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July 21, 2015

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

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Suite 400
Washington, DC 20210
Attention: D-11712 and D-11850

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

Re: Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters
ZRIN 1210-ZA25

Re: Proposed Best Interest Contract Exemption
ZRIN 1210-ZA25

To Whom it May Concern:

The Insured Retirement Institute ("IRI") is pleased to provide these comments with respect to the Department of Labor's notice of proposed rulemaking concerning the Definition of the term "fiduciary" of an employee benefit plan (the "Proposed Regulation"), the related proposed amendment to and proposed partial revocation of prohibited transaction exemption 84-24 (the "Proposed Amendment to PTE 84-24"), and the proposed Best Interest Contract Exemption (the "Proposed BIC Exemption") (collectively, the "Proposal").

About the Insured Retirement Institute

As the only national trade association that represents the entire supply chain for the insured retirement strategies industry, IRI is uniquely positioned to comment on the implications of the Proposal for manufacturers, distributors and consumers of annuity products that provide guaranteed lifetime income. IRI has more than 500 member companies, including major insurance companies, broker-dealers, banks, and asset management companies. Member companies account for more than 95% of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities around the country. IRI members therefore represent not only their own views, but also those of their clients across Main Street America.

Executive Summary

The following is an overview of our comments regarding the Proposal. We respectfully offer these comments to assist the Department in determining how to formulate a final rule that will enhance consumer protection while preserving consumer choice and access to the products and services they need to attain a financially secure and dignified retirement.

<u>Core Principles</u> (See pages 7-10)

1. Financial professionals should be held to a best interest standard when recommending investments to retirement savers. (See page 8)
2. Consumers are entitled to freedom of access to retirement income guarantees. (See page 8)
3. In the post-defined benefit plan era, the availability of guaranteed retirement income through IRA rollovers meets a critical consumer need. (See page 8)
4. Rules for annuity products must be specifically crafted to account for their guaranteed lifetime income features. (See page 9)
5. Competitive annuity markets serve consumer interests. (See page 9)
6. Consumers have a right to choose their preferred source of retirement advice, including the option to work with advice providers who are experts on proprietary products, and how their advice provider is compensated. (See page 9)
7. The Administration's public policy position in favor of access to and utilization of guaranteed lifetime income products should be advanced. (See page 10)

The Context for IRI's Comments on the Proposal: America's Retirement Income Challenge and the Need for Retirement Income Products (See pages 10-13)

1. Americans today are living longer than ever before, while access to traditional defined benefit pension plans continues to decline, creating a significant risk that many people will outlive their assets. It is critical that the regulatory environment allows consumers to access products that meet their need to protect against this increased longevity risk. (See pages 10-11)
2. Annuities are the only products available in the private market that can provide retirees and pre-retirees with a guaranteed source of income to ensure they can enjoy a financially secure and dignified retirement. (See pages 11-12)
3. Consumers who receive assistance from financial professionals save more throughout their working years, make better use of available retirement planning products and strategies, and commonly experience better returns on their investments, and therefore are better prepared for retirement than those who do not have access to retirement planning advice. (See pages 12-13)

Comments Relating to the Proposed Definition of the Term "Fiduciary" (See pages 13-28)

1. The definition of an investment advice "fiduciary" in the Proposed Regulation needs to focus more precisely on conduct that is appropriately regarded as fiduciary in nature rather than all manner of sales activities. The proposed definition would deprive retirement investors of access to information and would inappropriately limit advice sources. (See pages 15-20)
    a. The "specifically directed to" element of the Proposed Regulation will cause fiduciary status to arise as a result of ordinary advertising and marketing activities. This is unnecessary and harmful, and the phrase should therefore be removed from paragraph (a)(2)(ii) of the Proposed Regulation. (See pages 15-16)
    b. To provide predictability and certainty, both for consumers and financial professionals, the "individualized to the advice recipient" element of paragraph (a)(2)(ii) of the Proposed Regulation should be modified to read "sufficiently individualized as to form a reasonable basis for reliance by the advice recipient as a source of unbiased and impartial advice." (See pages 16-17)
    c. The "for consideration" element of paragraph (a)(2)(ii) of the Proposed Regulation is overly broad and should be changed to require that recommendations be made "for the purpose of" making investment decisions. (See pages 17-18)

d. The definition of "recommendation" as a suggestion to engage in or refrain from taking a particular course of action, as set forth in paragraph (f)(1) of the Proposed Regulation, is too broad and should be redefined as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a call to take action or to refrain from taking action." (See pages 18-19)

e. To avoid inappropriately giving rise to fiduciary status, the phrase "either directly or indirectly (e.g., through or together with any affiliate)" should be moved from paragraph (a)(2) of the Proposed Regulation to paragraph (a)(2)(i) immediately following the word "acknowledges." (See pages 19-20)

2. To ensure consumers continue to have access to guaranteed lifetime income products and related advice, an additional, generalized carve-out is necessary to accommodate sellers of financial products and services, and modifications to the proposed carve-outs are needed to accommodate reasonable and necessary business practices. (See pages 20-25)

    a. The Department should add a new carve-out from fiduciary status for a person who: "provides advice or recommendations . . . under facts and circumstances where there can be no reasonable expectation on the part of the advice recipient that the advice provider is undertaking to provide unbiased and impartial advice." (See pages 20-21)

    b. The proposed counterparty carve-out safe harbor should be broadened to apply to 401(k) plans of any size as well as participants, beneficiaries and IRA holders. (See pages 21-23)

    c. The platform providers carve-out should be available to IRAs and should clarify that merely tailoring a sub-platform to a particular marketplace segment should not be regarded as individualization rendering the carve-out unavailable. (See pages 23-25)

3. The investment education carve-out should, consistent with the current language of I.B. 96-1, permit the identification of specific investment alternatives in connection with asset allocation education and the identification of specific distribution products in connection with the provision of distribution information when accompanied by a statement that other investment products with similar risk and return characteristics and other distribution products may be available under the plan and indicating where to obtain information about those other products. (See pages 25-28)

Comments Relating to the Proposed Amendment to PTE 84-24 (See pages 28-34)

