Defined Contribution
Institutional Investment
Association

Dedicated to Enhancing Retirement Security

April 17, 2017

Filed Electronically

Mr. Timothy D. Hauser
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Examination of the Fiduciary Rules in Response to the President's Memorandum (RIN 1210-AB79)

Dear Acting Assistant Secretary Hauser:

The Defined Contribution Institutional Investment Association (DCIIA) appreciates the opportunity to provide commentary to the Department of Labor (Department) on its Definition of Fiduciary; Conflict of Interest Rule and related exemptions and other authority (Fiduciary Rules) in response to the Presidential Memorandum the Department received on February 3rd, 2017.

DCIIA is a non-profit association dedicated to enhancing the retirement security of American workers by promoting better plan design and institutional investment management approaches. Our members include record keepers, investment managers, consultants, trustees, law firms, and other industry stakeholders. DCIIA is available as a resource to provide education, insight on our members' views and practical experience as guidance in support of the Department's efforts to promote good fiduciary behavior.

ERISA-covered employee benefit plans are voluntarily adopted by employer plan sponsors to provide their employees needed access to retirement savings plan benefits. DCIIA firmly believes that employer plan sponsors, plan fiduciaries and service providers should be empowered - by the Department and other industry stakeholders - in offering professionally designed institutional investment programs and providing investment education, advice and other needed solutions. DCIIA believes we can work together to further improve the successful implementation of defined contribution plans and create improved income adequacy for working Americans in retirement.

While in recent years, DCIIA believes great strides have been made to enhance the tools available to employer plan sponsors - for example, automatic features that encourage participant savings and the

expanded use of institutional investment products and services - DCIIA believes this underscores the importance of the Department solidly supporting the creation of new and innovative products and solutions. DCIIA has also become very concerned that innovation will be stalled as the threat of litigation weighs on plan sponsor decision-making. While regulation and the threat of litigation can protect plan participants from bad actors, we are concerned that prudent fiduciary processes are already being negatively impacted by the dozens of class action lawsuits that have been filed over the last decade.

Recent survey data collected since the Rule was released shows that more than half (57%) of 801 401(k) sponsors surveyed in Q4 2016 are very or somewhat concerned about potential litigation.[1] When making DC plan decisions, survey data also shows that 55% of plan sponsors consider fiduciary liability and the potential for lawsuits as a very important factor.[2] Importantly, this factor ranks nearly as high as "improving participant outcomes", which 63% of plan sponsors consider very important. Thus, a less "visible" impact of the recent waves of ERISA litigation is the stifling effect it is having on fiduciary decision-making.

Looking at specific DC plan decisions, such as the decision to replace an actively managed option with a passively managed option, or to add a passively managed option as a new standalone investment option, 40% of plan sponsors select passive options because they believe "they are easier to monitor from a fiduciary perspective" or "alleviate the threat of lawsuits[3]" (instead of taking into consideration investments or services that may be beneficial to participants but are perceived as making fiduciaries more vulnerable to litigation).

Core menu design can - and should - reflect a plan fiduciary's best thinking on investment solutions for their participant population. Yet, our consulting firm members have seen an interest in "fund-mirroring", where plan fiduciaries seek to offer passive investment options that mirror the actively-managed investment options in the plan. Often the decision to offer an active/passive fund mirror is driven largely by the desire to decrease litigation risk for breach of fiduciary duty claims. Fund mirroring, however, has its drawbacks: it requires plan participants to understand the difference between active and passive fund choices, and it results in a greater number of options in the plan - which can be more difficult for participants to navigate the plan.

At the same time, our members have reported sightings of billboard signs soliciting plaintiffs' only by reason of their participating in a 401(k) plan[4] and have witnessed broad-scale social media campaigns to solicit 401(k) plan plaintiffs. Following the recent wave of 12 separate class action claims against leading academic institutions, we have also seen a plaintiffs' class action firm seeking potential plaintiffs from many other universities. Surely, the decision by plan sponsors to voluntarily offer a retirement savings plan to employees should not alone provide a basis for ERISA class action claims.

From a purely monetary perspective, according to a June 2016 Fiduciary Benchmarks survey that analyzed publically disclosed awards, settlements, and payments from 2009 until 2016, total damages of

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[1] Cerulli Associates, *The Cerulli Report – U.S. Retirement Markets 2016: Preparing for a New World Post-Conflict of Interest Rule*

[2] Id.

[3] Id.

