January 2, 2024

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC, 20210
Attention: Definition of Fiduciary—RIN 1210–AC02

Office of Exemptions Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC, 20210
Attention: Application No. D–12057; Application No. D–12094

Submitted online via http://www.regulations.gov

Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210–AC02); Proposed Amendment to Prohibited Transaction Exemption 2020-02 (Application No. D–12057) (ZRIN 1210–ZA32); Proposed Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128 (Application No. D–12094) (ZRIN 1210–ZA34)

BlackRock, Inc. (together with its affiliates, "**BlackRock**")[1] respectfully submits its comments to the Department of Labor ("**DOL**") in response to the DOL's proposed amendment to the regulation defining who is a "fiduciary" for purposes of the Employee Retirement Income Security Act of 1974 ("**ERISA**") and section 4975 of the Internal Revenue Code[2] (the "**Proposal**").[3] We also enclose our comments on the DOL's proposed amendment to Prohibited Transaction Exemption ("**PTE**") 2020-02[4] and its related proposal to amend PTEs 75–1, 77–4, 80–83, 83–1, and 86–128.[5]

---

[1] BlackRock is one of the world's leading asset management firms. We manage assets on behalf of individual and institutional clients across equity, fixed-income, liquidity, real estate, alternatives and multi-asset strategies. We manage retirement funds on behalf of millions of Americans.
[2] References to ERISA should hereinafter be considered to include references to corresponding provisions of Section 4975 of the Internal Revenue Code.
[3] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (November 3, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf
[4] Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75979 (November 3, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23780.pdf.
[5] Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 88 Fed. Reg. 76032 (November 3, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23782.pdf

As a manager of retirement funds on behalf of millions of Americans, BlackRock shares the DOL's goal of protecting the interests of retirement investors. We are committed to helping people achieve financial security throughout their lifetime, and our commitment starts with making it easier and more affordable for people to invest for their retirement. The robust, longstanding legal and regulatory framework established under ERISA undergirds our ability to support retirement investors' financial well-being.

As the DOL observes, a hallmark of today's retirement plan landscape is the "shift from defined benefit plans (in which decisions regarding investment of plan assets are primarily made by professional asset managers) to defined contribution/individual account plans such as 401(k) plans (in which decisions regarding investment of plan assets are often made by plan participants themselves)."[6] In this environment, individual retirement investors are increasingly responsible for choosing to save and invest wisely. These dynamics heighten the need for a regulatory environment that facilitates the establishment of plans and individual retirement accounts ("**IRAs**"), encourages increased retirement savings, and supports well-designed investment programs that seek to provide Americans with a more secure retirement.[7]

While we appreciate the DOL's interest in ensuring the regulatory "fiduciary" definition reflects these current retirement market realities, we believe the Proposal falls short in several critical respects, detailed below. If adopted in its current form, the Proposal would neither serve retirement investors nor improve their returns by eliminating "junk fees"—on the contrary, it would likely make saving for retirement more difficult by increasing costs, reducing the availability and quality of investment advice, making it risky to provide helpful investment education, and discouraging employers from offering retirement plans. Rather than empowering retirement investors with access to the investment advice and information that position them for financial well-being, the Proposal would impose new obstacles and costs to obtaining these resources, harming their investment decisions and returns.

Set forth below are BlackRock's principal comments on the Proposal and proposed PTE amendments. They reflect five key themes:

I. **The Proposed Definition of "Retirement Investor" Should be Narrowed to Align with Investors' Interests and Expectations.**

II. **The Discretionary Test Should Be Narrowed to Reflect a Relationship of "Trust and Confidence."**

III. **The DOL Should Enhance the Clarity and Objectivity of the Facts-and-Circumstances Test for Fiduciary Investment Advice.**

---

[6] 88 Fed. Reg. at 75892.

[7] *See, e.g.*, Blackrock Letter to the Office Regulations and Interpretations Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice (RIN 1210-AB32) and the Proposed Best Interest Contract Exemption and the Proposed Amendments to and Proposed Partial Revocation of PTEs 86-128 and 75- 1 (RIN 1210-ZA25) (July 21, 2015).