1. All fixed and variable annuities, whether registered as securities or not, are insurance products that provide guaranteed lifetime income, and therefore should be treated the same under PTE 84-24. Given the need for a level playing field for all annuities, exemptive relief should be available for all sales of both variable annuities and fixed annuities under both the Proposed Amendment to PTE 84-24 and the Proposed BIC Exemption. (See pages 28-30)
2. The definition of the term "Insurance Commission" in the Proposed Amendment to PTE 84-24 is overly narrow and should be broadened to ensure that advisers are not inadvertently prohibited from receiving customary employee benefits, such as health insurance coverage and access to an employer-sponsored retirement plan. (See page 30)
3. The Definition of the term "Best Interest" in the Proposed Amendment to PTE 84-24 is overly prescriptive and should be revised to make clear that advisers and financial institutions must always put their clients' interests first, but would not be required to completely disregard their own legitimate business interests. (See pages 31-32)
4. The Department should clarify that a recommendation to rollover a plan account balance or an existing IRA to an annuity is covered by PTE 84-24. (See pages 32-33)
5. The Department should clarify that the exemptive relief provided by PTE 84-24 is available for both the purchase of the annuity and the selection of investments under the annuity contract. (See page 33)
6. To level the playing field for annuities and mutual funds under PTE 84-24, the Department should extend to annuities the same independent fiduciary approval presumption provision that applies to mutual fund transactions. (See page 34)

Comments Relating to the Proposed Best Interest Contract ("BIC") Exemption (See pages 35-51)

1. To avoid disruptions in the availability of annuity products and their guaranteed lifetime income features to millions of retirement savers, and advice about whether these products fit their needs, the requirements in the Proposed BIC Exemption must be revised in a workable manner. (See pages 35-43)
    a. The terms of the BIC exemption should be clarified to indicate that a counter-signature on the part of the advice recipient is not needed to satisfy the condition. Advisers and financial institutions should be permitted to comply with this requirement through a unilateral agreement furnished to the advice recipient. (See page 35-38)

b. The contract timing requirement under the Proposed BIC Exemption should require the contract to be executed prior to the transaction, not prior to the recommendation. (See page 38)

c. The definition of the term "Best Interest" in the Proposed BIC Exemption is overly prescriptive and should be revised to make clear that advisers and financial institutions must always put their clients' interests first, but would not be required to completely disregard their own legitimate business interests. (See pages 39-41)

d. Given that the duty to act in a client's best interest is contained in the required contract under the Proposed BIC Exemption, the warranties required under the Exemption serve no useful consumer purpose, but expose Advisers and Financial Institutions to risks of frivolous and costly litigation, adding to the expense associated with serving retirement investors. (See page 41)

e. The "reasonable compensation" conditions of the Proposed BIC Exemption are focused on the value of services and fail to take into account the costs of annuity products' guaranteed features. Moreover, the conditions unfairly disadvantage proprietary products. For purposes of annuity product recommendations, the definition of "reasonable compensation" contained in the Proposed BIC Exemption should be conformed to the corresponding provision in the Proposed Amendment to PTE 84-24. (See pages 41-42)

f. The Adviser's and Financial Institution's agreement to comply with the Impartial Conduct Standards by delivering a Best Interest Contract should be sufficient to satisfy the conditions of section II(c) of the Proposed BIC Exemption. Violations of the Impartial Conduct Standards should not result in loss of the exemption. (See pages 42-43)

2. The Department should take steps to preserve proprietary annuity distribution models, which provide consumers with invaluable and irreplaceable sources of knowledge about annuity products and how annuities can be used to provide guaranteed lifetime income to retirees. To that end, the "Limited Range of Investment Options" requirements included in section IV of the Proposed BIC Exemption should not apply to Advisers and Financial Institutions that offer proprietary annuity products. (See pages 43-45)

3. The proposed point of sale, website, annual and ongoing information maintenance requirements impose exceedingly burdensome and expensive disclosure requirements on annuity product providers and distributors. In addition, many of these disclosure requirements are duplicative of, and in many cases conflict with, existing SEC prospectus

disclosure rules. For these reasons, the disclosure provisions should be removed from the Proposed BIC Exemption. (See page 45)

a. The point of sale disclosures required under the Proposed BIC Exemption should be made through the provision of a prospectus for registered annuity products and should be replaced by a reference to the statutory prospectus disclosure requirement. (See pages 45-47)

b. The website disclosure requirements for annuity products should be eliminated in favor of the settled disclosure regimes under applicable federal securities laws and state insurance laws. (See pages 47-48)

c. The annual disclosure requirement under paragraph III(b) of the Proposed BIC Exemption is overly burdensome, would be exceedingly costly to develop and does not advance investor interests, and should therefore be removed. (See page 49)

d. The Proposed BIC Exemption's provision authorizing public disclosure of Adviser return information will provide no meaningful benefit to consumers but will be extremely expensive to implement, and should therefore be deleted. (See pages 49-50)

4. The condition to the exemption for pre-existing transactions prohibiting additional advice following the applicability date of the regulation creates inappropriate incentives and would render the exemption worthless in practice, and should therefore be removed. (See pages 50-51)

<u>Comment on Timing of Implementation for Proposal</u>

1. The Department should extend the proposed implementation period to ensure the industry has adequate time to develop the necessary compliance processes. The proposed eight-month timeline would result in significant and harmful market disruptions. (See pages 51-52)

The Insured Retirement Institute's Seven Core Principles

A set of rules that would deprive consumers of access to guaranteed lifetime income products and the professional assistance needed to knowledgeably acquire and use those products would clearly run counter to the best interests of American working men and women. To help the Department formulate a final set of rules that avoids this result, IRI has prepared detailed comments that advance the core principles listed below.

Core Principle No. 1 *– Financial Professionals Should be Held to a Best Interest Standard When Recommending Investments to Retirement Savers*.

