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Office of Exemption Determinations
Employee Benefits Security Administration
(Attention: D-11933)
U.S. Department of Labor
200 Constitution Avenue, N.W., Suite 400
Washington, DC 20210

Re: RIN 1210-AB82

To Whom It May Concern:

Lincoln Financial Group is the marketing name for Lincoln National Corporation and its affiliates (collectively, "Lincoln"). Lincoln's Retirement Plan Services business helps millions of workers throughout the United States save for retirement through their employers' retirement plans. This letter responds to the Department of Labor's (the "Department's") Request for Information ("RFI") regarding the fiduciary regulation and related new and amended prohibited transaction exemptions (the "fiduciary rule").

This letter responds specifically to question 14 of the RFI, which asks whether the fiduciary rule should exclude recommendations to make or increase contributions to a retirement plan from the definition of fiduciary advice, or alternatively provide a specific exemption for that activity. It also provides the Department with additional input on how the fiduciary rule should treat plan-to-plan rollovers.

In order to ensure that the fiduciary rule does not limit the ability of employers and their service providers to help American workers achieve a secure retirement through employer-sponsored plans, Lincoln urges the Department to exclude the following activities from the definition of fiduciary investment advice:

- Recommendations to make or increase contributions to a plan. We believe that the rule as currently written clearly excludes recommendations to make or increase contributions into a plan from the definition of fiduciary advice. However, recent guidance from the Department has created uncertainty

about this. Continued uncertainty here will limit the ability of employers, and their service providers, to help employees make optimal use of their retirement plans. This will have a significant negative impact on employees' retirement security that is not justified by any countervailing public policy.

- Recommendations related to plan-to-plan rollovers. When an employee terminates employment there is a very real possibility that, unless counselled otherwise, the employee will cash out and spend his or her retirement plan account rather than leave it in the plan. Excluding communications about the benefits of plan-to-plan rollovers from the definition of fiduciary investment advice will reduce this harmful "leakage". And like retirement plan contribution recommendations, limiting this activity by deeming it fiduciary in nature serves no public policy purpose.

Together, these improvements to the fiduciary rule will enhance employees' future retirement security by encouraging them to accumulate more retirement savings while they are employed and by protecting the savings that they have accumulated when they change jobs.

Exclude contribution recommendations.

At the outset, we do not believe that any reasonable interpretation of the current rule would include recommendations to make or increase contributions to a plan in the definition of investment advice. The rule clearly limits its scope to recommendations about investment transactions: acquiring, holding, disposing of, exchanging securities or other investment property, as well as recommendations about rollovers, transfers and distributions.[1] Nothing in the rule's language indicates that it also covers a recommendation, without any accompanying investment recommendation, to make or increase contributions to a plan. Unfortunately, since the rule was issued, the Department has created uncertainty about this, triggering a need for additional clarity.[2] Given this, a clear and explicit exclusion for recommendations to make or increase plan contributions

[1] 29 C.F.R. 2510.3-21 (2017)

[2] Some of the Department's guidance seems to indicate that unless the recommendation to increase contributions is tied to maximizing the employer match, the communication will be treated as fiduciary investment advice. See U.S. Department of Labor, "Conflict of Interest FAQs (Part II - Rule)", January 2017, at FAQ 9, available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf. Another FAQ seems to indicate that whether or not the recommendation is fiduciary advice hinges on whether there is compensation tied to the activity. *Id*. at FAQ 10. A third FAQ appears to indicate that a recommendation to increase contributions is fiduciary investment advice unless the communication falls within the plan information and general financial, investment and retirement information categories of investment education. See U.S. Department of Labor, "Conflict of Interest FAQs (Transition

from the definition of fiduciary investment advice would provide employers and service providers with assurance that their actions to encourage employees to save more for retirement will not cause them to be fiduciaries. The responsibilities and legal risk associated with fiduciary status are wholly disproportionate to this kind of activity and without this exclusion, plan sponsors and their service providers will be much less willing to provide this needed assistance to employees.

