FISHER INVESTMENTS®
401(k) SOLUTIONS

July 21st, 2015

VIA ELECTRONIC MAIL to e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule (RIN 1210-AB32)
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Ladies and Gentlemen:

This letter responds to the request by the Department of Labor ("Department") for comments on the Department's proposed regulations on the Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice (the "Proposed Rule").[1] We appreciate the opportunity to comment on the Proposed Rule and related questions raised by the Department.

As a registered investment adviser who has continuously operated under a fiduciary standard for our clients, we concur with the sentiment that retail consumers should not have to worry about whether the advice they get is unduly influenced by the pecuniary or monetary interests of those offering the advice. That said, there are significant differences between the "broker-dealer" and the independent investment adviser model, which is why they have operated under two distinct statutory frameworks for more than 70 years. We are concerned that, however well-intentioned the Department's efforts may be, express efforts to conflate or harmonize these statutory differences will lead to the eventual demise of the independent investment adviser business model.

Because we operate our business with the philosophy that plan participants and IRA owners should be protected from conflicts of interest, and particularly fee–based conflicts by Plan Fiduciaries, we want to offer these comments to share our view on targeted, but critical modifications that would significantly improve the Proposed Rule.

[1] 80 Fed. Reg. 21928 (Apr. 20, 2015).

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I. Introduction

Founded in 1979, Fisher Asset Management, LLC ("Fisher Investments") is an independent, privately-owned money management firm with more than $65 billion under management. Fisher Investments is a registered investment adviser with the Securities and Exchange Commission ("SEC") and provides asset management services to institutions and individuals throughout the United States. Among Fisher Investments' clients are many employee benefit plans ("Plans") subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

At Fisher Investments, we understand the conflicts of interests that fees can raise, especially within the retirement industry. To address those conflicts of interests, we charge our clients a simple and transparent, competitive fee calculated as a percentage of assets under management. We do not earn brokerage commissions.

Fisher Investments' approach is focused on "goals-based" investing, looking to a client's long-term goals and needs. Our goals-based approach may require us to provide our clients with some additional education but it is, in our experience, well worth it.

In recognition of the fact that smaller companies—those with fewer than 200 employees—often struggle to find the specialized knowledge, resources and time necessary to successfully manage a 401(k) plan, Fisher Investments established the "401(k) Solutions" program (the "Program"). Building on our decades of experience working with institutions and individuals, the Program is designed to provide investment fiduciary services and retirement plan consulting services that meet the needs of small and mid-sized companies.[2] Once hired by a Plan, Fisher Investments serves as an "investment manager" within the meaning of Section 3(38) of ERISA and a fiduciary with respect to selecting and monitoring a menu of investment options available to Plan participants. In this connection, Fisher Investments also designs "Model Portfolios" comprised of the available investment options. Fisher Investments receives only a Plan-level fee calculated as a percentage of assets using the Program. It does not receive fees for advising the underlying investment options, and the Plan-level fee does not vary if a participant selects one investment option over another.

As part of the Program, Fisher Investments provides educational and enrollment services, including enrollment meetings, to assist Plan participants. Fisher Investments offers materials in both English and Spanish, and other languages as requested. The Program is designed to address the needs of Plan participants across the range of knowledge and experience levels. Plan participants who would like to select their own investments may choose from the available investment options or, if they want additional flexibility, may make use of a self-directed

[2] The typical company using the Program has assets between $1 million and $10 million. Reflecting our emphasis on expanding participation through education and enrollment activities, the median participant account balance is relatively small—approximately $5,000. The average account balance is approximately $73,000.

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brokerage account.[3] For Plan participants who take no action and fail to select investments, Fisher Investments designates a Model Portfolio as a qualified default investment alternative based on the Plan participant's age.

For Plan participants who want more help with selecting their investment options, Fisher Investments has developed an online questionnaire (the "Questionnaire"). The Questionnaire is designed to provide "investment education" within the meaning of the Department's interpretive bulletin relating to participant investment education.[5] It provides information on basic investment concepts, such as the effects of compound interest and how different factors may affect the amount of money available to a Plan participant in retirement. It also asks participants several questions about their investment goals and retirement plans. Based upon a Plan participant's answers provided online, the Questionnaire identifies a Model Portfolio, which is an asset allocation model available within the Plan that might be appropriate for someone with similar investment goals, risk profiles, and time horizons. The Questionnaire also provides information on all of the other Model Portfolios available under the Plan. No matter which Model Portfolio the participant chooses (or if no Model Portfolio is chosen), Fisher Investment's fee remains the same—a percentage of plan assets using the Program. Fisher Investments is thus not incentivized to steer Plan participants to any particular investment option in connection with the asset allocation models generated by the Questionnaire.

