



OppenheimerFunds®

The Right Way
to Invest

Ari Gabinet
General Counsel
agabinet@ofiglobal.com

July 21, 2015

Submitted Electronically

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

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

**Proposed Best Interest Contract Exemption
ZRIN 1210-ZA25**

To whom it may concern:

OppenheimerFunds, Inc., and its subsidiaries¹ (collectively, “OppenheimerFunds”) appreciate this opportunity to comment on the proposed rule issued by the U.S. Department of Labor (“DOL” or the “Department”) regarding the Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 75 Fed. Reg. 21928 (Apr. 20, 2015) (“Proposed Rule”). This letter also offers comments on DOL’s proposed Best Interest Contract Exemption, 75 Fed. Reg. 21960 (Apr. 20, 2015) (“BIC Exemption”).

As a global asset manager, OppenheimerFunds offers a range of products, services and strategies for a variety of clients, from corporations and endowments to financial intermediaries serving individual investors. Our comments focus on our work with financial intermediaries in the retirement segment of our business. As described more fully below, OppenheimerFunds, like many other asset managers, manufactures and sponsors investments including mutual funds, as

¹ OFI Global Asset Management, Inc., a direct, wholly owned subsidiary of OppenheimerFunds, Inc. (“OFI”), is a registered investment adviser, providing investment management and transfer agent services to nearly 100 registered investment companies (mutual funds). OFI has been in the investment advisory business since 1960, and with its subsidiaries, has more than \$235 billion in assets under management.

well as a range of retirement plan and individual retirement account (“IRA”) products, all of which are distributed and sold to investors through unaffiliated, third party financial intermediaries.

Our primary concern with the Proposed Rule is that it is likely to impose ERISA fiduciary status on firms such as OppenheimerFunds that rely entirely on these third party financial intermediaries to counsel and recommend investments to retirement plan sponsors and IRA investors. In addition, we are concerned that the BIC Exemption is too narrow in scope, and its conditions too unworkable, for it to be of practical use by the many financial institutions that would seek to utilize it.

In our view, the Proposed Rule would represent a misapplication of the fiduciary provisions of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). ERISA’s high fiduciary standards should be applied to advisers who assume a position of trust and impartiality via a direct relationship with retirement plans and investors who pay them a fee for investment advice. Those fiduciary provisions should not apply to industry participants engaged solely in manufacturing and broad marketing of mutual funds and other products for use by retirement plans and investors.

The statute specifically attaches fiduciary status to entities that provide investment advice for a fee. For fiduciary status to attach, the recipient of the advice must be paying for the advice itself, not for execution of transactions or allied services. Payment of a fee in exchange for purely sales and/or marketing services is, both from a simple factual standpoint and from an ERISA policy standpoint, not the same as payment of a fee for actual investment advice, and should not be equated with it for regulatory purposes. The Department and the courts have consistently recognized this basic concept of fiduciary status.²

Without significant modification and clarification to exclude asset managers such as OppenheimerFunds – which have no direct or material role in advising investors or plan sponsors with respect to their investments – the Proposed Rule and BIC Exemption will likely result in a substantial curtailment or elimination of retirement plan and IRA products offered to millions of small business and individual retirement account holders that our firm and others serve and support today in a clear, effective, non-fiduciary capacity that is regulated outside of ERISA. Simply put, the financial costs, legal liability, and incompatibility of our business model with this proposed expansion of ERISA fiduciary responsibility threaten to compel this outcome. Accordingly, we urge the Department to consider our attached comments – along with comments received from other asset managers like OppenheimerFunds that rely on third-party financial intermediaries to sell the retirement plan products they manufacture – and make necessary changes to the Proposed Rule and BIC Exemption to avoid this result.

² See, e.g., 40 Fed. Reg. 50842, 50842 (Oct. 31, 1975) (preamble to DOL’s final investment advice regulation) (the Department acknowledged that advice concerning the purchase or sale of securities or other property is “often merely an integral part of the execution of transactions instead of the provision of investment advice”); Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d 288 (7th Cir. 1989) (seller is not a fiduciary where the only “agreement” was that trustees would listen to sales pitch and purchase if they liked it); Hecker v. Deere & Co., 556 F.3d 575, 583 (7th Cir.2009), cert. denied, 558 U.S. 1148 (2010) (the creation of a platform of investment options to be marketed to 401(k) plans itself is not a fiduciary act).

Background

OppenheimerFunds is a leading manufacturer and sponsor of actively managed investment funds, including a full range of mutual funds covering every major asset class. We have a substantial defined contribution investment-only (“DCIO”) business, which places our mutual funds on third-party retirement platforms. In addition, we manufacture a range of retirement plan products for self-employed individuals and small businesses, including 401(k), profit-sharing, SEP IRA, SIMPLE IRA, and 403(b)(7) plans; as well as an OppenheimerFunds IRA product for individual retirement investors.

These retirement plan and IRA products provide plan sponsors, participants and accountholders with access to an investment menu consisting of the full range of Oppenheimer mutual funds. In addition, OppenheimerFunds provides typical plan-level and account-level administrative and recordkeeping services, and governing legal documents for plans and accounts. We participate in approximately 75 DCIO platforms, and OppenheimerFunds retirement plan products serve more than 100,000 plan sponsors and 850,000 accountholders. Total retirement assets under management were \$98 billion as of June 30, 2015.

Importantly, Oppenheimer mutual funds are almost exclusively “intermediary-sold,” meaning that we rely primarily on a network of third-party financial intermediaries – registered representatives of brokers-dealers, registered investment advisers, and consultants – to distribute and sell the Oppenheimer funds to end investors, whether for retirement or non-retirement purposes.³ This same intermediary-sold model also applies to our proprietary OppenheimerFunds retirement plan and IRA products – third-party intermediaries, not OppenheimerFunds, distribute and sell these products.

Like similarly situated investment providers, OppenheimerFunds has no true in-house, direct-to-investor distribution channel for its mutual funds and retirement plan products (*i.e.*, OppenheimerFunds does not utilize branch or sales offices that are accessible to the general public). We believe that the role of the third-party financial adviser or other intermediary is to provide individualized advice, assessing and taking into account the client’s retirement plan or IRA needs, investment goals and objectives, preferences, risk tolerances, liquidity requirements, and other assets. This role is critical for successfully bringing the Oppenheimer mutual funds and related products and services to appropriate investors, regardless of whether the investor is a retirement plan, IRA or non-retirement investor.