This should be an easy call for the Department. As noted by the Department throughout the preamble to the fiduciary rule, defined contribution plans have replaced defined benefit plans as the primary employer-sponsored retirement plan today. The retirement security of individuals who participate in defined contribution plans hinges on how much they are able to accumulate in their plan accounts. Most of these individuals are not accumulating nearly enough. The percentage of workers who say they expect to retire before age 65 has decreased, from 50% in 1991 to 24% in 2016.[3] In 1991, just 11% of workers expected to retire after age 65.[4] Twenty-five years later that percentage has climbed to 37%.[5] Six percent of workers say they don't plan to retire at all.[6]

The need for employees to receive regular and consistent encouragement to increase contributions to their retirement plans is clear. A Financial Engines report estimates that a staggering $24 billion of employer matching dollars or "free money" is left on the table by employees.[7] That amounts to nearly $43,000 per employee given compounding over 20 years.[8]The same report found that 25% of employees did not save enough to receive their employer's full match.[9] This number increases among lower-income employees and

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Period)", May 2017, at FAQ 12, available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period.pdf.

[3] Employee Benefit Research Institute and Greenwald & Associates. (2016 Survey) *Expectations about retirement*. Retrieved from https://www.ebri.org/pdf/surveys/rcs/2016/RCS_16.FS-2_Expects.pdf.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] Financial Engines. (May 2015) *Missing out: how much employer 401k matching contributions do employees leave on the table?* Retrieved from https://corp.financialengines.com/docs/Financial-Engines-401k-Match-Report-050615.pdf.

[8] *Id*.

[9] *Id*.

younger employees: 42% of employees earning less than $40,000 per year do not take full advantage of the employer match, compared to 10% of employees earning $100,000 or more. *Id*.[10]

The overwhelming majority of American workers prepare for retirement by making contributions into workplace retirement plans. Therefore, the most effective way to increase Americans' collective retirement security is to encourage more employee savings into these plans.[11] Employers know this and accordingly expect their service providers to provide this encouragement. If the rule is interpreted to treat this encouragement as fiduciary advice, service providers who cannot or reasonably do not wish to be fiduciaries will be prevented from performing this service.

To date, guidance from the Department has permitted certain communications about making and increasing contributions under the investment education exclusion described in paragraphs (b)(2)(iv)(A) and (B) of the fiduciary rule.[12] However, the education exclusion, with its focus on providing information without any specific recommendations, does not fit well with the need to give employees specific and actionable recommendations to save more. Limiting the communication to the general benefits of contributing to a retirement plan has the effect of inhibiting service providers' ability to adequately convey the value and the urgency of saving more for retirement. Even a recommendation to contribute enough to receive the full employer match is not sufficient, because many employees cannot contribute that much, and some should contribute more. To really move the needle on employees' retirement savings levels, service providers must be able to convey the value of saving more as a specific call to action. As an example, they need to be able to say that saving 6% of pay is better than saving 3%, or to say that contributing 8% of pay is a good choice. For this reason we believe it is more appropriate to give recommendations to make or increase contributions an explicit exclusion separate from the "education" exclusion.

We would finally point out that we cannot think of, and the Department has not identified, any harmful conflict of interest that would be prevented or curtailed by treating this activity as fiduciary advice. We urge the Department to make this beneficial clarification to the rule.

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[10] *Id*.

[11] Nearly eight in 10 Americans rely on their employer-sponsored plan as the primary vehicle they use to save for retirement. *Willis Towers Watson Global Benefits Attitudes Survey* (2015/2016), available at https://www.willistowerswatson.com/en/press/2016/06/one-in-four-us-employees-expect-to-work-beyond-age-70.

[12] U.S. Department of Labor, "Conflict of Interest FAQs (Transition Period)", May 2017, at FAQ 12, available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period.pdf.

Exclude plan-to-plan rollover recommendations.

We also strongly believe that, in order to limit harmful premature cash-outs from retirement plans (also known as "leakage"), the fiduciary rule should facilitate rather than prevent communications that encourage plan-to-plan rollovers when an employee changes jobs. Unfortunately, the fiduciary rule hamstrings service providers by making recommendations related to plan-to-plan rollovers fiduciary advice. Service providers who cannot or do not want to become fiduciaries cannot make a recommendation about a plan-to-plan rollover, despite the benefits of this transaction for many employees, particularly those with small account balances.