IV. The DOL Should Not Discourage Investment Advisers from Stating that They are a Fiduciary to Clients.

V. PTE 2020-02 Should Be Practicable for the Range of Firms and Professionals Who Would Seek to Use the Exemption.

Parts I through V describe these recommendations in further detail and provide proposed revisions to the Proposal to achieve them. BlackRock appreciates the opportunity to share our views and we look forward to engaging with the DOL on the Proposal.

****

I. The Proposed Definition of "Retirement Investor" Should be Narrowed to Align with Investors' Interests and Expectations.

Under the Proposal, a person would be an ERISA investment advice fiduciary if, for a fee or other compensation, they make an investment recommendation to a "retirement investor" in one of three specified contexts.[8] A "retirement investor" for these purposes appropriately includes an employee benefit plan, plan participant or plan beneficiary, as well as an IRA, IRA owner or IRA beneficiary; however, it also expressly includes a *fiduciary* to a plan or IRA.[9] The definition would therefore impose ERISA fiduciary obligations and prohibitions on a person making a recommendation to a *financial intermediary* that independently serves as an ERISA fiduciary or an IRA fiduciary.

In our view, this expansive conceptualization of a "retirement investor" would assign ERISA obligations in a manner that unjustifiably departs from the well-founded expectations, understanding, and interests of end investors. Under current law and regulation, the financial intermediary acting as a plan fiduciary or IRA fiduciary is subject to the full suite of ERISA fiduciary obligations—obligations widely recognized as the "highest known to the law."[10] The benefit of imposing an additional "layer" of the same ERISA requirements on a distinct party that often has no direct relationship with the plan is unclear. On the contrary, a system that would assign ERISA fiduciary status to multiple financial professionals providing services in connection with a single plan or IRA could create confusion among participants and beneficiaries or even weaken ERISA's effectiveness by undermining the perceived accountability of the plan's professional fiduciary. We believe the current regulatory regime better supports retirement investors, by providing them with ERISA's full protections and a fiduciary relationship that is well understood and readily navigated.

We appreciate that the DOL may have intended to ensure the coverage of recommendations to decision makers for plans, particularly small plans, who it believes may lack investment expertise. However, this goal can be accomplished without including plan fiduciaries and IRA fiduciaries in the definition of "retirement investor." Recommendations to individuals making decisions on behalf of a plan regarding the assets of the plan and based on the needs of such plan are already treated under current law and regulation as a recommendation to the plan itself.

---

[8] Proposed Rule §2510.3-21(c)(1).
[9] *Id.*
[10] Donovan v. Bierwirth, 680 F.2d 263, 272 n. 8 (2d. Cir. 1982), cert denied, 459 U.S. 1069 (1982).

We are also wary of the unintended consequences for plans and IRAs that could result from this expansive definition. Throughout our letter, we identify various contexts in which the Proposal's use of "retirement investor" creates or compounds undesirable outcomes for plans and IRAs that we believe the DOL did not intend. For example, one area of primary concern is its potential to discourage the provision to financial intermediaries of model portfolios (sometimes referred to herein as "models") and digital investment tools, which have served plans and other investors by improving the efficiency and reducing the cost of investing.

Asset managers, including BlackRock, often make model portfolios available to financial intermediaries (such as broker-dealers and third-party investment advisers) for intermediaries' use in working with their clients to develop portfolios that are designed to achieve their clients' investment goals. Clients of financial intermediaries may include plans and IRAs, among other investors. A model portfolio is a collection of possible diversified investment portfolios, comprising various strategies, product types, and risk profiles, that the asset manager believes may be appropriate for some sub-set of investors, but which is not targeted at any particular plan or IRA. The model provider thus does not intend to "recommend" a model to a plan or IRA, but instead provides it as a product or service to a financial intermediary, who may in turn evaluate and potentially recommend the model for their specific clients. We are concerned that, under the Proposal, the provision of models to a financial intermediary could be viewed as a recommendation of an investment strategy involving securities to a plan fiduciary or an IRA fiduciary, for which fiduciary status could attach.

