BLACKROCK®

July 21, 2015

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

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712, D-11327
United States Department of Labor
200 Constitution Avenue NW., Suite 400
Washington, DC 20210

Submitted via email to: e-ORI@dol.gov; RIN 1210-AB32
e-OED@dol.gov; RIN 1210-ZA25

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)

Americans increasingly rely on defined contribution plans, individual retirement accounts ("IRAs"), and personal savings as critical components for funding their retirement. In contrast to traditional defined benefit plans, in these plans, the burden of saving and wise investing falls on the individual. One-third of private-sector employees works for small businesses, and an estimated 51-71% of those employees do not have access to a work-place retirement plan.[1] Roughly 55 million employees do not have access to employer-sponsored retirement programs.[2] In this environment, it is more important than ever to (a) make it easier for employers, in particular small employers, and individuals, to establish a plan or IRA; (b) encourage and facilitate continuing and increasing levels of retirement savings, starting at an early age; and (c) support well-designed investment programs for individuals planning to retire and for those in retirement.

BlackRock, Inc. (together with its affiliates, "BlackRock"),[3] as a leading manager of pension assets, shares the Department of Labor's ("DoL") goal of enabling Americans "to retire with

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1 *See Challenges and Prospects for Employees of Small Business,* Statement of Charles A. Jeszeck, Director Education, Workforce, and Income Security (July 16, 2013); GAO, Retirement Security, Testimony Before the Committee on Health, Education, Labor, and Pensions, US Senate (July 16, 2013) at 1, available at http://www.gao.gov/assets/660/655889.pdf.

2 David John and Gary Koenig, "Workplace Retirement Plans Will Help Workers Build Economic Security," AARP Public Policy Institute Fact Sheet 317 (October 2014), available at: http://www.aarp.org/content/dam/aarp/ppi/2014-10/aarp-workplace-retirement-plans-build-economic-security.pdf.

3 BlackRock is one of the world's leading asset management firms. Our client base includes pension plans, endowments, foundations, charities, official institutions, insurers and other financial institutions, as well as individuals around the world.

dignity after a lifetime of hard work."[4] To achieve this goal, the DoL should enact rules that facilitate and encourage establishing and contributing to plans and IRAs as well as focusing on outcome-oriented investing. The Pension Protect Act of 2006 ("PPA")[5] is a good example of a fundamental change that achieved these objectives. Through the PPA, Congress and the DoL enacted legislation and implemented regulations designed to make it simple to increase savings and improve investment of those savings.[6] The PPA provided for automatic enrollment, automatic escalation and "qualified default investment alternatives" ("QDIA"), which were intended to collectively improve retirement outcomes. In particular, by adopting asset allocation products as QDIAs, the PPA addressed the problem that the average investor, with little knowledge of finance and investments, had overwhelming allocations to company stock and conservative fixed income investments and did not change allocations over time.[7] The DoL recognized that participants need help in allocating their savings across asset classes to achieve a better outcome and, by establishing asset allocation products as a safe harbor, it provided that help.

In contrast to the PPA, we believe that the structure and burdens imposed by the Proposal (defined below) will create a regulatory environment that is inconsistent with our shared goal and will produce the opposite of the intended effect. As contemplated, the Proposal will make delivery of advice and education quite cumbersome, especially for smaller plans and individual investors. Furthermore, while fees are an important consideration, the Proposal's heavy emphasis on "low fees" for each product may lead to suboptimal "low cost" outcomes. Instead of increasing plan establishment, savings and outcome-oriented investing, the Proposal will discourage companies from offering pension plans and will discourage individuals from saving for retirement. And instead of helping individuals manage their increasing responsibility for investing, the Proposal will make it even more difficult and costly to receive needed advice which will result in less optimal allocation of assets.

The critical flaw is that the DoL has not tailored the Proposal to address key perceived problem areas, such as IRA rollover sales practices. Instead, the Proposal broadly assumes that financial services firms and individuals do not act in the best interests of their clients and regularly provide conflicted advice. Starting with this premise, the Proposal includes an expansive definition of "investment advice" with the objective of broadly subjecting conversations with, and activities involving, plans, plan fiduciaries, plan participants or beneficiaries, IRAs and IRA owners (collectively, "Plans") to the fiduciary and prohibited transaction rules in ERISA and the Internal Revenue Code. The DoL then proposes a number of exceptions and exemptions in an effort to permit certain limited and existing market practices that it believes may be necessary and beneficial to Plans. The exceptions and exemptions are overly complex, burdensome and still fall short of what is necessary to enable broker-dealers, asset managers and other financial services firms to properly assist Plans – in particular small Plans and IRAs who need the most help – with saving and investing in a way that will optimize their retirement outcomes.

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[4] DoL Fact Sheet, Dep't of Labor Proposes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle-Class Families Billions of Dollars Every Year, available at http://www.dol.gov/protectyoursavings/FactSheetCOI.pdf at 1.

[5] Pension Protection Act, Pub. L. No. 109-280, 120 Stat. 780 (2006).

[6] Notice of Proposed Rulemaking - Default Investment Alternatives under Participant Directed Individual Account Plans, 71 Fed. Reg. 56806, 56807 (Sept. 27, 2006).

[7] 71 Fed. Reg. at 56806-07; *See also* William J. Wiatrowski, "401(k) Plans Move Away from Employer Stock as Investment Vehicle," Bureau of Labor Statistics, *Monthly Labor Review* (November 2008), available at http://www.bls.gov/opub/mlr/2008/11/art1full.pdf.

We believe that many firms and individuals are delivering good advice and products to their clients, and we urge the DoL to reconsider its approach. Instead of pursuing a broad Proposal that will have the effect of making it more difficult to establish a Plan, save and obtain needed advice, we recommend that the DoL pursue a combination of (i) a more targeted rule and (ii) a focus on innovative state-based solutions. A more targeted rule, or a sales practice project conducted jointly with FINRA, could address any abusive practices in IRA rollovers without disrupting the entire market and jeopardizing advice to Plans and individuals with smaller amounts of assets. In addition, several states, including California, Illinois, Oregon, Massachusetts and Connecticut have announced plans to explore public-private partnerships in which smaller employers would make a salary deduction and the respective states would assume responsibility for overseeing the investment of these funds.[8] These public-private partnerships are intended to increase savings by individuals while creating a scale program that would address cost issues and provide professional oversight and management of assets. However, the DoL has expressed its opposition to these programs unless they are fully ERISA compliant.[9] In his remarks at the 2015 White House Conference on Aging, President Obama emphasized that the government needs to "make it easier for people to save for retirement," and he called on the DoL to propose rules, by the end of 2015, that would "provide a clear path forward for states to create retirement savings programs."[10] We endorse this DoL action as a better way of achieving the three-part goal of increasing participation, increasing individual savings, and creating well-designed investment programs to ensure a more secure retirement for millions of Americans.

Set forth below are BlackRock's specific comments and suggestions with respect to the DoL's notice seeking comment on the Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice ("Proposal"), the proposed Best Interest Contract Exemption ("BIC") and the proposed Amendments to and Proposed Partial Revocation of PTEs 86-128 and 75-1 ("PTE 86-128").

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I. <u>DoL Should Permit the SEC to Rule First</u>

Individuals saving for retirement are likely to have more than one type of retirement account (as well as other sources of income, such as home equity and social security). They think of their "nest egg" as a whole and do not focus on whether their accounts are regulated by the SEC or the DoL. Financial advisers can better serve their clients' needs if they can provide advice with respect to all of their clients' assets, without the avoidable burden of complex, conflicting or overlapping regulatory requirements. As Financial Industry Regulatory Authority ("FINRA") Chairman and CEO, Richard Ketchum, remarked at the 2015 FINRA Annual Conference, "it is not optimal for investors to apply a different legal standard to IRAs and 401(k)'s than to the rest

8 *See e.g.*, Hazel Bradford, "States Pushing to Offer Retirement Accounts to Private Sector", Pensions & Investments (May 12, 2014), available at http://www.pionline.com/article/20140512/PRINT/305129971/states-pushing-to-offer-retirement-accounts-to-private-sector.

9 At a hearing of the Oregon Task Force on Retirement Savings, DoL staff said that a state run retirement plan for private sector workers could create significant liability for the state and its private employers. Joint Interim Task Force on Oregon Retirement Savings (HB 3436) (June 10, 2014); *See also* DOL Advisory Opinion 2012-01A (participation of private nonprofit employers in the Connecticut State Plan would adversely affect its status as a governmental plan under Section 3(32) of ERISA).

