

20 July 2015

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

Re: Definition of the Term “Fiduciary;” Conflict of Interest Rule—Retirement Investment Advice (RIN 1210-AB32)

Dear Sir or Madam:

CFA Institute¹ appreciates the opportunity to provide comments to the Department of Labor (DOL) on its proposed rulemaking to define “fiduciary” (the “Proposal”) for purposes of the Employee Retirement Income Security Act (“ERISA”) and the Internal Revenue Code (“IRC”) for those providing advice and recommendations to an employee benefit plan, plan fiduciary, plan participant or beneficiary, individual retirement accounts (“IRA”) or IRA owner under ERISA and the IRC. CFA Institute represents the views of those investment professionals who are its members before standard setters, regulatory authorities, and legislative bodies worldwide on issues that affect the practice of financial analysis and investment management, education and licensing requirements for investment professionals, and on issues that affect the efficiency, integrity and accountability of global financial markets.

Executive Summary

CFA Institute and its members have long supported the principle of putting the interests of clients first. Our Code of Ethics and Standards of Professional Conduct, to which all members must annually attest to adhering, specifically requires members and candidates to “act for the benefit of their clients and place their clients’ interests before their employer’s or their own interests.” Thus, it is without qualification that we support the aim of DOL, which we see as ensuring that clients’ interests are put first and that they receive advice that is impartial,

¹ CFA Institute is a global, not-for-profit professional association of more than 132,000 investment analysts, advisers, portfolio managers, and other investment professionals in 151 countries, of more than 125,000 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 145 member societies in 70 countries and territories.

transparent, and allows them to make reasoned decisions about investments and their service providers.

We support the goal of the Proposal and despite concerns expressed by some industry participants about the potential for reduced service to certain parts of the retirement investment market, we believe the Proposal does a good job of accommodating various business models while still requiring investment service providers (hereinafter “Retirement Advisers”) to act in their clients’ best interest. We believe that action in favor of a higher standard of care among those providing personalized investment is long overdue. As described by our members, the investment industry is moving toward fiduciary-based business models, both as a consequence of technology and competition among investment service providers. In this sense, the Proposal will push the industry in a direction where it already is heading, and could be seen as reinforcing market forces.

It was not without conflict that we have arrived at this conclusion. We’ve heard views about the Proposal from many CFA Institute members and industry experts. From some the feedback was strongly supportive as it was seen needed to ensure a fiduciary standard of care was available to investors most in need of good investment advice. From others, however, we received feedback that suggested this rule would make investment service providers less willing to provide retirement services to families and individuals due to the potential legal liability in the court system, and more general, the costs of compliance. In the end, however, we have based the views expressed herein on a careful reading of the Proposal together with the best arguments and insights gleaned from members whose professional standards require they put their clients’ interests first.

However, we continue to have a number of concerns about the complexity of this proposed rulemaking. We are concerned that this complexity will not only result in high compliance costs but also increases uncertainty about legal liability among market participants. We believe that these costs are justified by the benefit of moving to a higher standard and the benefits to investors. Nonetheless, we encourage added guidance that will more clearly delineate the responsibilities under the final rule, as well as when legal liability may occur.

Background

ERISA defines a fiduciary to a retirement investment plan as someone who (i) exercises any discretionary authority or discretionary control with respect to management of such plan or exercises any authority or control with respect to management or disposition of its assets; (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or has any authority or responsibility to do so; or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan. The definition of fiduciary for purposes of the IRC’s prohibited transaction rules (applying to IRAs) is essentially the same.

In 1975, the DOL adopted regulations—a “five-part test” (the “Test”) —for defining the circumstances when one would be seen as providing investment advice and thus subject to a fiduciary standard of care. This regulatory definition of what is a fiduciary applied to both ERISA and the IRC.

Under the Test, a fiduciary was one that would: (1) render advice to a plan based on the value of securities or other property, or make recommendations regarding advisability of investing in/purchasing/selling; (2) do so on a regular basis; (3) would provide the advice pursuant to a mutual agreement with the plan; (4) in which the advice would serve as primary basis for investment decisions with respect to plan assets; and (5) in which the advice would be individualized.

To qualify as a fiduciary, an individual or firm would have to meet *all* five elements of the Test. For example, an adviser would not be considered a fiduciary if investment advice were only provided one time, (thus not on a “regular basis”). And this would be allowed regardless of whether the advice was a primary basis for an accountholder’s investment decisions or involved a single, major decision involving a rollover.

