

July 15, 2016

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Proposed Questions and Suggested Answers Regarding the Conflict of Interest Regulation and Related Exemptions

Dear Mr. Canary:

The American Retirement Association (the “ARA”) is writing to provide proposed questions and suggested answers related to issues we believe could benefit by further clarification under the Conflict of Interest Regulation (the “Final Regulation”) and the related Best Interest Contract Exemption (the “BIC Exemption”). As a follow-up to our meetings with the U.S. Department of Labor (the “Department”) we have drafted the questions and answers for your review and consideration. We look forward to discussing them with you in more detail at your convenience.

The ARA is a national organization of more than 20,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-deferred Savings Association (“NTSA”) and the ASPPA College of Pension Actuaries (“ACOPA”). ARA members are diverse but united in a common dedication to America’s private retirement system.

Question 1: General Recordkeeper Recommendations

Third Party Administrator (“TPA”) is asked by the plan fiduciaries of Pete’s PetShop Plan to recommend a recordkeeper for the Plan. Based on TPA’s experience in the marketplace, TPA recommends that the plan fiduciaries consider either Phoenix Recordkeepers or Acme Recordkeepers. Both Acme and Phoenix provide revenue sharing payments to TPA to compensate TPA for various shareholder services that TPA will provide to the Plan and its participants. The revenue sharing payments do not vary based upon the investments options that are included on each platform or those selected as designated investment alternatives for the Plan. TPA’s recommendation does not include a description of available investment options on the Phoenix or Acme platforms although TPA generally describes the differences between the

investment options that each recordkeeper offers on its platform (open architecture versus limitation on proprietary funds) but makes no representations regarding these investments. Rather, TPA's recommendation that the fiduciaries consider Phoenix and Acme is focused solely on their administrative capabilities. Is TPA's recommendation of Phoenix and Acme Recordkeepers "investment advice" under the Final Regulation?

Proposed Answer

No, the recommendation of a plan service provider, such as a recordkeeper, is not a fiduciary act. Similarly, where there is no recommendation of investments offered under a recordkeeping platform, the recommendation of a third party recordkeeper is not considered fiduciary "investment advice" under the Final Regulation.

For a recommendation to constitute "investment advice" under the Final Regulation, the advice must be described under 29 C.F.R § 2510.3-21(a)(1). The recommendation of a recordkeeper that is based on its administrative capabilities is neither a recommendation of the advisability of acquiring, holding, disposing of, or exchanging securities or other property, nor is it a recommendation as to the management of securities of other property as required by the Final Regulation.

Question 2: Third Party Administrators and Platform Provider Exception

TPA works with the plan fiduciaries of Pete's PetShop Plan who tells TPA that it is looking to change recordkeepers and would appreciate if TPA could bring forth a recordkeeping platform for its consideration. Due to TPA's longstanding working relationship with Phoenix Recordkeepers, and TPA's knowledge of Phoenix Recordkeepers' platform of investment alternatives, TPA makes the Phoenix Recordkeepers' platform available to the fiduciaries of Pete's PetShop Plan. The Plan fiduciaries select the Phoenix Recordkeeper platform for the Plan and offer investment options available under the platform to the Plan's participants and beneficiaries. Phoenix Recordkeepers pays TPA a fee for the referral of Pete's PetShop Plan for recordkeeping services, regardless of the investments selected by Pete's PetShop Plan. Does the TPA provide fiduciary "investment advice" for purposes of the Final Regulation?

Proposed Answer

No. TPA would not provide a "recommendation" sufficient to provide "investment advice" under the Final Regulation. In this respect, the Platform Provider Communication Exception provides an exception from the definition of "investment advice" for the "[m]arketing or making available to a plan fiduciary of a plan, without regard to the individualized needs of the plan, its participants, or beneficiaries a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives" 29 CFR § 2510.3-21(b)(2)(i). The preamble to the Final Regulation also describes that the Platform Provider Communication Exception is "directed to service providers, such as recordkeepers and third-party administrators, that offer a "platform" or selection of investment alternatives to participant-directed individual account plans and plan fiduciaries of these plans" 81 Fed. Reg. at 20972. In this scenario, the TPA is making available Phoenix Recordkeepers' platform of investment options to the plan fiduciaries of Pete's PetShop Plan from which the plan fiduciaries will choose investment options to make available under the Plan. In the Department's view, the TPA may use the Platform Provider

Communication Exception to avoid providing fiduciary “investment advice” as the text of the Final Regulation does not specify that the person to be availed of the Platform Provider Communication Exception offer their own proprietary platform. Rather, the regulation only requires that the person “makes available” the platform to be availed of the exception.