Similarly, an asset manager may offer digital investment tools to financial intermediaries to assist them in evaluating and, if appropriate, selecting the asset manager's models and investment products. A financial intermediary may use these tools to generate a potential portfolio for a client based on client information such as investment objective, risk profile, and time horizon, using the model that best fits the client's information. The tools might include specific information on the funds or securities in the model portfolio. If a financial intermediary decides to use the tool, they may share the tool's "output" with their client (who may be a plan or IRA), which usually includes information on the proposed model portfolio and their client's actual portfolio. The "output" often identifies the tool provider and typically refers to investment products that the tool provider manages.

These model portfolios and digital investment tools are a portfolio management or investment service provided by an asset manager to a financial intermediary—the model provider does not have a contract with the plan or IRA. Indeed, the asset manager may not even know whether the financial intermediary's client is a retirement plan or IRA. Instead, the financial intermediary contracts with their plan or IRA client and retains responsibility for determining whether their client would benefit from an investment program based on tools or models, selecting a model or tool provider, choosing the applicable tool or model, deciding whether to make any modifications to the model or tool output based on the intermediary's judgment or client's preference, and executing any associated securities transactions for their client.

The Proposal's inclusion of plan fiduciaries and IRA fiduciaries in its definition of "retirement investor" could disrupt the provision of models or tools to a financial

intermediary by creating uncertainty as to whether this activity could in certain cases be treated as fiduciary investment advice. This risk is exacerbated by other broad, subjective elements of the proposed "fiduciary" definition, described in subsequent sections of our letter.

Providers of tools and models would find it exceedingly difficult, if not impossible, to comply with ERISA fiduciary obligations in this capacity. For example, they may be unable to comply with the impartial conduct standards under PTE 2020-02, as they are unlikely to have sufficient information regarding the financial intermediary's plan or IRA client to demonstrate prudence. If adopted in its current form, the Proposal could therefore cause investment model and tool providers to drastically limit their offering of these products and services or even exit the market, which could meaningfully reduce the availability of these resources, to the detriment of plans and IRAs.

We also note that a narrower definition of "retirement investor" would better align with ERISA's statutory text. Specifically, ERISA section 3(21)(A)(ii) provides that "a person is a fiduciary with respect to a *plan* to the extent he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property *of such plan*, or has any authority or responsibility to do so [emphasis added]." The statute focuses on a person's relationship with the plan, and does not directly contemplate that interactions with plan fiduciaries and IRA fiduciaries could constitute fiduciary investment advice.

To address these concerns, we recommend that the DOL narrow the term "retirement investor" to omit plan fiduciaries and IRA fiduciaries.[11] We believe this revision would better align the Proposal with investors' interests and expectations, more accurately reflect the statutory text, and mitigate the Proposal's potential chilling effects on the provision of investment information, tools, and other services to financial intermediaries.

II. The Discretionary Test Should Be Narrowed to Reflect a Relationship of "Trust and Confidence."

Under both the current and proposed definition of "fiduciary," ERISA fiduciary status attaches to a person who makes a covered recommendation and has discretionary authority or control (either directly or indirectly) with respect to certain assets. Notably, however, proposed section 2510.3-21(c)(1)(i) would significantly expand the scope of assets over which discretion could trigger fiduciary status. Under the Proposal, discretionary authority or control with respect to purchasing or selling securities or other

---

[11] We suggest the following changes to paragraph (c)(1) of proposed §2510.3-21: "(c) *Investment advice*. (1) For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act), section 4975(e)(3)(B) of the Internal Revenue Code (Code), and this paragraph, a person renders "investment advice" with respect to moneys or other property of a plan or IRA if the person makes a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property (as defined in paragraph (f)(10) of this section) to the plan, **~~plan fiduciary~~,** plan participant or beneficiary, IRA, IRA owner or beneficiary **~~or IRA fiduciary~~** (retirement investor) and the person satisfies paragraphs (c)(1)(i), (ii), or (iii) of this section:..."

investment property for the *retirement investor* can make a person a fiduciary—the parallel language in the current regulation refers only to property for the *plan* (or IRA) itself.[12]