The growth of 401(k) plans (which were not anticipated when the regulations were adopted in 1975) and IRAs has spurred the DOL in recent years to reconsider this approach. In particular, it believes the Test allows many advice providers, including brokers, to circumvent the true fiduciary standard originally promulgated by ERISA to provide conflicted advice to the detriment of investors in retirement accounts.

Under ERISA, advisers are held to standards of prudence and loyalty and can be held liable for breaches of these duties. Thus, the DOL notes that the greatest impact of its proposed Best Interest standard will be on IRA accountholders, who do not benefit currently from ERISA's prudence and loyalty standards for retirement advisers. DOL states IRA accountholders also will gain a private right of action to sue for breaches of this duty.

Moreover, the DOL believes that many broker-dealers do not understand that they are fiduciaries with respect to such plans, because they do not hold themselves out as registered investment advisers (“RIAs”). It states, specifically, that “the Proposed Regulation will cover many investment professionals who do not currently consider themselves to be fiduciaries under ERISA” or the IRC. We believe investors also are confused as to the standard of care that is being provided.

Through the Proposal, DOL aims to establish a standard that is true to ERISA’s statutory intent by narrowing the current definition of a fiduciary, so as to expand the protections afforded to investors making decisions with respect to retirement assets. At the same time, it notes an intention to “preserve beneficial business models for delivery of investment advice” that allows firms “to continue common fee and compensation practices” (including commissions and revenue sharing). Central to this concept is the proposed Best Interest Contract Exemption (BICE) that would allow those providing conflicted advice to still receive compensation for that advice.

Discussion

Under ERISA, a fiduciary must provide impartial advice that is solely in the client’s best interest. A fiduciary may not accept payment that creates conflicts of interest unless a prohibited transaction exemption (PTE) provided by the DOL is applicable.

Despite this language, the Test has allowed broker-dealers and other advice providers (hereinafter Retirement Advisers) to advise retirement plans, individuals, and IRA accountholders without meeting a Best Interests standard or having to qualify under a PTE.

Through this Proposal, the DOL attempts to restore the landscape for receiving advice that is consistent with the statutory language originally contemplated by ERISA.

The Proposal seeks to achieve this by requiring new obligations on those individuals and firms providing advice or recommendations to employee benefit plans, plan fiduciaries, plan participants or beneficiaries, or IRAs or IRA owners in the role as fiduciaries under ERISA and IRC. Notably, the Proposal would extend for the first time a private right of action to IRA holders to hold Retirement Advisers liable for breach of their Best Interests Standard.

The Proposal also responds to comments received in response to the DOL's 2010 proposal by specifically seeking to alleviate (1) concerns about the ability of Retirement Advisers to provide education without triggering a fiduciary duty; and (2) industry concerns that current advice providers would lose their ability to retain certain compensation structures in light of a required fiduciary duty standard.

We recognize that the retirement landscape for individuals has shifted substantially since DOL's 1975 amendments. Moving toward defined-contribution retirement plans and away from defined-benefit retirement plans, today's investors have greater individual responsibility for understanding their retirement options, planning their futures, and managing their retirement assets through participant-directed plans, including company-sponsored 401(k) plans and IRAs.

We agree with the DOL that the current Test does not honor the statutory definition of fiduciary and has allowed many current Retirement Advisers to avoid the obligations of a fiduciary under ERISA rules. It has allowed them to give conflicted advice, steer investors into investments that may benefit the Retirement Advisers to the detriment of clients, and to act in ways that would be prohibited if they were considered fiduciaries. We strongly support this attempt by DOL to realign the provisions defining a fiduciary with the original statutory context. This is an important step in providing retirement investors with the protection they deserve.

CFA Institute strongly believes Retirement Advisers owe a duty of prudence, loyalty and care to their clients when providing personalized investment advice. As a consequence, we believe these service providers therefore must put the interests of their clients ahead of their own interests and the interests of their firms. We believe that the BICE, as described more fully below, goes a long way toward alerting investors to potential conflicts of interest on the part of their Retirement Advisers. We also support the approach that the most robust disclosure requirements are dedicated to advice and transactions that favor proprietary products and those sold from a firm's securities inventory. These are appropriate responses to the greater potential for misconduct arising from such transactions. And we support extending the private right of action to IRA investors as appropriate to ensure accountability for Retirement Advisers, though, as noted below, the uncertainty about legal liability is perhaps the greatest threat to the success of the Proposal.