Question 3: Third Party Administrators and the Independent Fiduciary Exemption

Assume the same facts as in Question 2 except that TPA presents Phoenix Recordkeepers’ platform of investment options to Steve the Adviser who is a registered investment adviser and an ERISA section 3(21) fiduciary to Pete’s PetShop Plan. The TPA and Steve the Adviser are completely independent of one another with no common ownership or other business relationships. Does the TPA provide fiduciary “investment advice” for purposes of the Final Regulation?

Proposed Answer

No. TPA would not provide a “recommendation” sufficient to provide “investment advice” under the Final Regulation. In this respect, TPA may utilize the Independent Fiduciary Exception if the conditions of the exception are met. The “Independent Fiduciary Exception” is available to TPA in the scenario described above provided that 1) TPA knows or reasonably believes that Steve the Adviser is an investment adviser registered under the Investment Advisers Act of 1940 and a fiduciary to the plan, 2) knows or reasonably believes that Steve the Adviser is capable of evaluating investment risks in general, and with regards to the provision of the Phoenix Recordkeepers’ platform, 3) TPA fairly informs Steve the Adviser that they are not providing independent advice and the nature of payments made to the TPA, and 4) TPA is not paid directly from the Plan or Steve the Adviser for the provision of the advice.

Question 4: Availability of Frost Bank

Cincinnati Advisers, an advisory firm dually registered as a Registered Investment Adviser with the Securities and Exchange Commission and as a Broker-Dealer with the Financial Industry Regulatory Authority, charges clients a mutually agreed upon asset-based fee of 35 basis points to provide ongoing investment advisory services. As part of its arrangements with various mutual fund families, Cincinnati Advisers may receive revenue sharing from some of the mutual funds as a result of plan clients’ investments in the mutual funds recommended by Cincinnati Advisers. The fees paid by the mutual funds to Cincinnati Advisers are generally considered 12b-1 fees, sub transfer agency fees, or commissions.

Cincinnati Advisers relies on DOL Adv. Op. 97-15A to avoid engaging in potential prohibited transaction, meaning that before entering into an arrangement with a plan, or recommending any particular mutual fund investments, Cincinnati Advisers will disclose to the plan fiduciary the extent to which it may receive fees from the mutual fund(s) and will expressly provide that any fees received by Cincinnati Advisers as a result of the plan’s investment in such a mutual fund will be used to pay all or a portion of the compensation that the plan is obligated to pay to Cincinnati Advisers, and that the plan will be entitled to any such fees that exceed the plan’s liability to Cincinnati Advisers. May Cincinnati Advisers still rely upon the analysis in DOL

Adv. Op. 97-15A such that its receipt of these payments does not result in a non-exempt prohibited transactions under ERISA?

Proposed Answer

Yes. As described within the preamble to Final Regulation and the BIC Exemption, nothing in the Final Regulation or BIC Exemption alters the analysis of DOL Adv. Op. 97-15A . 81 Fed. Reg. at 20987, 21038 fn. 65, 66. Thus, to the extent that Cincinnati Advisers appropriately offsets its compensation against payments received from mutual fund companies, no prohibited transaction would occur because Cincinnati Advisers would not be affecting the amount or timing of its compensation.

Question 5: Availability of Frost Bank as a Level Fee Fiduciary under the BIC Exemption

Cincinnati Advisers provides fiduciary “investment advice” to the Acme Plan and is paid on a commission basis. As described in question 4 above, under its current relationships with mutual fund companies, Cincinnati Advisers may receive 12b -1 fees, sub-transfer agency fees and commissions for the sales of mutual funds offered under the Acme Plan. In light of the Final Regulation and the BIC Exemption, Cincinnati Advisers seeks to qualify as a “Level Fee Fiduciary” under Section VIII(b) of the BIC Exemption. However, many mutual fund companies with which Cincinnati Advisers maintains relationships continue to make revenue sharing payments to Cincinnati Advisers. Moreover, several of the mutual funds offered by the Acme Plan have performed very well and removing such investment options would likely result in significant client disruption. Cincinnati Advisers understands from conversations with the mutual fund companies that they will be unable to provide mutual fund shares without revenue sharing payments before the Applicability Date.