10 President Barack Obama, Remarks by the President at White House Conference on Aging (July 13, 2015), available at https://www.whitehouse.gov/the-press-office/2015/07/13/remarks-president-white-house-conference-aging.

of an investor's assets. A great many investors simply do not plan for their retirement by segregating tax-advantaged vehicles from their other investment strategies."[11]

The SEC has broad regulatory authority over Plan and non-Plan accounts. It has already published its study mandated by Section 913 of the Dodd-Frank Act[12] and Chair White has "directed the staff to evaluate all of the potential options available to the [SEC], including a uniform fiduciary standard for broker-dealers and investment advisers when providing personalized investment advice to retail customers."[13] On June 22, 2015, the SEC's Office of Compliance Inspections and Examinations ("OCIE") announced that it was launching a Retirement-Targeted Industry Reviews and Examinations (ReTIRE) Initiative.[14] The ReTIRE Initiative will focus on the same core concerns relating to "harm to retail investors saving for retirement"[15] as the DoL Proposal. Moreover, a "best interest" standard already applies to many relationships between an entity regulated by the securities laws and an investor. Registered investment advisers are held to a fiduciary standard under the securities laws.[16] There is increasing support of, and migration to, a best interest standard governing broker-dealer conduct with respect to retail investors generally.[17] Recently, Chairman Ketchum specifically urged adoption of a best interest standard for brokers and investment advisors. In addition, FINRA Regulatory Notice 13-45 specifically addressed IRA rollover practices – a key target of the DoL's Proposal.[18]

If different regulators working on similar issues take divergent or inconsistent paths, it will create a complicated and confused regulatory environment that will operate to the detriment of both Plan and individual investors. Absent a uniform standard or, at a minimum, a fully coordinated standard, individual investors with Plan and non-Plan accounts will simply be baffled by different and/or conflicting standards. In addition to confusion, the investor may not get the information needed, or may get so many disclosures that he does not know where to start to make informed decisions about his retirement resources and retirement planning. Overlapping, inconsistent and/or duplicative rules will also be difficult for the financial adviser to navigate and to explain to her client. In short, the absence of a harmonized and integrated regime among different federal regulators will exacerbate confusion, increase costs and ultimately create an environment that discourages retirement savings and investing generally, as individuals will lack the confidence in the system needed to encourage saving.

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11 Richard G. Ketchum, FINRA Chairman and CEO, Remarks from the 2015 FINRA Annual Conference (May 27, 2015), available at https://www.finra.org/newsroom/speeches/052715-remarks-2015-finra-annual-conference.

12 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

13 Mary Jo White, SEC Chair, "Wall Street Reform: Assessing and Enhancing the Financial Regulatory System," Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs (Sep. 9, 2014), available at http://www.sec.gov/News/Testimony/Detail/Testimony/1370542893146.

14 SEC, National Exam Program, Risk Alert by Office of Compliance Inspections and Examinations, Vol. IV, Issue 6 (June 22, 2015).

15 *Id.*

16 *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-192 (1963).

17 The Securities Industry Financial Markets Association ("SIFMA"), the Investment Company Institute and the Financial Services Roundtable ("FSR") have all expressly supported a "best interests" standard for broker-dealers. *See* Press Release, SIFMA, SIFMA Proposes Best Interests Standard for Broker-Dealers (June 3, 2015), available at http://www.sifma.org/newsroom/2015/sifma_proposes_best_interests_standard_for_broker-dealers. Press Release, FSR, FSR: DoL 'Best Interest' Standard Better Achieved Through Simpler Rule, Better Enforcement (June 17, 2015), available at http://fsroundtable.org/fsr-dol-best-interest-standard-better-achieved-through-simpler-rule-better-enforcement. Press Release, Investment Company Institute ("ICI"), ICI Statement on SIFMA's Proposed Best Interests of the Customer Standard (June 3, 2015), available at https://www.ici.org/pressroom/news/15_news_ici_sifma.

18 FINRA Regulatory Notice 13-45, Rollovers to Individual Retirement Accounts (Dec. 2013).

A uniform SEC standard would apply across all sales practices and investment recommendations made to individual retail customers in all accounts, not just their IRA or Plan accounts. The SEC and FINRA are moving in that direction and their efforts would provide a solid basis for addressing concerns with existing market practices. Rather than moving ahead with its Proposal, the DoL should participate in, and provide input into, the SEC and FINRA processes with the goal of having these agencies incorporate DoL concerns into their final rules. After the SEC and FINRA act, the DoL can assess whether there are remaining gaps and can tailor solutions to those issues, if any.

II. Following the Precedent of the Pension Protection Act, the DoL Should Support Outcome Oriented Investing

The PPA was successful because it made it simpler and easier to save for retirement and supported investment options – QDIAs – that were considered appropriate to achieve retirement goals.[19] By evidencing the DoL's apparent preference for low cost and index or index-based products, the Proposal moves in the opposite direction. The DoL is requesting comments on the potential adoption of a separate, streamlined exemption for "high-quality, low-fee" investments. We presume that the DoL is advancing this exemption as a way to promote index and index-based products. The DoL went so far as to state that "[f]acilitating investments in such high-quality, low-fee products would be consistent with the prevailing view in the academic literature which posits that the optimal investment strategy is often to buy and hold a diversified portfolio of assets calibrated to track the overall performance of financial markets."[20] The DoL continued: "Under this view, for example, a long-term recommendation to buy and hold a low-priced (often passively managed) target date fund that is consistent with the investor's future risk appetite trajectory is likely to be sound."[21]

However, cost is only one of many factors that need to be considered in providing advice that is in the best interests of the client. In 2013, the DoL underscored this point in outlining the multiple factors that a plan sponsor should take into account in selecting a target date fund.[22] In our view, it will not serve retirement investors if cost is the sole or predominant driver in retirement investing, and this leads to a disproportionately heavy reliance on index investing. Large institutional pension portfolios regularly incorporate a diverse set of investment strategies as part of their overall asset allocation process. Likewise, well run, large institutional defined contribution Plans offer participants a diverse set of investment options under their Plan, including equity and fixed income, index and active products and a multi-asset QDIA. Indeed, this type of diversified Plan menu is required for a Plan fiduciary to have the protections afforded

[19] Pension Protection Act, Pub. L. No. 109-280, § 624(a), 120 Stat. at 980. *See e.g.,* U.S. Bureau of Labor Statistics, Automatic enrollment, employer match rates, and employee compensation in 401(k) plans, Monthly Labor Review, at 3 (May 2015), available at http://www.bls.gov/opub/mlr/2015/article/pdf/automatic-enrollment-employer-match-rates-and-employee-compensation-in-401k-plans.pdf.

[20] Notice of Proposed Class Exemption – Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960, 21978 (April 20, 2015).

[21] 80 Fed. Reg. at 21978. The White House Report on "The Effects of Conflicted Investment Advice on Retirement Savings" likewise also tacitly suggests through the examples that passively managed index funds are superior to actively managed funds. In one example, the White House report posits that a participant moves from a low cost index fund available as an investment option in a defined contribution plan to a higher priced actively managed product and asserts, without factual support, that "unless the fund involves a significantly different risk profile than the index fund, the expected return will likely be quite similar." Council of Econ. Advisers, Exec. Office of the President, The Effects of Conflicted Investment Advice on Retirement Savings at 17 (Feb. 2015), available at https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

[22] DoL, Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries (Feb. 2013).

by Section 404(c) of ERISA. Individual retail investors should be allowed to build a diversified portfolio incorporating their various account holdings. However, the Proposal is likely to limit their choices.

The right approach to maximize the potential for a secure and fulfilling retirement will likely vary from individual to individual and will depend on a variety of factors, including the individual's age and expected retirement date, whether the individual has a defined benefit plan or only an IRA, and the individual's overall financial situation, obligations, retirement goals and risk tolerance. For one investor, the goal may be low volatility and a smoother, more predictable, income stream. For another, it may be growth needed to fill a potential gap in income at retirement. And another may want diversification that cannot be provided by returns that are strictly correlated to the market. Since individuals are differently situated and have different goals, the portfolios in which they invest should likewise have different strategies and different risk and return profiles. For some, an asset allocation among low cost index products may be appropriate. Index products, however, can be single dimensional and do not serve all investors' needs, as they only provide returns that are correlated to the market. Actively managed products may have higher fees, but these products also have the ability to deliver outcomes that cannot be delivered by pure beta products (i.e., index funds) and may have return patterns that are not always correlated with traditional markets.[23] Some products can also be used to lower volatility while still providing an above money-market rate of return. A good example of products that could benefit retail investors who want to build a diversified portfolio is multidimensional asset allocation products, which combine active and index management across multiple asset classes, including non-traditional asset classes. While such an asset allocation product may have a higher fee than a simple index fund, it offers a professionally managed and diversified portfolio that may be the best alternative for certain retirement investors to achieve their goals. This is just one example of many where "low cost" may not lead to the most desirable outcome.

In the PPA, Congress specifically directed the DoL, in adopting regulations providing guidance on appropriate QDIAs, to designate "investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both."[24] The DoL sought primarily to promote default investments that enhance retirement savings.[25] It considered market trends, generally accepted investment theories, mainstream financial planning practices and actual investor behavior, as well as the estimated effect of QDIAs on retirement savings.[26] In determining that managed accounts, balanced funds and target date funds would be eligible as QDIAs, the DoL *rejected* arguments that the low cost alternatives should also be included. Commenters in support of the inclusion of stable value products argued that stable value funds have relatively low costs compared to life-cycle, target-retirement date and balanced funds, particularly those that use "fund of funds" structures.[27] Despite the lower costs of these products, the DoL determined not to include capital preservation products,

[23] As of May 2015, actively managed mutual funds out-performed index funds for the period January 1, 2015 through April 30, 2015. *See* Kirsten Grind, *Human Stock Pickers Gain Against Indexes*, Wall Street Journal (May 17, 2015), available at http://www.wsj.com/articles/human-stock-pickers-gain-against-indexes-1431904605.

[24] ERISA, § 404(c)(5).

[25] Final Rule – Default Investment Alternatives under Participant Directed Individual Account Plans, 72 Fed. Reg. 60452, 60477 (Oct. 24, 2007).

[26] 72 Fed. Reg. at 60477.

[27] 72 Fed. Reg. at 60463.

such as money market or stable value funds, as separate long-term investment options under the QDIA regulation.[28]

The Proposal moves in the opposite direction by emphasizing low cost and evidencing a preference for low-cost index or index-based products. As an alternative approach, we recommend that the DoL follow the example set by the PPA and its own QDIA regulations and focus on ensuring that a "fiduciary" standard fosters optimal retirement outcomes. Using this approach, the DoL would facilitate and promote the availability of advice along with a broad and diversified array of investments and strategies, so that each individual has the maximum opportunity to act on advice to achieve his retirement goals.

