



The Inland Real Estate Group  
of Companies, Inc.  
2901 Butterfield Road  
Oak Brook, Illinois 60523  
630-218-8000

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Submitted Electronically – e-ORI@dol.gov and e-OED@dol.gov

Office of Regulations and Interpretations  
Office of Exemption Determinations  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

**Re: Definition of the Term “Fiduciary” (RIN 1210-AB32);  
Best Interest Contract Exemption (ZRIN 1210-ZA25)**

Dear Ladies and Gentlemen:

The Inland Real Estate Group of Companies, Inc. (“Inland”) submits the following comments with respect to the rule proposed by the U.S. Department of Labor (the “Department”) which would define who is a “fiduciary” by reason of providing investment advice for a fee or other compensation (the “Proposed Conflict of Interest Rule”<sup>1</sup>) and the related proposed Best Interest Contract Exemption (the “Proposed BIC Exemption”<sup>2</sup>). Inland appreciates the opportunity to comment on this important regulatory action.

With more than 40 years of expertise, Inland is one of the nation’s largest commercial real estate and finance groups. As a business incubator, we specialize in creating, developing and supporting member companies that provide real estate-related investment funds, including limited partnerships, institutional funds and non-listed and listed real estate investment trusts, or “REITs,” and real estate services for both third parties and Inland member companies. Inland Real Estate Investment Corporation has sponsored seven non-listed REITs, five of which have experienced full or partial liquidity events in the form of a listing, a sale or a spin-off.

Our primary concerns relate to two issues: (i) the Department’s apparent substitution of a “legal list” of acceptable (and presumably “worthy”) assets in place of its traditional principles-based approach; and (ii) the definition of “Assets” in the Proposed BIC Exemption. The Department has requested comment on the proposed definition of “Assets” and has specifically asked that commenters who believe that additional investments should be included in the scope of the

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<sup>1</sup> U.S. Department of Labor, Notice of Proposed Rulemaking, *Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment Advice*, 80 Fed. Reg. 21960 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), available at: <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28201>.

<sup>2</sup> U.S. Department of Labor, Notice of Proposed Class Exemption, *Proposed Best Interest Contract Exemption*, 80 Fed. Reg. 21960 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), available at: <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28202>.

exemption provide the Department with information supporting their inclusion. We are writing to recommend that the Department to revise the Proposed BIC Exemption in order to include direct investment products, such as publicly registered non-listed REITs, non-listed Business Development Companies (“BDCs”) and other publicly registered, non-listed direct participation programs (collectively referred to herein as the “Public Products”), within the scope of the Proposed BIC Exemption, either by removing the “legal list” of “Assets” or by including Public Products on the “legal list.” As discussed in this letter, Public Products are important investment vehicles for American investors trying to save for their retirement. Failing to address these include within the scope of the Proposed BIC Exemption will have the impact of effectively making these publicly registered investments unavailable to qualified IRA investors.

***Direct Investment Products Are Compatible with Retirement Investment Objectives and a Common Investment for Retail Investors.***

Currently, over 30,000 financial advisors regularly recommend Public Products for their clients’ portfolios. Public Products have been rapidly gaining advocates among financial advisors and investors in part because their attributes and benefits are highly compatible with retirement investment objectives. The reasons that Public Products are compatible with investors’ retirement objectives are manifold, including without limitation: Public Products typically provide a significant majority of their returns in the form of a stable stream of income; Public Products avoid the risks of “growth” investments; asset-based Public Products (e.g. real estate and oil and gas) can provide capital protection through appreciation of value of the assets induced by inflation; Public Products help investors avoid concentrating their portfolios in traded securities or vehicles which invest in exchange-traded securities and thereby help avoid the volatility and market risks associated with such products; and Public Products provide individual investors with access to “direct investments” which for years have been a fundamental component of the investment portfolios of institutional pension plans and endowments.