Notwithstanding the foregoing, Cincinnati Advisers decides to enter into an arrangement with the Acme Plan to establish an asset-based fee under the Acme Plan. Cincinnati Advisers will credit against this fee any 12b -1 fees, sub-transfer agency fees, and commissions received from mutual fund companies and the Plan will be entitled to any amount that is received in excess of the fee. Cincinnati Advisers disclosed this new arrangement in advance to the fiduciaries of the Acme Plan who have agreed to the new terms. Will Cincinnati Advisers qualify as a Level Fee Fiduciary and for the Streamlined BIC Exemption if it relies on a “Frost Bank” offset approach described under DOL Adv. Op. 97-15A?

Proposed Answer

Yes. A person will qualify as a Level Fee Fiduciary under the BIC Exemption if the only fee received by the fiduciary in connection with advisory or investment management services to the Plan or IRA assets is a Level Fee that is disclosed in advance to the Retirement Investor. BIC Exemption, Section VIII(h). A “Level Fee” is a fee or compensation that is provided based on a fixed percentage of the value of the assets or a set fee that does not vary with the particular investment recommended, rather than a commission or other transaction-based fee. *Id.* Here, Cincinnati Advisers’ compensation will be disclosed and agreed to by the fiduciaries of the

Acme Plan in advance of the arrangement taking effect. Moreover, Cincinnati Advisers' compensation is based on a fixed percentage of the value of the assets, any revenue sharing received from mutual fund companies is credited back against the advisory fee charged to the Acme Plan and the Acme Plan will be entitled to any excess. Thus, Cincinnati Advisers' compensation does not vary with any particular investment recommended and as a result, the investment advice is not subject to a conflict of interest. Accordingly, the Streamlined BIC Exemption for Level Fee Fiduciaries would be available to Cincinnati Advisers.

Question 6: Utilizing the BIC Exemption's Transition Relief with Frozen Investment Options

Tammy the Adviser acts as an "investment advice" fiduciary to Bob's Bikes 401(k) Plan and is currently paid on a commission basis. After a review of Bob's Bike's 401(k) Plan and its expenses, Tammy believes that the Plan would be better served if Tammy no longer received commissions and was paid an asset-based fee calculated on plan assets. Tammy proposes to the fiduciaries of Bob's Bikes 401(k) Plan that the investments in the Plan be transitioned to an asset-based fee schedule that no longer pays commissions and there are good and valid reasons why such a change is in the best interest of Bob's Bikes 401(k) Plan. The fiduciaries of the Bob's Bikes 401(k) Plan agree, however, it was noted that the stable value fund option within the Bob's Bikes 401(k) Plan has a surrender charge of 2% on assets invested in the fund. Tammy recommends that the Bob's Bikes 401(k) Plan freeze the stable value fund to new investments until the Plan no longer needs to pay a surrender charge at which time it will be removed as a Plan option. After the transition, Tammy is paid a flat asset-based fee on all assets in the Bob's Bike's 401(k) Plan except for assets invested in the stable value fund on which Tammy continues to receive commission based payments. Can Tammy qualify as a Level Fee Fiduciary for purposes of the Streamlined BIC Exemption while also using the Pre-Existing Transaction Exemption under Section VII of the BIC Exemption for the stable value fund?

Proposed Answer

Yes. If the conditions of the exemptions are met, Tammy may qualify as a Level Fee Fiduciary for purposes of the Streamlined BIC Exemption for recommendations made after the Final Regulation's Applicability Date while "carving-out" the stable value fund under Section VII of the BIC Exemption. Section VII of the BIC Exemption was made available to afford the retirement services industry time to transition to the regulatory structure and to minimize disruption of current arrangements. Consistent with this approach, compensation that is received as a result of investment advice that occurred prior to the Applicability Date should not be considered for plan fiduciaries who are otherwise in compliance with the other terms of the BIC Exemption after the Applicability Date. Therefore, to help the industry with its compliance efforts, Tammy may utilize section VII of the BIC Exemption for recommendations made prior to the Applicability Date (as well as hold recommendations) while also relying on the Streamlined BIC Exemption for recommendations made after the Applicability Date.

Question 7: Utilizing the BIC Exemption's Transition Relief with Legacy Investments Outside of a Fiduciary's Control

Jimmy the Adviser and Insurance Broker acts as an “investment advice” fiduciary to The Good Foundation 403(b) Plan and is currently paid on a commission basis. The Good Foundation 403(b) Plan is funded through “legacy” individual annuity contracts between individual Plan participants and AnnueX, an annuity provider that were added to the Plan in 2005. The Good Foundation 403(b) Plan also offers mutual funds with no revenue sharing selected by the fiduciaries of The Good Foundation 403(b) Plan at the recommendation of Jimmy. Jimmy is paid 35 basis points on the mutual fund investments in the Plan and receives commissions on the AnnueX investments that may exceed 35 basis points. Jimmy and his affiliates receive no other compensation in connection with the AnnueX investments. Jimmy intends to be a Level Fee Fiduciary but neither Jimmy nor the fiduciaries of The Good Foundation 403(b) Plan have the authority to terminate the AnnueX contracts because of their status as individual contracts. Can Jimmy qualify as a Level Fee Fiduciary for purposes of the Streamlined BIC Exemption while also using the Pre-Existing Transaction Exemption under Section VII of the BIC Exemption for the AnnueX individual contracts?