As described in Part I, the Proposal defines "retirement investor" broadly to include, *inter alia*, a financial intermediary that serves as an ERISA fiduciary to a plan or IRA. Therefore, under the Proposal, if a person with discretion over *any assets* for such a financial intermediary makes a recommendation for compensation to that financial intermediary, the person may be deemed an ERISA fiduciary. No further analysis of the recommendation's circumstances is necessary to establish a fiduciary relationship under this proposed provision. The relationships giving rise to fiduciary status based on discretion are further attenuated under proposed section 2510.3-21(c)(1)(i), which provides that such discretion may be "either direct[] or indirect[] (e.g. through or together with any affiliate)."[13]

In explaining the proposed discretionary test, the DOL states that "[p]ersons that have discretionary authority or control over the investment of a retirement investor's assets necessarily are in a relationship of trust and confidence with respect to the retirement investor."[14] We agree that a relationship of trust and confidence is foundational to establishing ERISA fiduciary status. We also agree that when *a person* has discretionary authority or control over certain plan or IRA assets, *such person* is in a relationship of trust and confidence with respect to the assets that the plan or IRA has entrusted that person to manage. However, we are concerned that the DOL's proposed change threatens to dilute the circumstances giving rise to this unique relationship and its concomitant obligations.

In practice, this provision could apply ERISA fiduciary obligations in routine interactions that have never before been viewed as fiduciary investment advice. For example, a wholesaler who is employed by an asset manager may from time to time provide a financial intermediary with various investment ideas regarding different ways the wholesaler's products could be used in a diversified portfolio. That financial intermediary may also happen to be an IRA fiduciary to several IRAs. Separately, the asset manager or its affiliate may have discretion over certain assets (either plan/IRA assets or non-qualified account assets) under the financial intermediary's advisement or management. The asset manager could, for instance, be a sub-advisor for a fixed income sleeve of a portfolio for which the financial intermediary is the investment advisor. Under the Proposal, it is possible that any recommendation the wholesaler makes to the financial intermediary, who happens to be an IRA fiduciary, could be treated as fiduciary investment advice, regardless of the circumstances under which it is provided, because the asset manager has discretion over assets for the "retirement investor."

As the above example shows, the Proposal can be read to extend fiduciary obligations in circumstances where there is *no relationship*, contractual or otherwise, between the

---

[12] Proposed Rule §2510.3-21(c)(1)(i); 29 CFR §2510.3-21(c)(1)(ii).

[13] Proposed Rule §2510.3-21(c)(1)(i); 29 CFR §2510.3-21(c)(1)(ii). While current §2510.2-21(c)(1)(ii) also refers to discretionary authority or control "directly or indirectly (e.g. through or together with any affiliate)," we believe the current provision's reference to discretion over "plan" assets rather than "retirement investor" assets appropriately limits the scope of covered relationships.

[14] 88 Fed. Reg. at 75901.

putative provider of fiduciary investment advice and the plan or IRA. Indeed, in instances like the above, this lack of a relationship is often by design, as the financial intermediary wishes to preserve its own direct client relationship and the asset manager intends to provide services only to its intermediary client. It is thus highly unlikely that the wholesaler would know the financial intermediary's clients, let alone be positioned to adhere to ERISA's stringent advice standards. Moreover, the financial intermediary understands the wholesaler's communication to be sales activity and presumably has similar conversations with any number of wholesalers from other financial institutions. The financial professional's role requires them to gather and analyze this type of information so that they can prudently provide fiduciary investment advice to their plan and IRA clients. We trust that the DOL does not intend to make it more difficult for plan fiduciaries to review investment options and other information that position them to discharge their duty of care.

To better reflect a relationship of "trust and confidence," we therefore recommend that the DOL revise proposed section 2510.3-21(c)(1)(i) to clarify that a person is only a fiduciary with respect to the plan or IRA assets for which they have management discretion.[15] We note that this change would also hew more closely to ERISA's statutory language, which provides that a person is a fiduciary with respect to a plan to the extent the person "exercises any discretionary authority or discretionary control respecting management *of such plan* [emphasis added] or exercises any authority or control respecting management or disposition of its assets."[16]

III. The DOL Should Enhance the Clarity and Objectivity of the Facts-and-Circumstances Test for Fiduciary Investment Advice.