These third-party intermediaries – not OppenheimerFunds – counsel their clients about OppenheimerFunds products and services; execute transactions for them; and offer investment-related advice and education at the plan level and investor level, thereby providing their own valuable professional financial services. Most if not all of these intermediaries also offer a range of other, non-OppenheimerFunds retirement plan products and investment funds to their clients. For our own regulatory and compliance purposes, we have developed a narrowly circumscribed role in marketing and selling our products and services designed for use by plans and investors. We view our limited involvement in distribution as an advantage, freeing us to focus instead on

³ OFI is a majority-owned subsidiary of MassMutual Life Insurance Company (“MassMutual”); certain of the OppenheimerFunds retirement plan products are also sold by broker-dealer subsidiaries of MassMutual.

our core investment and retirement plan product design and sponsorship competencies, for the benefit of plans and investors, including small business owners and self-employed individuals.

Comments

Many of our comments to the Proposed Rule and BIC Exemption focus on issues that may particularly impact firms that manufacture and sponsor mutual funds and related retirement products, but which play no material role in the investment-related decision-making of retirement plans and IRA investors. While we recognize that the Department is seeking to update the regulatory test for defining fiduciary adviser status based on the significant changes to financial products and the retirement industry that have occurred over the last 40 years, we are particularly concerned that the Department's proposals will unfairly impose fiduciary status on manufacturers whose investment and retirement plan products are recommended and sold by the third parties in whom plan sponsors and individual retirement investors have placed their trust, especially small business owners and self-employed individuals.

The burden of such potential legal responsibility, neither sought by OppenheimerFunds nor conferred by plan sponsors or investors, would likely force us and firms like ours to curtail or exit certain retirement plan product and service businesses. The loss to plans and investors would be significant, as it would reduce or eliminate investment and product choices that have long served them well, as well as add complexity to their retirement savings efforts with little corresponding benefit.

We are similarly concerned that the Proposed Rule and BIC Exemption will have an overbroad, undesirable impact on financial intermediaries. Under the Department's proposal, our intermediary partners may also be swept into ERISA fiduciary status all too frequently for common education and sales activities. As such, we encourage the Department to narrow the definition of fiduciary and streamline the BIC Exemption to generally preserve the business model of financial advisers that have typically been compensated based on the transactions they execute.

Detailed comments are set forth in the attachment to this letter, but our key points are briefly summarized as follows:

- The definitions of "recommendation" and "fiduciary advice" should be modified so that they are logically, reasonably focused on the communications and conduct of persons who should be serving in a role based on trust and impartiality – not on the communications and conduct of manufacturers of the underlying mutual funds and other products
- The "platform exception" should be expanded to include IRA and "owner-only" qualified plan platforms, as the mere offering of a proprietary investment fund platform and associated investor services in connection with an IRA or owner-only plan is not fiduciary activity

- The “low-fee” exemption is vague and inappropriately creates a bias for particular investments as *per se* consistent with fiduciary status on the basis of undefined low cost and “high quality” criteria
- Making recommendations to non-discretionary fiduciaries to plans should not itself be fiduciary activity
- The “counterparty exception” should be expanded to cover “services” recommendations and to encourage a wide range of “selling activity” to all plans, which is critical to successful fiduciary oversight
- References to specific investment funds in asset allocation models should be allowed
- The BIC Exemption should be broadened and substantially simplified to enable it to be workable for providers of fiduciary advice.

We appreciate the opportunity to provide these comments and look forward to answering any questions the Department may have as it finalizes and implements these rules. If you have any questions, please contact me at agabinet@ofiglobal.com or 212.323.5062.

Sincerely,



Ari Gabinet
Executive Vice President
and General Counsel
OFI Global Asset Management, Inc.

Attachment

OppenheimerFunds Comments on Proposed Rule and BIC Exemption

1. **The definitions of “recommendation” and “fiduciary advice” should be modified so that they are logically, reasonably focused on the communications and conduct of persons who should be serving in a role based on trust and impartiality – not on the communications and conduct of manufacturers of the underlying mutual funds and other products.**

The Proposed Rule’s definitions of recommendation and fiduciary advice are overbroad and, if finalized, would result in an extremely wide range of legitimate, ordinary plan and investor education and other materials triggering fiduciary status for the provider of such education and materials. This low bar represents a significant departure from accepted concepts of fiduciary duty. Accordingly, we request that the Department modify the definitions as described below.

Under the Proposed Rule, a person would be deemed an ERISA investment advice fiduciary if, for a fee or other compensation, he or she provides one of the four types of covered advice that is either “individualized to” or “specifically directed to” the recipient of the advice. Accordingly, so long as the recommendation is “specifically directed,” it need not be “individualized” to the particular needs of the plan or investor. Further, to trigger this ERISA status, a “recommendation” need be nothing more than a mere “suggestion” for the recipient’s “consideration.” Lastly, the arrangement or understanding between the advice recipient and advice fiduciary need not be a “mutual” one.

Respectfully, we believe that this framework is unwarranted and unreasonable, and would have a chilling effect on all manufacturers of investments and other plan products within retirement services industry, to the detriment of retirement plans, their participants, and IRA investors. First, the definition of “recommendation” is so broad that, for all intents and purposes, little would fail to fit within the vague, subjective contours of a “suggestion.”

Second, and even more troubling from the manufacturer’s perspective, the “specifically directed to” element is so broad that it would mean, for example, that the mere act of furnishing any marketing material or product literature – non-individualized and tailored to no one in particular – could nevertheless be deemed ERISA fiduciary investment advice.

Third, the definition of fiduciary advice lacks any “mutuality” and “reliance” elements. This is problematic, as (1) the recipient of fiduciary advice deserves certainty in their expectations of the duties owed to them by an advice provider; (2) the provider of fiduciary advice needs clear, unambiguous understanding of its duties and obligations to the advice recipient; and 3) both parties should understand that the advice is intended to be relied on by the recipient.

Further, “mutuality” and “reliance” elements are crucial in carving out situations where neither party intends for an individualized recommendation to be investment advice, for example, a product manufacturer’s responses to a request for proposal (“RFP”) issued by a plan to the manufacturer and others like it. In this situation, the plan is gathering information from the product manufacturer for use in connection with its eventual product decision-making; the plan and the manufacturer would agree that the plan is not at that point obtaining fiduciary advice.

In sum, the definition of ERISA fiduciary investment advice should not be so broad that it ensnares a manufacturer of investments and other products, acting in the ordinary course of its business and receiving no fee for providing “investment advice” within the rational, common, and regulatorily consistent understanding of the term. Rather, the definitions should be modified so that, consistent with long-standing application of ERISA’s fiduciary provision, they reach persons actually serving (or who should be serving) in a role of trust and impartiality with respect to retirement plans or investors. Absent these modifications, a very real risk exists that many manufacturers in the retirement services industry will curtail or exit their businesses, leaving plans and investors without reasonable access to products, services and information they need at a price they can afford.

