Message To: e-ORI@dol.gov and e-OED@dol.gov

From: Fil Williams

Subject: RIN 1210-AB32; Notice of Proposed Rulemaking (NPRM) – Definition of the Term "Fiduciary"; Conflicts of Interest Rule – Retirement Investment Advice; ZRIN: 1210-ZA25; Notice of Proposed Best Interest Contract Exemption (BICE) and related class exemption proposals (D-11712, D-11713, et al.)

Interested persons are advised that I was a long-time employee of the U.S. Department of Labor (DOL), who served almost my entire career as an employee (i.e., pension law specialist) with the Employee Benefits Security Administration (EBSA). I retired in January 2013, after completing over thirty-three (33) years of Federal service with DOL. Thus, my interest in this matter is currently as a private citizen, is purely academic and does not represent the interests of any private party, private sector firm or organization.

I have read the NPRM and related class exemption proposals. I'm familiar with their subject matter and history. In this regard, I worked for many years in EBSA's Office of Regulations and Interpretations (ORI) and Office of Exemption Determinations (OED). Specifically, in ORI, I worked on advisory opinions (AOs) and other technical guidance relating to prohibited transaction (PT) and exemption issues under ERISA. In OED, I worked on many individual and class exemptions (PTEs) dealing with such PT issues, including matters concerning the class PTEs that DOL is proposing to amend in connection with the NPRM.

During my years in ORI (i.e., from April 2004 to December 2012), I was often required to speak to outside groups and organizations, as well as other Federal agencies (e.g., FDIC), about current PT and other fiduciary issues under ERISA, including various AOs, regulations and regulatory projects dealing with the same PT issues being considered in the NPRM and related class PTEs.

My past experience as a DOL employee in EBSA, both in ORI and OED, has allowed me to accumulate a unique perspective on the subject matter at hand, which hopefully may add some credibility to comments that I wish to make as a private citizen. These comments are meant to encourage a final conclusion of this important matter.

Comments:

1. While the general public's overall knowledge of PTs and PTEs under ERISA, and the significance they have to their retirement income security and performance, is often rather low, their common sense perspective and understanding of fiduciary self-dealing, conflicts of interest, and third-party compensation is high enough for them to understand pertinent issues that impact their retirement security when proper disclosures are made to them in a clear and concise manner.

2. Disclosures made to participants of ERISA-covered pension plans (e.g., 401k plans or other similar individual account plans), as well as disclosures made to individuals who establish and maintain individual retirement accounts (IRAs), are often complex, voluminous, and confusing to the average person. This concern may be particularly problematic for younger workers who need to start saving and investing more effectively for their retirement. Thus, disclosures made to them should adequately highlight information about when fiduciary self-dealing, conflicts of interests, and third-party compensation are present and briefly explain why they are relevant.

3. Service-providers to pension plans, including fiduciaries who have or obtain "fiduciary" status by providing "investment advice for a fee" pursuant to the current DOL regulation at 29 CFR § 2510.3-21(c), often do not present or explain pertinent information to plan participants in a manner that allows for them to have a clear understanding of fiduciary conflict issues.

   Lack of proper knowledge and /or understanding about conflicts often results in suspicions that inhibit participants from developing suitable and sustainable investment strategies or trust in the retirement savings system. Such suspicions can lead to irrational behaviors that produce negative results, such as:

   (i) Lack of steady funding of a retirement plan (even when consistent savings are possible);

   (ii) Unnecessary leakage from retirement asset accumulations, and /or

   (iii) Inappropriate long-term investment strategies (e.g., an overly conservative approach that fails to adhere to professional investment advice and proper risk management strategies).

   The crisis of confidence that results from arrangements where participants lack key information, or a clear understanding of available information, is avoidable with a combination of proper disclosure and professional "fiduciary" investment advice.

4. While service and investment arrangements with lower fees and/or fewer conflicts of interest are important options for participants and appropriate plan fiduciaries to understand, contractual obligations that bind parties to particular agreements where such options are present can and should be made more certain. Such certainty would be an improvement over current practices for "fiduciary" advice that occur under the existing DOL regulation at 29 CFR § 2510.3-21(c). Clear and concise disclosure of salient terms and conditions in fiduciary services agreements should be considered imperative to their success. The certainty of an investment adviser's "fiduciary" status to a plan and/or participant is vital to that success.

Based on the concerns noted above, finalization of the NPRM and related class exemptions should ensure that operation of any service / investment agreements for "fiduciary" advice deemed "impartial" and/or "in the best interest" of client plans and participants require clear and concise disclosure to responsible fiduciaries to enable effective understanding and monitoring of pertinent conflicts. Conflict disclosures that are prominently displayed, along with guides or other disclosure tools that highlight fiduciary conflicts, should enhance the understanding of salient contract terms by responsible plan fiduciaries and affected participants.

In sum, the status of an investment adviser as a "fiduciary" under ERISA can be made more certain to affected ERISA-covered plans and participants, as well as to IRAs and IRA owners, through finalization of the NPRM in some version of its present form. Finalization of amendments to existing class PTEs, as proposed (with any adjustments deemed essential by DOL), should also allow for greater certainty in contractual compliance, monitoring and avoidance of PT liability by responsible plan fiduciaries. Appropriate class PTEs for arrangements involving non-abusive fiduciary self-dealing, conflicts, and third-party compensation should help facilitate professional "fiduciary" investment advice deemed in the best interests of affected pension plans and their participants, including IRAs and their owners.

The current DOL proposals seek to address these important concerns and are a valuable step toward improving the existing "fiduciary" investment advice framework under DOL regulations at 29 CFR § 2510.3-21(c) that have become outdated by marketplace developments since the 1970s. Continued resistance to these improvements by certain affected stakeholders in the financial services industry will undermine the public's perception of the industry's overall credibility in pursuing meaningful reform and diminish the industry's ability to maintain the public's trust. Meanwhile, industry participants' failure to adopt best practice measures consistent with any well-intentioned regulatory reforms proposed by DOL does not serve the important role that the financial services industry plays in the success of the retirement savings system, as regulated by ERISA. Finally, financial services firms that make meaning progress toward addressing "fiduciary" conflict concerns are to be commended. Positive public perceptions of such firms, with the renewed confidence they bring to affected plans and participants, should help reward them with more business and shape future industry developments.

Best wishes to all DOL personnel involved in the finalization of this regulatory project, as well to all of my former DOL colleagues, as they complete this important work.