The Proposal would replace the longstanding "five-part test" for fiduciary investment advice with a facts-and-circumstances test comprised of fewer prongs that could, in practice, be difficult to apply. Under the current "five-part test," a person is an ERISA fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan.[17] The Proposal would eliminate this five-part test and instead provide that a person is an ERISA fiduciary if the person makes a covered recommendation to a retirement investor, and (1) the person directly or indirectly "makes investment recommendations to investors on a regular basis as part of their business" and (2) the recommendation is "provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the

---

[15] We suggest the following changes to paragraph (c)(1)(i) of proposed §2510.3-21: "(i) The person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the ~~**retirement investor**~~ **plan or IRA**;..."
[16] ERISA §3(21)(A), 29 U.S.C. 1002(21)(A).
[17] *See* 29 CFR §2510.3-21(c)(1).

retirement investor as a basis for investment decisions that are in the retirement investor's best interest."[18]

In describing its new circumstantial test, the DOL emphasizes the objective nature of each prong. According to the DOL, "[w]hether someone gives investment recommendations on a regular basis as part of their business is an objective test based on the totality of facts and circumstances."[19] Similarly, the revised description of the circumstances of an in-scope recommendation "would focus on the objective 'circumstances' surrounding the recommendation, including how the investment professional held themselves out to the retirement investor and described the services offered."[20] More generally, the DOL states that the Proposal

> comports with the broad language and protective purposes of the statute, while at the same time limiting the treatment of recommendations as ERISA *fiduciary* advice to those objective circumstances in which a retirement investor would reasonably believe that they can rely upon the advice as rendered by an investment professional who is acting in the investor's best interest, rather than merely promoting their own competing financial interests at the investor's expense.[21]

We agree that objectivity is a critical feature of any effective, administrable facts-and-circumstances test for fiduciary investment advice. Indeed, we have found that the objective analysis required by the current five-part test provides necessary clarity in identifying recommendations that constitute ERISA fiduciary advice. We are therefore troubled by what we read to be several *subjective* elements of proposed section 2510.3-21(c)(1)(ii).

In particular, we have questions as to how one can determine whether a recommendation is provided "under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest." According to the DOL, circumstances such as "how the investment professional held themselves out to the retirement investor and described the services offered" will indicate whether a recommendation is fiduciary investment advice under this provision.[22] This appears to be a subjective test based on a particular individual's presumed interpretation, without reference to the relationship or mutual understanding between the person and the retirement investor. The broad definition of "retirement investor" further obscures the provision's application—for example, we are unaware of how to evaluate the "individual circumstances" of a financial professional acting as a plan fiduciary (or how this serves ERISA's aims). It is difficult to square such an approach with the established legal framework governing ERISA fiduciary status that focuses on a relationship of trust and confidence between a person and a plan.

---

[18] Proposed Rule §2510.3-21(c)(1)(ii).
[19] 88 Fed. Reg. at 75902.
[20] *Id.*
[21] 88 Fed. Reg. at 75899.
[22] 88 Fed. Reg. at 75902.

The standard established by the clause "may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest" is particularly unclear. There is no precedent for such a standard in ERISA's 50-year history, and we are unaware of any limiting principles that could apply to identify circumstances indicating that a recommendation does *not* satisfy these criteria. It is particularly inapt when applied to a "retirement investor" that is a plan fiduciary or IRA fiduciary—the connection between a financial professional's "best interest" and ERISA is unclear. The language also seems to potentially apply to an extremely broad set of circumstances.

For example, it is unclear whether an asset manager's response to a request for proposal ("**RFP**") to manage a fundamental equities allocation within a defined benefit plan could be treated as fiduciary investment advice under proposed section 2510.3-21(c)(1)(ii). RFPs tend to include many detailed questions about the asset manager's credentials, the nature of services to be performed, portfolio construction views and approach, and the proposed fee terms. Detailed RFP responses help plan fiduciaries make well-informed, prudent investment decisions. All relevant parties understand that a competitive bidding process does not establish a relationship of trust and confidence, even in circumstances where an existing asset manager is re-bidding for a project. Despite this, it is unclear whether a plan fiduciary considering recommendations contained in RFP responses and then ultimately deciding based, at least in part, on the information in those responses would be seen under the Proposal as relying upon them as a basis for investment decisions in the plan's best interest, such that each RFP response would be treated as fiduciary investment advice.