We support provisions in the Proposal to allow investors to receive general retirement education and information without triggering a fiduciary standard for the providers of that education. We believe preserving this advantage for investors is a critical component for creating informed investors who need such information if they are to make meaningful investment decisions. While these education and retirement materials would be general and not individualized, they nonetheless would give investors a starting place for assessing their individual needs.

In general, we also support the use of various forms of compensations for individuals and firms providing investment services to their clients. However, many in the industry have helped to blur the lines between the standards of care that investors should expect from different types of service providers. For example, investment advisers have been bound by a fiduciary duty as stipulated in the Advisers Act and as interpreted through common law. Brokers and other non-fiduciary service providers, on the other hand, are bound by a lower, suitability standard, wherein they are not bound by the standards of prudence, loyalty or care, but by whether a product or service sold is suitable for a particular investor at a particular time. Confusion over the distinction between these two types of service providers has blurred, in part because of lenient regulatory interpretations over how non-fiduciaries refer to themselves. Many use the term, "Financial Advisors," which we believe has contributed significantly to the confusion among retail investors about the standards of care owed to them by their investment service providers. This situation was described in the 2008 study of investor perceptions of investment advisers and broker-dealers conducted by the Rand Corp. (the "Rand Study").

CFA Institute strongly believes that regulators need to control the terminology used to describe different investment service providers in order to remedy this type of confusion among investors. In particular, only those individuals and/or firms that are subject to the fiduciary standards of the Advisers Act -- and to the fiduciary standards of ERISA -- should be permitted to use terms such as advisers or advisors as titles or descriptions for what they do. If an individual or firm wishes to refer to themselves as advisers, then they would be subject to the fiduciary standards of the Advisers Act and ERISA. Likewise, all service providers who provide individualized investment advice should have to refer to themselves as advisers and adhere to the fiduciary standards of the Advisers Act and ERISA.

On the other hand, service providers who wish to be subject to the lower suitability standard -- and, per the Proposal, continue to receive commission-based compensation -- should have to refer to themselves as "salespersons" to reflect the different standards of care their clients should expect them to provide. Overall, we don't believe the Proposal will help to reduce investor confusion about standards of care. Indeed, it may exacerbate the confusion because salespeople operating under the BICE in the retirement market may lead their clients to assume they are providing a fiduciary standard of care when providing advice for other, non-retirement investments. It is critical, therefore, that the DOL work with the Securities and Exchange Commission ("SEC") to develop a harmonized approach to these definitions to add clarity to the roles of advisers in the non-retirement market to prevent increased confusion.

Differences in the Governing Statutes

The DOL has stated with regard to the Proposal that it has "aimed to coordinate and minimize conflicting or duplicative provisions between ERISA, the Code and federal securities laws, to the extent possible." The DOL also points out the governing statutes do not permit it to make the obligations of fiduciary investment advisers under ERISA and IRC "identical to the duties of advice providers under securities laws." ERISA and the IRC "establish consumer protections for some investment advice that does not fall within the ambit of federal securities laws, and vice versa. Even if each of the relevant agencies were to adopt an identical definition of 'fiduciary', the legal consequences of the fiduciary designation would vary between agencies because of differences in the specific duties and remedies established by the different federal laws at issue."

CFA Institute understands that there are statutory differences, and different circumstances and context in which these standards would be applied, between ERISA, the IRC and the Advisers Act. We believe this would mean that the principles of loyalty, prudence and care, would be applied differently by advisers in the different situations overseen by the different statutes. In a more favorable environment, we would prefer a fiduciary standard that would apply consistently for retirement and non-retirement investment advice. That is not the market in which we operate, however, and the different fiduciary standards are a fact of life. Nevertheless, we encourage the SEC, as the statutory regulator for most of the firms and investment products used in the retirement market, to work closely with the DOL to reduce the disparities between the different fiduciary standards.

New Definition of Investment Advice

The Proposal seeks to replace the 1975 Test for determining who is a fiduciary and redefine what constitutes providing investment advice as:

- (1) Providing investment or investment management recommendations or appraisals to an employee benefit plan, a plan fiduciary, participant or beneficiary, or an IRA owner or fiduciary, and
- (2) Either (a) acknowledging the fiduciary nature of the advice, or (b) acting pursuant to an agreement, arrangement, or understanding with the advice recipient that the advice is individualized to, or specifically directed to, the recipient for consideration in making investment or management decisions regarding plan assets.

