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Office of Regulations and Interpretations
Employee Benefits Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20120

Attention: Conflict of Interest Rule
Room N-5655

Re: Proposed Rule Regarding the Definition of the Term "Fiduciary": Conflict of Interest Rule - Retirement Investment Advice
RIN 1210-AB32

Dear Sir or Madam:

We write on behalf of a client regarding the Proposed Rule referenced above which was published in the Federal Register on April 20, 2015, Volume 80, at 21928 (such publication, in its entirety, the "Release"). The Proposed Rule defines "fiduciary" in the context of persons providing investment advice to employee benefit plans ("Retirement Plans"), thereby providing essential protections under ERISA to Retirement Plans and participants in Retirement Plans ("Participants"). The client supports the Department of Labor's efforts to enhance the definition of "fiduciary" in order to protect Retirement Plans and Participants from conflicts of interest and biased advice.

Paragraph (b)(3) of the Proposed Rule contains a broad carve-out from fiduciary status for platform providers that merely market and make available investment alternatives to Retirement Plans ("Platform Provider Carve-Out"). The client, a large, sophisticated financial services firm with significant experience in the Retirement Plan market, is concerned that the Proposed Rule does not adequately protect Retirement Plans and Participants from the conflicts of interest that are prevalent among platform providers.

We set forth below the concerns of the client regarding the Platform Provider Carve-Out and the client's proposal to address those concerns with suggested changes to the Proposed Rule.

Platform Providers, Revenue Sharing and Conflicts of Interest

Platform providers receive a variety of payments from mutual funds and other investment alternatives or their investment advisers incident to the selection of investments for their

platforms. The Department of Labor's Regulatory Impact Analysis refers to such arrangements as "revenue sharing payments."[1] These arrangements can create significant conflicts of interest.

Under the Proposed Rule, the platform provider would only be required to disclose to Retirement Plan fiduciaries that the provider is not acting as a fiduciary and is not undertaking to provide impartial investment advice. This disclosure requirement does nothing to protect plan fiduciaries from conflicts of interest or inform them of the extent to which the platform provider's self-interest could affect the investment choices available to the Retirement Plan.

Both the Regulatory Impact Analysis and the January 2011 GAO Report on 401(k) Plans offer detailed descriptions of the conflicts of interest that arise from the receipt of revenue sharing payments. Indeed, as documented in the GAO Report, revenue sharing is widespread, with payments ranging from 5 to 125 basis points a year. Platform providers have clear financial incentives to design platforms to include investment options (*e.g.*, mutual funds and mutual fund share classes) that pay higher revenue sharing and exclude other investment options that pay lower or no revenue sharing. Under the Proposed Rule, there is no requirement to provide the Retirement Plan fiduciary with any information regarding the criteria used by the platform provider to select the investments available on the platform.

The Regulatory Impact Analysis and GAO Report highlight the adverse financial impact on Retirement Plans and Participants due to the conflicts of interest stemming from revenue sharing and the inclusion of proprietary investment products. These effects have also been noted in academic and other studies. In a working paper titled "It Pays to Set the Menu: Mutual Fund Investment Options in 401(k) Plan," the Pension Research Council[2] demonstrates that platform providers favor their own affiliated mutual funds, even when those affiliated mutual funds perform poorly. The paper also shows that Participants are unlikely to overcome this affiliation bias when selecting investments. Thus, the selection of investments for a platform can have a significant impact on Participants.

In addition, platform providers often influence the selection of a Retirement Plan's qualified default investment alternative ("QDIA"), which typically gathers a significant percentage of Retirement Plan assets from Participants who may be less engaged and informed about their investment options. Frequently, the QDIA is a proprietary fund of the platform

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[1] "Payments can take several forms, for example 12b-1 fees, sub-transfer agency fees that reimburse the plan's record keeper for services that otherwise would be provided by a mutual fund, or payment of the mutual fund investment adviser's compensation to the financial adviser, its firm or an affiliated firm for promotion, marketing, or distribution." *Regulatory Impact Analysis*, Footnote 257 at p. 142.

[2] The Pension Research Council of the Wharton School of the University of Pennsylvania sponsors interdisciplinary research on a range of private pension and social security programs.

provider. The selection of a plan's QDIA is an important fiduciary decision with lasting financial impact on Participants. Such a decision should be made in the best interest of Participants and free from conflicts of interest. As proposed, the Platform Provider Carve-Out requires Retirement Plan fiduciaries to choose the specific investment alternatives that are available to Participants. This requirement implicitly includes the choice of the QDIA. We suggest making this explicit to ensure the protection of Participants.

Shortcomings of the Proposed Carve-Out for Platform Providers

The proposed carve-out for platform providers preserves the status quo in which providers can offer a platform designed to maximize profits for the provider. The Department's use of the term "merely" in the carve-out suggests that the act of creating and making available a platform is a simple, impartial act. But the Department, the GAO, and other researchers have established that the universe of investment options on a platform is often tainted by bias and self-interest. As a result, the investment menu selected by the Retirement Plan fiduciary from such a platform can also be tainted.

A platform provider selecting investment options based on financial incentives to the provider should not be exempt from fiduciary status. In a separate but related carve-out for selection and monitoring assistance in paragraph (b)(4) of the Proposed Rule, the importance of applying objective criteria to the selection process is recognized. This objective criteria requirement is an important protection currently missing from the Platform Provider Carve-Out. As discussed more fully below, the Platform Provider Carve-Out should be amended to include only platforms designed using objective criteria without consideration of financial incentives to the platform provider.

A Revised Carve-Out for Platform Providers

An exception for platform providers should ensure that, in all circumstances, the investments available on the platform are selected in an objective manner without consideration of financial incentives to the platform provider. In addition to disclosing that it is not acting as a fiduciary investment adviser and not undertaking to provide impartial investment advice, the platform provider should: (i) determine the investment being made available on the platform based on objective criteria; (ii) disclose to the Retirement Plan fiduciary the objective criteria it has used to select mutual funds and mutual fund share classes and other investment alternatives that will be available on the platform; and (iii) be expressly prohibited from giving any effect or consideration to its direct or indirect receipt of compensation associated with a particular investment option, including revenue sharing and revenue from affiliated or proprietary products.

This exception is not intended to prevent a platform provider or plan fiduciary from considering the net expense to the Retirement Plan of a particular investment option; accordingly, any revenue sharing passed on to the Retirement Plan or Participants may be factored in the expense of a fund. In addition, if individual mutual funds or mutual fund share classes from the platform provider's own proprietary family of mutual funds meet the objective criteria, those funds and share classes should be eligible for the platform. Finally, to ensure that a platform provider does not exclude investment options based on the amount of revenue sharing it receives, platform providers should be required to include any and all investment options that meet the objective criteria established for the platform.

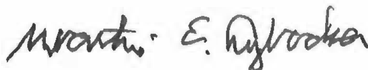
Applicability of the Proposed Revised Platform Carve-Out to Smaller Retirement Plans

The conflicts of interest highlighted above are particularly concerning for small Retirement Plans, since such Retirement Plans may not have the resources or leverage to adequately address those conflicts of interest on their own. By prohibiting revenue maximization as a selection criterion, the revised carve-out for platform providers offers sufficient protection to small Retirement Plans and will allow investment selections to be made in the best interest of their Participants.

Conclusion

The proposed revisions to the Platform Provider Carve-Out will ensure that platform services are provided in an impartial manner and will facilitate the selection of investment options in the best interest of Participants. Ultimately, these changes will help Participants save more for retirement. Thank you for this opportunity to express our client's views on the Platform Provider Carve-Out.

Respectfully submitted,



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