As noted above, IRI supports the application of a best interest standard when a financial professional provides investment advice or recommendations to plans, plan participants and beneficiaries, and IRA holders. IRI believes the vast majority of financial professionals already act in the best interest of their clients, and recent IRI research found that nearly all consumers agree.[1] The standard must be carefully crafted, however, to avoid any implication that acting in clients' best interest requires that financial professionals must completely disregard their own interests in order to recommend the "best product" (which can only be determined with any degree of certainty with the benefit of hindsight years or decades after the recommendation is made) or the cheapest product (which would prevent recommendations of higher-cost products that provide guarantees or other features many consumers want and need).

Core Principle No. 2 *– Consumers are Entitled to Freedom of Access to Retirement Income Guarantees.*

IRI believes it is in the best interests of American working men and women to have the freedom to shop the financial marketplace for annuity products and to procure a source of secure retirement income. Unfortunately, the Proposal would severely constrain individual access to annuity products based on the assumption that, "as a rule," individual workers are too uninformed to look out for their own interests.[2] IRI disagrees with the premise that all consumers should be pre-judged to be incapable of looking after their own affairs and that existing regulations do not appropriately require financial professionals to act in the best interest of their clients.

Core Principle No. 3 *– In the Post-Defined Benefit Plan Era, the Availability of Guaranteed Retirement Income through IRA Rollovers Meets a Critical Consumer Need.*

As a result of dramatic declines in defined benefit plan coverage, coupled with the fact that very few defined contribution plans provide lifetime income forms of distribution, IRI believes individual annuity purchases through IRAs are, on a *de facto* basis, the primary means, other than Social Security, through which retirees procure guaranteed retirement income.[3] IRI is concerned that the Proposal will effectively cut off access to guaranteed

[1] Insured Retirement Institute. *January 2014 Survey of Americans aged 51-67*.
[2] 80 Fed. Reg. 21942.
[3] An independent study conducted for the Department of Labor in 2011 reported that only about 1% of defined contribution plans offer a deferred annuity. By contrast almost all defined contribution plans offer the option of a lump sum distribution upon job separation, which may be rolled over into an IRA and used to purchase an annuity. The same study noted that although only about 6.1% of workers who retire with a defined contribution plan convert their account balance into an annuity "substantial additional annuitization takes place after retirement

income products for most Americans at the exact moment in history when ready access is most urgently needed.

Core Principle No. 4 *– Rules for Annuity Products Must be Specifically Crafted to Account for their Guaranteed Lifetime Income Features.*

IRI believes annuity products, by virtue of the guaranteed lifetime income and other guarantees they provide, are uniquely suited to provide the financial safety and security sought by many retirees. The Proposal fails to account for the benefits and costs associated with these guarantees. In particular, the levelized distribution compensation structures that appear to be compelled by the Proposed BIC Exemption are incompatible with well-functioning individual annuity product distribution models and would curtail the availability of those products.

Core Principle No. 5 *– Competitive Annuity Markets Serve Consumer Interests.*

IRI believes a competitive product marketplace is clearly in the best interests of retirement investors. Marketplace competition between and among manufacturers and other investment providers, and between and among affiliated and unaffiliated distributors, fosters innovations and efficiencies that advance consumer interests. IRI is concerned that the Proposal would stifle product innovation and price competition by superimposing a "value of services" compensation model that ignores the intrinsic value consumers derive from insurance guarantees of safety and security.

Core Principle No. 6 *– Consumers Have a Right to Choose their Preferred Source of Retirement Advice, including the Option to Work With Advice Providers who are Experts on Proprietary Products, and How their Advice Provider is Compensated.*

IRI believes in a best interest standard that gives consumers freedom of choice over who they receive advice from, whose product(s) their adviser may offer (i.e., affiliated or unaffiliated), how their adviser is compensated, and how their retirement savings are invested. In particular, consumers should not be denied access to advice providers who have acquired in-depth knowledge and expertise by concentrating or dedicating their practices to the products of a single company or a select group of companies. In the current regulatory framework, for example, 86% of Baby Boomers say they are better prepared for retirement as a result of their adviser's help, validating existing distribution models.[4] The conditions of the Proposed BIC Exemption include a bias that favors unlimited product

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through conversions of IRAs, often in the form of a deferred annuity." *Annuities in the Context of Defined Contribution Plans, A Study for the U.S. Department of Labor, Employee Benefits Security Administration,* Michael J. Brien, PhD and Constantijn W.A. Panis, PhD, November, 2011.

[4] Insured Retirement Institute. *Boomer Expectations for Retirement 2015*.

choice over expertise. This bias poses a threat to proprietary annuity distribution models. The proprietary distribution model emphasis on adviser training and expertise is vital to a healthy marketplace and needs to be preserved.

Core Principle No. 7 *– The Administration's Public Policy Position in Favor of Access to and Utilization of Guaranteed Lifetime Income Products Should beAdvanced.*

IRI enthusiastically supports Department of the Treasury and Department of Labor efforts to facilitate retirement savers' access to and use of guaranteed lifetime income products. [5] In particular, the Department of Labor's recent rulemaking initiative to require defined contribution account balances to be expressed not only as a lump sum amount, but also as a retirement income stream, would help transform the way Americans think about the adequacy of their accumulated retirement savings to replace pre-retirement monthly income flows.[6] If that public policy initiative is to be a success, it is essential for workers who have been newly sensitized to the importance of retirement income guarantees through their account statements to be able to meet their guaranteed income needs by purchasing annuities in the private marketplace.

The Context for IRI's Comments on the Proposal: *America's Retirement Income Challenge and the Need for Retirement Income Products*

With unprecedented growth in the number of retired Americans, the nation's retirement system is at a crossroads, and policymakers in Washington have clearly taken notice. Numerous retirement-focused bills have been introduced in Congress over the past several years, and, as noted above, the Obama Administration has been working to make guaranteed lifetime income products more widely available. The Proposal would, unfortunately, undermine these efforts.

Longevity Risk *- Americans today are living longer than ever before, while access to traditional defined benefit pension plans continues to decline, creating a significant risk that many people will outlive their assets. It is critical that the regulatory environment allows consumers to access products that meet their need to protect against this increased longevity risk.*

Americans today are at risk of outliving their assets. This longevity risk has never been greater. The rapid and continuing shift away from defined benefit plan designs in favor of a defined contribution plan model, increasing life expectancies, and rising health care costs are combining to exert significant pressures on individual consumers, in particular middle-income Americans, seeking a financially secure retirement. These challenges simply did not exist in earlier generations.