III. The Proposal Threatens to Deter Small Employers and Individuals From Setting Up Plans and IRAs

A 2013 Government Accountability Office ("GAO") report noted that "one-third of all private-sector employees, about 42 million, work for small businesses with fewer than 100 employees and many of these employees lack access to a work-based plan to save for retirement. In fact, an estimated 51 to 71 percent of employees for small business lack access to such plans."[29] Many small employers are reluctant to offer Plans because of concerns regarding administrative costs, the risks of compliance errors and the fear of litigation.[30] Retirement savings and investing is secondary to running their business. Even when small employers do offer Plans, they may be less likely to provide participants with much needed education.[31] Based on observed behaviors, many individuals simply do not have the knowledge, interest or time to manage their own retirement assets.

We believe that the DoL is searching for ways to improve small employer and individual adoption of Plans and their retirement savings levels and outcomes. However, we are concerned that the Proposal will have the opposite of the intended effect and will exacerbate the problem of low levels of retirement savings by individuals who work for small employers or do not otherwise have access to a retirement plan. By assuming bad behavior,[32] the DoL has crafted an overly broad definition of advice, unnecessary limitations on education and complex and burdensome requirements on broker-dealers. In practice, these measures taken together will make it more difficult for small employers and individuals to set up and maintain Plans and receive the advice they need to optimize their retirement savings.

In particular, the Proposal can be read to prohibit sales and marketing activities directed at small employers and individuals, without the person engaging in those activities being considered a fiduciary. At the same time, the DoL has made it more difficult for a person to make retirement decisions on his own by imposing significant restrictions on investment education. Information

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28 *Id*.

29 See footnote 1.

30 *See* "The Challenge of Retirement Savings for Small Employers." U.S. House of Representatives Committee on Small Business, Hearing Memorandum (Sept. 30, 2013) ("The cost and complexity of retirement plans can deter small firms from offering plans.") available at: http://smbiz.house.gov/uploadedfiles/10-2-2013__hearing_memo_.pdf.

31 Richard Eisenberg, "The Sorry State of Small Business Retirement Plans," Forbes (Oct. 16, 2013), available at http://www.forbes.com/sites/nextavenue/2013/10/16/the-sorry-state-of-small-business-retirement-plans.

32 Notice of Proposed Rulemaking and Withdrawal of Previous Proposed Rule – Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 80 Fed. Reg. 21928, 21930 ("In the current marketplace for retirement investment advice, however, advisers commonly have direct and substantial conflicts of interest, which encourage investment recommendations that generate higher fees for the advisers at the expense of their customers and often result in lower returns for customers even before fees.").

is no longer considered "education" if it includes any information on investment alternatives. IRAs do not have the benefit of the "platform" exceptions to even help them get started. BIC is not available to provide advice to small participant directed defined contribution plans and, although it is available with respect to IRAs, the burdensome conditions render it unworkable. These are critical flaws that will make it even more difficult for small Plans and IRAs to obtain sufficient information or "education" to make decisions, or at least good decisions, on their own and advice may become less available, more costly or both. In 2012, the United Kingdom adopted comprehensive regulations for retail investors to address conflict of interest concerns. The post implementation reviews reveal that the type of advice needed and desired by investors with lower balances is less available.[33] BlackRock believes that without significant modification the Proposal will cause even more small employers and individuals to simply give up because they cannot receive the advice they are looking for, and establishing, maintaining and investing in a Plan will be too difficult and/or too expensive.

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We set forth below our specific suggestions on how to revise the Proposal, BIC and Prohibited Transaction Exemption 86-128 to better fulfill our key goals of (a) facilitating the establishment of Plans; (b) promoting additional savings; and (c) ensuring wise investing. We further highlight where we believe the language of the Proposal has unintended consequences and suggest modifications and clarifications to avoid those consequences.

Specific Comments on Definition of the Term "Fiduciary";
Conflict of Interest Rule-Retirement Investment Advice (RIN 1210-AB32)

IV. <u>Models and Tools Provided Through Intermediaries Should Not be Considered Investment Advice</u>

Asset managers, including BlackRock, often make model portfolios and/or investment tools available to financial intermediaries. Financial intermediaries are generally broker-dealers or other investment advisers and asset managers, who have direct relationships with Plans, particularly smaller plans and IRAs. By taking advantage of models and investment tools, financial intermediaries are better able to work with their clients to develop portfolios that improve their client's ability to achieve their investment goals in a cost effective manner.

Model portfolios are collections of possible investment portfolios, comprising a wide range of strategies (e.g., growth, low volatility, inflation protection, income), product types (e.g., exchange traded funds, mutual funds) and risk. The models are rebalanced or updated by the model provider on a periodic basis, but the model provider does not generally purchase and sell the securities contained in the model on behalf of any investor. The models are developed based on what an asset manager believes would be an appropriate or attractive strategy for

[33] In the United Kingdom, the Retail Distribution Review ("RDR") made a number of significant changes, including with respect to compensation practices, in the way investment products are distributed to retail customers, with the objective of addressing perceived issues related to conflicted compensation arrangements. Experience to date indicates that, as a result of RDR, there is a shortage of transaction based advice offerings desired by investors with lower balances as advisers have moved to providing more "holistic" advisory services that are geared to higher balance investors. Advice Gap Analysis: Report to FCA, Towers Watson, 5 December 2014, available at http://www.fca.org.uk/your-fca/documents/research/advice-gap-analysis-report. *See* Retail Distribution Review Post Implementation Review, Europe Economics, 16 December 2014 at 63, available at http://www.fca.org.uk/your-fca/documents/research/rdr-post-implementation-review-europe-economics (cites Towers Watson study as expressing the view that as advisers move away from providing simpler services, there may be "a shortage of transactional advice offerings – especially at the lower end of the mass market").

some sub-set of investors, but without targeting any particular investor. Thus, the model provider is not "recommending" any model to a Plan. It is making the model portfolios available as a product and/or service to a financial intermediary, who, in turn, may evaluate and recommend the models for specific Plans or clients.

In addition, as technology improves, asset managers are increasingly offering financial intermediaries sophisticated investment tools to assist them in taking advantage of the asset manager's models. The financial intermediary obtains information regarding a client's investment objective, risk profile, time horizon, total savings, etc. and uses that information with the tool to generate a potential portfolio for a client, using the model that best fits the client's information. The tools and technology are accompanied by detailed financial information on the investment funds or other securities included in the model, the strategy and risks. The financial intermediary generally shares with her client a streamlined version of the "output" generated by use of the tool, including information regarding the proposed model portfolio and actual portfolio, once an investment is made. The "output" will generally include investment funds (e.g., exchange traded funds or mutual funds) managed by the model/tool provider and is likely to identify the asset manager that provides the model and/or tool.

Model portfolios and investment tools are viewed as a portfolio management or investment service provided by an asset manager to a financial intermediary. As model providers, asset managers do not have a contract with a client and are unlikely to know whether the client is a plan or IRA. A financial intermediary, and not the asset manager, is responsible for determining whether a client would benefit from an investment program based on models, determining the appropriate model provider (which may be BlackRock or another asset manager), selecting a particular model and determining whether to follow the model in its entirety or to make modifications based on the intermediary's judgment or the client's preference. The financial intermediary, and not the asset manager, will have responsibility for execution of securities purchase and sale instructions, including rebalancing. We believe that the model and any "output" from a tool cannot and should not be characterized as a recommendation by the asset manager, even where the financial intermediary identifies the asset manager and presents the client with a particular asset manager's model portfolio.

However, under the Proposal, it is not clear that asset managers can continue to make model portfolios and investment tools available to intermediaries without fiduciary status attaching to the asset manager, in its capacity as a model/tool provider. Unlike the current rule, the Proposal provides that a person is considered a fiduciary if she provides a "recommendation" regarding the purchase or sale of securities "directly to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner."[34] The Proposal includes a broad, subjective definition of "recommendation" and does not incorporate the requirement in the existing rule that advice be based on a *mutual* agreement, arrangement or understanding. Under Section (a)(2) of the Proposal, recommendations are considered fiduciary advice if they are "individualized to" or "specifically directed" to the Plan.[35] BlackRock is concerned that the language in the Proposal can be construed to render models and tools investment advice to a financial intermediary who is a plan fiduciary. It can also be construed to make BlackRock a fiduciary to the financial intermediary's Plan client, when the financial intermediary uses its models and tools to generate an individualized portfolio that is provided directly to a Plan.

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[34] 80 Fed. Reg. at 21956.

[35] 80 Fed. Reg. at 21957.

Specifically, the financial intermediary would likely be a "plan fiduciary" to whom a model and tool is made available. The financial intermediary, in turn, uses the models and tools to make an individualized recommendation. That recommendation would necessarily be provided directly to a Plan, and it will likely identify the provider of the model or tool and incorporate an investment portfolio that includes investment funds managed by the model or tool provider or an affiliate. Although BlackRock would not make a recommendation to, or have a connection with, the Plan, we are concerned that, where the financial intermediary uses BlackRock models and tools and identifies BlackRock to the Plan, the advice provided by the financial intermediary would be construed as "individualized" or "directed to" a Plan by BlackRock. This is particularly the case because the Proposal does not include an "objective" standard for determining whether someone is providing advice. Rather, fiduciary status could attach based on the Plan's subjective perception.[36]

If models and tools provided to financial intermediaries are considered "fiduciary" advice from an asset manager, the Proposal could significantly increase compliance burdens on model and tool providers or render it impossible to offer these services, as the model/tool providers do not have information regarding the end client. This, in turn, could increase costs to Plans and/or force some model/tool providers to exit the market, or at least the market for retirement investment, as they do not want to assume fiduciary status under the circumstance described above. Models and tools are intended to improve the efficiency and reduce the cost of investing. Indeed, one of the benefits of models and tools is that they allow a financial intermediary to select a model portfolio or investment strategy that satisfies the client's needs without creating a more expensive bespoke solution. The imposition of fiduciary status on the model/tool provider threatens to impede that goal.