For these reasons, we urge the Department to modify the Proposed Rule as follows:

- modify the definition of “recommendation” in paragraph (f)(1) to add a measure of objectivity to the determination of whether a communication is a recommendation; this can be accomplished by adopting the “facts and circumstances” approach set forth in guidance by the Financial Industry Regulatory Authority (“FINRA”) that addresses the same topic of whether an investor communication is a recommendation, for purposes of the broker-dealer “suitability” requirements⁴; and
- modify the language in paragraph (a)(2)(ii) by deleting the “specifically directed to” element and revising the paragraph to read: “Renders the advice pursuant to a written or verbal agreement, arrangement or **other mutual** understanding that the advice is individualized to, **and reasonably intended to be relied on by**, the advice recipient in making investment or management decisions with respect to securities or other property of the plan or IRA.”

⁴ See, e.g., NASD, Online Suitability, Notice to Member 01-23 (April 2001) at page 2 (“NTM 01-23”), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003887.pdf>. NASD (April 2001) (“The determination of whether a ‘recommendation’ has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether—given its content, context, and manner of presentation—a particular communication from a broker/dealer to a customer reasonably would be viewed as a ‘call to action,’ or suggestion that the customer engage in a securities transaction.”); Know Your Customer and Suitability, FINRA Regulatory Notice 11-02 (Jan. 2011) (“FINRA Regulatory Notice 11-02”) (“... [T]he more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation. Furthermore, a series of actions that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate.”).

2. **The “platform exception” should be expanded to include IRA and “owner-only” qualified plan platforms, as the mere offering of a proprietary investment fund platform and associated investor services in connection with an IRA or owner-only plan is not fiduciary activity.**

A. **A platform exception is necessary for IRA products.**

We request that DOL expand the “platform exception” under the Proposed Rule to cover IRAs, which merit the same treatment as ERISA-covered plans where the same exact platform is offered to both. Specifically, we ask DOL to extend the platform exception to any person who markets and makes available to an IRA a platform or similar mechanism from which an IRA holder may select investment alternatives.

The OppenheimerFunds IRA product offers IRA investors access to retail share classes of the full range of Oppenheimer mutual funds. Identical to our ERISA and non-ERISA small business plan products, virtually every taxable Oppenheimer mutual fund is available to IRA investors, and OppenheimerFunds does not in any way restrict, channel or focus the Oppenheimer mutual fund choices available to IRA investors. The full array of asset classes are represented in the Oppenheimer fund family and IRA investors can create diversified portfolios of Oppenheimer funds on their own.

OppenheimerFunds’ business model relies on a network of third-party financial intermediaries to market our IRA product to potential investors. Therefore, neither OppenheimerFunds itself, nor its employees, would make any recommendations with respect to the sale of the OppenheimerFunds IRA itself to a plan participant or an IRA holder. Nor does OppenheimerFunds or its employees ever recommend a specific Oppenheimer mutual fund to an IRA investor. Any recommendation to use the OppenheimerFunds IRA product, or invest IRA assets in a particular mutual fund, would come from a financial intermediary, not from OppenheimerFunds.

We do create brochures and other marketing materials that describe the OppenheimerFunds IRA and the Oppenheimer mutual funds that are available to IRA investors. These materials describe the key features of the IRA, including the tax treatment, contribution and distribution rules, available mutual funds, and procedures for making contributions, rollover transactions and distribution requests. These materials generally carry the OppenheimerFunds logo and are provided to potential IRA investors by the financial intermediaries that offer these products and investments to their clients. They are not customized to particular investors in any way; any customization is made by the financial intermediary.

We also maintain a call center for all of our current and prospective mutual fund shareholders and retirement product customers, including OppenheimerFunds IRA investors. The call center allows IRA accountholders to receive such information and perform such transactions as checking account balances, changing investments, requesting distributions and rollovers, requesting statements and prospectuses, and other general information regarding the OppenheimerFunds IRA. The call center is an administrative service feature of the IRA product, giving investors ready access to information over the phone about the IRA and available investments. Call center employees are employees of OppenheimerFunds. The call center also may assist prospective IRA accountholders by answering questions on how to complete

application forms or initiate a rollover transaction. Frequently asked questions addressed to the call center are typically answered by reading or consulting prepared scripts, which help ensure that the information communicated is consistent and high quality. While these call center employees provide information regarding the OppenheimerFunds IRA and the mutual funds that are available through the IRA product, they would not make recommendations of the IRA product or any particular affiliated fund, and their compensation is not affected in any way by a caller's investment decisions or purchase of an IRA product.

Despite the fact that none of the foregoing would be thought of as providing investment advice for a fee, or assuming a role of trust and impartiality, the Proposal could reasonably be interpreted to subject OppenheimerFunds to ERISA fiduciary status on the basis of its investment and IRA product manufacturing and service offerings. In large part, our concern arises because DOL has specifically provided an exception from fiduciary status for platform providers that is limited to offering a "platform or similar mechanism" to ERISA covered plans, creating a risk of fiduciary status by negative implication. See DOL Prop. Reg. 2510.3-21(b)(3). We see no policy reason why an exception from fiduciary status should be available to a provider offering a platform of available investments to ERISA-covered plans, but no exception available to firms offering the identical platform to non-ERISA IRAs. A number of courts have, in fact, held that a service provider does not act as a fiduciary when it makes available a platform of mutual fund investments to an ERISA plan. See Hecker v. Deere & Co., 556 F.3d 525 (7th Cir. 2009); Leimkuehler v. Am. United Life Ins. Co., 713 F.3d 905 (7th Cir. 2013); Zang v. Paychex, 728 F.Supp.2d 261 (W.D.N.Y. 2010); Santomenno v. John Hancock Life Ins. Co., No 2:10-cv-01655 (WJM), 2013 WL 3864395 (D.N.J. 2013). Accordingly, we ask the Department to (1) extend the "platform exception" to IRA platforms, and (2) clarify that the use of non-customized marketing materials prepared by an investment or product manufacturer for use by third party financial intermediaries would not cause it to be a fiduciary under the Proposed Rule.

B. The platform exception should cover "owner-only" qualified plan products.

In addition, we request that DOL expand the "platform exception" under the Proposed Rule to cover "owner-only" qualified plan products, which merit the same treatment as similar ERISA-covered plans. Specifically, the exception should be modified so that it expressly covers the marketing and making available of platforms and similar mechanisms to any "plan" meeting the Proposed Rule's definition of "plan," including any plan described in ERISA section 3(3) and any plan described in section 4975(e)(1)(A) of the Code.

OppenheimerFunds offers a suite of ERISA-covered retirement plan solutions to small businesses. These products include SEP plans, SIMPLE plans, and small business profit sharing plans. The products involve the plan sponsor customer receiving a complete retirement plan package including a prototype plan document and associated adoption agreement, directed trustee services (as applicable) provided by an affiliated trust company as well as certain recordkeeping and administrative services. Like the OppenheimerFunds IRA, these plans also receive unfiltered access to the full range of Oppenheimer mutual funds.