Most cash-outs occur at the time of a job change. Studies have shown that as many as 43% of terminated employees will cash out their benefits when changing jobs.[13] Since today's average employee will change jobs multiple times during his or her working life, it is easy to see how potentially damaging this can be to long-term retirement savings accumulation. According to the Bureau of Labor Statistics, as of January 2016, the median number of years that employees remain with one employer is only 4.2 years, down from 4.6 years in 2014.[14] Over a 40-year career that is 10 job changes and 10 opportunities to cash out retirement benefits. Further statistics show the alarming impact of this: An estimated 1.5% of 401(k) and IRA assets are prematurely withdrawn each year, reducing wealth at retirement by about 25%.[15]

Employees have four options for handling retirement assets from a previous employer: 1) roll the assets from the previous employer's plan to the current employer's plan; 2) roll the assets into a retail IRA; 3) leave the assets with the previous employer (if the account balance exceeds the plan's automatic cash-out/rollover limit); or 4) cash out the benefit. As the numbers above show, many employees unfortunately choose the cash-out option. Or, if an employee's account balance is small when he or she changes jobs, the previous employer's plan may involuntarily cash it out or transfer it to an automatic rollover IRA. Even if an employee chooses to keep the account in the previous employer's plan or leaves it in the automatic IRA, it may be a

[13] Aon 2016 Universe Benchmarks: *Employee Savings and Investing Behavior in Defined Contribution Plans.*

[14] Bureau of Labor Statistics News Release "Employee Tenure In 2016," (September 22, 2016), available at https://www.bls.gov/news.release/pdf/tenure.pdf.

[15] Munnell, Alicia H. & Webb, Anthony. (February 2015) Center for Retirement Research at Boston College. *The Impact of Leakages on 401(k)/IRA Assets.* Retrieved from http://crr.bc.edu/wp-content/uploads/2015/02/wp_2015-2.pdf.

relatively small amount. This is a particular issue for younger workers who tend to switch jobs more often than older workers.[16]

The end result of all this is either leakage from the retirement system in the form of withdrawals at the time of a job change (by employee choice or automatically), or employees accumulating multiple low-balance plan and IRA accounts that they must keep track of as they move from job to job. And with each new job, the employee is starting from zero in each new plan, making it more likely that he or she will end that job with yet another small balance that is more likely to be cashed out.

From a retirement policy perspective, this result does not make sense. With the increasing number of job changes occurring in today's average career, retirement policy should encourage employees to bring their retirement accounts with them when they arrive at a new job, for all of the following reasons:

- Employer plans best protect employees' retirement savings, through fiduciary oversight of investment elections, service providers and plan expenses.
- Employer plans are more likely have institutionally priced services and investment options.
- Individuals may encounter conflicted advice and higher fees in the retail IRA market.
- Consolidation of retirement assets in to one plan allows for easier investment management and tracking.
- Consolidation removes the temptation to cash out low balance retirement plans of prior employers and minimizes involuntary cash-outs.

Retirement plan service providers are in a unique position to facilitate plan-to-plan rollovers, because they have the advantage of being "on the spot" when employees join their new retirement plans. This is the most natural point to engage an employee in a discussion about retirement plan assets in a previous employer's plan. Service providers can prevent premature withdrawal of those assets by encouraging a rollover into the new plan. However, as with contributions, the responsibility and risk that attach to fiduciary status are inappropriate for this beneficial activity, and plan sponsors and service providers will not engage in it unless it is excluded from the scope of the fiduciary rule.

[16] "Young workers are frequent job changers compared to older workers, and, if they cash out their 401(k) account every time they switch jobs, an early start to savings will be for naught. The Millennial demographic should be discouraged from cashing out their 401(k) accounts and should receive guidance that supports plan-to-plan rollovers when applicable." The Cerulli Report: *U.S. Evolution of the Retirement Investor 2016.*

Finally, provided there is no recommendation with respect to specific investment products or specific plan alternatives, or any other specific investment recommendation, there is no harmful conflict of interest that would be removed by treating plan-to-plan rollover recommendations as fiduciary advice. We urge the Department to allow employers and their service providers to most effectively help employees protect their savings when they change jobs by excluding this activity from the definition of fiduciary investment advice.

Thank you for the opportunity to comment.

Sincerely,

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