BlackRock does not believe the DoL intended this result. In the past, the DoL has recognized the importance of providing flexibility and encouraging innovation in the development and offering of retirement products, model portfolios or services.[37] In fact, the DoL has expressly recognized that model portfolios could be a relatively simple, cost effective way to help Plans structure diversified portfolios.[38] In our view, if a financial intermediary enters into a direct fiduciary relationship with a client and stands between a model/tool provider and the client, fiduciary status should not attach to the model/tool provider. The client is protected by the fiduciary status of the intermediary, who has a direct relationship with the client. The model/tool provider is not making a recommendation to a Plan; rather it is making services and products available generally to the financial intermediary to help her better do her job and without regard to whether the ultimate investor may be a Plan.

BlackRock suggests the following modification to the language of the Proposal to avoid inadvertently making providers of models and tools fiduciaries, when the models include strategic asset allocations that are not directed to any particular investor and the tools are intended to help the financial intermediary take full advantage of the models when working with her client.

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[36] BlackRock and other asset managers also make tools and model portfolios available to the general public. For similar reasons, we are concerned that these public models and tools could be construed as "advice", even though they are made available without regard to whether the user is a plan or an individual. As discussed in more detail in Section V below, to the extent that these public tools could be considered "advice", they should be covered by a carve-out for education.

[37] 72 Fed. Reg. at 60460.

[38] 72 Fed. Reg. at 60477.

(a) *Investment advice.* For purposes of . . . a person renders investment advice with respect to moneys or other property of a plan or IRA described in paragraph (f)(2) of this section if –

(1) Such person provides, directly to a plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner, the following types of advice in exchange for a fee or other compensation, whether direct or indirect:

***

(2) Such person directly

(ii) Provides individualized and specifically tailored advice directly to the advice recipient for consideration pursuant to a written or verbal agreement or arrangement or reasonable understanding that the advice is a recommendation that the advice recipient take or refrain from taking one of the actions in Section (a)(1)(i)(ii) or (iv), with respect to a particular plan or IRA.

This language incorporates concepts from FINRA Rule 2111, in particular the use of an objective, rather than a subjective standard for purposes of determining whether any advice has been provided, and makes clear that a recommendation needs to be both individually tailored and provided directly to a Plan for fiduciary status to attach. While BlackRock does not believe that the DoL should adopt all guidance under FINRA Rule 2111, as that rule has a different purpose and different consequences flow from non-compliance, we believe that the DoL can and should adopt additional, specific concepts from FINRA Rule 2111 guidance. In particular, BlackRock believes that it is important that the DoL adopt an objective test for purposes of determining whether a recommendation has been made or advice has been provided and require (as FINRA does before individual suitability attaches) sufficient specificity and customization so that considering the content, context and presentation, the information would be viewed as advice to a particular Plan.

Separately, or as an alternative, the DoL should specifically state (by adding a new exception to fiduciary status in Section (b) of the Proposal) that a model/tool provider is not a fiduciary to a Plan, where (A) the models are generic based on strategies, type of product and risk and not tailored to a particular Plan or individual, (B) the model/tool provider does not enter into a contract with a Plan, (C) a financial intermediary will act as a fiduciary, conduct suitability analysis and be responsible for choosing a model provider and model, making any individual changes to the model and trading/execution and (D) the tool applies generally accepted investment theories that take into account the historic returns of different asset classes over a defined period of time. To provide additional protection to Plans, the Proposal could require that the Plan receive clear disclosure regarding the services provided by the model/tool provider, including that it is not a fiduciary.

V. <u>The DoL Should Broaden the Exception for Investment Education</u>

We applaud the DoL for recognizing the importance of investment education and creating a carve-out from investment advice for education. In particular, we appreciate that the DoL intends to be responsive to our concern in 2011 that investment advice not capture statements made to the general public or to no one in particular. We also agree with the DoL's approach that education includes information and materials that are provided to the Plan, the Plan fiduciary, participant, beneficiary or IRA owner, not just the Plan participant in a defined contribution plan. It further supports the provision of education if an asset manager can provide general information that "helps an individual assess and understand retirement income needs and associated risks" and that "explains general methods for the individual to manage those risks" without fiduciary status attaching.[39] However, we believe that the Proposal significantly limits the utility of such information by excluding from the education carve-out information regarding investment alternatives that would fit into underlying asset classes.

In the preamble to the Proposal, the DoL stated that it "believes that effective and useful asset allocation education materials can be prepared and delivered to participants and IRA owners without including specific investment products and alternatives available under the plan."[40] We disagree. In BlackRock's view, the usefulness of these materials is significantly diminished if specific investment alternatives are not available. With the decline of defined benefit plans, plan sponsors are increasingly concerned that their employees have sufficient knowledge and information to manage their investments on their own. Asset managers are continuing to develop a wide array of educational tools and materials intended to provide the guidance and financial literacy that plans and individuals need to improve retirement outcomes. These materials use examples of investment options to facilitate learning. Without references to specific investment alternatives, the average retirement investor will not understand the lesson and will not have enough information to make or improve his investment allocations. Consider the corollary of a nutritionist telling a patient that he can learn to eat healthier by providing him with the FDA's food pyramid, but then not providing him with examples of foods included in each group or giving him actual recipes. Without specific investment options, an investor at most learns that he should diversify his portfolio among various asset classes in certain percentages, but he is not provided sufficient information to actually follow through with the investment decision.

While we recognize the DoL's concern that individuals may not clearly differentiate between examples of funds as education and recommendations for investments, we also believe that making it more difficult for individuals to connect information about asset allocation to actual products will harm their savings levels and returns on investment. As behavioral finance research shows, savers are more likely to save when saving is made easier. For instance, participation rates in 401(k) plans are much higher when participants are automatically enrolled.[41] While, to our knowledge, no study has specifically examined scenarios where savers only received asset allocation information and not information regarding particular investment options that fit into that allocation, we believe that a reasonable conclusion from existing research is that providing only allocation information will make saving more difficult for investors and thus negatively impact savings. Indeed, the PPA recognized the importance of making it easier to save and receive advice when it sought to increase 401(k) participation by creating statutory authority for automatic enrollment,[42] and sought to improve the available investment

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[39] 80 Fed. Reg. at 21944.

[40] 80 Fed. Reg. at 21945.

[41] *See* David Laibson, Lecture at the American Economic Association, "The Psychology and Economics of Household Investment Decisions" (Jan. 2010), available at http://scholar.harvard.edu/files/laibson/files/thepsychologyandeconomicsofdefaults_laibsonaealecture3.pdf ("Automatic enrollment as the default dramatically increases 401(k) participation, and those hired under automatic enrollment tend to stay at the default levels."); Gabriel D. Carroll, James J. Cho, David Laibson, et al., "Optimal Defaults and Active Decisions," National Bureau of Economic Research (Jan. 2005), available at http://www.nber.org/papers/w11074.pdf; Jodi DiCenzo and Paul Fronstin, "Lessons From the Evolution of 401(k) Retirement Plans for Increased Consumerism in Health Care: An Application of Behavioral Research," Employee Benefit Research Institute, Issue Brief No. 320 at 16 (Aug. 2008), available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_08-2008.pdf. ("The favorable results of automatic-plan features have been impressive—generally more than 90 percent of automatically enrolled participants remain in the retirement plan…Automatic-service plans have effectively made retirement-plan savers out of people who had not been previously motivated by financial incentives or education.").

[42] Pension Protection Act, Pub. L. No. 109-280, § 902, 120 Stat. 780, 1033-39.

advice by permitting fiduciary investment advisers to receive compensation from recommended investment vehicles as long as it is based on a computer model or done on a level-fee basis.[43]

We believe that the continued ability to include investment alternatives in educational materials is critical to making savings easier. If information regarding specific investments is considered "investment advice", the information, in most cases, will not be provided. Without the additional information, investing will be made significantly more time consuming and difficult. Many investors may be disincentivized from saving and investing for retirement because it is simply too hard.[44]

In our view, the DoL should include a carve-out for education to Plans that is consistent with what is currently permitted under DoL Bulletin IB 96-1.[45] Under this bulletin, asset allocation models can provide examples of products that meet an allocation without constituting investment advice. These examples are accompanied by qualifiers telling the investor that (A) other investment alternatives with similar risk and return characteristics may be available under the plan and identifying where information about those alternatives can be obtained, and (B) in applying particular asset allocation models to their individual situations, participants should consider their other assets, income and investments. The DoL has not demonstrated that IB 96-1 has resulted in misinformation or harmed investors in any way. This information bulletin is not "outdated", but was specifically designed to address the shift to participant directed defined contribution plans.

At a bare minimum, the DoL should permit lists of available alternative funds and other investments by asset class without highlighting any one particular investment. Such a breakdown of available investment options under a participant directed defined contribution plan is already required by the participant disclosure rules in the DoL's rule 404a-5.[46] Such lists of investments can be accompanied by appropriate disclosures, including statements that the products listed are just examples, information about where additional products can be found, and notes that the listed products are not the entirety of what is available and that other products may be similar or superior.