[4] Franklin D. Azar & Associates, P.C. is a Colorado-based personal injury law firm. A recent article on the firm's expansion into 401(k) litigation can be found at http://www.wagnerlawgroup.com/documents/Colorado_000.pdf .

$698,000,000 were collected in ERISA class action proceedings for this time period. These suits resulted in $204,000,000 paid to plaintiffs' firms[5] and an average award of $116 paid to each participant.[6] It has also been reported that employer plan sponsor costs in defending these claims through the motion to dismiss stage typically range from $500,000 and $750,000, and based on the broad-based nature of the claims alleged and plaintiffs' discovery requests, we understand "discovery" can cost between $2.5 and $5 million.[7] We thus understand that pre-trial settlements, which account for a significant portion of the litigation proceeds, are often dictated by the out-of-pocket and opportunity costs of the litigation.

The Regulatory Impact Analysis accompanying the Fiduciary Duty Rules project increased insurance costs in response to the additional compliance and litigation risks resulting from the implementation of the Fiduciary Duty Rules.[8] However, increased insurance costs are not the only costs of increased litigation. Not all claims are covered by insurance and the projected costs in the RIA do not include the burden placed on employers in defending these claims, both in terms of the time and effort expended by plan sponsor personnel, but also the need to prioritize business resources to litigation defense efforts over other projects that are more constructively intended to promote improved participant outcomes.

The result is that DCIIA members are keenly interested in question 3 of the Presidential Memorandum which asked if the Department's "Fiduciary Duty Rule is likely to cause an increase in litigation." DCIIA's concern is that further expansion of litigation by the Fiduciary Duty Rules will continue to inhibit plan fiduciaries from considering products and services that can positively impact participant outcomes. We have already seen an increase over the past decade in ERISA class action litigation claims - much of it baseless or contradictory[9] - and our members have concern that the trend not be further fueled by the implementation of the Fiduciary Duty Rules.

DCIIA also has interest in conducting research to better understand the impact of litigation risks on fiduciary-decision making, and DCIIA requests that the Department itself conduct research to examine the impact of increased litigation on promoting innovation and the successful implementation of defined contribution plans by employer plan sponsors and other plan fiduciaries. We believe this research should include an assessment of potential harm to plan participants resulting from lack of access to products and services that can improve their ability to save effectively for retirement but that plan fiduciaries may be reluctant to offer due to the potential threat of litigation. The Department has noted in prior research the significant impact that a small change in net earnings can have over time on retirement outcomes. While that change can result from unreasonable fees, it may also occur from a lack of access to products and services designed to improve outcomes.

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[5] Kmak, Tom, *Fiduciary Benchmarks: Protect Yourself at All Times*. DC Dimensions (Summer 2016) available at: https://us.dimensional.com//media/Dimensional/Documents/US/Auxiliary/Defined-Contribution/Summer-2016/02-Fiduciary-Benchmarks-Protect-Yourself-at-All-Times.pdf.

[6] *Id.*

[7] *Fiduciary Liability Claim Trends*", Lockton Companies, February 2017

[8] Department of Labor, *Fiduciary Investment Advice – Regulatory Impact Analysis*, Page 1 (April 14, 2015) available at: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/proposed-regulations/1210-AB32-2/conflictsofinterestria.pdf.

[9] In fact recent litigation challenges have included disparate allegations that are wholly contradictory. For example, recent litigation has included, on the one hand, claims of breach of fiduciary duty for a plan to offer a "stable value"-type of capital preservation fund, and in separate litigation, claims that it is a breach of fiduciary duty not to offer a stable value fund. Recent litigation challenges have also included excessive fee claims for a fund with an expense ratio of less than 4% of 1% of the amount invested (e.g., less than $4.00 per year on $10,000 invested).

While litigation can be an effective tool for enforcement against bad actors, DCIIA believes it as important, if not more important, for the Department to empower plan sponsors and advice-providers to be “good actors.” We firmly believe the Department’s Fiduciary Rules and other policy goals should facilitate good fiduciary decision-making. For example, the Department could work to develop supplemental guidance for plan sponsors on what they CAN do to prevent unnecessary and costly litigation and to defend themselves more effectively from frivolous suits.

In sum, DCIIA believes any regulatory initiatives pursued by the Department which would increase harmful litigation are important to question and carefully examine so that the Department’s efforts can be directed toward supporting plan sponsors seeking to improve participant retirement outcomes.

DCIIA appreciates the opportunity to provide these comments and would be happy to engage in further discussion with the Department to address our comments.

Sincerely,

Lew Minsky,
Executive Director
Defined Contribution Institutional Investment Association (DCIIA)