Treating each RFP response as fiduciary investment advice would be unnecessary and could yield undesirable results for plans. In such bidding situations, a plan often hires an investment consultant (another fiduciary) to conduct the review and make a recommendation to the plan, so there may be two sophisticated fiduciaries involved in the decision-making process, ensuring that plan participants and beneficiaries are well protected. In a competitive process, market forces and the asset manager's reputation adequately incentivize them to provide thoughtful, well-researched and reasoned RFP responses. Moreover, plans benefit from these rigorous and highly competitive RFP processes, which can improve the variety, quality, and costs of investment options available to them. Ambiguity as to whether RFP responses constitute fiduciary investment advice could in certain instances discourage asset managers from participating in such processes, particularly for smaller mandates where the compliance risks and costs may outweigh the potential benefits of winning the business. This could reduce the availability of cost-effective, high quality investment options for such plans.

In addition, uncertainty as to whether such RFP responses could constitute fiduciary investment advice would likely require an asset manager to comply with PTE 2020-02, as described in Part V. Requiring the establishment of a compliance framework under PTE 2020-02 (including delivery of the necessary disclosures) in the context of these robust RFP processes, merely for an asset manager to be hired, would be overly burdensome and inappropriate. This is particularly true in the case of an asset manager who, once hired, would be a fiduciary with *discretion*, rendering PTE 2020-02 unavailable for the ongoing provision of investment management services.

The DOL's explanation of how it views the definition of a recommendation seems to compound the ambiguities of the facts-and-circumstances test. According to the Proposal's preamble, a recommendation is "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking particular course of action."[23] Thus, for example, the investment manager of an investment product used in defined contribution plans that wishes to supply clients with educational information about who the product is designed to help may need to navigate multiple contextual levels of analysis to determine that the information will not be considered a fiduciary recommendation.[24] This would make it harder for investment managers and product manufacturers to assist plans in creating helpful and informative participant communications without unnecessary fear of unintended fiduciary status or regulatory missteps.

We note that the proposed condition that a person "make[] investment recommendations to investors on a regular basis as part of their business" is reasonably objective. However, this prong is so broad as to render it meaningless—we read it to apply to all asset managers and almost any other financial services firm. Furthermore, unlike the parallel prong of the current five-part test, this "regular basis" prong has no nexus to the recipient of the investment advice. As described in Part I, ERISA section 3(21)(A)(ii) defines a fiduciary based on a person's relationship to *a plan*—the person's business or activities outside of that context are not part of the analysis. In our view, a more appropriate and statutorily sound approach would reinstitute the requirement that the person provide advice *to the plan or IRA* "on a regular basis." If the DOL determines that certain recommendations outside of this context merit treatment as fiduciary investment advice (e.g. the provision of one-time rollover advice), this could be addressed in discrete revisions tailored to that purpose.

If the DOL decides to adopt proposed section 2510.3-21(c)(1)(ii) despite these concerns, we would offer two additional recommendations. First, we recommend that it replace references to "retirement investor" with references to "plan or IRA," to avoid treating non-fiduciary interactions between financial professionals as fiduciary investment advice. Revising the term "retirement investor" to omit plan fiduciaries and IRA fiduciaries, as recommended in Part I, would accomplish a similar result. Second, we recommend that the DOL revise the proposed rule to clarify that RFP responses are not provided under circumstances that would render them fiduciary investment advice.