Investment Advice is in the “Best Interest” of the investor when the Retirement Adviser and financial institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances and needs of the retirement investor, without regard to the financial or other interest of the adviser, financial institution, any affiliate, related entity, or other party.

We strongly support the proposed definitions for investment advice and the DOL's view of the need for and manner in which the interests of investors are put first.

Activities That Constitute Investment Advice

The types of activities that would constitute “investment advice,” and thus would make a provider of such advice a fiduciary, include:

- *Recommendation to distribute plan assets.* A recommendation regarding the advisability of acquiring, holding, disposing of, or exchange, securities or other property (including recommendations relating to rollovers/distributions from IRAs); merely providing plan participants with information about the plan or IRA distribution options will not create a fiduciary.
- *Recommendation as to management of plan assets.* A recommendation regarding the management of securities or property (including recommendations relating to rollovers/distributions from IRAs). Individualized advice or that which is specifically-directed concerning proxy voting and other ownership rights creates a fiduciary duty. But

guidelines and other information about proxy voting policies provided to a broad group of investors would not.

- *Appraisals.* An appraisal, fairness opinion or statement about the value of securities or other property when provided in connection with a specific transaction involving acquiring, disposing or exchanging of the securities or other property by the plan or IRA.
- *Recommendation on investment managers or advisers.* A recommendation on the selection of an investment adviser or manager would constitute investment advice. However, general advice on the criteria to consider when making such selections would not be a recommendation.

The Proposal makes clear that execution alone at the direction of the plan or IRA owner will not constitute a fiduciary activity.

In addition to the content of the communication, the manner in which the content is provided, would be important in the Proposal for determining whether a person providing it is a fiduciary. In order to be a fiduciary, a person would have to acknowledge that status as a fiduciary under ERISA with respect to the advice, or give the advice “pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.”

Consistent with this approach, information that is provided by someone not claiming to be a fiduciary under ERISA or is so general as not to meet the standard for individualized advice will not necessarily trigger the requirements pertaining to being a fiduciary.

In general, we are supportive of applying the definition of fiduciary duty to recommendations for plan asset distributions, as well as relating to the management of plan assets. However, we have difficulties seeing why performing an appraisal on property or assets, or the valuation of securities or other property should create a fiduciary duty. Value is tangible only when and if two parties agree to exchange property on the basis of an agreed-upon price that may or may not be based on an appraisal or valuation. A valuation or appraisal is applicable only at the time it is given, and may change significantly in the very near term.

Carve-outs from Definition of Investment Advice

The Proposal notes that the definition of investment advice, alone, could cast the net too wide and capture activities that should not trigger a fiduciary duty. Thus, the DOL is proposing certain “carve outs” for those who (a) do not specifically hold themselves out as fiduciaries with respect to the advice or (b) do not provide advice in a way that is individualized or specifically directed to an individual for use in making investment decisions regarding securities or property in the plan or IRA. Retirement Advisers who promote themselves as fiduciaries cannot later claim reliance upon one of the carve-outs.

The carve outs for activities that will *not* constitute investment advice:

- *Arms’ length transactions.* Statements or recommendations that are made to a large plan investor in an arm’s length transaction, when there is not an expectation of fiduciary investment advice;

- Employee advice. Statements or recommendations by employees of a plan sponsor to the plan fiduciary of an ERISA plan, if the employees do not receive additional compensation for the statements or recommendations;
- Platform providers. Marketing or making available a platform of investment alternatives to plan fiduciaries for ERISA participant-directed individual account plans;
- Swap transactions. Offers or recommendations to plan fiduciaries of ERISA plans to enter into regulated swaps or security-based swaps with plans;
- ESOP appraisals. An appraisal, fairness opinion or other statement of value to an ESOP regarding employer securities, to a collective investment vehicle holding plan assets, or a plan for meeting reporting and disclosure requirements;
- Investment alternatives. Identifying investment alternatives in keeping with objective criteria provided by plan fiduciaries of ERISA plans, or providing objective financial data to such fiduciaries; and
- Education materials. Information and materials that constitute investment or retirement education.