OppenheimerFunds also offers a qualified 401(k) plan product that is specifically designed for "owner-only" small businesses, marketed as the OppenheimerFunds "Single K" plan product. Plans established through this product would typically cover only a business owner, his or her spouse and their dependents. Like the OppenheimerFunds IRA product and other small business

plan products, this product allows the business owner (including any spouse and dependents) to invest plan account balances in the full range of Oppenheimer mutual funds; no unaffiliated funds are available.

The vast majority of plans established through this product are technically not covered by ERISA because they cover only a business owner and his or her immediate family, and no additional employees. See 29 C.F.R. 2520.3-3(b). Nonetheless, because of the broad definition of the term “plan” utilized in the Proposed Rule, any specific investment recommendations made to the business owner that establishes this plan could give rise to fiduciary status for the advice provider and potential prohibited transaction liability in connection with conflicts of interest under section 4975 of the Internal Revenue Code of 1986, as amended (“Code”). See Prop. Reg. 2510.3-21(f)(2)(i) (defining the term “plan” to include a plan that is qualified under section 401(a) of the Code and not subject to tax based on section 501(a) of the Code).

Because investment recommendations with respect to these non-ERISA owner-only plans can give rise to fiduciary status under the Proposed Rule, and thus prohibited transaction liability under section 4975 of the Code, these plans should have available to them the same exception that platform providers have with respect to ERISA-covered plans. OppenheimerFunds believes that the exception should be available in the case of any “plan” meeting the regulation’s definition, including any plan described in ERISA section 3(3) and any plan described in section 4975(e)(1)(A) of the Code.

To the extent DOL believes that the BIC Exemption – not the platform exception – should govern treatment of “owner-only” plans under the Proposed Rule, OppenheimerFunds would strongly dispute the appropriateness of relying on the BIC Exemption for “owner-only” plans in light of the policy considerations that lead to their exclusion from ERISA. In 1975, DOL proposed the regulation that now excludes owner-only plans from ERISA. See Notice of Proposed Rulemaking, 40 Federal Register 24642 (June 9, 1975). In that proposal, DOL explained that its decision to exclude these plans from ERISA was based on its view that the Title I protections are unnecessary for a plan covering only a sophisticated business owner and spouse, the abuses which ERISA sought to control are unlikely in such a plan, and extending ERISA to these plans could “divert resources of the Department of Labor from administering Title I in situations where genuine abuses existed or could arise.” 40 Fed. Reg. at 24643. Because DOL expressly carved these plans out of all of Title I in 1975, we believe the correct result is that they also be included in the platform exception under the Proposed Rule, rather than subjected to the BIC Exemption.

3. The “low-fee” exemption is vague and inappropriately creates a bias for particular investments as *per se* consistent with fiduciary status on the basis of undefined low cost and “high quality” criteria.

OppenheimerFunds strongly objects to the Department’s desire for the creation of a separate exemption for “certain high-quality low-fee investments” as an alternative to the BIC Exemption and other available exemptions. Although the Department requested comment on the usefulness of such an exemption, the Department did not propose any specific terms or conditions because of its acknowledged difficulty in implementing such an approach. Moreover, without providing public notice of the scope and terms of such an exemption, we believe the Department lacks a

basis on which to finalize such an exemption at this time under the “notice and comment” requirements of the Administrative Procedures Act (“APA”). 5 U.S.C. § 553(b).

Courts have upheld rulemakings under APA challenge where the final rule is a “logical outgrowth” of its notice of proposal. Am. Waterworks Assoc. v. E.P.A., 40 F.3d 1266 (D.C. Cir. 1994). However, regulations have been struck down for insufficient notice where the agency fails to describe the range of alternatives being considered with reasonable specificity, such that interested parties are on notice as to whether their interests are at stake and reasonably should file comments. Time Warner Cable Inc. v. F.C.C., 729 F.3d 137, 170 (2d Cir. 2013). We believe that DOL’s failure to describe with any specificity the proposed conditions of a low-fee, high quality exemption constitutes insufficient public notice under the APA, barring DOL from moving forward with a final exemption at this point.

In addition, we believe that a streamlined exemption for “low-fee,” “high-quality” investment products creates a governmental preference for certain investment strategies, *i.e.*, passively managed investment vehicles. Although passively managed products may be suitable to some investors for certain investment strategies or asset classes, cost alone is not a guarantee of the propriety of any particular investment product for any particular investor or plan. It would be a grave mistake to encourage a provider of investment advice to avoid the obligation to act in the best interests of its client by virtue of recommending a “low cost” product, as that product may be no better, or may even be worse, than a product with a higher price tag more thoughtfully tailored to the client’s needs and objectives.

Further, there is a long standing academic and trade debate over the merits of active and passive investing. DOL would be stepping well beyond its purview and expertise in giving its imprimatur to passive investments – in the form of an apparent near-free pass for fiduciary compliance – and making it harder for investors to get advice about a wide range of investments with the benefit of fiduciary protection. In fact, DOL has itself acknowledged that fees are not the only factor to consider in selecting an investment product or service for a plan. Rather, the analysis of whether a given product or service is prudent involves a consideration of many factors, applied to the specific facts and circumstances of each plan. 29 C.F.R. § 2550.404a-1(b). DOL has rejected in the past any approach that creates a non-level playing field for certain investment strategies. See Investment Advice—Participants and Beneficiaries, Final Rule, 76 Fed. Reg. 66136, 66140-43 (Oct. 26, 2011) (in designing the computer model provisions of 29 C.F.R. § 2550.408g-1 DOL declined to specify generally accepted investment theories, authorize certain asset classes or favor active over passively managed investment strategies due to various concerns, including limiting the development of participant advice products).

Moreover, DOL’s adoption of modern portfolio theory in its investment prudence regulation clearly suggests that plan fiduciaries should have free reign to determine the investment strategies most appropriate to the plan (or IRA). 29 C.F.R. § 2550.404a-1(b). OppenheimerFunds believes that any attempt to define the investment vehicles that would qualify as “high-quality” and “low-fee” would ultimately be impossible as a practical matter. Even if such investments could somehow be defined, the result of such an example would artificially drive advisers toward funds meeting DOL’s definitions regardless of an investor’s

circumstances, and would limit the development of new and better retirement investment products.

We strongly urge the Department to not spend its limited time and resources in this rulemaking on developing such an exemption. Rather, DOL should focus its resources and the current comment process to make the Proposed Rule and BIC Exemption more practical and workable so that investor choice and flexibility can be preserved, while still achieving the investor protections DOL desires.

4. Making recommendations to non-discretionary fiduciaries to plans should not itself be fiduciary activity.

The provision of investment advice to a non-discretionary adviser should not itself be a fiduciary act. As explained more fully below, we ask the Department to revise the definitional provisions of the Proposed Rule so that advice provided directly to a person who is a fiduciary solely by reason of the provision of non-discretionary investment advice for a fee within the meaning of ERISA § 3(21)(A)(ii) does not give rise to fiduciary status.