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[5] *See* Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 Fed. Reg. 5253 (Feb. 2, 2010).

[6] Advance Notice of Proposed Rulemaking, *Pension Benefit Statements,* 78 Fed. Reg. 26727 (May 8, 2013).

At their peak in 1985, over 114,000 private-sector defined benefit plans were in place,[7] but by 2012, less than 26,000 of these defined benefit plans remained.[8] Only 19 percent of private-sector workers had access to a defined benefit plan in 2014.[9]

Individuals today are living longer than in past generations. The population of older Americans continues to increase at a faster rate than the overall population. For example, between 2000 and 2010, the number of Americans aged 85 to 94 grew by 29.9 percent; by comparison the entire U.S. population increased by 9.7 percent during that timeframe.[10] Moreover, according the Society of Actuaries, a married couple age 65 has more than a 65 percent chance of one or both spouses living to age 90 and a 35 percent chance of one spouse living to age 95.[11]

As a result of these trends, today more than 30 million Baby Boomers are "at risk" for inadequate retirement income; that is, a lack of sufficient guaranteed lifetime income.[12] Just as concerning, nearly half (45 percent) of Generation Xers (ages 36-45) are "at risk" for inadequate retirement income.[13] Alarmingly, only 40 percent of Americans 30 to 49 years of age have tried to determine how much they need to save by the time they retire.[14] Meanwhile, nearly one-third of Baby Boomers cite having adequate retirement assets as a top concern, while over three-quarters said they will work for income in retirement, meaning they actually will not be retired, a goal that might not be feasible.[15] This reality underscores the critical importance of a regulatory environment that allows consumers to access products that meet their need to protect against longevity risk.

Guaranteeing Lifetime Income with Insured Retirement Products *– Annuities are the only products available in the private market that can provide retirees and pre-retirees with a guaranteed source of income to ensure they can enjoy a financially secure and dignified retirement.*

Outside of Social Security and private pensions, annuities are the sole source of guaranteed lifetime income during retirement. Only insurance companies and their distribution partners can provide these products. With proper planning and use, annuities can provide retirees with

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[7] Pension Benefit Guaranty Corporation. *Trends in Defined Benefit Pension Plans.*

[8] Pension Benefit Guaranty Corporation. *Pension Benefit Guaranty Corporation Annual Report 2012.*

[9] Bureau of Labor Statistics. *National Compensation Survey: Employee Benefits in the United States, March 2014.*

[10] United State Census Bureau. *The Older Population 2010*.

[11] Society of Actuaries. *SOA 2012 Individual Annuitant Mortality tables.*

[12] Employee Benefit Research Institute. *EBRI Notes: Retirement Income Adequacy for Boomers and Gen-Xers: Evidence from the 2012 EBRI Retirement Security Projection Model.*

[13] *Ibid.*

[14] Insured Retirement Institute*. Baby Boomers and Generations Xers: Are They on Track to Reach Their Retirement Goals?*

[15] Insured Retirement Institute. *Boomer Expectations for Retirement 2013*.

guaranteed lifetime income and the security of knowing that they will not outlive their savings. Boomers who own insured retirement products, including all types of annuities, have a higher confidence in their overall retirement expectations, with nine out of 10 believing they are doing a good job preparing financially for retirement.[16] Compared to non-annuity owners, Baby Boomers who own annuities are more likely – by more than a two-to-one ratio –to be among those who are most confident in living comfortably throughout all their retirement years.[17] Baby Boomer annuity owners also are more likely to engage in positive retirement planning behaviors than Baby Boomer non-annuity owners, with 68 percent having calculated a retirement goal and 63 percent having consulted with a financial adviser.[18]

Annuities appeal to Americans of all income levels and consumers who do not have access to other retirement savings vehicles. In fact, annuity owners are overwhelmingly middle-income. Seven in 10 annuity owners have annual household incomes of less than $100,000. Unfortunately, as we will explain in greater detail below, the Proposal would unreasonably limit consumer access to annuity products through employer-sponsored retirement plans and IRAs at precisely the point in time when access to annuities is most vitally needed.

Benefits of Working With a Financial Professional *– Consumers who receive assistance from financial professionals save more throughout their working years, make better use of available retirement planning products and strategies, and commonly experience better returns on their investments, and therefore are better prepared for retirement than those who do not have access to retirement planning advice.*

Financial professionals play a critical role in helping consumers understand the wide variety of annuity products available in the market and how best to utilize them to prepare for retirement. Americans accumulate more savings when working with a financial professional, saving twice the amount over a seven- to 14-year period.[19] Working with a financial professional has a positive influence on retirement planning behaviors including: increased usage of tax-advantaged savings vehicles, improved asset allocation, greater portfolio diversification and less-speculative investing.[20] Financial professionals have also been shown to help consumers earn 1.59 percent in additional returns, which over time leads to 22.8 percent

[16] Insured Retirement Institute. *Boomer Expectations for Retirement 2011*.

[17] Insured Retirement Institute. *Survey of Americans Aged 51 to 67*.

[18] Insured Retirement Institute: *Tax Policy and Boomer Retirement Saving Behaviors.*

[19] Claude Montmarquette, Nathalie Viennot-Briot. Centre for Interuniversity Research and Analysis on Organizations (CIRANO). *Econometric Models on the Value of Advice of a Financial Advisor*. http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf.

