unlevel fee for recommending which funds a janitor with an eighth grade education should actually use as a participant of that plan. Needless to say, that is hardly a "uniform" fiduciary standard.

The Proposed Regulations Will Harm Plan Participants

As noted above, the EBSA's justification for the new regulations relies heavily on academic studies that stress the negative effects "conflicted investment advice." In this regard, the signatories do not dispute that conflicts of interest can harm investors. In compliance with 29 CFR §2550.408b-2(c), our investment advisory agreements confirm our fiduciary status when we are providing investment advice to a retirement plan or plan participants. Therefore, we are already bound – both by law and by contract – to provide investment advice that is based upon the best interests of our clients and to disclose any potential conflicts of interest.

However, as the EBSA readily admits, "Retirement investors typically are not financial experts and consequently must rely on professional advice to make critical investment decisions."[1] Unfortunately, the signatories have seen countless examples of retirement plan participants who have made egregious investment

[1] EBSA's "Notice of Proposed Best Interest Contract Exemption," p. 10.

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errors as a result of not receiving professional help and the proposed regulations will make it even less likely they will receive the assistance they desperately.

The Devastating Effects of a Lack of Professional Assistance Dwarf Those of Conflicted Advice

According to the scholarly treatises cited by the EBSA, conflicts of interest are estimated to cause retirement plan accounts to underperform by 100 basis points (1%). However, that result pales in comparison to the 70-year old administrative assistant who contributed to her 401(k) account over her entire career – only to lose 40% of it because she remained entirely invested in equities as she began her retirement during the market downturn in 2008-09. Needless to say, she would have gladly paid for advice – even if it was conflicted – to a professional who would have provided the very fundamental recommendation to invest more conservatively as she got older or who would have assisted her in rolling those assets into an annuity that protected her from investment losses.

Similarly, the signatories often see young participants who invest 100% of their 401(k) assets in money market accounts with the intent to remain there over their entire career in order to avoid investment risk. As a result, those participants will not achieve the type of investment returns required to adequately fund their retirement.

Finally, it should be noted the primary reason workers fail to meet their retirement goals is not because they receive conflicted advice or even because they made poor investment choices. Instead, it is because they fail to contribute enough toward their retirement.

The Interests of Investment Advisors and Plan Participants Are Currently Perfectly Aligned

As advisors to qualified retirement plans, we use innovative strategies to help plan participants avoid these common mistakes. For example, we often request that the plan's record keeper provide demographic information regarding participants' general investment allocations. If those records show those allocations have become skewed (i.e., with younger participants taking on too little risk and older participants taking on too much), we will often recommend the plan's administrators consider an automatic re-enrollment that places all participants' accounts in an appropriate qualified designated investment alternative ("QDIA"). Similarly, to help ensure participants contribute sufficiently, we will often recommend auto-enrollment and/or auto-escalation of deferrals.

However, as investment advisors who charge a level fee, our compensation does not change if participants are invested in an appropriate QDIA, a properly diversified portfolio, or 100% in the most aggressive/conservative fund available. By contrast, our compensation typically *does* increase as the size of the plan (i.e., the value of the participants' accounts) increases. Furthermore, a plan sponsor is much more likely to retain us as the plan's investment advisor if the participants are pleased with how their accounts are performing. As such, our interests are aligned with those of the plan and its participants because our success is directly tied to their success.

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Needless to say, it would be refreshing if the EBSA and the current Administration would come to understand and appreciate that concept rather than continually vilifying our industry.

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Advisors Motivated by Greed Will Not Last

The EBSA appears to assume that all advisors are motivated by one thing – to take as much of plan participants' money as possible. However, that assumption does not make logical sense and is not based in reality.

As noted, the signatories have well over a century of combined experience in serving qualified plans and they intend to continue to provide those services many years into the future. In fact, many of us have ownership interests in the firms listed above. As a result, our future economic security is dependent upon developing long-term relationships with our retirement plan clients, as well as an impeccable reputation in order to continue to secure new ones. Therefore, if our clients ever came to believe we were simply motivated by greed and did not have their best interests in mind, our business model would quickly fail.

