July 21, 2015

*VIA EMAIL ONLY (*e-ORI@dol.gov*)*

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: RIN 1210-AB32

Dear Sir or Madam,

MarketCounsel appreciates the opportunity to comment on the U.S. Department of Labor's ("Department's") April 20, 2015 proposal to expand the definition of "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") to cover a broader range of persons who provide investment advice to employee benefit plans, plan fiduciaries, plan participants and individual retirement account ("IRA") owners.

For perspective, MarketCounsel is a business and regulatory compliance consulting firm to some of the country's preeminent entrepreneurial investment advisors. In addition, our affiliated law firm, the Hamburger Law Firm, renders legal counsel to over 1,000 entrepreneurial companies, investment advisers, broker-dealers, hedge funds, family offices, and registered securities personnel. It would reason that we stand to benefit from a more onerous regulatory climate for our clients. However, this short-term view is outweighed by our interest in independent investment advice in America which has been, and seems poised to continue to be, the most significant gain for investors in decades. Therefore, while the Department's proposal is only tangentially of interest to our clients, we felt this issue was too important not to supply our comments.

At the outset, MarketCounsel agrees with the Department that the marketplace for advisory services in general, and retirement advisory services in particular, has evolved tremendously over the past several decades, which warrants a review of regulatory responsiveness to such changes. Among other things, the shift of retirement assets from defined benefit plans to participant-directed plans and self-directed IRAs has resulted in an increased number of retail investors seeking expert assistance to manage their assets. At the same time, an increasing number of institutions, including brokers and insurance agents, have entered into the marketplace to offer a wide range of investment advisory services, often holding themselves out to the public as "wealth managers," "financial advisors" or "financial planners," regardless of their actual legal status. Yet, under the Department's current regulations and practices, many such institutions are not being

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regulated as fiduciaries and therefore are not being held to ERISA's fiduciary standards of prudence and loyalty despite entering into a relationship of trust with clients by rendering investment advice. Such circumstances have also created confusion among investors as to what they should expect from their financial service providers.

Generally, MarketCounsel agrees with the Department's functional approach to eliminating the coverage gap by conferring fiduciary status based on the type of advisory services offered by a person or institution, as opposed to the legal status of such person or institution, which has little meaningful correlation with investor protection. For instance, as the Department has recognized, brokers and other institutions that solely engage in exempt activities, such as order taking and execution, need not be subject to ERISA's fiduciary standards because they are not rendering investment advice to customers. Unnecessarily subjecting such institutions to ERISA's fiduciary standards could cause such institutions to stop offering their services to retirement investors. On the other hand, where such brokers choose to receive compensation for rendering advice that is individualized or specifically directed to a particular plan sponsor, plan participant, plan beneficiary or IRA owner for consideration in making an investment decision, they would be considered ERISA fiduciaries under the rule proposal, which would require them to act in their clients' best interests.

Nonetheless, in securities law circles, some have called for all brokers to be subject to a uniform fiduciary standard, arguing that the line between investment advisers and brokers has become so irrevocably blurred that investors can no longer distinguish between the two categories of service providers, thus necessitating an elevated level of protection. However, such a solution is unnecessary because the Investment Advisers Act of 1940 ("Advisers Act"), when strictly enforced, offers investors sufficient safeguards. For example, as a result of the Supreme Court's decision in SEC v. Capital Gains Research Bureau, Inc., Section 206 of the Advisers Act subjects all investment advisers, whether registered or not, to statutory fiduciary duties requiring them to seek their clients' best interests and to manage and disclose material conflicts of interest. Such fiduciary duties also apply to brokers engaging in the business of providing investment advice for compensation unless such investment advice is provided "solely incidental to" their brokerage business. Yet, for years, brokers who have rendered investment advice that is not solely incidental to the conduct of their brokerage business have been allowed to hold themselves out as investment advisers and to operate in the adviser arena despite not registering as investment advisers and becoming subject to the Advisers Act's regulations. This practice has contributed significantly to investor confusion. In short, additional regulatory scrutiny by the U.S. Securities and Exchange Commission ("SEC") would compel brokers rendering non-incidental investment advice to become subject to Advisers Act registration and regulation and cause brokers no longer wishing to render non-incidental investment advice to leave the adviser marketplace, which would result in added investor protection and eliminate much investor confusion. Additionally, conflicts and other disclosures required of newly-covered registrants would further clarify what investors should expect from their financial advisors.