Today’s Public Products have evolved from their distant predecessors (the publicly registered, non-listed direct participation programs in the 1980s), through new features, enhanced governance and regulation and successful investment performance, among other things, to become “common” retail securities. Annual investment in Public Products has increased from \$920 million in the year 2000 to over \$21.1 billion in 2014.<sup>3</sup> Approximately 30% of all public equity issuance by real estate investment entities since the year 2000 has been invested in public, non-listed REITs, confirming not only the ubiquity of this product relative to securitized public real estate investments, but also its important role in real estate capital markets. Of a cumulative total of over \$140.6 billion invested in Public Products since 2000, \$58.8 billion was invested in the past three years, evidencing the rapid growth of recognition of the value of these investments in diversified portfolios. Further, of the \$21.1 billion invested in Public Products in 2014, 43% was invested by IRA accounts. Public Products provided over \$5.9 billion of income distributions to investors in 2014, of which over \$2.5 billion went to IRA accounts.

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<sup>3</sup> See comment letters from the Investment Program Association (“IPA”) and the Public Non-Listed REIT Council of the National Association of Real Estate Investment Trusts (“NAREIT”) for additional data and investment information about public, non-listed REITs and their role in IRAs.

The Department has not set a standard for what constitutes a “common” retail investment, but it would seem that a product with millions of accounts and billions of dollars invested should be considered common. If the Department does not revise the definition of “Assets” as currently provided within the Proposed BIC Exemption, it will deprive retirement investors from continuing to invest in products which they clearly find favorable for their individual situations.

The Public Products are direct investment programs, which typically invest in tangible assets such as real estate, equipment leasing, or energy, or as in the case of non-listed BDCs, invest in loans to certain U.S. businesses. Traditionally, these types of investments are intermediate to long-term with a focus on current income, preservation of capital and potential growth. As non-listed investments, Public Products typically have less daily volatility than their exchange-listed counterparts, and tend to have a low correlation to other asset financial classes. Most Public Programs are subject to higher disclosure requirements than many other financial products. These features, together with added diversification, can help to enhance an investor’s overall portfolio return while reducing risk.

Moreover, the Public Products offer many benefits to investors, including the potential for superior current yields, the potential for competitive total returns, and access to experienced management teams which specialize in the asset class.

The Public Products clearly serve an important purpose in a retirement or other portfolio. As many financial advisors have learned, the investment performance of these Public Products justifies their inclusion in investor portfolios. For example, in the most recent and comprehensive study of performance, the average annual returns for NL REITs outperformed both the S&P 500 and a typical bond fund benchmark. The performance of Public Products also does not correlate directly with the S&P 500, thus providing the type of diversification recommended by Modern Portfolio Theory. Given these attributes, there is no principled reason why an IRA investor may not choose to invest in other Public Products not currently considered “Assets.”

### ***The Department Should Discard the Legal List of “Assets.”***

A list of “Assets” will deprive investors of choice and will render the Department unable to easily adapt to market changes. New investment products are continually introduced to the market. It is not feasible to expect that the Department will have the means or ability to regularly and continually consider and analyze new investment products for inclusion as an Asset. As a result, the “Asset” list process will create a category of investors who are not able to take advantage of market evolutions and improvements. Further, this will result in those investors being precluded from seeking the same return available to other investors or from being able to diversify their investment portfolios on the same basis as other investors. This outcome could both lower returns and increase risk through lack of portfolio diversification—the exact opposite of the Department’s objectives.

In the Proposed BIC Exemption, the Department emphasized that it intended to adopt a “principles-based” or “standards-based” approach that “would flexibly accommodate a wide range of current business practices” while minimizing conflicts of interest. Yet while the Proposed BIC Exemption is designed to accommodate a wide range of compensation, and to be adaptable over time to market changes in the way investment advisers are compensated, the

Department abandoned a principles-based approach when it came to the types of assets covered by the exemption. By proposing a fixed list of acceptable “Assets,” the Department chose to freeze in time the types of investments that may be offered to retail retirement investors. We urge the Department to reconsider the “legal list” approach, which is inconsistent with the history of ERISA and modern trust law. We urge the Department instead to adopt a flexible, principles-based approach to the types of assets to which the Proposed BIC Exemption applies and to allow retail retirement investors to continue to invest in Public Products.