We generally agree that these proposed carve-outs from what is considered investment advice for purposes of applying a fiduciary standard are appropriate and workable. We believe the importance lies in ensuring advice that is tailored to the particular needs of specific investors is provided under a fiduciary standard of care. The more general advice and services noted in the carve outs, while important, do not rise to that level.

Investment Education.

The Proposed rule makes clear that Retirement Advisers and others may provide general education on retirement savings or employment-based plans and IRAs without being seen as fiduciaries. We believe this provision to be of utmost importance and support the approach. Moreover, we appreciate that the information and educational materials may address retirement needs beyond the actual date of retirement.

We agree that investors readily need these types of information in order to consider and prepare for a retirement future. We further believe that investors must receive information that allows them to make meaningful investment decisions. As investors have had to become more active in choosing retirement options and investment vehicles, they have faced a growing need for tools that allow them to meaningfully direct their future.

We support the extension of this carve-out for general investment education information and materials to be provided to plan participants and IRA accountholders. We understand that neither the frequency nor form of these materials or information matters as long as they do not include advice or recommendations as to specific investment managers, investment products, or the value of particular securities or property. We also agree with the preclusion of references to specific products and alternatives on the basis that even when accompanied by statements about the availability of other products, specific recommendations can easily convey to investors that the advice is individualized enough to be fiduciary advice.

In allowing a range of educational information to easily flow to investors, the Proposal groups this information into five categories: plan information, general financial, investment and retirement information, asset allocation models, and interactive investment materials, but confirms that these groups are not exclusive and that other types of information may also be allowed without constituting investment advice.

Prohibited Transaction Exemptions

The DOL has existing prohibited transaction exemptions (PTEs) that essentially provide safe harbors for certain actions that otherwise would violate DOL regulations. Thus, particular PTEs provide specific conditions under which otherwise prohibited activities are allowed.

In addition to the “carve outs” from what would be considered the rendering of investment advice, the Proposal proposes new or amended PTEs are aimed at allowing advisers to continue engaging in common compensation arrangements. At the same time, certain of these new and amended PTEs would protect plan participants and IRA accountholders by imposing a Best Interest standard.

The most significant of the newly proposed PTEs is the Best Interest Contract Exemption. Under the BICE, advice providers could meet their fiduciary obligations and be deemed as providing advice in the best interests of clients in cases where otherwise that advice would be seen as conflicted, and thus prohibited. It also would dramatically change the way Retirement Advisers who heretofore have not adhered to a fiduciary standard conduct business.

Best Interest Contract

Under BICE, Retirement Advisers could comply with the required fiduciary standard while still receiving compensation for investment advice in potentially conflicted situations if they comply with all aspects of the BICE.

To qualify for the exemption, Retirement Advisers and their firms would need to comply with all of the following conditions:

- They would have to contractually acknowledge their fiduciary status and commit to adhering to basic standards of impartial conduct;
- They would have to warrant that they will comply with applicable federal and state law regarding advice;
- They would have to adopt policies and procedures reasonably designed to minimize the harmful impact of conflicts of interest; and
- They would have to disclose basic information about their conflicts of interest and the cost of their advice.

Beyond these conditions, Retirement Advisers seeking to qualify for the BICE also would have to commit to fundamental obligations of fair dealing and fiduciary conduct, meaning to give advice that is in the customer’s best interest. They would have to avoid misleading statements, receive no more than reasonable compensation, and comply with applicable federal and state laws governing advice.

The BICE would be available to Retirement Advisers who provide advice to retail investors, including plan participants and beneficiaries, IRA owners, and plan sponsors of plans with fewer

than 100 participants. In keeping with the DOL's concern about the vulnerability of retail investors, we agree that this is an appropriate focus on smaller plans with fewer than 100 participants. We agree that plan sponsors of larger plans often are able to provide a broader range of resources to plan participants.

The BICE is designed to allow individual Retirement Advisers or their firms to provide advice under otherwise "conflicted" circumstances while continuing to receive otherwise prohibited compensation (brokerage or insurance commissions, trailing commissions, sales loads, 12b-1 fees, and revenue sharing payments). Other compensation such as investment management and administrative fees would also be allowed. In all cases, allowable compensation would be limited to sales of commonly purchased investments, including "assets" defined as bank deposits, bank certificates of deposit, shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITS, exchange-traded funds, corporate bonds offered under the 1933 Act, agency debt securities, US Treasury securities, insurance and annuity contracts, guaranteed investment contracts, and equity securities that are exchange-traded. The DOL also advises that a number of investments not specifically listed would be allowed through pooled investment funds, which are covered by the exemption.