As noted, OppenheimerFunds relies almost exclusively on third-party financial intermediaries to distribute and sell its investment and retirement products directly to investors, including ERISA-covered plans and IRA investors. OppenheimerFunds employs a team of “wholesalers” to market its investment and retirement products to these financial intermediaries. These wholesalers are OppenheimerFunds employees, and there are a number of ways in which they may be involved in marketing and “pitching” investments and retirement plan products to financial intermediaries, as described in the examples below.

- A. An OppenheimerFunds wholesaler discusses and makes suggestions regarding one or more specific Oppenheimer funds to a financial adviser who may have clients who are ERISA plans or IRA investors, but the conversation is not individualized or particularized to any particular client plan or IRA of the financial adviser. The adviser may have acknowledged fiduciary status as an investment adviser to one or more ERISA clients, but his or her fiduciary status with respect to ERISA plans is unknown to OppenheimerFunds. The OppenheimerFunds wholesaler is simply marketing to the financial adviser and educating about how the Oppenheimer funds may be used in a client portfolio, generally with the desire that the adviser will in turn recommend Oppenheimer funds to appropriate clients based on circumstances specific to the client that are known to the financial adviser.
- B. An OppenheimerFunds wholesaler discusses OppenheimerFunds investments and products with a financial adviser under circumstances where the financial adviser has an advisory relationship with a specific ERISA plan client and has acknowledged fiduciary status to the ERISA client, and OppenheimerFunds is aware of the adviser’s fiduciary relationship. The wholesaler suggests specific funds that may be appropriate for the client to the adviser as well as a sample plan investment lineup, based on the client’s specific circumstances as described to

OppenheimerFunds by the financial adviser. The adviser includes the OppenheimerFunds investments and sample lineup in the recommendations he or she presents to the client, based on the adviser's judgment and knowledge of the client's individual circumstances and needs. The adviser has no discretion to make investment choices for the client.

- C. An ERISA plan issues an RFP for investment advisory services to be provided to an ERISA-covered 401(k) plan. Among the services requested to be provided to the plan are advisory services with respect to the plan's 401(k) lineup. If hired, the investment adviser would acknowledge fiduciary status but would not have discretion regarding the selection of funds for the plan. An OppenheimerFunds wholesaler discusses OppenheimerFunds investments with one of the respondent financial advisers in connection with developing the financial adviser's response to the RFP. Investment suggestions by OppenheimerFunds could be individualized to the plan to the extent that the financial adviser communicates information about the plan and its investment objectives to the wholesaler.

These examples illustrate the broad net cast by the Proposed Rule, since in each case, the OppenheimerFunds wholesaler could become a fiduciary based on these activities alone. This is because the Proposed Rule would impose fiduciary status under circumstances where a specific investment fund is recommended "directly" to a "plan fiduciary." DOL Prop. Reg. 2510.3-21(a)(1).

In example A, the wholesaler has provided an investment recommendation to a financial adviser that may have acknowledged fiduciary status as an investment adviser to one or more ERISA plan customers. Although in this example the recommendation has not been individualized to any particular customer of the financial adviser, the advice is arguably "specifically directed" to the financial adviser for use by the financial adviser in its provision of investment advice to its end clients who are ERISA covered plans or IRA holders. In example B, the financial adviser who is the recipient of the OppenheimerFunds wholesaler's communications has acknowledged fiduciary status to a specific ERISA plan and has disclosed that status to the wholesaler. Even if the advice is not "individualized" to the end plan customer, it would be "specifically directed to" the financial adviser who is known to OppenheimerFunds to have acknowledged fiduciary status to the plan client.

Finally, in example C, the OppenheimerFunds wholesaler may be making investment suggestions that are "individualized" to a particular plan described in an RFP. The wholesaler makes an investment suggestion to the financial adviser who is responding to an RFP for fiduciary adviser services, but the adviser will not have fiduciary status, if at all, until later when the plan customer actually hires the adviser as a fiduciary adviser or it earns a fee in connection with the plan's investments based on the adviser's recommendations.

We believe that none of these wholesaler activities should be swept into the rule as fiduciary conduct because in each case, OppenheimerFunds is not making recommendations to a person who is a fiduciary with discretion to either act on the advice or disregard it. Rather, the OppenheimerFunds wholesaler is providing information about the Oppenheimer funds to a

person who is a non-discretionary fiduciary (or may become a non-discretionary fiduciary at a later date) by reason of the provision of investment advice for a fee.

We believe that the recommendations that should be clearly subject to fiduciary standards are those recommendations that are made to a fiduciary who has discretion on behalf of the plan or IRA investor to act on the advice. This view is consistent with the regulatory text, which requires that fiduciary advice be provided to “the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.” DOL Prop. Reg. 2510.3-21(a)(2)(ii).

Accordingly, we request that the Department clarify that advice provided to a non-discretionary advice provider, who has no ability to accept or reject the advice on behalf of the plan investor, is not itself a fiduciary act. Without this clarification, the result is that there could be a chain of advice “fiduciaries” extending from the discretionary plan fiduciary several layers back in connection with a single investment recommendation.

For example, under the Proposed Rule it would be possible for there to be a “front line” fiduciary adviser who provides an investment recommendation directly to the plan’s fiduciary investment committee regarding a specific investment product. In addition, there could be an OppenheimerFunds wholesaler who could become a fiduciary based on his suggestion of a specific fund to the fiduciary adviser. There could also be a different OppenheimerFunds employee who recommends to the OppenheimerFunds wholesaler what form the specific investment strategy should take, whether it is a mutual fund, separate account or collective investment trust. In this scenario, there could be three advisers, each having “fiduciary” status with respect to the advice, only one of whom communicates directly with and is responsible to the plan customer who exercises discretion in the transaction. We do not believe that DOL intended for several investment advisers to each potentially have fiduciary liability in connection with a single investment recommendation to a discretionary plan fiduciary/investor.

Therefore, we respectfully ask the Department to modify the reference to “plan fiduciary” in paragraph (a)(i) of the Proposed Rule so that it excludes a person who is a fiduciary solely by reason of the provision of non-discretionary investment advice within the meaning of ERISA section 3(21)(A)(ii). This would provide an important, much-needed limitation on the range of advice recipients that will give rise to fiduciary status on the part of the advice provider, and not chill very important interactions strictly between the actual advice provider and firms like OppenheimerFunds.

5. The “counterparty exception” should be expanded to cover “services” recommendations and to encourage a wide range of “selling activity” to all plans, which is critical to successful fiduciary oversight.