As stated above, we want to offer these comments because we operate our business with the philosophy that plan participants and IRA owners should be protected from conflicts of interest, and particularly fee–based conflicts by Plan Fiduciaries. However, as discussed further below, we request clarification on certain aspects of the Proposed Rule that could have the effect of limiting educational activity sorely needed by Plan participants, particularly in the underserved community of smaller Plans. In addition, we request certain clarifications of the scope of the Proposed Rule that have the, likely unintended, impact of potentially restricting non-fiduciary marketing activity.

II. "Fee Neutral" Asset Allocation Models that Identify Specific Investment Alternatives Should Remain Within the Scope of "Investment Education."

As discussed above, Fisher Investments currently provides investment education through the Questionnaire to assist Plan participants in understanding their investment options. Although the Questionnaire is designed to comply with the Department's interpretive bulletin relating to participant investment education, the Proposed Rule would remove and replace that guidance. In particular, the Proposed Rule would alter the guidance with respect to asset allocation models

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[3] Fisher Investments does not charge Plans any fees based on assets in self-directed brokerage accounts. Plan participants using such accounts may be subject to separate fees, such as asset management fees, charged directly by the investment manager selected by the participant.

[5] 29 CFR § 2509.96-1.

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and interactive investment materials, such that these models and materials, in order to qualify as investment education, could not "include or identify any specific investment product or specific alternative available under the plan or IRA."[6]

The Questionnaire provides valuable assistance at no additional cost to participants in small Plans, participants that may not want, or be able to afford, a managed account relationship. Because the asset allocation models generated by the Questionnaire are fee neutral with respect to Fisher Investments, we are not concerned that use of the Questionnaire would involve any prohibited transactions. However, if being a fiduciary involves more than simply not having a prohibited transaction, some service providers may cease providing this type of educational tool, or change such tools in ways that make them far less useful to Plan participants.

We understand that the Department is concerned that service providers can use asset allocation models to effectively steer participants to a specific investment alternative.[7] That is a valid concern when a service provider can use such a tool to direct Plan participants to products that generate additional fees for such service provider or their affiliate. However, we respectfully request that the Department continue to include within the scope of "investment education" online tools and asset allocation models that identify specific investment alternatives in cases where such alternatives are fee neutral with respect to the service provider offering the tool.

In this connection, we suggest revising portions of § 2510.3–21(b)(6) as follows (suggested additions in **bold**):

> "(ii) *General financial, investment and retirement information.* Information and materials on financial, investment and retirement matters that do not address specific investment products, specific plan or IRA alternatives or distribution options available to the plan or IRA or to participants, beneficiaries and IRA owners, or specific alternatives or services offered outside the plan or IRA, **except to the extent that the fee to the person furnishing such information and materials does not vary on the basis of any investment product or alternative selected by the plan participant or IRA owner,** and inform the plan fiduciary, participant or beneficiary, or IRA owner about—
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> . . .
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> (iii) *Asset allocation models.* Information and materials (*e.g.*, pie charts, graphs, or case studies) that provide a plan fiduciary, participant or beneficiary, or IRA owner with models of asset allocation portfolios of hypothetical individuals with

[6] 80 Fed. Reg. 21928, 21958 (April 20, 2015).

[7] 80 Fed. Reg. 21928, 21945n.23 (April 20, 2015).

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different time horizons (which may extend beyond an individual's retirement date) and risk profiles, where—

. . .

(C) Such models do not include or identify any specific investment product or specific alternative available under the plan or IRA**, except to the extent that the fee to the person furnishing such models does not vary on the basis of any investment product or alternative selected by the plan participant or IRA owner**; and

. . .

(iv) *Interactive investment materials*. . . .

. . .