If the DoL fails to broaden the Proposal's definition of education, that failure could have the further unintended consequence of chilling education provided by asset managers and other financial services firms to the public. To illustrate, asset managers, including BlackRock, often make model portfolios and investment tools available to the general public for free on their

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43 DoL Fact Sheet, Final Rule to Increase Workers' Access to High Quality Investment Advice (Oct. 2011), available at http://www.dol.gov/ebsa/newsroom/factsheet/fsinvestmentadvicefinal.html.

44 Investors are more likely to save when saving is made easier. See David Laibson, Lecture at the American Economic Association, "The Psychology and Economics of Household Investment Decisions" (Jan. 2010), available at http://scholar.harvard.edu/files/laibson/files/thepsychologyandeconomicsofdefaults_laibsonaealecture3.pdf (highlighting the impact of automatic enrollment on making investing easier); Sheena S. Iyengar, W. Jiang and Gur Huberman, "How Much Choice Is Too Much: Determinants of Individual Contributions to 401(k) Retirement Plans," in Pension Design and Structure: New Lessons from Behavioral Finance 83-95 (Olivia S. Mitchell & Stephen P. Utkus eds., Oxford Univ. Press 2004), working paper available at http://www.archetype-advisors.com/Images/Archetype/Participation/how%20much%20is%20too%20much.pdf (Study showing that if a plan offered more funds it depressed the probability of employee 401(k) participation at a rate of, for every ten funds added, a 1.5 to 2 percent drop in participation. Where only two funds were offered, participation rates peaked at 75 percent, but when 59 funds were offered, participation dipped to a low of approximately 60 percent.).

45 DoL, Interpretive Bulletin 96-1; Participant Investment Education, 61 Fed. Reg. 29586, 29 C.F.R. § 2509.96-1 (June 11, 1996), available at https://www.dol.gov/ebsa/regs/fedreg/final/96_14093.pdf.

46 29 C.F.R. § 2550.404a-5(d)(i). We note that the inability to list investment options as education creates a concern that a Plan sponsor cannot provide the required rule 404a-5 disclosures in proximity to educational information or tools without creating a risk that the educational information will turn into investment advice. We do not believe the DoL intended this result.

websites. These investment tools and models are generally "simpler" than what is provided to financial intermediaries. They are designed to provide investment education and to make the asset allocation process easier for investors, without regard to whether those investors are Plans. Asset allocation models can simplify the diversification process in a cost-effective manner by providing sample portfolios based on risk profiles, investing horizons, etc. for hypothetical investors. These models are not specifically tailored or targeted to any particular investors. Similarly, an investment tool is simply a calculator that provides assistance to potential investors to sort through potentially appropriate investments that may meet their needs, not an individualized solution. Although the model or tool provider does not charge a fee for the service, there is the possibility of indirect compensation to the asset manager if the investor invests in any of the investment funds or other products that are referenced in the model or tool.

As described above, because of the breadth of the definition of "investment advice", we are concerned that the output of these tools could be construed as a recommendation that is "directed to" or "individualized to" the user, which may or may not be a Plan. In the context of publicly available models and tools, where the model and tool provider has no information regarding the identity of the user or whether the user is even a Plan, we believe that the use and output of the tool is not advice. The information is purely educational. BlackRock urges the DoL to modify the Proposal's definition of education to continue to permit the provision of information on investment solutions, consistent with IB 96-1. This would avoid the unintended consequence of considering publicly available investment models and tools fiduciary investment advice to Plan and non-Plan users. If the DoL fails to make this change, these services will likely simply be discontinued or will be provided only to a more limited extent or for a fee. This will harm all investors, including Plans.

Even if the DoL is concerned about providing specific fund examples directly to IRAs, IRA owners, or plan participants and beneficiaries, it should, at a minimum, permit such information to be provided to plan sponsors. Plan sponsors need – and are requesting from their asset managers – information and education regarding all aspects of the establishment and maintenance of their plans, including alternative plan designs, how to increase savings levels and improve retirement outcomes for their employees, and custom glidepath alternatives for target date products. For these conversations to be meaningful and helpful to the plan sponsor, the asset manager needs to be able to discuss not only asset allocation and diversification but also different investment options available under the plan and how they may help the plan sponsor improve retirement outcomes for its employees.

VI. Suggested Modifications/Clarifications to the Counterparty Exception

A. *Services to Plans or Plan Asset Vehicles.* The "counterparty" exception in Section (b)(1) addresses some industry concerns with the 2010 Proposal that financial institutions could inadvertently be considered "fiduciaries" if they make investment suggestions that are incidental to providing, or in connection with offering to provide, other services to a Plan. However, it still contains some ambiguity and is too narrow to address industry concerns that a revised definition of fiduciary could disrupt ordinary market activity. The issue is caused by the use of the term "counterparty" – service providers acting as agents do not generally consider themselves counterparties –; the undefined term "bilateral contract", and the absence of an express reference to services. For example, any incidental recommendation made by a dealer regarding how to structure a swap would be covered by the "counterparty" exception. However, as drafted, the exception is too narrow to cover a number of transactions or activities engaged in by Plans or their investment advisers on a routine basis. For example, the exception does not cover services provided to a Plan on an agency basis, such as services provided by a futures commission merchant. Likewise, the exception on its face does not cover situations in which a large plan hires a firm to provide comprehensive data analytics, modeling and risk analysis, raising the question whether the output generated by those analytics could, in some circumstances, be construed as investment advice. We do not believe that the DoL intended to limit the exception to exclude such service providers. The fact that a service provider is acting on an agency, rather than a principal, basis and thus is not in the true sense a counterparty, should not affect the availability of the exception. To correct this omission, we suggest that the text of the exception be revised to specifically refer to counterparties and service providers to Plans and to cover "an arm's length sale, purchase, loan, *provision of services*, or bilateral contract…."

B. *Asset Manager Marketing and Sales Activities.* We also urge the DoL to either modify the counterparty exception or to create a new exception to make clear that an asset manager who is "selling" her fiduciary services or products (i.e., engaging in marketing, responding to requests for proposals or other routine sales activity) should not be considered to be providing investment advice when she is marketing her products or services. In the Preamble, the DoL stated that "[t]he overall purpose of [Section (b)(1)] is to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of proposed deals", which may include incidental advice.[47] In that situation, "[b]oth sides of such transactions understand that they are acting at arm's length, and neither party expects that recommendations will necessarily be based on the buyer's best interests. In such a sales transaction, the buyer understands that it is buying an investment product, and not advice about whether it is a good product, from a seller who has opposing financial interests. The seller's invitation to buy the product is understood as a sales pitch, not a recommendation."[48] Based on this language in the Preamble, we believe that the DoL intended to provide a broad exclusion for sales activity targeted to a large Plan or sophisticated asset manager.

However, the language in Section (b)(1)(i) creates concern that such sales activity may not be covered by the exception. If such activities were considered investment advice, that would have a chilling effect on asset managers being able to explain their products, services and expertise and respond to questions raised by a Plan fiduciary, as part of its diligence process of determining who to engage or as part of ongoing discussions on how to improve Plan design and participant savings and engagement. As discussed above, the carve-out does not expressly cover the provision or proposed provision of services. Further, Section (b)(1)(i)(B)(3) and (b)(1)(i)(C)(3), can be read to exclude all sales and marketing of advisory services or products from the exception. They condition the exception on the counterparty not receiving "a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction."[49] The asset manager would not receive a fee for marketing and sales efforts, but it would receive an investment management or advisory fee if and when it is hired as an investment manager or the Plan purchases an investment product, such as shares of a mutual fund. We believe that the purpose of the conditions in Sections (b)(1)(i)(B)(3) and (b)(1)(i)(C)(3) is to preclude use of the exception when someone has been engaged to provide fiduciary services, but not prior to such

[47] 80 Fed. Reg. at 21941.

[48] *Id*.

[49] 80 Fed. Reg. at 21957.

engagement or sale. A different conclusion would render it virtually impossible for an asset manager to sell any of its products or services. One way to resolve this issue would be to revise Sections (b)(1)(i)(B)(3) and (b)(1)(i)(C)(3) to read:

> Such person –
>
> (A) Does not receive any separate fee or other compensation directly or indirectly from the plan, or plan fiduciary with respect to any advice provided in connection with a proposed provision of investment advice or purchase of an investment fund, security or other Plan investment (as opposed to compensation received after such person is hired to provide investment management or advisory services or the plan or plan fiduciary makes an investment); or
>
> (B) the person does not receive a fee or other compensation for the provision of investment advice (as opposed to other services) in connection with the transaction or proposed transaction.

Another unintended consequence is that the exception can be read to draw a distinction between incidental advice that may be provided in connection with the sale of shares of a mutual fund and a sale of investment advisory services. The sale of the mutual fund is arguably covered by the exception,[50] as this is a purchase or proposed purchase by a Plan of a product (shares of a mutual fund). However, it may not pick up a sale by the same asset manager of her services as an investment manager, because Section (b)(1) does not include an express reference to services. We do not believe that the DoL intended to distinguish between the sale of a mutual fund investment product and asset management services and, as outlined above, the exception should be clarified to cover services specifically.