EBSA's Misperception of Advisors' Motivations Harms Plan Participants

Unfortunately, the EBSA's assumption that all advisors are out to take advantage of plan participants leads to proposals that – while might appear effective on paper – will actually harm participants in the real world. For example, the Department's prior interpretive bulletin regarding participant education (29 CFR 2509.96-1) permitted retirement plan advisors to construct model portfolios for plan participants that would be considered education and not investment advice. This is a valuable tool because it enables advisors to at least get plan participants to consider investment allocations that are appropriate for their age and risk tolerance without incurring the responsibility of ongoing investment advice.

Under the proposed regulations, though, these model portfolios would be deemed investment advice if they included references to the actual investments available under the plan. This demonstrates a lack of understanding as to how advisory services are provided in the real world. To begin with, participant education is typically included as a service provided under the investment advisory agreement entered into with the plan's sponsor. Because that contract provides for a level fee, the actual investments selected by the plan's participants have no impact on the compensation the advisor will receive. To put it another way, no conflict of interest is created when the plan's investment advisor constructs a model portfolio based upon the investment options actually available under the plan because the advisor's compensation will not change based upon the investment choices made by the plan or its participants. Instead, the advisor's compensation will only increase if the value of the participants' accounts increase.

However, if the new regulations are adapted, advisors will be less likely to construct workable model portfolios for participants because those models would cause the advisors to be deemed as providing fiduciary investment advice, which – especially in light of the Supreme Court's *Tibble* decision - could be interpreted as a duty to provide ongoing advice. Conversely, if advisors develop models that merely reference general investment categories, participants will be less likely to actually use them. To put it as simply as possible, the primary request participants make regarding the allocation of their investment funds is – "Just tell me what to do."

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Unfortunately, though, the EBSA's proposal will make it much less likely they will receive the guidance they desperately want.

Plan Advisors Are Uniquely Qualified to Provide Non-Conflicted Advice on Participant Rollovers

Similarly, it appears the EBSA believes a conflict of interest is created whenever the plan's investment advisor assists a plan participant in rolling funds out of the plan and into an individual retirement account ("IRA") managed by the advisor. Once again, this demonstrates a lack of understanding as to how the real world operates.

For many low- and middle-income workers, their 401(k) is their only investment account and the plan's investment advisor is the only investment professional with whom they have ever interacted. As a result, when those workers decide to roll their investments out of the plan, it is common for them to request that the plan's investment advisor – the individual who has provided them with investment education to help them make proper investment decisions for many years – assist them in setting up and managing an IRA.

The EBSA seems to believe the only motivation for the plan's advisor to assist a participant with rolling his or her funds into an IRA is to collect a higher advisory fee. However, that ignores the real life implications of those transactions. To begin with, if the plan's sponsor comes to believe the advisor is inappropriately encouraging participants to roll their funds out of the plan, it is likely to terminate the advisor's contract – thus removing the compensation the advisor is receiving from the plan entirely.

Furthermore, there are many reasons why an employee may not want to keep his or her retirement assets in a 401(k) plan – despite the fact the overall cost may be lower. In many cases, a participant does not want his/her former employer to continue to receive information regarding the financial decisions the participant makes after a separation event. In addition, retirees often want someone to more actively manage their investment account to help prevent them from making a critical mistake when they can least afford it. However, the EBSA's proposal will make it more difficult for plan participants to obtain the professional help they are seeking in making these important decisions.

As noted, when the plan's investment advisor assists the participant with that rollover, that advisor faces pressures from two customers. To begin with, instead of merely educating the participant on general investment concepts to help guide his or her own allocation choices, the advisor will now have the responsibility (and potential liability) for actively managing those funds on an ongoing basis. At the same time, if the plan's sponsor comes to believe the advisor is no longer acting in the best interests of its participants – both current and former – it can terminate the advisor's contract with the plan.