(E) **Except to the extent that the fee to the person furnishing such materials does not vary on the basis of any investment product or alternative selected by the plan participant or IRA owner,** the materials do not include or identify any specific investment alternative available or distribution option available under the plan or IRA, unless such alternative or option is specified by the participant, beneficiary or IRA owner; and"

III. If the Department Does Not Include Asset Allocation Models that Identify Fee Neutral Specific Investment Alternatives Within the Scope of "Investment Education," the Department Should Clarify the Limited Scope of Fiduciary Duties Applicable to Such Asset Allocation Models.

The Questionnaire leads Plan participants through a number of basic, predetermined questions. By its nature, Plan participant input leads to set outputs. It would be unreasonable to expect the same type of fiduciary relationship with a Plan participant using the Questionnaire that might exist in a full discretionary managed account or even in a formal non-discretionary advisory relationship. Such tools are not designed or intended to be a replacement for these fiduciary services. However, the Questionnaire provides valuable educational assistance at no additional cost to Plan participants that may not want, or be able to afford, more extensive services. Applying fiduciary status based on an online questionnaire at the same level as a fiduciary in a traditional managed account or advisory relationship may lead service providers to no longer offer these types of educational tools.

If the Department declines to include within the scope of "investment education" online tools and asset allocation models that identify specific investment alternatives in cases where such alternatives are fee neutral with respect to the service provider offering such tool, then we respectfully request that the Department clarify that only limited fiduciary duties should apply,

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matching the limited scope of such tools.[8] We ask that the Department clarify that such tools may base their results on a limited number of questions posed to the Plan participants and are not required to gather extensive information. The Department should also clarify that the service provider may rely on the information given by the Plan participant and has no duty to inquire as to the accuracy or completeness of such information or to consider information about assets not provided by the Plan participant.

IV. The Department Should Make Clear that Marketing Activities by an Investment Manager of its own Services is Outside the Scope of the Proposed Rule.

As drafted, the Proposed Rule would extend fiduciary status to persons that provide certain investment "recommendations" for a fee or other compensation, whether direct or indirect, to, among others, plan fiduciaries. These include, under Section 2510.3-21(a)(1)(iv) of the Proposed Rule, "[a] recommendation of a person who is also going to receive a fee or other compensation for providing [fiduciary investment advice]."

We are concerned that this provision could be read to make our marketing of our own investment management services to a Plan sponsor (and thus a plan fiduciary) itself fiduciary investment advice under the Proposed Rule.[9] If marketing of one's own services is fiduciary investment advice, the exemption for provision of services under ERISA Section 408(b)(2) (which the Department has clarified only provides an exemption from prohibited transactions under ERISA Section 406(a) and not the fiduciary self-dealing prohibited transactions under ERISA Section 406(b)) would be of no value.

We believe that the Department may have intended to capture only those service providers that provide third-party recommendations of products or services and that receive a fee specifically for providing those recommendations. Unintended effects can be avoided by adopting either, or both, of the following solutions: (1) the Department could clarify that the fee triggering fiduciary status under the Proposed Rule must be a separate fee specifically for providing the recommendation and does not include the fee (such as an asset-based management fee) a service provider would receive for providing the services once hired; or (2) the Department could clarify that a recommendation triggering fiduciary status includes only a recommendation of *another's* product or services and not the marketing of one's own.

[8] The Department has previously recognized that certain fiduciaries, such as directed trustees, should only have limited fiduciary responsibilities that match the scope of their fiduciary authority. Field Assistance Bulletin 2004-03 (Dec. 17, 2004).

[9] We note that the "seller's carve-out" in paragraph (b)(1)(i) of the Proposed Rule is not designed for the marketing of services. Further, Fisher Investments markets the Program to small and mid-sized companies, which often have less than 100 employees, where the seller's carve-out may not be applicable.

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IV. Conclusion

In light of the foregoing, Fisher Investments respectfully urges the Department to clarify the scope of the Proposed Rule as requested and retain within the scope of "investment education" asset allocation models and interactive investment materials that identify specific investment alternatives in cases where such alternatives are fee neutral with respect to the service provider offering such tool.

If there is any additional information or assistance that Fisher Investments can provide to the Department in connection with the Department's consideration of the comments and issues raised in this letter, please let us know.

Sincerely,

Nathan Fisher

Nathan Fisher

Managing Director

Fisher Investments 401(k) Solutions

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