***If the Department Maintains the “Legal List,” the Department Should Add Public Products to that List.***

If the Department determines that a return to the “legal lists” of the past best serves the purposes of the Proposed Conflict of Interest Rule and the Proposed BIC Exemption, we respectfully request that the Department add Public Products to that list. As noted above, Public Products are common, indeed ubiquitous, in the retirement investment marketplace and commonly included in many investor portfolios, providing access to investment opportunities once only available to wealthy investors and institutions, as well as diversification and protection against market volatility.

The other terms and conditions of the Proposed BIC Exemption are already robust and flexible enough to protect retail investors, regardless of the product type. For example, if a recommended investment has different characteristics than “Assets” on the current list – such as less liquidity, lack of a public market, or different fee structure – those characteristics would have to be disclosed and taken into account by the adviser in order to meet ERISA’s fiduciary obligations, and the stringent best interest standard and other conditions of the Proposed BIC Exemption. Certainly, not all investments would be in the best interest of all retail investors, but the investment adviser’s newly imposed fiduciary status combined with the conditions of the exemption already require the adviser to consider those factors before making a recommendation. Since the conditions of the exemption are both flexible and demanding, the Department need not attempt to determine in advance which assets are appropriate to particular retirement investors, or under what circumstances.

Moreover, the definition of “Adviser” in the exemption already requires compliance with applicable federal and state securities laws and licensing requirements with respect to the covered transaction. Thus, for example, any additional disclosure requirements or suitability standards of FINRA or other regulatory authorities with respect to non-listed REITs, non-listed BDCs or other forms of “direct investment” are effectively incorporated into the Proposed BIC Exemption. Consequently, the exemption is flexible enough to accommodate different types of investment on the “Asset” legal list. At a minimum this should favor the inclusion of Public Products on the legal list.

A comparison of Public Products to some of the items on the list of “Assets” illustrates some of the deficiencies of relying on a pre-established list of products, as opposed to providing a list of factors (and perhaps some baseline criteria) that industry participants can take into account in deciding for themselves whether a product complies with their fiduciary duties under the Proposed BIC Exemption and Proposed Conflict of Interest Rule. While the Department has expressed some concern about the liquidity of retirement investments, it has nevertheless

included both certificates of deposit and variable annuity contracts on the legal list. Neither of these instruments is liquid and if an investor wishes to exit the investment early, there are typically penalties imposed. Non-listed REITs and non-listed BDCs, however, have a history of honoring redemption requests with little or no penalty, depending on the timing and circumstances. To the extent that any of the externally managed Public Products invest in securities, their managers are subject to the fiduciary duties imposed upon investment advisers under the Investment Advisers Act of 1940. In addition, BDCs are subject to the strict fiduciary standards imposed by the U.S. Investment Company Act of 1940 regardless of whether they are listed (and thereby constitute “Assets” under the proposed rule) or unlisted (as is the case with the BDCs that constitute Public Products). Like any of the “Assets” that are sold by a broker-dealer or investment adviser (as defined by the Advisers Act), including corporate bonds, exchange traded funds and interests in registered investment companies, those selling Public Products are also subject to the basic FINRA imposed suitability and disclosure requirements (in the case of brokers) or the Advisers Act imposed fiduciary standards (in the case of investment advisers). Despite being non-listed, both REITs and BDCs have regularly determined prices, like the majority of the items on the list of “Assets.” Any justification the Department has for including some investment products as “Assets,” while excluding others, such as Public Products, is far from clear.

For all the reasons I mention above, we urge the Department to revise the Proposed BIC Exemption in order to include Public Products within the scope of the Proposed BIC Exemption, either by doing away with a list of specific “Assets” or by adding Public Products to that list. I appreciate your time and attention in ensuring that retirement investors are provided with the broadest array of investment options, while taking all possible measures to avoid conflicted advice.

Respectfully submitted,

**THE INLAND REAL ESTATE GROUP OF  
COMPANIES, INC.**

A handwritten signature in cursive script that reads "Dan Goodwin". The signature is written in dark ink and is positioned below the company name.

Daniel L. Goodwin  
Chairman