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Before

The U.S. Department of Labor
Employee Benefits Security Administration

Administrative Hearing on the Proposed Regulation on the Definition of Fiduciary and Related Proposed and Amended Prohibited Transaction Exemptions

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Introduction:

Thank you Deputy Asst. Sec. Mares, Deputy Asst. Sec. Hauser and the other members of the panel for this opportunity to discuss the proposal.

I am here today representing the U.S. Chamber of Commerce, the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Most of our members are small businesses. Our members strive to provide quality retirement benefits, and they take their responsibilities as plan sponsors and fiduciaries very seriously. Our members are the people the Department intends to help with this rule, the recipients of advice, and the Department should listen closely to their concerns.

Our members, especially small businesses, have been very clear: as proposed, the rule wouldn't help us, it would hurt us. Now, of course our members want financial advisors to act in their best interest. Our members are fiduciaries themselves. However, our members believe this overly broad, overly complicated, overly restrictive and fundamentally flawed proposal will result in less advice, fewer choices, and more cost. They believe the rule as proposed will restrict their choices of advisors and service models, especially for small businesses. With that said, it is time to fix the rule, and we offer our comments and testimony to help the Department do exactly that.

Unfortunately, the proposal's regulatory burden and choice limitations fall hardest on those very small businesses that already have the most difficult time offering retirement plans.

Working with an advisor makes a small business with less than 10 employees twice as likely to offer a plan, and a small business with less than 50 employees 50% more likely to offer a plan. Our members believe that the proposal, with its massive new compliance and legal liability costs for advisors, will make it infeasible for a portion of those advisors to continue to serve the small plan marketplace, negatively affecting plan formation. While platform providers may offer "turn-key" plans designed for un-advised small businesses if the final rule permits, this cannot

fully replace the value of an advisor, especially for small businesses offering IRA-based retirement plans like SEP and SIMPLE IRAs.

We also know that there is a large cost to participants who do not have access to advice. In 2011, the Department found that partly due to the restrictions of the prohibited transaction rules—the very rules this proposal would apply even more broadly—lack of access to advice and the resulting preventable investment mistakes cost retirement savers $114 billion in 2010 alone, and estimated losses of more than $100 billion per year thereafter. This cost is several times greater than the estimated losses motivating this proposal.

I don't have time today to cover all of the issues in our comment letter, but I do want to address some of the most significant.

Issues:

First and foremost, we object to the discriminatory effect the proposal would have on our small business members. It permits large plans with more than 100 participants to retain the choice of advisors and service models best suited for their needs, but denies that choice to small businesses and individuals. Small plans have the same legal obligations as large plans, and deserve access to the same choice of advisors as large plans. The Department has consistently stated that these decisions are based on individual facts and circumstances, but here the Department has chosen to substitute its one-size-fits-all judgment for that of all small plans and individuals.

Denial of choice is a consistent theme in the proposal. For example, the proposal's likely effect is to substitute fee-based accounts for transaction-based accounts, despite potentially higher costs. The BIC Exemption prevents advisors from discussing certain assets even if they are in the recipient's best interest.

Our members understand the difference between sales and advice, and they want the choice of both for their plans and IRAs. Any final rule should adopt the Department's approach from 2010 and carve out sales discussions for all plans and IRAs.

Second, our members are concerned about the loss of a vital educational tool in IB 96-1. Redefining asset allocation models referencing the plan's investment options as fiduciary advice would significantly disrupt plan sponsor educational efforts. Removing a proven tool without evidence of abuse is a mistake. Forcing participants to "connect the dots" themselves undermines the purpose of education.

Third, we believe the proposal's definition of advice will confuse participants about when they are receiving fiduciary advice. The proposal removes the requirement that there be a "mutual understanding." The retention of this concept is critical. Fiduciary status determines the respective expectations and obligations of the recipient and the advisor, and there must be a mutual intent to protect those expectations. In addition, the proposal creates a new and undefined term—advice "specifically directed to" the recipient. It is not clear from the proposal what this means in practice. This is not a minor ambiguity, but a major source of potential confusion at the intersection between marketing products and advice.

We ask that the Department retain the requirement of a mutual understanding, and eliminate the "specifically directed to" language in any final regulation to prevent confusion and unnecessary litigation.

Fourth, we think the proposal will negatively affect the RFPs our members use to select and monitor service providers. The platform provider carve out reads that information must be provided "without regard to the individualized needs of the plan." This simply does not work in practice. The platform provider must discuss how its services would meet the individual needs of the plan outlined in the RFP. If plan fiduciaries are unable to have meaningful discussions about individualized services and investment issues due to platform provider concerns about becoming a fiduciary, they will not receive the information they need to properly select and monitor. The Department should remove this language.

Fifth, we object to the BIC Exemption's limitation on the assets advisors may discuss. This approved list of assets provides no additional protection from conflicts. It also presents a host of practical problems—IRAs may hold both listed and unlisted assets in the same account, making it difficult to understand how the new standard would even apply, especially in transition. Further, the list prevents an advisor from discussing an unlisted asset, no matter how much doing so is in the best interest of the IRA owner. The Department should not be substituting its own judgment—on a one-size-fits-all basis over millions of individual accounts—for the professional and impartial judgment of advisors complying with BICE. The list should be removed—alternatively, common investments such as discretionary account management and non-publicly traded REITs should be included.

Sixth, the new state court causes of action established by BICE are a major flaw in the proposal. To begin with, we don't believe the Department has the authority to establish in an exemption, alternative remedies to ERISA's exclusive remedies for participants. Further, the ambiguity of subjective conditions will result in class action lawsuits in state courts despite good faith efforts to comply. The large legal liability risk will likely prevent many advisors from using BICE as proposed, and will therefore reduce rollover and other advice services available to participants and IRA owners against their best interest. BICE also does not provide needed clarity on its application to rollover advice. This is a general concern as well—the Department should clearly state under what circumstances a rollover results in a prohibited transaction for which BICE or another exemption is needed.

Seventh, the disclosure requirements in BICE will be nearly impossible to achieve in just eight months, and extremely costly to the recipients who will ultimately pay. As FINRA pointed out, the disclosures also conflict with securities laws and regulations regarding predictions of future performance. Any final rule should use general rather than individualized disclosures, such as illustrations of the effect of fees over time. We note that the Department took roughly three years to implement electronic filing in EFAST II—it is unreasonable to expect the private sector to achieve an even more difficult system redesign in only 8 months.

Finally, we are concerned that the division of guaranteed income products between BICE and 84-24 will confuse participants and undermine efforts to provide retirement income. Instead of

receiving “apples to apples” information to compare guaranteed income products, an IRA owner evaluating a variable annuity and an equity index annuity will get different disclosures that are not readily comparable for what appear to him or her to be similar products. Two exemptive regimes for the same class of products will serve only to confuse individuals. The Department should allow all annuity products to be provided under PTE 84-24.

Conclusion:

In conclusion, we believe the proposal has fundamental and technical problems that would harm the plans and people they are intended to protect. We do not believe there has been adequate time to evaluate and comment on these rules, and we are concerned that the Department also does not have enough time to adequately consider the issues raised if it intends to proceed with a final rule next spring. However, changes are essential for a rule that works, as is feedback on those changes. Accordingly, we ask that the Department provide all interested parties a chance to formally review its changes to the proposal prior to issuing a final rule.

I appreciate the opportunity to discuss these matters, and I would be happy to answer any questions the panel may have.