



July 21, 2015

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Conflicts of Interest Rule  
Room N-5655  
US Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

*Via email e-ORI@dol.gov*

**Subject: RIN 1210-AB32 – Proposed definition of fiduciary regulation comments**

Dear Sir or Madam:

Nova 401(k) Associates<sup>1</sup> appreciates the Department of Labor's efforts to update the definition of fiduciary to better protect participants. However, we are concerned that the proposed regulations would decrease the number of small employer plans, and thus the number of Americans covered by employer workplace retirement plans.

We request consideration of the following comments in finalizing the regulations.

1. **Extend arms-length transaction to small plans.** A carve-out is provided in proposed 2510.3(21)(b)(1)(i)(B) under certain circumstances to plans with more than 100 participants. The 100 participant requirement does not serve a valid public policy purpose. Requiring 100 participants may reduce the number of small 401(k) plans by reducing the number of advisors selling small plans due to the additional responsibilities, costs and risks of serving as a fiduciary. This would reduce the number of Americans covered by a workplace retirement plan.

By extending the arms-length transaction to small employers, the DOL would provide small employers a choice – demand an advisor who will serve as a fiduciary (potentially for a higher fee) or accept a party who will not serve as a fiduciary. This will keep the small plan marketplace vibrant and ensure that a sufficient number of advisors continue to serve the small plan marketplace. It will also encourage an open and frank discussion about the role of the advisor on each plan.

The 100 participant requirement is arbitrary. Small, owner-operated employers deal with a wide variety of financial and contractual transactions and do not need this protection. While large employers may benefit from more infrastructure, small employers are educated by routinely make financial and contractual decisions with no safety net for their income or wealth.

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<sup>1</sup> Nova 401(k) Associates is non-producing third party administrator of over 2000 401(k), profit sharing and defined benefit plans.

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The drafters of the proposed regulations greatly underestimate the financial competence of small employers by comparing small employers to retail investors.

The requirement of proposed 2510.3(21)(b)(1)(i)(B)(4) is sufficient without an objective, bright-line participant count test. Footnote twenty to the preamble states that most plans with less than one hundred participants have fewer than ten participants and comments that these plans are much more like retail customers. While we do not agree with this assertion, if the concern is plans with fewer than ten participants, then the appropriate threshold is ten participants.

**Recommendation:** Nova recommends that the 100 participant requirement the arms-length transaction carve-out be removed or lowered to ten participants.

- 2. Clarify length of fiduciary status.** Proposed 2510.3(21)(c) clarifies that individuals are only considered a fiduciary with respect to plan assets on which they provide advice and receive compensation. However, it is not clear for what time period an individual remains a fiduciary. While this issue exists under the current regulatory framework, the issue will be much more significant under the proposed regulatory framework because of the increased number of fiduciaries. Fiduciaries will need clarity on how long they retain fiduciary status for business and insurance purposes.

For example, if an individual becomes a fiduciary due to providing advice on the purchase of an investment product, is that individual a fiduciary for a limited time after the purchase, the length of time the plan holds the asset or does it depend on the agreement between the plan and the individual?

**Recommendation:** Nova recommends that the length of fiduciary status be the longer of the time specified in the contract between the parties and the period for which the individual receives compensation related to the investment advice.

- 3. Safe Harbor for Resolving Co-Fiduciary Breaches.** Many providers in the small plan retirement arena are willing to be held to a fiduciary standard with respect to their own actions, but do not have the resources to resolve co-fiduciary breaches efficiently and effectively if they become aware of a co-fiduciary breach. Small plan fiduciaries may not have staff attorneys to counsel them or the financial resources to institute litigation on behalf of the participants. This is an issue under the existing regulations, but given the scope of the proposed regulations, this issue is even more important.

**Recommendation:** Nova recommends that the DOL provide a safe harbor method for small plan fiduciaries to resolve the most common co-fiduciary breaches. For example, with respect to failure to deposit 401(k) deferrals, the DOL should prescribe a method of reporting late or missing 401(k) deferrals to the DOL which would satisfy a small plan's co-fiduciary's responsibility to resolve the fiduciary breach.

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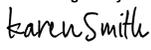
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Thank you for the opportunity to comment on the proposed fiduciary definition regulations. If we can provide additional information, please feel free to contact me at [karens@nova401k.com](mailto:karens@nova401k.com) or (713) 881-9310.

Sincerely,

DocuSigned by:  
  
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Karen Smith

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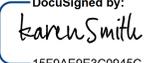
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