A. The counterparty exception should clearly apply to recommendations for services.

OppenheimerFunds appreciates that the DOL has proposed a “counterparty” exception that allows fiduciary status to be avoided in connection with certain recommendations made to large, sophisticated plan sponsors. However, we are concerned that there is a substantial omission in

the exception in that it does not explicitly cover services arrangements. We believe that the counterparty exception's reference to "bilateral contract" was intended by the DOL to encompass contracts for services to plans because most services contracts would qualify; however, this critically important issue should be clarified.

Because "services" are not clearly covered by the exception, Oppenheimer is concerned that recommendations and sales pitches to hire OppenheimerFunds (or to hire any other provider) as an ERISA section 3(38) investment manager for a separate account or to provide any other plan services, including trustee, recordkeeping, or third party administrative services, would not be covered by the counterparty exception. Moreover, responses to RFPs for investment management services to large, sophisticated plans would not be covered by the exception.

We see no policy reason why advice to a large, sophisticated plan sponsor regarding the purchase of a security or product (such as a mutual fund or annuity contract) should receive different treatment under the rule than advice to hire an investment manager for a separate account, or a directed trustee. These two advice transactions appear to receive different treatment under the Proposed Rule, a result DOL should remedy.

B. Selling is a critical component of fiduciary oversight, and should be covered by the counterparty exception.

We believe the "counterparty exception" should be modified to address a serious problem with the Proposed Rule – sales presentations by OppenheimerFunds to plan sponsors for products or services should not be deemed fiduciary activity, regardless of a plan's size or asset level.

We believe that this problem is an unfortunate consequence of the Department's determination to remove the "ongoing basis" and "mutual agreement" elements of DOL's existing 5-part fiduciary test. Based on the current regulation, firms have never considered discrete sales presentations with respect to investment products and services, and responding to RFPs from ERISA plans for investment products and services, to be fiduciary activity in and of itself. Nor do we believe that this is an appropriate result under the Proposed Rule. This position is consistent with early guidance from DOL, in which DOL made clear that selling one's own services to a plan and negotiating one's own compensation are not fiduciary activities. 29 C.F.R. § 2550.408b-2(f), examples (1), (3) and (4). Unlike the Department, we believe that retirement plan sponsors – including small plans – can tell the difference between investment advice provided by an impartial adviser who has knowingly taken on the role to act solely in their interest, and a sales presentation where a seller is acting in his own interest.

OppenheimerFunds understands that DOL is keenly concerned with curtailing sharp marketing practices to plan participants and IRA holders under circumstances where the participant or IRA holder lacks the ability or experience to discern impartial, trusted advice from non-fiduciary self-motivated selling. However, for purposes of plans and plan sponsors, we strongly believe that the ability to conduct pure sales presentations and related activity with plans and plan sponsors is vital to the ability of plans and plan sponsors to continue to receive the highest quality products that the market has to offer, at the most advantageous pricing. DOL has repeatedly made clear in publications and interpretive guidance that one of the fundamental fiduciary duties is the duty to scrutinize plan service providers and their associated fees, as well as compare competitors, to ensure that the plan receives quality services at a competitive cost. See Understanding

Retirement Plan Fees and Expenses, at www.dol.gov/ebsa/publications/undrstndgrtrmmt.html; Meeting Your Fiduciary Responsibilities, at www.dol.gov/ebsa/publications/fiduciaryresponsibility.html; DOL Field Assistance Bulletin 2002-3 (Nov. 5, 2002); DOL Information Letter to D. Ceresi (Feb. 19, 1998). This duty applies not only to the fiduciary's initial selection, but also to the ongoing monitoring of the provider's fees and services. *Id.*; 29 C.F.R. 2509.75-8, Q-FR-17. Further, DOL's own 408(b)(2) regulation requires that plan service arrangements not be long-term, such that the plan is locked into an arrangement that becomes disadvantageous over time. 29 C.F.R. § 2550.408b-2(c).

These fundamental fiduciary duties create an environment where plan fiduciaries should move the plan's business to a better arrangement when doing so is prudent and in the best interest of the plan and its participants. We believe that selling and marketing to plans and responding to RPFs are crucial components of the process of plan fiduciary oversight and monitoring that should be encouraged and preserved. Any disincentives to engage in selling could effectively limit or otherwise hinder plan fiduciaries from exploring better services and financial terms for their plans, which ERISA requires them to do.

Therefore, in order to continue to allow advisers to engage in routine selling activities with respect to retirement investors, we respectfully request that the counterparty exception be extended to cover sales presentations to plan sponsors for products or services regardless of the plan's size or asset level. Moreover, given that courts as well as DOL have acknowledged that ERISA's fiduciary standards should not govern pure sales activities, we believe that the counterparty exception should be extended to all retirement investors including plan participants as well as IRA holders. *See, e.g., F.W. Webb Co. v. State St. Bank and Trust Co.*, 09 CIV 1241 RJH, 2010 WL 3219284, at *8 (S.D.N.Y. Aug. 12, 2010) ("Courts have recognized that the [fiduciary definition] regulation . . . seeks to separate compensated investment advice—which properly gives rise to fiduciary status—from mere sales efforts touting the attributes of a security or investment vehicle."); *Farm King Supply, Inc.*, 884 F.2d 288 at 289 (seller is not a fiduciary where the only "agreement" was that trustees would listen to sales pitch and purchase if they liked it). This important modification would ensure that retirement investors continue to have exposure to the best products and services available to them at the most competitive prices.

6. References to specific investment funds in asset allocation models should be allowed.

OppenheimerFunds appreciates that Interpretive Bulletin 96-1 ("IB 96-1") has been updated to explicitly apply to information provided to plan fiduciaries, IRA holders, and to participant-directed and non-participant-directed plans. However, a key feature of the Proposed Rule prohibits firms from using asset allocation models that identify specific investment funds available to the plan or IRA. Under this regime, a call center employee could not identify whether a specific investment fund meets a certain asset class, even though DOL's participant disclosure rules require an identification of the specific "type or category" for each designated investment alternative offered under a participant directed plan (we interpret the "type or category" of the investment to refer to its strategy, such as balanced, large-cap growth, etc.). *See* 29 C.F.R. 2550.404a-5(d)(1)(i)(B).

We believe that IB 96-1 has been a significant benefit to plan participants for the last 20 years, and goes a long way toward helping plan investors, both sophisticated and unsophisticated,

translate fundamental investment concepts to the real-world task of managing their account balances. We regrettably believe that the Department is taking a significant step backward with this change. Generic asset allocation models without any reference to specific investments will not be useful to participants and will ultimately hurt them. Moreover, most of the models currently being used by providers will require redrafting.