By contrast, if the plan's advisor is not permitted to assist those participants with managing the funds they have decided to roll out of the plan, those participants will face the choice of either continuing to make their own investment decisions or using an advisor or broker who has no allegiance to the plan. As a result, if the EBSA is

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truly interested in ensuring that the person who is assisting a former plan participant with a rollover decision is acting in within the best interests of the plan and the participant, it should *encourage* the plan's investment advisor to assist participants who have decided to roll their assets out of the plan. By discouraging plan advisors from

providing that service, the EBSA is essentially pushing participants into the waiting arms of brokers who have no affiliation to the plan and who are solely looking to earn a quick commission for the sale of a product.

A More Effective Approach – Extend the 408(b)(2) Regulations to Rollover Advice

Rather than creating a complex and contradictory BICE, the EBSA could enact a more effective solution by simply extending the requirements of 29 CFR §2550.408b-2(c) to rollover investments. In other words, the EBSA could take the position that assisting plan participants in making decisions to roll their assets out of the plan is a service necessary for the operation of the plan and, thus, subject to 29 CFR §2550.408b-2(c). This would provide the EBSA with the authority to actually enforce its disclosure requirements and reduce the argument it is overreaching its authority by attempting to regulate all IRAs.

Retirement plan advisors have already adopted the requirements of 29 CFR §2550.408b-2(c), and the information required – the compensation the adviser/broker will receive, the services to be provided, whether the adviser/broker will be acting as a fiduciary, and a disclosure of any conflicts of interest – are precisely the information a participant needs to make an informed decision. However, the EBSA could require additional disclosures with regard to a participant rollover that explains why the participant has requested the rollover or, if the advisor/broker recommended the transaction, why it is in the participant's best interests. Finally, the EBSA could require that these disclosures be provided to the plan's sponsor, as well as the applicable plan participant, so both can review the reasonableness of the proposed transaction.

By contrast, BICE would require advisors and brokers to establish websites and point-of-sale disclosures that will be extremely expensive to create and maintain. While the academics and bureaucrats that developed the proposed rule may enjoy pouring over the mountains of data required under these disclosures, the simple truth is that most investors will never even look at them – even though they will bear the cost of creating those disclosures through higher fees. Worse yet, many independent investment advisors – especially smaller firms - may conclude the cost and the burden of maintaining these disclosures is too great and will avoid providing advice on IRAs. ***Therefore, rather than helping individual investors, the proposed rule will reduce the likelihood them will receive the professional assistance they need by limiting their available options to large brokerage firms that have the resources needed to comply with these disclosure requirements and can simply pass along those costs to the individual investors.***

Conclusion

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The signatories share the EBSA's desire to eliminate the provision of conflicted advice to retirement plans and their participants. However, we also believe it is important those plans and participants actually receive professional advice in order to avoid even more egregious investment mistakes.

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Unfortunately, the EBSA's proposed rules will harm participants by making it much more difficult and expensive for them to receive the type of advice they desperately desire. Worse yet, the proposal would undermine the advances that have already been achieved as a result of the prior regulatory regime the EBSA has established.

In that regard, the signatories would stress they are not asking the EBSA to adopt a laisse faire approach to the provision of investment advice under ERISA. Instead, they are encouraging the EBSA to recognize the benefits of the regulations it has previously adopted and build upon them instead of adopting a completely new and untested scheme that will actually result in a retreat from the advances the EBSA has already brought about through its enforcement of ERISA §408(b)(2).

Therefore, the signatories request that the EBSA withdraw the proposed regulations and, instead:

- enforce the existing disclosure requirements under 29 CFR §2550.408b-2(c);
- enforce 29 CFR §2550.408b-2(e) by requiring anyone who provides ongoing investment advice to a retirement plan or participant to do so pursuant to a level fee;
- extend the requirements of 29 CFR §2550.408b-2(c) to services provided to assist a participant with rolling his/her assets out of a retirement plan; and
- confirm the exemption provided by ERISA §408(2) will also apply to the plan's investment advisor assisting a participant with such a transaction.

Thank you for your consideration of our comments.

Sincerely,

[Signatures appear on the following page]

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