With respect to sales and marketing of investment advisory services and products, the DoL could alternatively include a separate exception which provides (and which, as explained below would apply regardless of Plan size):

> (b) *Carve-outs – investment advice…*
>
> The person is marketing investment advisory products or services to, responding to a request for proposal for, or engaging in other sales, support or promotional activity with respect to, a plan fiduciary or IRA owner who is independent of such person and who exercises authority or control with respect to the management or disposition of the plan's or IRA's assets, if, prior to engaging in such sales or marketing activity, such person:
>
> (1) Has a reasonable basis to believe that the independent fiduciary exercises authority or control with respect to the management or disposition of the employee benefit plan's or IRA's assets;
>
> (2) Fairly informs the independent fiduciary that it is seeking to market or sell its products and services and the nature of the person's financial interest in the transaction; and
>
> (3) Does not receive any separate fee or other compensation directly or indirectly from the plan, plan fiduciary, IRA or IRA owner with respect to any advice provided in connection with a proposed provision of investment advice or purchase of an investment fund, security or other investment (as opposed to compensation received after such person is hired to provide investment

50 We note that there is some concern regarding whether Section (b)(1) of the Proposal applies to sales of mutual funds, as it is not clear, in all cases, who the counterparty would be and some mutual funds are sold on an agency basis.

management or advisory services or the plan, plan fiduciary, IRA or IRA owner makes an investment).

C. *Carve-Out for Sales and Marketing Should Not Be Limited to Large Plans and Sophisticated Fiduciaries.* BlackRock does not believe that the carve-out for sales activities should be limited to large Plans and sophisticated asset managers. As described above, small employers and individuals are the groups that are in the greatest need of establishing Plans, increasing savings and wiser investing. Rather than discouraging marketing activities targeted to these groups, the DoL should be encouraging and facilitating increased marketing, education and outreach to these groups. We understand that the DoL may be concerned about broker-dealers disclaiming fiduciary responsibility, but the solution is not to subject marketing and sales activity to fiduciary status and require compliance with BIC for retail investors. To provide additional protection for small Plans, including IRAs, the exception could require a very clear disclosure (not in fine print or buried at the end of television advertising) that materials are "sales" and "marketing materials" that do not purport to be fiduciary advice, are not individualized and may not be appropriate for a particular individual. The materials could also include a suggestion that the person could contact a broker-dealer or investment adviser to obtain advice regarding whether the service or product would be appropriate for a person's circumstances.

D. *Consultants and Other Fiduciaries.* The counterparty exception should be broadened so that it is available to consultants and other financial intermediaries who acknowledge fiduciary status and act as an ERISA investment advice fiduciary with respect to at least $100 million in Plan assets. Smaller plans often hire investment consultants to act on their behalf. Some of these consultants many not actually manage Plan assets, but may be highly experienced, knowledgeable and sophisticated about ERISA and financial products and services for Plans. The carve-out in Section (b)(1) should be available where a Plan is represented by a sophisticated fiduciary who provides "advice" within the meaning of Section 3(21) of ERISA, but may not have discretion to manage plan assets, within the meaning of Section 3(38) of ERISA.

E. *Expand Counterparty Exception to Include Pooled Funds.* Section (b)(1) is limited to counterparties to an "employee benefit plan (as described in section 3(3) of the Act.)"[51] To the extent relevant, the exception should also apply with respect to pooled vehicles that are considered "plan assets" within the meaning of Section 3(42) of ERISA, provided that the pooled vehicle is managed by an independent plan fiduciary that has responsibility for managing at least $100 million in Plan assets. There is no reason to exclude these pooled products.

F. *Eliminate Unnecessary Burdens of Diligence Requirements in the Counterparty Exception*. We urge the DoL to modify the requirement in Section (b)(1)(i)(B)(1) that a counterparty obtain a written representation from the independent plan fiduciary before the counterparty or service provider is engaged to provide services to the Plan.[52] Obtaining such an advance written representation presents timing challenges and is particularly unworkable in the context of marketing and sales activities where a representation would be required from a potential client before the counterparty or service provider can even present her products or

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[51] 80 Fed. Reg. at 21957

[52] We believe that the requirements of Sections (b)(1)(i)(B) and (C)) should be eliminated in their entirety for sales and marketing activities, including activities directed to smaller Plans and IRAs. As noted in the text, we believe that there should be a broad sales exception applicable to smaller Plans and IRAs to facilitate increased adoption of these Plans and higher savings levels. However, to the extent the DoL does not agree, we are commenting on the impracticality of the advance written representation requirement.

services. The DoL could instead impose requirements more in line with Section (b)(1)(i)(C). Specifically, the counterparty could rely on the most recent Form 5500 Annual Return/Report for purposes of satisfying the 100 or more participant requirement (with no need to check more frequently than annually).

G. *Section (b)(1)(B)(4) should be deleted*. The requirement that the service provider "[k]nows or reasonably believes that the independent plan fiduciary has sufficient expertise" to evaluate a transaction or determine its prudence is neither workable nor necessary. The broad and vague language will make it difficult for the person to make a determination regarding the sophistication of the plan fiduciary. Further, a particular plan fiduciary may be sophisticated with respect to some products, but not with respect to others. In addition, where a transaction is proposed, it will not generally be possible to obtain advance written representations. We believe that the DoL's core objective is to ensure that service providers do not take advantage of their clients and that compliance with the FINRA Rule 2111 suitability standards that would attach to a particular communication should provide sufficient protection.

With respect to Section (b)(1)(i)(C)(1), we urge the DoL to clarify that reviewing Forms 5500 or obtaining representations regarding the value of assets under management is not required, but represent examples of information sufficient to verify sophistication. A financial services firm may determine that other information is sufficient.

VII. Suggested Expansions to the Platform Exceptions to Facilitate Adoption of Defined Contribution Plans

All employers, in particular small employers and individuals should be encouraged to set up Plans for their employees and the DoL should make it simple for them to do so. To achieve that goal, we urge the DoL to expand Sections (b)(3) and (4) of the Proposal to include IRAs. These platform exceptions should also be broadened to include "guidance" in the context of establishing a Plan and an investment menu. Further, the exceptions could be expanded to include a specific "safe harbor" for assistance in connection with establishing a Plan. The exception could provide that a financial services firm may provide assistance to a plan sponsor in establishing a participant directed defined contribution plan without fiduciary status attaching, subject to the following: (a) the plans offered (i.e., standardized form simple 401(k)) should make available sufficient investment options for the plan to be able to qualify under Section 404(c) of ERISA, including investment options that could qualify as QDIAs; (b) information on investment options would include objective criteria (e.g., expense ratios, fund size and asset type, performance against benchmarks); (c) overall compensation must be reasonable; and (d) the plan sponsor receives disclosure consistent with 408(b)(2) of ERISA. A similar concept would apply to IRAs, Simplified Employee Pensions ("SEP") and Savings Incentive Match Plan for Employees ("SIMPLEs"). As an alternative, and as discussed in Section IX F below, this concept could be included in a streamlined exemption.

VIII. Valuation

The Proposal is generally responsive to the industry's concerns with the 2010 Proposal's treatment of "valuation" as investment advice. The exception in Section (b)(5) of the Proposal covers regular and ordinary course valuations provided to pooled investment products in which a Plan may invest. However, it does not include statements of value provided to separately managed accounts on an ongoing basis, including "unitized"[53] separately managed accounts or funds where there may be a sole shareholder or owner. The exception also does not make clear that values provided to Plan participants, beneficiaries or IRA owners on an ongoing basis should not be considered investment advice. The Proposal should be revised to state that all non-transaction based valuations provided in the ordinary course of business (including, but not limited to, net asset value calculations provided for purposes of processing a previously placed purchase or redemption order), are excepted from the definition of investment advice. We believe this was the DoL's intent.

VIII. Clarify that the Proposal Does Not Expand the Statutory Premise that a Person is a Fiduciary Only "To the Extent" that She Engages in Fiduciary Conduct

Under ERISA a person is a fiduciary "to the extent" she provides any of the services or performs any of the functions specified in the statute.[54] While we believe the DoL intended to fully incorporate this basic statutory premise in the Proposal, it should be clarified to reflect this concept. In particular, the exceptions in Section (b) do not apply to a person who "represents or acknowledges that it is acting as a fiduciary within the meaning of [ERISA] with respect to advice described in paragraph (a)(1)". Section (a)(2)(ii) should be clarified so that a carve-out is unavailable only where the representation or acknowledgement of fiduciary status pertains to the specific assets and transaction or series of transactions involved.

Specific Comments on Proposed Best Interest Contract Exemption and the Proposed Amendments to and Proposed Partial Revocation of PTEs 86-128 and 75-1 (RIN 1210-ZA25) (Application Number D-11712, D-11327)

IX. The Best Interest Contract Exemption Will Work Against Our Shared Goal to Improve Retirement Outcomes for All Americans

A. In General. The DoL has proposed BIC as its solution to preserve existing market practices.[55] BlackRock agrees with the DoL that a broad exemption that enables maintenance of existing market structures should help facilitate cost effective investment advice. However, the burdens and conditions imposed by BIC may render the DoL's effort ineffective. The disclosure obligations are so burdensome that Financial Institutions may decline to use BIC and, if they do, individuals will be overwhelmed with detailed information, which behavioral economists have concluded "freezes" investors into making no decision.[56] Further, the impartial conduct standards need greater clarity and specificity to accommodate different compensation arrangements. Plan service providers are not accustomed, and will have difficultly adapting, to a "principles-based" exemption, rather than the traditional proscriptive conditions, particularly considering the significant potential liability for breaching their fiduciary obligations or engaging in a prohibited transaction.

53 A "unitized" separate account is a separate account where the holdings are divided into units, and investors hold "units" in the separate account. The concept is similar to holding of shares in a fund, but there is no "vehicle" that issues shares. A separate account may be "unitized" for accounting or cash management purposes.