IV. The DOL Should Not Discourage Investment Advisers from Stating that They are a Fiduciary to Clients.

The Proposal would establish a new context in which a person who makes a covered recommendation may be deemed an ERISA fiduciary, based on whether the person "represents or acknowledges that they are acting as a fiduciary when making investment recommendations."[25] Notably, this context would not be limited to circumstances in which a person represents that they are an *ERISA* fiduciary, but rather would apply to any

[23] 88 Fed. Reg. at 75904.
[24] Compliance with PTE 2020-02, which requires an explicit fiduciary status acknowledgement, for material that is not intended to be a recommendation seems, at a minimum, to be inappropriate.
[25] Proposed Rule §2510.3-21(c)(1)(iii).

statement to a retirement investor that the investment advice or recommendations were or will be made in a fiduciary capacity.[26]

According to the DOL, this change is "intended to align fiduciary status with the retirement investor's reasonable expectations. A retirement investor who is told by a person that the person will be acting as a fiduciary reasonably and appropriately places their trust and confidence in such a person."[27] We agree that fiduciary status should align with investors' reasonable expectations and reflect a relationship of trust and confidence, but we are concerned that proposed section 2510.3-21(c)(1)(iii) would apply ERISA fiduciary obligations in a manner that departs from such expectations and relationships.

In our view, it is extremely unlikely that our clients would infer that ERISA requirements apply to a specific recommendation because of a general, unrelated statement that BlackRock is a fiduciary to our clients when managing their assets. Based on the proposed language, a client need not even be aware of this statement for the ERISA obligations to apply. To the extent a client has any expectations as to whether ERISA requirements would apply to a particular recommendation, they would likely be based on a holistic assessment of whether their specific circumstances indicate a relationship of "trust and confidence," as longstanding law and regulation provides. However, proposed section 2510.3-21(c)(1)(iii) does not require any circumstantial analysis. Applying ERISA fiduciary requirements due to broad, unrelated statements without such an analysis would be confusing and unpredictable for investors; it would also diverge dramatically from the established ERISA framework.

We also believe that the provision could inadvertently discourage communications by investment advisers that benefit investors. BlackRock acts as an ERISA fiduciary when it provides investment management services to U.S. retirement plans subject to ERISA. In addition, as a registered investment adviser, BlackRock has a fiduciary duty to our U.S. asset management clients under the Investment Advisers Act of 1940.[28] In our view, an investment adviser's statement that it is a fiduciary to clients helps to raise the bar in setting client expectations and ensuring the asset manager's accountability. Such statements can remind clients of the duties they are owed and make them more confident in communicating their interests to the adviser. The DOL should not seek to discourage such communications by advisers. Yet this is exactly what the Proposal would do, by providing that general statements regarding the management of non-plan assets can trigger ERISA requirements with respect to a specific, unrelated recommendation for a plan or IRA.

To better align the Proposal with investors' expectations and relationships of trust and confidence, we recommend that the DOL narrow the scope of fiduciary acknowledgements or representations that would trigger ERISA fiduciary status. Specifically, we recommend that proposed section 2510.3-21(c)(1)(iii) be revised to read:

---

[26] 88 Fed. Reg. at 75903.
[27] 88 Fed. Reg. at 75903.
[28] *See, e.g.,* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33669, 33671 (July 12, 2019).

(iii) The person making the recommendation provides a written representation to a retirement investor, plan fiduciary or IRA fiduciary acting on behalf of the plan or IRA, respectively, that they are acting as a fiduciary when making such recommendation.

To the extent that a person acknowledges fiduciary status orally, or in a manner that is not covered by the above proposed revision, that fiduciary acknowledgment would be a relevant fact to consider when making a determination under proposed section 2510.3-21(c)(1)(ii). This proposed revision has the additional benefit of creating a construct to allow sophisticated parties to clearly define the nature of their relationship.

V. PTE 2020-02 Should Be Practicable for the Range of Firms and Professionals Who Would Seek to Use the Exemption.

Along with the Proposal, the DOL proposes to amend a series of related “prohibited transaction exemptions” or “PTEs.” ERISA’s PTEs generally allow a person who meets the statutory definition of “fiduciary” to engage in activity that would otherwise violate the prohibited transaction rules, so long as they comply with the conditions set forth in the applicable PTE. There are currently a number of PTEs available for financial institutions and investment professionals, each with different eligibility criteria and requirements. The proposed amendments would revise several of these existing PTEs (PTEs 75-1, 77-4, 80-83, 83-1, and 86-128) to make them no longer available for fiduciaries providing investment advice; they would also significantly curtail the availability of PTE 84-24. Instead, investment advice fiduciaries would generally be required to rely on recently adopted PTE 2020-02, which the DOL also proposes to amend.