The confusion over when someone is an investment adviser versus when they are merely a broker has led to a lack of understanding over duties owed by industry participants. Consumers are confused because a review of the activities provided by advisers and brokers are often identical. In furtherance of this confusion, the Department is proposing extending the definition of "fiduciary" to include many brokers. The proposal is years in the making and countless hours have been spent by the Department and all sides of the securities industry in debating the topic. MarketCounsel respectfully submits that more rules will lead to more confusion. Quite simply, if the SEC would limit the "solely incidental" exemption from adviser registration to those broker-dealers that were truly only providing incidental advice, most confusion would come to a sudden end. Those providing investment advice would be fiduciaries, and those merely selling securities would not. This could then be extended to the Department's fiduciary analysis as well. We understand that, unfortunately, the Department is not vested with the authority to enforce the Advisers Act so we will address the proposal more specifically.

MarketCounsel proposes a carve-out from the definition of fiduciary investment advice for advisory services that are solely incidental to the traditional services offered by brokers, insurance agents and other institutions. As referenced above, the Advisers Act includes such a carve-out from the definition of an "investment adviser" where a broker provides incidental advisory services that are connected with or reasonably related to its brokerage services. Nonetheless, to qualify for the Advisers Act exemption, a broker cannot receive any special compensation for providing such advisory services and may not hold out or provide any financial planning services. We are not proposing adopting such an exemption word for word from the Advisers Act, but rather, are focusing on the spirit of the exemption, which is to avoid regulation where only de minimis advisory activity is taking place. Ultimately, MarketCounsel believes that the benefits of such an exemption would outweigh the costs. For starters, providing such a carve-out would minimize the marketplace disruption that could result if brokers elected to stop providing advisory services to ERISA plans or IRAs. Invariably, middle-class and lower-income individuals would be disproportionately impacted as a result of such defections as some brokers may no longer find it profitable to serve this segment of the market. On the other hand, MarketCounsel does not believe that investor protections would be weakened in any meaningful way by the adoption of such a carve-out, particularly given the other regulatory regimes governing such brokers' conduct.

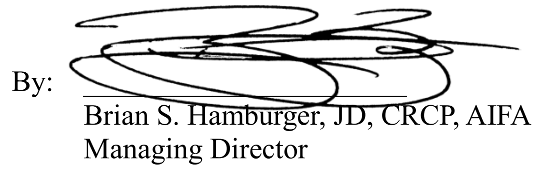
Such a carve out should be coupled with a requirement that anyone providing securities advice that is not solely incidental to brokerage services must be a registered investment adviser with the SEC or applicable state regulator. This would make the need for the "best interest contract exemption" moot, because registered investment advisers would already meet the requirements. The best interest contract exemption is just going to add to consumer confusion. Why? First, the rule itself calls the advice providers "advisers." How can we expect a consumer to understand that their "adviser" (with an "e") is not an investment adviser. Also, how are they going to differentiate that their adviser is only a fiduciary when providing advice about their retirement assets, and not when providing advice about their other assets. Requiring securities advice to be provided by registered investment advisers would result in a simpler regime to comply with and one that is less confusing to industry participants and clients alike.

Finally, MarketCounsel believes that the requirement of the best interest contract exemption for individual advisers to contractually acknowledge fiduciary status (as well as other liability acknowledgments) will result in brokers walking away from certain retirement services. This will result in less options for investors.

In conclusion, MarketCounsel applauds the Department for taking the difficult and controversial step of redefining "fiduciary." We just feel that many of the challenges that the Department is trying to cure, namely mitigating consumer confusion, may get even worse while adding a great deal of regulation to industry participants. Especially in light of the fact that the simplest solution rests with the SEC to merely enforce its existing rules. We are not alone in this analysis. In fact, while not absolutely unified in our positions, we find ourselves with strange bedfellows in that our conclusions align with FINRA and SIFMA. MarketCounsel recommends that the Department should reject the proposal and re-propose, as necessary, after the SEC either commits to enforcing its "solely incidental" exemption or it chooses to take on a fiduciary rule itself.

Once again, MarketCounsel appreciates the opportunity to comment on the rule proposal. Should you have any questions or require any additional information regarding the foregoing, we remain available at your convenience.

Best regards,
MARKETCOUNSEL, LLC



By: ______________________
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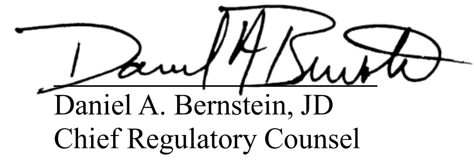

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