Advisers relying on the BICE would have to notify the DOL prior entering into such agreements with their clients and would have to keep records for six years that the DOL could review on request. When reliance would begin is unclear under the Proposal and as proposed it would create uncertainty for Retirement Advisers as to when they need to first enter into the BICE. We recommend that the Final Rule address this, or that the DOL provide accompanying clarifying guidance.

Finally, Retirement Advisers could not be subject to policies and procedures designed to make recommendations not in their clients' best interests. This would include certain compensation arrangements or incentive programs. The Proposal notes that while not required, a "level-fee" structure would be one way to comply with this requirement. We also encourage the DOL to provide additional guidance on the types of practices that would meet these requirements.

We believe that the exemption afforded Retirement Advisers through the BICE serves to require a fiduciary standard while concurrently allowing various types of compensation arrangements. This approach allows investors to continue receiving service from an array of providers while receiving a fiduciary-level of care despite having potential conflicts of interests.

We recognize that the introduction of the BICE is intended to preserve the business models of commission-based service providers. By using the BICE, DOL reasons, Retirement Advisers would have flexibility to determine how to comply with the standards in light of their particular businesses. Plan participants and IRA owners would be ensured fair dealing and pay only "reasonable" compensation while not having to endure misleading statements from their Retirement Advisers. The principles-based approach of this PTE would avoid prescriptive rules and rely on the commitment of commission-based Retirement Advisers to provide advice in the best interests of retail investors, the plan, and/or IRA owners.

While we appreciate the intent of the BICE, we have a number of concerns about the complexity of the BICE process that will impede its effectiveness, as well as impose compliance costs that may be unnecessary under a simpler approach. The complexity of what is required for complying with the BICE has only increased the concerns about potential liability and accompanying legal

costs. To the extent that the DOL can in its final rules more clearly define the parameters of using BICE and when liability may attach, we believe this approach will become more palatable to Retirement Advisers and help assuage the concerns relating to increases in litigation.

We are also concerned about the requirement that advisers must notify the DOL in advance of creating an agreement reliant upon a BICE. While we are under the belief that advisers are required only to provide notification to DOL, we don't believe it is appropriate to put paperwork ahead of implementation of an investment program. At the very least, we believe notification should occur concurrently with implementation of the plan rather than prior to its adoption. We also suggest clarification that the Retirement Adviser can take certain steps, such as preliminary conversations with investors generally relating to engagement, before having to execute a BICE.

Disclosure Requirements

The Proposal recognizes that some Retirement Advisers and their firms limit the products available to investors to those that will generate third-party income or are proprietary products. Retirement Advisers taking that approach could still receive compensation by relying on the BICE, and meeting additional conditions. In particular, before offering products to investors, the firm would have to make a written statement that the limitations do not prevent the Retirement Advisers from acting in the client's best interests. And when the limited menu of options would not meet an investor's needs, the Adviser would have to notify the Investor of that circumstance.

We support the enhanced disclosure requirements mandated for Retirement Advisers who limit their offerings to products that generate income for the advisers or to proprietary products. These products may or may not be the best options for investors, but the potential for selling instruments that are not in the best interest of clients is sufficiently great to warrant greater care and disclosure.

Compensation Disclosures

The Proposal would limit the payments received to the fair market value of the services provided by the Retirement Adviser. Retirement Advisers using the BICE would have to provide a Web page showing the compensation that they could receive in relation to each asset that it makes available to the investor, or that has been sold within the last 365 days; the source of the compensation, and how it varies among asset classes. In addition, Retirement Advisers would have to provide individual annual disclosure statements to each investor within 45 days of year's end showing the asset purchased or sold and its price; the total fees and expenses paid by the individual, plan account or IRA with respect to each asset; and the total dollar amount of compensation received during the period relating to that asset.

The BICE itself would contain a number of disclosures, including the identity of any of the Retirement Advisers' conflicts of interest (and reference to the advisers' Web sites), notification that investors have a right to obtain complete information about fees relating to its investments, including fees payable to the Retirement Advisers (their firms and related entities), and whether their Advisers' firms offer proprietary products or receive third-party payments with respect to those investments.