[20] *Ibid.*

more income in retirement.[21] Moreover, financial professionals help their clients overcome the emotional aspects of investing, which can add one percent to two percent in net return.[22]

It is also significant to note the particular benefits of retirement planning advice for women and minorities. Women are more than twice as likely to be confident in their outlook on retirement when they work with a financial professional.[23] African Americans are nearly three times more likely to save in an IRA and four times more likely to have an annuity when working with a financial professional.[24] Similarly, nearly 90 percent of Hispanic Americans contribute to a retirement plan when working with a professional, compared to only 54 percent working on their own.[25]

Many of the problematic provisions in the Proposal appear to be designed to eliminate conflicts of interest. However, recent IRI research found that conflicts of interest are not a significant concern for most retirement savers. In fact, an overwhelming majority of people indicated they are aware of potential conflicts of interest but are nevertheless highly satisfied with their relationship with their adviser and would recommend their adviser to a friend or relative.[26]

IRI's Comments on the Proposal

While both the President and leaders in Congress have recognized that positive changes are needed to help Americans be financially prepared to enjoy longer lifespans, the Proposal runs contrary to this goal. By making the revisions IRI recommends in this comment letter, DOL can adopt a rule that imposes a best interest standard of care without the harmful consequences that would result from the current Proposal.

I. Comments Relating to the Proposed Definition of the Term "Fiduciary"

The Proposed Regulation would significantly expand the circumstances under which a person would acquire fiduciary status under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and section 4975 of the Internal Revenue Code of 1986, as amended ("Code"), as a result of giving investment advice to a plan, its participants or beneficiaries, including an individual retirement account ("IRA"), for a fee or other compensation.

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[21] Morningstar. *Alpha, Beta, and Now…Gamma*. http://corporate.morningstar.com/ib/documents/PublishedResearch/AlphaBetaandNowGamma.pdf.
[22] Vanguard Research. *Putting a Value on Your Value: Quantifying Vanguard Advisor's Alpha*. http://www.vanguard.com/pdf/ISGQVAA.pdf.
[23] Prudential Financial, Inc. *Financial Experience & Behaviors Among Women: 2014-2015 Prudential Research Study*. http://www.prudential.com/media/managed/wm/media/Pru_Women_Study_2014.pdf.
[24] Prudential Financial. *The African American Financial Experience*. http://www.prudential.com/media/managed/aa/AAStudy.pdf.
[25] Prudential Financial. *Hispanic Americans On the Road to Retirement*. http://www.prudential.com/media/managed/Hispanic_Retirement_FINAL_3-19-08.pdf.
[26] Insured Retirement Institute. *January 2014 Survey of Americans aged 51-67*.

IRI supports the Department's efforts to assure that the term "fiduciary" clearly includes those relationships that are appropriately regarded as fiduciary in nature and clearly excludes those that are not. Moreover, IRI is supportive of applying a "best interest" standard of care to those relationships that involve recommendations of financial products.

However, following careful evaluation and discussion by our membership, we are extremely concerned that the Proposed Regulation inappropriately characterizes as fiduciary in nature a broad spectrum of financial marketing and sales activities where no reasonable expectation can exist that an advice provider has been engaged by an advice recipient to act as an unbiased and impartial source of recommendations under a legal obligation to disregard its own interests as a seller of investment products or asset management services. Simply put, IRI believes annuity distributors should be permitted to recommend products they believe are in an advice recipient's best interest without necessarily triggering fiduciary status by virtue of having made such a recommendation. A fiduciary standard that requires advice providers to completely disregard their own interest in earning compensation is inappropriate, overly burdensome, and frustrates the Administration's stated policy goals of increasing access to and utilization of guaranteed lifetime income products.

Annuity providers and investment managers engage in a number of activities that simply should not be considered "advice" that would give rise to fiduciary status within the ambit of this rulemaking. According to a recent study conducted for IRI by Deloitte & Touche (a copy of which is attached as Appendix 1 to this letter), this significant expansion of the definition of "fiduciary" will create "creates operational risk considerations and obligations that may cause insurers to restrict or end certain types of communications, products and services that consumers rely on to plan for their financial security in retirement."[27] The following are just a few examples of activities engaged in by our members that do not reasonably give rise to a fiduciary relationship yet appear to be captured under the Proposed Regulation and would likely have to be discontinued if the Proposal is adopted without the modifications recommended in this letter:

- giving a mere factual description of the features of an annuity product, such as an immediate fixed annuity or a deferred variable annuity, and explaining how the product can meet certain needs;
- responding to a Request for Proposal by submitting a description of a product that may be a fit for the needs of a plan, including a sample fund line-up;
- answering questions from plan participants about the operation of an "in-plan" guaranteed lifetime income product and its available features;

[27] Deloitte & Touche LLP. *Anticipated Operational Impacts to the Insured Retirement Industry of the Department of Labor's Proposed Rules for the Definition of Fiduciary Advice*.

- proprietary product "wholesaling" activities where representatives of an annuity product provider meet with financial professionals – either one-on-one or in group sessions – to explain the features of the product and to conduct training;
- providing a brochure to a prospective purchaser describing the features of one or more annuity products available for sale through a registered broker-dealer;
- presenting to a prospective annuity purchaser a list of investments that are available under a variable annuity product;
- explaining basic asset allocation concepts and providing examples of how one or more particular annuity products could be used to implement an individual's asset allocation plan;
- counseling a recent retiree about his or her likely income replacement needs and the features available under various annuity products that could help meet those income replacement needs;
- chatting with friends or family about what an advice provider does for a living and expressing his or her professional enthusiasm for and confidence in the products he or she makes available; and
- the referral of a client by one financial professional to another who specializes in annuity products and has specialized knowledge and training in annuity features.

We offer the following suggestions on how the proposed definition of fiduciary should be changed in order to more properly distinguish conduct that is fiduciary in nature from ordinary sales and marketing activity which is not.

A. *General Comment on the Definition of "Fiduciary"*: The definition of an investment advice "fiduciary" in the Proposed Regulation needs to focus more precisely on conduct that is appropriately regarded as fiduciary in nature rather than all manner of sales activities. The proposed definition would deprive retirement investors of access to information and would inappropriately limit advice sources.

Under the Proposed Regulation, fiduciary status arises virtually any time a communication is made that is in any way *suggestive* of a plan investment or investment management activity and is either *individualized* for or *specifically directed to* an advice recipient *for consideration* in making investment or management decisions. Moreover the Proposed Regulation would have fiduciary status attach at the time a recommendation is made, even in circumstances where no business relationship has been established.