Proposed Answer

Yes. If the conditions of the exemptions are met, Jimmy may qualify as a Level Fee Fiduciary of the Streamlined BIC Exemption for recommendations made after the Final Regulation’s Applicability Date while “carving-out” the AnnueX contracts under Section VII of the BIC Exemption. Section VII of the BIC Exemption was made available to afford the retirement services industry time to transition to the regulatory structure and to minimize disruption of current arrangements. Consistent with this approach, compensation that is received as a result of investment advice that occurred prior to the Applicability Date should not be considered for plan fiduciaries who are trying to comply with the other terms of the BIC Exemption after the Applicability Date. Therefore, Jimmy may utilize section VII of the BIC Exemption for recommendations made prior to the Applicability Date (as well as hold recommendations) while also relying on the Streamlined BIC Exemption for recommendations made after the Applicability Date.

Question 8: Level Fee Fiduciaries – Investments Not Subject to a Fee

Larry the Adviser provides fiduciary services to the XYZ Company 401(k) Plan which includes a self-directed brokerage window option for plan participants. Larry is paid a flat asset-based fee of 35 basis points on assets invested in the Plan’s investment alternatives but receives no compensation with respect to assets invested through the Plan’s self-directed brokerage window or in the Plan’s company stock fund. Larry makes no recommendations with respect to investments in the Plan’s self-directed brokerage window or in the Plan’s company stock fund and Larry does not make investment recommendations to the Plan’s participants. Larry’s investment advisory agreement specifies that Larry will not receive compensation on assets invested in the Plan’s self-directed brokerage window or company stock fund. May Larry be considered a Level Fee Fiduciary for purposes of the Streamlined BIC Exemption notwithstanding that he does not receive compensation on assets invested in the self-directed brokerage window or company stock fund?

Proposed Answer

Yes. The BIC Exemption defines the term Level Fee Fiduciary as a fiduciary who receives only a Level Fee in connection with advisory or investment management services to the Plan or IRA assets that is disclosed in advance to the Retirement Investor. Here, Larry is paid a 35 basis points fee on assets in the plan on which he provides investment advice. Although Larry receives no compensation on assets invested through the Plan's self-directed brokerage window or company stock fund, the arrangement is fully disclosed and approved in advance by the Plan fiduciary. Thus, Larry will still be considered a Level Fee Fiduciary where he advises and is paid only on the assets invested in the investment alternatives within the XYZ Company 401(k) Plan and not on the assets invested in the self-directed brokerage window or company stock fund provided that the arrangement is fully disclosed to the fiduciary and is approved within the investment advisory agreement.

Question 9: Level Fee Fiduciaries – Investments Not Subject to a Fee

Larry the Adviser provides individual investment advice to an IRA owner. Larry is paid 35 basis points on all assets invested in the IRA except for the IRA's investments in money market funds. The account opening documents specify that Larry will not receive compensation on amounts invested in money market funds. May Larry be considered a Level Fee Fiduciary for purposes of the Streamlined BIC Exemption notwithstanding that he does not receive compensation on assets invested in the money market fund options?

Proposed Answer

Yes. The BIC Exemption defines the term Level Fee Fiduciary as a fiduciary who receives only a Level Fee in connection with advisory or investment management services to the Plan or IRA assets that is disclosed in advance to the Retirement Investor. Here, Larry will still be considered a Level Fee Fiduciary where he only receives a fee for assets invested in the IRA that do not include the IRA's money market fund option provided that is approved by the Retirement Investor within the account opening documents.