54 ERISA, § 3(21).

55 Capitalized terms "Financial Institution" and "Adviser" in this section have the meanings ascribed in the Notice of Proposed Class Exemption – Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960.

56 *See* Julie R. Agnew & Lisa R. Szykman, "Asset Allocation and Information Overload: The Influence of Information Display, Asset Choice, and Investor Experience," Journal of Behavioral Finance (June 7, 2010) available at (finding that when people, particularly those with a low level of financial knowledge, suffer from information overload they take the path of least resistance, the "default option" because they withdraw from the decision-making process).

In our view, if BIC is not significantly modified and the DoL does not provide additional specificity, the impact could be a significant disruption of market structures – the opposite of the intended effect. If BIC is used at all, it may only be available for a narrow set of products, with respect to which the Financial Institution determines compliance is possible. Many Financial Institutions will not use BIC, but will move to one or more of the following: (A) shift Plans to more costly asset-based fee programs (even where a Plan has no intention to engage in regular trading); (B) require Plans to pay an upfront fee for advice (similar to the U.K. model); (C) if adopted, advise Plans to invest in the products covered by a "low-cost, streamlined exemption," regardless of whether those investments are in the best interests of the Plan; or (D) decline to provide any advice to Plans.

B. BIC Disclosure Obligations. We are concerned that the comprehensive disclosure obligations imposed on Financial Institutions and Advisers are either not workable or so costly to implement as to render them impracticable. BlackRock, as an adviser to and sponsor of mutual funds, is a payer of the various types of fees referred to in Section III of BIC, including 12b-1 fees, sub-transfer agency and revenue sharing. Our payment and billing arrangements differ among financial intermediaries and products. Considering the arrangements we have in place today, we believe that it would not be possible for Financial Institutions to sort, consolidate and disclose the required information (e.g., "all compensation received by the Adviser and Financial Institution")[57] without massive and costly changes to their infrastructure. Even if the Financial Institution did overhaul its infrastructure to comply, the costs would likely be passed through to Plans.

As an alternative, we urge the DoL to require only more limited initial disclosure, consistent with the requirements of Section 408(b)(2) of ERISA, and not to require Financial Institutions to send out annual updates to Plans, unless there are changes to the Financial Institution's or Adviser's compensation that will result in direct or indirect increases in costs to the Plan. Ongoing basic information regarding the Financial Institution's investment programs for Plans and potential investment options can be provided through the Financial Institution's website. The website disclosure should not include the detail suggested in Section III(b) of BIC with respect to each Asset in which a Plan could invest, but rather should include general information (including comparison information) regarding different programs and services, and how the Financial Institution and Adviser are compensated in connection with those programs (e.g., 12b-1 fees, commissions paid by Plan, revenue sharing from investment fund adviser, distributor or sponsor) together with links to fund prospectuses or other documents that would include additional information.

C. Impartial Conduct Standards Need to be Revised to Accommodate the Different Compensation Practices Applicable to Different Products and Should Include a "Safe-Harbor". In addition to making the disclosure requirements more practical for both the investor and industry, the "impartial conduct standards" need to be modified to expressly sanction different fee structures and levels for different product types. Under existing market structures, different product types have different compensation structures. For example, an Adviser may be compensated for advice with respect to purchase of an exchange traded fund through commissions and be compensated with respect to the purchase of a mutual fund through revenue sharing or 12b-1 fees. The different nature of the products would almost certainly result in different levels of compensation. However, based on the limited examples in the Preamble, there is concern that the only viable way to comply with BIC in many cases is fee

[57] 80 Fed. Reg. at 21985.

offsetting or leveling, at least at the Adviser level. Any attempt to level or offset fees for these different products could force the Plan into a more expensive "asset-based" fee program or severely limit the products available.

The suggestions below should help ensure that Financial Institutions and Advisers can provide necessary advice to invest in the strategy or product that is most likely to enable the Plan to achieve its investment objective without fear that recommendation of a higher priced service or product may be viewed as impartial.

1. Safe Harbor Based on "Best Interest" Factors

The Preamble states that "neutral" factors could justify differential payments and cites the amount of time and expertise involved in providing advice as appropriate neutral factors.[58] We suggest that the DoL expand on this concept and make clear that the Financial Institution and Adviser may take into account appropriate, *objective* factors in making an investment recommendation, even if that recommendation results in higher compensation to the Adviser. These factors include the Plan's investment objective (e.g., stable income or growth), the nature of the product (e.g., actively managed vs. index mutual funds or exchange traded funds, equity vs. fixed income products, asset allocation mutual funds, etc.), investment performance of the product, reputation of the asset manager, level of service provided by the Financial Institution or Adviser (including services such as recordkeeping and omnibus accounting that may be necessary to the operation of the Plan), diversification, and overall cost to the Plan for implementing its investment strategy. It should be permissible for an Adviser to select an actively managed mutual fund that may result in higher compensation to the Adviser than an index exchange traded fund (where the only compensation may be the brokerage commission) if, taking into account the Plan's investment objectives, risk and return characteristics, research, performance information, the allocation to different asset classes or products, etc., in the Adviser's good faith judgment, such investment is in the best interests of the Plan.

We suggest that the DoL adopt a "safe harbor" which expressly permits different types and levels of compensation for different product types in accordance with required new Financial Institution policies and procedures. The policies and procedures would establish controls and parameters to limit conflicts of interest (including possibly maximum fees for particular product types and services, depending on industry norms), and require the Adviser to take into account the myriad factors, such as investment performance, asset manager reputation, client investment objectives, risk profile, etc., that are relevant to complying with a fiduciary standard of care. The policies and procedures could further mandate that the Adviser receive regular training on ERISA fiduciary obligations and the requirements of the BIC policies and procedures and/or complete a "fiduciary diligence checklist" with respect to each client as a reminder and to ensure that the applicable policies and procedures are satisfied. If the DoL declines to adopt a safe-harbor, at a minimum, the Preamble should be revised to include additional examples of "impartial conduct" that expressly contemplate different levels and types of compensation and focus on the Adviser taking into account objective factors, including an individual's circumstances, investment performance of a particular product, the asset manager's reputation and other relevant factors.

[58] 80 Fed. Reg. at 21971.

2. Suggested Language Changes to Warranties

Separately, as written, Section II(d)(4) of BIC creates concern that any compensation that is not level or could otherwise be construed as creating an incentive to pick one product or service over another – even when that product or service is in the best interests of the Plan – could run afoul of the impartial conduct standards. That section provides that the Financial Institution and its affiliates may not "use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they *would tend to encourage* individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor." The phrase "*tend to encourage*" makes it virtually impossible to have differences in compensation, even where the higher priced product would be in the best interests of the client, because *any* difference in compensation could be viewed as creating some incentive, no matter how small or indirect, to recommend the higher priced product. We suggest that "*tend to encourage"* be revised to state: "*are intended to encourage*" or "*are materially likely to affect the Adviser's judgment as a fiduciary."*

D. BIC Should Be Available to All Plans Who Work through Financial Intermediaries. There is no reason to limit BIC to non-participant-directed plans that have fewer than 100 participants.[59] Plan sponsors of larger plans may want the advice of a Financial Institution and Adviser who may be paid, in part, through revenue sharing, commissions, loads or other forms of compensation that could give rise to conflicts of interest or prohibited transaction concerns. The same holds true with respect to participant directed defined contribution Plans, which may seek advice on investment options or QDIAs offered under the Plan and may desire to pay for the cost of that advice, at least in part, through payments made from the funds that are available as investment options. There is no reason to exclude these groups from being able to receive advice from a Financial Institution or Adviser, subject to the conditions of the BIC or an alternative exemption. If such Plans are excluded they would likely be unable to receive investment advice from Financial Institutions and Advisers who may be compensated through commissions or other payments from investment funds or asset managers.

E. BIC Should Not Be Limited to a Prescribed List of Assets. BIC should apply to all asset classes instead of just the enumerated assets.[60] Limitation to certain types of assets is a significant shift and counter to one of the foundational principles of ERISA, not to prohibit any specific types of investments. In our view, the limited availability of BIC to transactions involving "Assets" serves unnecessarily to limit Plan choice. BIC should further be expanded to include recommendations of managers, not only products. Financial Institutions and Advisers have many programs available to clients, including Plans, today that "refer" or "recommend" the client to an asset manager to implement a particular investment strategy. As fiduciaries, the Financial Institution and the Adviser must make recommendations that are in the best interests of Plans. There is no need to further restrict the Financial Institution and the Adviser with respect to the products or services that may be recommended to a Plan under BIC.

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[59] 80 Fed. Reg. at 21967.

[60] Currently, the DoL only recognizes the following asset classes: bank deposits, certificates of deposit, shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(l) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts, guaranteed investment contracts, and equity securities within the meaning of 17 C.F.R. § 230.405 that are exchange-traded securities within the meaning of 17 C.F.R. § 242.600. 80 Fed. Reg. at 21987.