The Department's stated rationale is that asset allocation models populated with actual investment alternatives available under the plan or IRA "function as tailored, individualized investment recommendations, and can effectively steer recipients to particular investments, but without adequate protections against potential abuse." 75 Fed. Reg. at 21945. To the contrary, OppenheimerFunds believes that the utility of these models in helping participants to make critical investment choices far outweighs any hypothetical concern that they may be abusive. Accordingly, we request that the Department revise the education exception to retain the ability under IB 96-1 to identify specific investment funds to a plan sponsor, participant, beneficiary, or IRA owner.

7. The BIC Exemption should be broadened and substantially simplified to enable it to be workable for providers of fiduciary advice.

OppenheimerFunds appreciates that the Department has issued the BIC Exemption as a means through which Financial Institutions⁵ and Advisers can continue to receive the traditional forms of compensation that they have been receiving in connection with recommending assets. However, in its present form, we believe that the BIC Exemption is unworkable from a practical standpoint in many respects. We request a number of specific changes to the exemption in order to make it a viable option for the many providers who will no doubt seek to use it.

A. The BIC Exemption should clearly cover recommendations with respect to IRA products themselves.

It is unclear whether the proposed BIC Exemption applies to recommendations to roll a plan account balance, or to roll an existing IRA account, into a new IRA product. This ambiguity is created by the fact that although the list of Assets covered by the proposed BIC Exemption includes specific types of investment products in which IRA assets may be invested, it does not explicitly refer to an "IRA" product itself. OppenheimerFunds understands that the Department has given verbal assurances that this omission will be corrected in the final BIC Exemption. Because the OppenheimerFunds IRA product represents a substantial component of Oppenheimer's total business, we feel compelled to ask the Department to make explicit in the preamble and text of the BIC Exemption that a recommendation to invest assets in, or roll assets to, an IRA product is covered by the BIC Exemption.

⁵ Capitalized terms not defined herein refer to terms as defined in the BIC Exemption.

B. The contract timing requirement should be clarified.

The contract timing rule set forth in the proposed BIC Exemption must be changed. The proposed BIC Exemption requires that the contract be entered into prior to “recommending” that the investor purchase, sell or hold an asset. As a practical matter, this timing requirement will be impossible to satisfy in many cases, particularly in a context where activities that have been historically viewed as sales activities will now be considered fiduciary “recommendations.” Typically, an adviser would make a “recommendation” in the context of a sales presentation before an investor has had the opportunity to make a judgment about whether the recommendation is worthy of serious consideration.

We do not believe that many retirement investors would be willing enter a contract with an adviser before they understand the nature of the recommendations that the adviser will make. Further, requiring a prospective investor to sign a detailed, tri-party contract before the Financial Institution is permitted to give the client any of its recommendations will no doubt end many sales presentations.

The point in time when it is most critical for a customer to understand the nature of the relationship between the parties is prior to the execution of the transaction, meaning the time that the investor acts on the advice and either purchases, sells or holds an asset based on the adviser’s recommendations. The final BIC Exemption should not require that an agreement be entered prior to when investment advice is provided, but rather prior to the implementation of such advice.

C. The BIC Exemption should require only a two-party contract.

The Proposed BIC Exemption requires a tri-party contract to be entered between the Financial Institution, the Adviser and the Retirement Investor. This tri-party contract requirement is unnecessary and unwieldy, and should be replaced with a two-party contract requirement instead.

First, this tri-party requirement will only serve to delay the provision of investment advice under the BIC Exemption. Second, there will be occasions where Advisers move from firm to firm, a client is assigned to a new Adviser at the same firm, or a client receives recommendations from multiple Advisers at the same firm.

These ordinary staffing changes should not require the execution of a new contract. Only the Financial Institution should be required to enter a contract with the investor on behalf of itself and any of its Advisers. Where an Adviser is not affiliated with any Financial Institution, the only parties to the contract should be the Adviser and Retirement Investor. A two-party contract requirement will be far easier to implement as Advisers and Financial Institutions attempt to bring potentially hundreds or thousands of existing client relationships into compliance with the new BIC Exemption.

D. The compensation disclosure requirements should be greatly simplified, and harmonized with other ERISA disclosure regimes.

The proposed BIC Exemption mandates a range of detailed, complex and voluminous financial transaction and compensation disclosures, via point-of-sale and annual disclosures to Retirement Investors and a continually-updated website accessible to the public.

These proposed point-of-sale, annual, and website disclosures are unreasonably burdensome and will not result in more meaningful information being digested by plan sponsors, participants, and IRA holders. Implementation of these disclosed requirements will require a significant investment in technology and human resources to produce such disclosures and their development will take significantly more time than the proposed effective date would allow. Further, we believe that the type of disclosure required will be of little benefit to plan fiduciaries, plan participants and beneficiaries, and IRA holders. Rather, these disclosure requirements, particularly the website disclosures, seem to be designed for the benefit of litigators, as well as advisers who want to research compensation paid to their competitors by specific institutions.

In recent years, Financial Institutions and Advisers devoted significant financial and compliance resources to complying with DOL's 408(b)(2) disclosure regulation and participant disclosure rules at 29 C.F.R. 2550.404a-5. In both of those rulemakings, DOL painstakingly developed the disclosures that it viewed as most useful for plan sponsors and participants concerning investment fees. Nonetheless, in this rulemaking, the Department appears to take the view that significantly more and different information should be provided. We note that both Advisers and Financial Institutions are fiduciaries for purposes of the BIC Exemption, and so will already be subject to the 408(b)(2) disclosure requirements in addition to those imposed by the BIC Exemption. OppenheimerFunds requests that the Department revise the BIC Exemption to require no more point-of-sale, annual, and website disclosure than that which is already being compiled and disclosed for purposes of ERISA section 408(b)(2) and DOL's participant disclosure rules.

E. The conditions relating to use of proprietary platforms should be clarified.

It is critical for the Department to clarify, in the preamble to the final exemption, that nothing about the best interest standard renders proprietary-only platform products ineligible for the BIC Exemption. Moreover, DOL should clarify that an exclusively proprietary platform will not necessarily, in every case, trigger the additional disclosure conditions that apply to the offering of a limited range of investment options.

As we have described, OppenheimerFunds offers an IRA product as well as several small business plan products that offer investors access to exclusively affiliated funds. The BIC Exemption requires added conditions if a Financial Institution offers an exclusively affiliated platform. DOL Prop. BIC Exemption, § IV. Specifically, the Financial Institution must make a written finding that the limitations it has imposed on Assets made available to an Adviser do not prevent the Adviser from providing advice in the "best interest" of the investor. Moreover, before giving recommendations to the investor, the Adviser or Financial Institution must give the

investor written notice of the limitations placed on the Adviser and must disclose if it is unable to recommend a sufficiently broad range of Assets to meet the investor's needs.