Question 10: Level Fee Fiduciaries and Educational Conferences

Cincinnati Advisers provides investment advice to ERISA covered plans and charges each plan an asset-based fee of 35 basis points for its services. Cincinnati Advisers sponsors an educational conference for its investment advisory representatives, and mandates attendance at the conference as they consider the conference a substantial part of an adviser's ongoing education and training. The conference is attended by plan sponsor clients and mutual fund companies who participate in the program to offer their individual perspectives on the retirement plan marketplace. The mutual fund companies in attendance (whether presenting or merely "exhibiting" to facilitate providing information on their products) pay a flat fee to Cincinnati Advisers that helps to cover the cost of the educational conference. The fee is the same for each mutual fund company attending or exhibiting at the conference and is not based on the assets placed with the mutual fund company, nor is the fee tied to any particular plan to which Cincinnati Advisers advises on. Cincinnati Advisers makes no profit on the event and only uses the fees to help cover the cost of the event. Will the existence of such fees paid by the mutual fund companies affect Cincinnati Advisers' ability to qualify as a Level Fee Fiduciary and rely on the Streamlined BIC Exemption?

Proposed Answer

No. The existence of fees intended for educational conferences should not change Cincinnati Advisers' ability to qualify as a Level Fee Fiduciary and rely on the Streamlined BIC Exemption. The BIC Exemption defines the term Level Fee Fiduciary as a fiduciary who receives only a Level Fee in connection with advisory or investment management services to the Plan or IRA assets that is disclosed in advance to the Retirement Investor. While this is a facts and circumstances inquiry, and depends on the particular facts presented in each case, based on the facts described above, the fees received by Cincinnati Advisers for the educational conferences are not received in connection with the advice provided by Cincinnati Advisers to its retirement plan clients. This is because the fees received by Cincinnati Advisers do not depend on the volume or percentage of assets placed with any particular mutual fund company nor are they tied to any particular plan client. Rather, such fees are received to provide education and training to Cincinnati Advisers' employees and not to obtain a profit. Thus, fees for educational conferences as described above will not need to be considered when determining whether Cincinnati Advisers satisfies the definition of a Level Fee Fiduciary.

Question 11: Adviser Recommendation of a Recordkeeper

Milwaukee Advisers already serves as a fiduciary to Hakim's Furniture Forum 401(k) Plan. The fiduciaries of the Hakim's Furniture Forum 401(k) Plan are considering switching recordkeepers and want to get recommendations from Milwaukee Advisers. Based on their experience with the Hakim Furniture Forum 401(k) Plan, Milwaukee Advisers recommend RecordCo as a new recordkeeper. RecordCo has an open architecture platform that allows its clients to elect to include any investment option with a CUSIP number. Does the recommendation of RecordCo as the new recordkeeper result in Milwaukee Advisers providing investment advice with respect to the recommendation of RecordCo?

Proposed Answer

No. Milwaukee Advisers has recommended a recordkeeper that permits a broad spectrum of available investments on its recordkeeping platform. Because of this open-ended breadth with no curation of investments by RecordCo, Milwaukee Advisers cannot be seen as making an investment recommendation much in the same manner that a broad-based public presentation is not considered an investment recommendation. Similarly, the recommendation of a third party recordkeeper for recordkeeping services is not considered fiduciary investment advice under the Final Regulation.

Question 12: Sale of Additional Services by an Existing Fiduciary

American Advisors already serves as a non-discretionary fiduciary advisor (which is labeled as a "3(21) co-fiduciary" in American Advisors' marketing materials) to the Turbo Technologies Retirement Plan. American Advisors has developed a new service where American Advisors can become an ERISA section 3(38) investment manager to a plan and will assume all responsibility for selecting and monitoring the investments made available under a participant-directed 401(k) plan. Melissa, the American Advisors' advisor who has worked with the Turbo Technologies Retirement Plan, recommends to the fiduciaries of the Turbo Technologies Retirement Plan that they hire American Advisors to serve as the ERISA section 3(38)

investment manager to the Turbo Technologies Retirement Plan for an additional fee. Melissa and the American Advisors staff have made this recommendation by following the Impartial Conduct Standards set forth in the BIC Exemption. Can Melissa and American Advisors rely on the Streamlined BIC Exemption for Level Fee Fiduciaries for making the recommendation that they should be hired to provide ERISA section 3(38) services to the Turbo Technologies Retirement Plan?

Proposed Answer

Yes. The Streamlined BIC Exemption for Level Fee Fiduciaries is not limited to “rollover recommendations” and is broadly available for the recommendation of services by existing fiduciaries so long as the conditions of the exemptions are satisfied.

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The ARA appreciates the ongoing opportunity to work with the Department on these issues of great importance to our diverse membership of professionals. We would welcome the opportunity to discuss these proposed questions and answers further with you. Please contact Craig Hoffman, ARA General Counsel, at CHoffman@USARetirement.org if you have any questions. Thank you for your time and consideration.

Sincerely,

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