1. *Specific Comment*: The "specifically directed to" element of the Proposed Regulation will cause fiduciary status to arise as a result of ordinary advertising

and marketing activities. This is unnecessary and harmful and the phrase should therefore be removed from paragraph (a)(2)(ii) of the Proposed Regulation.

The mere fact that a suggestion is "specifically directed to" a plan, participant or IRA owner is simply not relevant to the question of whether a fiduciary relationship has been created. Institutions that offer products and services in the retirement plan marketplace generate specifically directed communications every day in the course of advertising and marketing to existing and potential clients. Specifically directed communications are vital to the functioning of the financial marketplace. Without these kinds of communications, plans, participants and IRA owners might never become aware of or learn about products and services that may be a fit for their needs. By the same token, providers and distributors of annuities and other financial services products require the freedom to utilize specifically directed marketing communications to identify consumers with a potential interest in purchasing those products.

In this regard, a provider or distributor of insured retirement products should be able to provide advertising and marketing materials describing the insurance products it makes available, including detailed information about the key features and pricing of these products, to retirement investors in the course of marketing its products. Such material would be delivered to a particular individual (e.g., by mail), thereby falling within the "specifically directed to" element of the Proposed Regulation. Yet it would be wholly inappropriate for generalized, albeit "specifically directed," marketing communications activities to result in the establishment of a fiduciary relationship. The same materials would be sent to hundreds if not thousands of recipients and would not be customized or tailored to the unique retirement circumstances of any particular recipient.

The mere fact that materials are mailed directly to a recipient or handed to a recipient in person should not give rise to fiduciary status where there is no customization or individualization based on the recipient. For these reasons, we request that the Department delete the "specifically directed to" element from the Proposed Regulation.

2. ***Specific Comment*: To provide predictability and certainty, both for consumers and financial professionals, the "individualized to the advice recipient" element of paragraph (a)(2)(ii) of the Proposed Regulation should be modified to read "sufficiently individualized as to form a reasonable basis for reliance by the advice recipient as a source of unbiased and impartial advice."**

In our view, a fiduciary relationship should only arise when a communication with a retirement investor is sufficiently tailored, within the context of a particular relationship, to provide a basis for the investor's reliance on that communication as an impartial and unbiased investment recommendation. Consistent with our general observation that the Proposed Regulation should clearly differentiate between relationships that are appropriately classified as fiduciary in

nature from those that are not, IRI believes the Department should modify the "individualized to the advice recipient" element of paragraph (a)(2)(ii) to more precisely specify the degree of individualization needed to give rise to fiduciary status. It could be argued, for example, that any written communication addressed to an advice recipient is "individualized" since it bears the individual's name. Moreover, it could be argued that the mere sending of a brochure describing one product versus another based on the recipient's age or level of assets qualifies as an "individualized" communication.

The preamble to the Proposed Regulation indicates that the Department is seeking to cover those relationships where the advice provider is in a position of trust with respect to the advice recipient.[28] Yet the mere naming of an individual in a communication, or picking one brochure over another, would not ordinarily be viewed as placing an adviser in a "position of trust." Likewise, the delivery of information by customer service representatives of an annuity provider in response to an inquiry, while undoubtedly individualized, does not "implicate relationships of trust and expectations of impartiality." This important concept should be clearly set forth in the language of the definition itself, and not tucked away in preamble references.

IRI feels strongly that without this important modification, all sales activity in the retirement investment space will be chilled and consumers will lose access to guaranteed retirement income products and information, in contravention of IRI's Core Principles and the Department's articulated goal of protecting the interests of plan sponsors, participants and IRA customers.

3. *Specific Comment*: The "for consideration" element of paragraph (a)(2)(ii) of the Proposed Regulation is overly broad and should be changed to require that recommendations be made "for the purpose of" making investment decisions.

The Proposed Regulation describes the delivery of recommendations "for consideration in making investment or management decisions with respect to securities or other property of the plan." The "for consideration" element of the definition sets an inappropriately low bar and should be changed.

Virtually every conversation regarding retirement investment products and services between plans, participants and IRA owners on the one hand, and professional investment providers including insurers, brokers, advisers, and managers, on the other hand, involves an exchange of information "for consideration in making investment decisions." Information may be provided

[28] *See, e.g.*, 80 Fed. Reg. 21938 (the proposal "avoids burdening activities that do not implicate relationships of trust and expectations of impartiality."); 80 Fed. Reg. 21941 ("In each instance, the proposed carve-outs are for communications that the Department believes Congress did not intend to cover as fiduciary 'investment advice' and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality.").

"for consideration" in the context of a conversation that is entirely objective and factual. On this basis, we are of the view that the "for consideration" phrase is vague and does little to help consumers or financial professionals ascertain whether fiduciary status has arisen.

We believe requiring an understanding between an advice provider and client that impartial, unbiased advice will be provided "for the purpose of" making investment decisions is consistent with the purposes of ERISA and the Department's goal to broaden the range of providers subject to fiduciary duties.

4. ***Specific Comment*: The definition of "recommendation" as a suggestion to engage in or refrain from taking a particular course of action, as set forth in paragraph (f)(1) of the Proposed Regulation, is too broad and should be redefined as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a call to take action or to refrain from taking action."**

Under the Proposed Regulation, a "recommendation" means "a communication that, based on its content, context, and presentation, would reasonably be viewed as a *suggestion* that the advice recipient engage in or refrain from taking a particular course of action." (Emphasis added.)

Again, IRI is very concerned that the range of communications that could be deemed to be "recommendations" is overbroad and that common activities related to marketing and selling will fall within the definition of recommendation even if the parties do not intend or expect a fiduciary relationship to arise.

Particularly troubling about this definition is that a communication that can be reasonably viewed as a *suggestion* to act or not act can be a "fiduciary" communication. Virtually all communications, including marketing materials, mailings, brochures, and comparative charts describing investment products, could potentially be viewed as suggestive in nature. Any advertisement might suggest that a prospective customer utilize one product or investment rather than another product or investment.