OppenheimerFunds appreciates these rules because they make clear that DOL does not view proprietary-only platforms as inconsistent with the best interest standard. However, we do not agree that the offering of an exclusively affiliated fund platform should always be subject to the additional requirements set forth by DOL in section IV of the BIC Exemption. For a full service investment provider such as OppenheimerFunds that offers a full suite of investments covering every major strategy, we do not view its offerings as imposing any limitations on an investor. It makes sense for these additional requirements to apply where a provider offers a limited range of investment strategies, but it does not make sense to impose them on a proprietary-only platform that covers every major asset class available in the marketplace. Accordingly, OppenheimerFunds asks that the Department clarify that the use of a proprietary-only product platform would not cause the provider to be subject to the "Limited Range of Investment Options" requirements of section IV(b) of the BIC Exemption where the provider covers all (or substantially all) asset classes available in the marketplace, consistent with modern portfolio theory.

Moreover, there is significant concern in the investment industry that the offering of an exclusively proprietary platform may be simply incompatible with the Best Interest standard. Under the BIC Exemption, the Adviser and Financial Institution act in the "best interest" of the investor if they provide "advice that reflects 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 interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party." Prop. BIC Exemption, § VIII(d). It is the last phrase – "*without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party*" – that calls into question whether a proprietary-only platform could be consistent with this standard.

This language appears to require a complete disregard of any financial interest of the Adviser, the Financial Institution or any Affiliate, Related Entity or other party in the advice transaction. On its face, it suggests that these parties must completely ignore the reality that where an institution relies on fund compensation to cover its costs, it simply cannot ignore its potential compensation and expect to stay financially viable. We do not believe that DOL intended to completely disallow proprietary-only platform products by incorporating the "without regard" language into the Best Interest standard.

We ask the Department to make clear in the preamble to the final BIC Exemption that the offering of a proprietary-only platform may be fully consistent with the best interest standard. We believe this clarity requires the deletion of the "*without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party*" language. If eliminated, the remainder of this condition would reflect the traditional duty of prudence under ERISA, which should be more than sufficient to protect retirement investors. To the extent that any additional elaboration is required, then the Department should reflect the "solely in the interest" standard of ERISA such that the adviser must act "solely in the interest"

of the advice recipient and prudently. Only this formulation tracks ERISA's current structure and will avoid the needless confusion of the Department's current proposal.

F. Relief available under the “grandfather” exemption should be unconditional.

OppenheimerFunds appreciates the Department's addition of a so-called “grandfather” relief exemption within the BIC exemption. See Prop. BIC Exemption, § VII (“Grandfather Exemption”). However, we are concerned that the proposed Grandfather Exemption is unnecessarily restrictive and not in the best interest of Retirement Investors. The Grandfather Exemption permits the continued receipt of compensation by an Adviser, Financial Institution or an Affiliate in connection with an “Asset” purchased, sold or held by the plan prior to the applicability date, subject to certain conditions. Prop. BIC Exemption, § VII. However, the Grandfather Exemption is available only if the Adviser and Financial Institution provide no additional investment advice regarding Assets following the applicability date. Prop. BIC Exemption, § VII(b)(3). It cannot be the case that the exemption absolutely bars the provision of investment advice to existing clients after the applicability date of the BIC Exemption. This condition is problematic for several reasons.

First, barring the provision of advice makes the Grandfather Exemption meaningless. In our view, where an Adviser gave pre-applicability date advice that was not a prohibited transaction, if the Adviser provides no advice following the applicability date of the exemption, he would not become a fiduciary with respect to the investor, and would have no need for the BIC Exemption's relief for his ongoing receipt of compensation (such as 12b-1 fees paid by mutual funds) after the applicability date. We believe that this condition renders the Grandfather Exemption, in reality, not an exemption at all and legally unnecessary.

Second, the condition on its face creates incentives that are not in the best interest of retirement investors. A condition requiring that no ongoing advice be provided after the applicability date will encourage some Advisers to provide no recommendations at all following the effective date so that their continued receipt of ongoing compensation is not a prohibited transaction. This may conflict with an adviser's suitability obligations. Conversely, other Advisers will not find the Grandfather Exemption attractive and so will instead move assets to unconflicted flat-fee advisory accounts (that do not require an exemption) or BIC Exemption accounts and will then be more likely to recommend sales of pre-existing assets to the detriment of the client. Many of these clients will have chosen to pay a front-end sales load in connection with investments which generally entitle them to pay either reduced or no ongoing commission payments – these sales loads can be appropriate for a buy-and-hold strategy. But, the effect of the exemption is that it could create incentives for account “churning” as Advisers recommend sales of low paying commission funds/shares in favor of funds/shares that pay higher ongoing compensation to the Adviser.

For these reasons, OppenheimerFunds asks the Department to eliminate the condition requiring that no advice is provided following the applicability date of DOL's new exemption. In order for the Grandfather Exemption to be in the interest of retirement investors and have meaning as a prohibited transaction exemption, it must permit investment advice to be provided with respect to all assets held by a customer under circumstances where any pre-applicability advice did not give rise to a prohibited transaction.

G. The initial compliance timeframe should be lengthened and “good faith relief” should be offered for an initial period of time.

The Department has stated that it intends that the final regulations and exemptions would become applicable eight months after publication in the Federal Register. The regulated community needs more time to come into compliance with this complex regulatory scheme. We estimate that it will take at least two to three years, if not longer, to develop the systems, information and disclosures necessary to comply with the BIC Exemption. Entering new contracts with investors for existing accounts will also be an overwhelming compliance hurdle. We respectfully request that DOL consider at least a two-to-three year period of time to come into compliance with these complex new rules.

In addition, we urge the Department to add a “good faith compliance” provision or temporary non-enforcement policy for a period of three years after the BIC Exemption becomes effective, to allow Financial Institutions and Advisers to develop the procedures and disclosures necessary for compliance, along with a cure period for compliance failures upon discovery. Many other recent regulatory regimes promulgated by DOL have offered some form of “good faith compliance” relief, including the recently finalized service provider disclosure rules and participant disclosure rules, among others. See 29 C.F.R. §§ 2550.408b-2(c)(1)(iv)(F)(2), (c)(1)(vii), 2550.404a-5(b)(1), 2550.401c-1(i)(5); DOL Frequently Asked Questions on the 2009 Schedule C, Q40, available at www.dol.gov/ebsa/faqs/faq-sch-C-supplement.html.

Because a failure to meet a technical requirement of the BIC Exemption raises the potential for substantial excise tax liability under the Code, we believe a good faith compliance period is a reasonable request. Moreover, we note that the DOL’s service provider disclosure regulation, like the BIC Exemption, also involves the risk of excise tax liability in the case of technical failures. DOL offered “good faith” relief in that rulemaking, even though compliance with the service provider disclosure rules is far less complicated than the BIC Exemption.

At the very least, good faith compliance should be extended in connection with the detailed disclosure provisions of the BIC Exemption, which would require costly and labor intensive systems changes to develop.