F. Alternative Approach for Guidance and Marketing Targeted to Retail Investors. If the DoL is not willing to expand the counterparty and/or the platform carve-outs to cover marketing, sales and general guidance on Plan design and investment alternatives to smaller Plans and individuals (i.e., retail investors), BIC (or an alternative exemption) should permit marketing and guidance with respect to products and services targeted to help small employers establish Plans or individuals establish IRAs, including a SEP or SIMPLE Plan. The exemption would be subject to simpler conditions than the existing proposed BIC and use concepts included in the "platform" exceptions. The conditions would include: (a) the materials explain the different types of Plans that a small employer or individual may establish (e.g., SEP, SIMPLE, 401(k) or IRA) and the benefits and requirements for each type of Plan; (b) there would be a broad range of investment options, which would include, among others, options that could qualify as a QDIA (or similar outcome-oriented investment); (c) the investment options could not include any mutual fund share class that bears a front end sales load (e.g., A class or C class shares); (d) the Plan sponsor or individual is provided objective information (e.g., expense ratios, fund size, asset type, and comparisons to benchmarks) regarding available investment options; (e) the materials provide clear disclosure of the service provider's actual or potential conflicts of interest, including the fact that the information is being provided in connection with a proposed sale; (f) overall compensation must be reasonable; (g) the materials provide fee disclosure consistent with that required under Section 408(b)(2) of ERISA; (h) the materials comply with all applicable FINRA and SEC requirements for advertising and marketing materials; and (i) the Financial Intermediary or Adviser acknowledges fiduciary status if it is engaged by the Plan.

X. Mutual Fund Sales under PTE 86-128

BlackRock agrees that the relief previously provided in PTE 75-1, Part II(2) remains relevant and important to facilitate the availability of mutual funds as Plan investment options. However, in amending PTE 86-128, the DoL has defined "Commission" narrowly as a brokerage commission or sales load, but not a 12b-1 fee, revenue sharing payment, marketing fee, administrative fee, sub-TA fee or sub-accounting fee. Some of these fees are for services, such as omnibus accounting, that are necessary to facilitate investment by a Plan or Plan participants. While we understand the prohibition on revenue sharing in this context, we urge the DoL to continue to permit the payment of fees, such as 12b-1, administrative, sub-TA or sub-accounting fees from mutual funds to facilitate payments for services. If service fees cannot be paid, that would restrict the availability of the exemption and may preclude Plans, particularly smaller Plans, from purchasing certain mutual funds. Thus, the term "Commission" should be defined as "a brokerage commission or sales load paid for the services of effecting or executing the transaction and/or a 12b-1 fee, marketing fee, administrative fee, sub-TA fee or sub-accounting fee paid with respect to a Mutual Fund Transaction under Section I(b)."

Further, we note that the purchase of the mutual fund is not always effected on a principal, or on a riskless principal basis. Rather, the fiduciary may be acting as an agent on behalf of the mutual fund. Thus, we urge the DoL to amend Section I(b) to cover mutual fund transactions where the fiduciary acts as a principal or agent on behalf of a Plan as follows: "(b) *Mutual Fund Transactions Exemption*. If each condition of Sections II and IV…from such fiduciary, acting as principal *or agent* and to the receipt of a Commission…."

XI. Proposal for Streamlined Exemption for Products that May Qualify as a Qualified Default Investment Alternative

A. *Proposal*. The DoL requested comments regarding whether it should issue, in addition to BIC, a streamlined exemption for high-quality, low-fee products. BlackRock supports an alternative exemption that advances investor choice and facilitates the establishment of Plans, particularly by small employers and individuals. However, we caution the DoL that, unless BIC is significantly modified to make it reasonably useable, any streamlined exemption may effectively be the only exemption and lead to limitations on investor choice. In addition, an exemption that expressly favors low fee products would tend to disproportionately favor index products that track broad-based market indices, to the detriment of Plans that would be better served by investments in narrower or customized indices, actively managed funds or more complex asset allocation strategies (including asset allocation funds or strategies that may use some index funds as core building blocks). Instead of an exemption that focuses on "low cost", BlackRock supports an alternative streamlined exemption for investment alternatives that may qualify as a QDIA.[61] We believe that this outcome oriented approach is more likely to work in the best interests of Plans.

In its rulemaking under the PPA, the DoL focused on "investment alternatives that it determined appropriate for achieving meaningful retirement savings over the long-term."[62] It did not identify specific permissible investment products, rather, it described mechanisms for investing participant contributions. The intent was "to ensure that an investment qualifying as a QDIA is appropriate as a single investment capable of meeting a worker's long-term retirement savings needs."[63] BlackRock believes that was and continues to be the right approach. We urge the DoL to consider a streamlined exemption for investment alternatives that meet the following requirements:[64]

- is an investment fund, product, model portfolio or investment management service that applies generally accepted investment theories;
- is diversified so as to minimize the risk of large losses; and
- either
    - is designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures based on the participant's age, target retirement date (such as normal retirement age under the plan) or life expectancy. Such products and portfolios change their asset allocations and associated risk levels over time with the objective of becoming more conservative (i.e., decreasing risk of losses) with increasing age. An example of such a fund or portfolio may be a ''life-cycle'' or ''targeted-retirement-date'' fund or account;
    - is designed to provide long-term appreciation and capital preservation through a mix of equity and fixed income exposures consistent with a target level of risk appropriate for participants of the Plan as a whole. An example of such a fund or portfolio may be a ''balanced'' fund; or
    - allocates the assets of a participant's individual account to achieve varying degrees of long-term appreciation and capital preservation through a mix of

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61 29 C.F.R. § 2550.404c-5(e)(4).

62 72 Fed. Reg. at 60460.

63 DoL Fact Sheet, Regulation Relating to Qualified Default Investment Alternatives In Participant-Directed Individual Account Plans (April 2008), available at https://www.dol.gov/ebsa/pdf/fsQDIA.pdf.

64 *See* 29 C.F.R. § 2550.404c-5(e)(4)(i), (ii), (iii) and (vi).

> equity and fixed income exposures, offered through investment alternatives available under the Plan, based on the participant's age, target retirement date (such as normal retirement age under the Plan) or life expectancy. Such portfolios are diversified so as to change their asset allocations and associated risk levels for an individual account over time with the objective of becoming more conservative (i.e., decreasing risk of losses) with increasing age. An example of such a service may be a ''managed account."

If a fiduciary recommends a QDIA, then the additional conditions of the exemption would be limited to:

- a written acknowledgement of fiduciary status by the Financial Institution and Adviser with respect to the recommendation to purchase, sell or hold a qualifying investment alternative;
- Fee disclosure consistent with the regulations under Section 408(b)(2) of ERISA (including for Plans that are IRAs); and
- Compliance with a general recordkeeping requirement.

B. *Process.* We appreciate the DoL's effort to seek input on the potential terms and technical design of a potential streamlined exemption. We believe that, prior to issuance, the DoL needs to re-propose the streamlined exemption, including specific conditions, consistent with a formal rulemaking process. The DoL concedes that it has been unable to operationalize a streamlined exemption.[65] Section 4(a) of the Administrative Procedure Act of 1946 (the "APA") requires that a notice of proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subject and issued involved." We do not believe that the DoL's request for comment meets the requirements of the APA and it certainly does not provide commenters with sufficient detail upon which to reflect and respond. A rulemaking process that is consistent with the APA would grant the public an opportunity to provide meaningful, substantive comments after it has re-proposed the text of an exemption, and the provision of these comments coupled with DoL analysis will likely result in a final exemption that best serves investors.

XII. Request for Extension of Implementation Period (Proposal, BIC and PTE 86-128)

As proposed, the requirements of the Proposal, BIC and other exemptions would become applicable eight months after their publication.[66] The DoL acknowledges that a new rule would require "changes in business practices, recordkeeping, communication materials, sales processes, compensation arrangements and related agreements, as well as the time necessary to obtain and adjust to any additional individual or class exemptions."[67] Even taking into account adoption of BlackRock's suggestions, implementation of the massive changes required by this complex and far-reaching regulatory change will take significantly more than eight months to complete. Policies and procedures must be developed, computer systems must be overhauled, financial services firms must coordinate on compliance, contracts both with Plans and among financial institutions must be redrafted and renegotiated and disclosure materials must be prepared. BlackRock respectfully requests that the DoL permit a period of 36 months to implement compliance with the final rule.

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65 80 Fed. Reg. at 21978.

66 80 Fed. Reg. at 21950.

67 *Id*.

Conclusion

BlackRock is concerned that the Proposal, as written, undermines our shared goal of enabling Americans to "retire with dignity after a lifetime of hard work." We recommend that the DoL limit the scope of the rule and take a more targeted approach rather than move forward with an overly broad proposal that will not effectively achieve the intended objective. In addition, the DoL should recalibrate the rule to better facilitate and foster: (i) establishing retirement plans such as a 401(k) plans or IRAs; (ii) increasing levels of individual retirement savings, starting at an early career stage; and (iii) encouraging outcome-oriented investing. To enable these goals, we suggest that the DoL:

- Permit the SEC to act first to ensure that a uniform standard will apply to both pension plan and individual savings that will be used as a source for retirement income.
- Make it easier for everyone to save for retirement and to invest, particularly individuals and small employers.
    - Expand the definition of investment education to cover information regarding investment alternatives. Investors will benefit from having examples of potential investment solutions.
    - Simplify and streamline BIC so that it is usable and facilitates the provision of investment advice.
    - Promote outcome oriented investing (as was done successfully by DoL in the PPA), rather than focus heavily on low cost products.
- Narrow the definition of investment advice and clarify that model portfolios and investment tools provided through financial intermediaries are not investment advice, as they are not targeted toward any particular investor.
- Expand the exceptions so that existing market practices, such as certain marketing and sales activities and the provision of services, are not disrupted.

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We thank the DoL for providing BlackRock the opportunity to comment on the Proposal, BIC and PTE 86-128. Please contact either of us if you have any questions or comments regarding BlackRock's views.

Sincerely,

Barbara Novick
Vice Chairman

Patricia Anne Kuhn
Managing Director