Guidance issued by the Department in other contexts recognizes the distinction between communications that are merely suggestive and those that may be viewed as an endorsement of a particular program. The Department's safe-harbor exclusion from ERISA coverage for certain group-type insurance programs offered by an employer to employees requires that:

> the sole function of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums

through payroll deductions or dues check offs and to remit them to the insurer;[29]

Under this regulation, an employer who "endorses" an insured benefit program would not be eligible for this ERISA-coverage exclusion, and would risk subjecting the program to ERISA's requirements. Moreover, an employer who "endorses" such a program within the meaning of the regulation risks becoming an ERISA fiduciary with respect to the ERISA plan created by the program.[30] Importantly, however, the Department's regulation in this context recognizes that employers can make such programs available to employees without "endorsing" them.

Similarly, FINRA guidance concerning the distinction between recommendations and non-recommendations focuses not on the existence of a mere suggestion, but on whether there has been a communication that could be viewed as a "call to action" that might reasonably influence an investor to trade a particular security or group of securities.[31] IRI believes such FINRA guidance may usefully be applied to distinguish an objective description of the features of an investment product or service (including performance and benchmarking information) from communications that constitute a "recommendation." The definition of "recommendation" should not require a provider to cease marketing its products and communicating with potential purchasers about the provider's products in order to avoid becoming a fiduciary.

5. *Specific Comment*: To avoid inappropriately giving rise to fiduciary status, the phrase "either directly or indirectly (e.g., through or together with any affiliate)" should be moved from paragraph (a)(2) of the Proposed Regulation to paragraph (a)(2)(i) immediately following the word "acknowledges."

Consistent with the approach taken in paragraph (a)(1) of the Proposed Regulation, which requires the *direct* provision of a recommendation to a plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner as one of the necessary elements that would give rise to fiduciary status, IRI believes that written or verbal agreement, arrangement or understanding element of paragraph (a)(2)(ii) should also be provided *directly* by the same advice provider providing the recommendation and by the same advice recipient receiving the recommendation described in paragraph (a)(1). IRI is concerned that the modifying language "either directly or indirectly (e.g., through or together with any affiliate)" as set forth in paragraph (a)(2) of the Proposed

[29] 29 C.F.R. § 2510.3-1(j)(3); *see also* 29 C.F.R. § 2510.3-2(d) (identical condition with respect to IRA safe harbor).
[30] The Department has issued similar guidance in the context of IRAs. 29 C.F.R. 2510.3-2(d). And, in Interpretive Bulletin 99-1 with respect to payroll IRAs, the Department made clear the circumstances under which an employer that offers employees access to a payroll deduction IRA may avoid creating an ERISA-covered pension plan. In that Bulletin, the Department clarified the circumstances under which an employer will not be deemed to "endorse" the IRA, and therefore avoid ERISA coverage. DOL Interpretive Bulletin 99-1, 29 C.F.R. 2509.99-1(c).
[31] *See* NASD Notice to Members 01-23.

Regulation could be misapplied in a manner that could give rise to fiduciary status by a direct party to a recommendation but not to the necessary written or verbal agreement, arrangement or understanding described by paragraph (a)(2)(ii).

B. ***<u>General Comment on the Carve-Out Provisions</u>*****: To ensure consumers continue to have access to guaranteed lifetime income products and related advice, an additional, generalized carve-out is necessary to accommodate sellers of financial products and services, and modifications to the proposed carve-outs are needed to accommodate reasonable and necessary business practices.**

1. ***<u>Specific Comment</u>*****: The Department should add a new carve-out from fiduciary status for a person who: "provides advice or recommendations . . . under facts and circumstances where there can be no reasonable expectation on the part of the advice recipient that the advice provider is undertaking to provide unbiased and impartial advice."**

The Department states throughout the preamble that it views as "fiduciary" in nature those investment recommendations where there is an expectation that the advice provider will provide *unbiased and impartial* advice. IRI agrees that providers who are engaged by a plan or a retirement investor (including an IRA owner) to provide advice that is loyal to the recipient and untainted by conflicts of interest, and are paid a direct or indirect fee for his or her loyalty to the interests of the consumer, should be held to ERISA's fiduciary standards.

IRI believes the Department should recognize that financial professionals who interact with plans, plan participants and beneficiaries, and IRA owners may undertake to provide advice that does not purport to be unbiased or impartial. For example, an advice provider that engages in the distribution of proprietary annuity products may work with a prospective client to identify a particular product that fits the customer's needs. The customer, who has been informed that the advice provider offers proprietary annuity products, is under no illusion that the advice provider is unbiased or impartial.

Based on the customer's lack of any expectation of receiving unbiased or impartial advice, it would be inappropriate to impose fiduciary status on such a relationship. Therefore, IRI proposes to add a new carve-out from fiduciary status that would apply where there can be no reasonable expectation that impartial advice in the client's best interest will be provided. The new carve-out would read as follows:

> The person provides advice or recommendations to a plan fiduciary who exercises authority or control with respect to the management or disposition of plan assets, or to a plan participant or beneficiary or IRA owner, under facts and circumstances where there can be no reasonable expectation on the part of the

advice recipient that the advice provider is undertaking to provide unbiased and impartial advice.

We believe structuring this as a carve-out from fiduciary status is appropriate because it would place the burden on the advice provider (rather than the recipient) to demonstrate that any expectation of unbiased advice on the part of the recipient was not reasonable in light of the surrounding facts and circumstances.

2. *Specific Comment*: The proposed counterparty carve-out safe harbor should be broadened to apply to 401(k) plans of any size as well as participants, beneficiaries and IRA holders.

The Department has expressed the view that the counterparty carve-out cannot and should not be applied to transactions involving retail investors, including small plans, IRA owners and plan participants and beneficiaries, because, "as a rule," investment recommendations to such retail customers do not fit the arm's length characteristics that the seller's carve-out was designed to preserve.[32]

IRI does not agree with the Department's determination that, "as a rule," retail customers are incapable of looking out for their own best interests by engaging in arm's length bargaining with financial service providers for favorable terms. We also note that this determination is inconsistent with the position taken by Congress in enacting ERISA § 404(c). The conclusion that all individuals and small 401(k) plan fiduciaries are so lacking in financial sophistication as to be incapable of independent thought and choice has not been adequately supported by the Department, and will deprive plans and individuals of the opportunity to shop the financial services marketplace for the investment arrangements that best fit their needs.

a. Given that ERISA imposes the same fiduciary duties on all plan sponsors, regardless of the size of their plans, limiting the counterparty carve-out to plans with 100 or more participants is arbitrary, unsupportable and should be removed.