We believe these disclosures would be critical to help investors understand the potential conflicts that could affect a Retirement Adviser's approach with respect to investors' assets, and affect an investor's decision about whether to work with an Adviser. While the Retirement Adviser

ultimately would have to apply the Proposal's Best Interest approach to potentially conflicted situations, these disclosures would enable investors to be informed about those conflicts. This is central to maintaining the investor's trust and strengthening market integrity.

Under BICE requirements, Advisers would have to provide "point of sale" disclosures to investors before execution of transactions. This information would be provided through a chart for each asset recommended the "total cost" for 1-, 5-, and 10- year periods, based on the dollar amount investment recommended by the Adviser and on reasonable performance assumptions.

We believe requiring point of sale disclosures exceed what is needed and places undue burdens on Retirement Advisers. If the goal is to provide investors with information on costs of investment options, the DOL could require disclosure in a more feasible and less-complicated format. For example, providing disclosure at or before completion of the transaction would be sufficient. A "Surgeon General"-type warning to investors about costs and fees, as noted in the Proposal, would be sufficient to put investors on notice.

Other PTEs

The Proposal would allow Retirement Advisers to recommend and sell certain fixed-income securities directly from their own inventories in accordance with the exemption's consumer-protection conditions. While each investor's circumstances would be different and we support the ability of investors to buy instruments that they feel are most suited for their particular circumstances, we question this PTE given that retirement plans have many other options that would give such plans more diversified exposure to the fixed-income market without having to worry about pricing for illiquid instruments. Moreover, as these markets become increasingly illiquid, investors will have difficulty finding indicative quotes as to the value of these instruments. At the very least, then, we believe these instruments should adhere to the same disclosure and standards of care required of other instruments that are sold from firms' own inventories or are sold on a principal basis.

Of particular interest to us is the DOL's consideration of a PTE that would contain less stringent requirements than the BICE. This PTE would provide for a more streamlined approach for advisers who offer certain high-quality investment products such as transparent mutual funds that carry lower fees, on the theory that they would present less potential for conflicts of interest.

We recognize the justification for a streamlined system with fewer conditions that would continue to safeguard investors' interests. We understand that this PTE would reduce the potential for conflicts by requiring high-quality and low-cost investment options. This approach would not require adherence to many of the contractual commitments in the BICE and would provide a viable alternative to Retirement Advisers who may not have the resources to comply with the BICE. Finally, this provision would go toward striking a reasonable balance between doing what's right for investors and managing the compliance costs of advisers.

We have concerns about the potential for abuse under this PTE, specifically as it relates to the type of investments exempted. We recognize that index funds may be included in this category of exempted instruments and while each investors' circumstances will be different, index funds often provide acceptable investment options for many investors. Nevertheless, low-cost is a relative consideration, as an index fund that carries a 70-basis point fee is relatively high-cost when compared with similar funds of reputable and experienced firms who charge less than 25

basis points for similar products. Again, a PTE in this instance would not ensure investors of a fiduciary standard of care and could lead to less-than-optimal outcomes for investors.

Private Right of Action

The proposal would grant IRA account holders a private right of action to bring suits to allege violation of an adviser's fiduciary duty with respect to their accounts. This new provision would replace arbitration as the only avenue for redress for such investors.

We believe this is a positive development. Retirement investors should be entitled to hold Retirement Advisers accountable for breaches of their Best Interest duty.

Effectiveness

The DOL proposes to make definition of fiduciary effective eight months after its adoption. Given the extensive change in policies, procedures, and contract provisions that these new regulations would impose on certain service providers, we suggest a longer time phase-in period for Retirement Advisers to come into compliance. We think this is particularly necessary if the BICE is adopted substantially in the form proposed.

Conclusion

We appreciate the goal of the DOL to impose a more robust fiduciary standard for those who provide advice to investors relating to their retirement. We believe this to be a particularly crucial issue, given the importance of the investment decisions and the investor's right to rely on advice that that is provided with the investor's best interests in minds. We support the Proposal as an important step toward this goal.

Should you have any questions about our positions, please do not hesitate to contact Kurt N. Schacht, CFA at kurt.schacht@cfainstitute.org or 212.756.7728; or Linda Rittenhouse at linda.rittenhouse@cfainstitute.org or 434.951.5333.

Sincerely,

/s/ Kurt N. Schacht

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