To rely on the current version of PTE 2020-02, financial institutions and investment professionals must comply with requirements that include acknowledging their fiduciary status in writing, disclosing their services and material conflicts of interest, conducting an annual retrospective compliance review, and adhering to “Impartial Conduct Standards.”[29] The proposed amendment to PTE 2020-02 would retain these existing requirements and “build on” them with several additional conditions.[30]

Similar to the Proposal, PTE 2020-02 (currently and as proposed) incorporates the term “Retirement Investor” through its operative provisions. For example, Section II(a)(1) requires that investment advice is in the “Best Interest of the *Retirement Investor* [emphasis added]” and

> reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like

---

[29] 88 Fed. Reg. at 75980. The “Impartial Conduct Standards” require that they: investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would (i.e., their recommendations must be “prudent”); act with undivided loyalty to retirement investors when making recommendations (i.e., they must never place their own interests ahead of the retirement investor’s interest, or subordinate the retirement investor’s interests to their own); charge no more than reasonable compensation; comply with federal securities laws regarding “best execution”; and avoid making misleading statements about investment transactions and other relevant matters.
[30] *Id.*

> aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the *Retirement Investor* [emphasis added]. [31]

Both the current and proposed PTE 2020-02 define "Retirement Investor" to include a plan fiduciary or IRA fiduciary ("[a] fiduciary acting on behalf of a Plan or an IRA," in the proposed amendment's terms).[32]

According to the DOL, "in the Department's view, PTE 2020-02 is consistent with the requirements of the SEC's Regulation Best Interest and the fiduciary obligations of investment advisers under the Advisers Act. Therefore, broker-dealers and investment advisers that have already adopted meaningful compliance mechanisms for Regulation Best Interest and the Advisers Act fiduciary duty, respectively, should be able to adapt easily to comply with the PTE."[33]

BlackRock has robust compliance mechanisms in place to carry out our fiduciary duties under ERISA and the Advisers Act. However, we believe PTE 2020-02 (both currently and as proposed) would require distinct compliance infrastructures that could be impracticable to create under certain circumstances, given the breadth of activities that could be considered fiduciary investment advice under the Proposal.

For example, as described in Part II, it is not uncommon for a wholesaler employed by an asset manager to present investment ideas to a financial professional that may also be a plan or IRA fiduciary. Under such circumstances, the wholesaler does not have a relationship with the financial professional's plan or IRA clients, and consequently would not have any specific information about them or their investment objectives. Yet to comply with PTE 2020-02, the wholesaler would need to adhere to a prudence standard that would require its putative advice to be based on the retirement investor's investment objectives, risk tolerance, financial circumstances, and needs. The broad definition of "Retirement Investor" complicates the picture further. If the provision is intended to require the wholesaler to base its advice on the *financial professional's* investment objectives and needs, then the requirement represents a stark, unexplained departure from the ERISA statute's framework and objectives. If it is read to require the wholesaler to base its advice on the *plan's* or *IRA's* investment objectives and needs, the wholesaler lacks the essential information about the financial professional's client to comply with the exemption.

If the DOL intends for parties to rely almost exclusively on PTE 2020-02 for exemptive relief when they are providing investment advice, its conditions must be feasible for the range of firms and professionals that would seek to use the exemption. To improve PTE 2020-02's workability, we recommend that the DOL revise the exemption's definition of "Retirement Investor" to omit "[a] fiduciary acting on behalf of a Plan or IRA." This change would parallel our recommended revision to the definition of "retirement investor" in the Proposal and would enhance the exemption's practicability.

****

[31] Proposed PTE 2020-02, Section II(a)(1), 88 Fed. Reg. at 76000.
[32] Proposed PTE 2020-02, Section V(n)(3), 88 Fed. Reg. at 76003.
[33] 88 Fed. Reg. at 75899.

We thank the DOL for providing BlackRock the opportunity to comment on the Proposal. Please contact the undersigned if you have any questions or comments regarding BlackRock's views.

Sincerely,

Samantha DeZur
Managing Director, Head of Regulatory Affairs & Capital Markets Policy

Nicole Rosser
Managing Director, Legal & Compliance