The Department states that the "overall purpose" of the seller's carve-out 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."[33] The Department makes available a counterparty exception for transactions with all plans willing to provide a written representation from an independent plan fiduciary that it will not rely on the

[32] 80 FR 21941
[33] 80 FR 21941.

seller to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity, *unless* the plan has fewer than 100 participants.

For purposes of assessing fiduciary responsibility, the ERISA statute draws no distinction between small and other plans. ERISA commands all plan fiduciaries, regardless of plan size, to have sufficient knowledge and skill to make prudent decisions on behalf of the plan. ERISA section 404(a)(1)(B) requires a fiduciary to "discharge his duties . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like a capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[34]

Courts agree that ERISA requires plan fiduciaries to recognize when they lack the knowledge to satisfy the prudence standard of section 404(a)(1)(B), and to hire independent experts to supply the necessary expertise.[35]

By making the seller's carve-out unavailable for transactions with small plans, the Department has in essence decided to force the fiduciaries of all such plans to do business with a fiduciary adviser whether or not a fiduciary adviser is wanted or needed. Financially sophisticated fiduciaries of small plans might wish to shop the marketplace of competing products and services to find the best fit for their plan's needs, and would benefit from the price competition that such shopping activity tends to induce. IRI believes that small plans should not be constrained from arm's length bargaining with sellers where they knowingly represent their non-reliance on a counterparty for impartial investment advice.

b. The counterparty carve-out safe harbor should be available to cover sales activities with plan participants, beneficiaries and IRA owners.

The Department's bright line assumption that "[a]s a rule, investment recommendations to [plan participants, beneficiaries, and IRA owners] do not fit the 'arm's length' characteristics that the seller's carve-out is designed to preserve"[36] is simply not true in many cases.

The Proposed Regulation's blanket exclusion of individual retirement investors from the scope of the seller's carve-out is inappropriate and unnecessary in regards to individuals who would represent to the advice provider, in writing, that they have sufficient expertise to evaluate the

[34] 29 U.S.C. § 1104(a)(1)(B) (emphasis added).

[35] *See*, *e.g.*, *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) ("The trustees, being ill-equipped to evaluate the soundness of the proposed loan, failed to observe their duty to seek outside assistance."); *Harley v. Minn. Mining & Mfg. Co.*, 42 F. Supp. 2d 898, 907 (D. Minn. 1999) ("[I]f a fiduciary lacks the education, experience, or skills to be able to conduct a reasonable, independent investigation and evaluation of the risks and other characteristics of the proposed investment, it must seek independent advice."); *Liss v. Smith*, 991 F. Supp. 278, 297 (S.D.N.Y. 1998) ("In such circumstances, where the trustees lack the requisite knowledge, experience and expertise to make the necessary decisions with respect to investments, their fiduciary obligations require them to hire independent professional advisors.")

[36] 80 FR 21942

transaction being recommended and are not relying on the advice provider as a source of unbiased or impartial advice.

This approach would allow individuals interested in shopping the market for guaranteed lifetime income products to engage in discussions with advice providers on an arm's length basis, and is more consistent with the Department's stated purpose for the seller's carve-out than a blanket exclusion, which takes no account of the expectations of the individual retirement investor.

3. ***Specific Comment*: The platform providers carve-out should be available to IRAs and should clarify that merely tailoring a sub-platform to a particular marketplace segment should not be regarded as individualization rendering the carve-out unavailable.**

The platform providers carve-out under paragraph (b)(3) of the Proposed Regulation is available to any person who "merely markets and makes available .... without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property through a platform or similar mechanism" subject to the condition that such person "discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity."

As a preface to the comments that follow, IRI observes that the need for such a carve-out lends further support for our initial comment that the Proposed Regulation is over-inclusive and would capture a broad spectrum of marketing and sales activities where no reasonable expectation could exist that an advice provider has been engaged by an advice recipient to act solely in the recipient's best interest and to disregard its own interests as a seller. In this case the Department appears to have acknowledged that, in its view, the non-individualized marketing of an investment platform to plans would be included within the definition of fiduciary investment advice but for the carve-out provision.

If the provisions of paragraph (a)(1) of the Proposed Regulation retain their sweeping breadth, IRI believes it is essential for the platform providers carve-out to be modified in several important respects, as described below, to make the carve-out workable.

a. **The platform providers carve-out should be clarified and broadened to cover the mere marketing and making available of securities and other property to IRAs and similar arrangements through a platform. In this regard, the phrase "or to any plan described in section 4975(e)(1) of the Code, including an IRA" should be added immediately after the phrase "to an employee benefit plan (as described in section 3(3) of the Act)," the phrase "or to an IRA or IRA owner" should be added immediately after the phrase "the plan, its**

participants, or beneficiaries," and the phrase "or IRA owner" should be added immediately after the phrase "the plan fiduciary."

As previously noted, the mere marketing of a non-individualized platform or similar menu of investment products and choices as being available for selection by an IRA owner cannot reasonably be regarded as a basis for giving rise to a fiduciary relationship between the platform provider and the individual who is considering making use of the platform and its offerings. Yet the very presence of the platform providers carve-out implies that such a result could arise, given the sweeping nature of the Proposed Regulation's definitions. In light of that inherent difficulty, the platform providers carve-out should be broadened to cover non-individualized mere marketing efforts to *all* plans that fall within the definition assigned to that word under the Proposed Regulation, including plans described in section 4975(e)(1) of the Code.

b. The platform providers carve-out should clarify the meaning of the term "individualized needs" for purposes of that provision. Specifically, the following sentence should be added as the final sentence of paragraph (b)(3) – "For purposes of this paragraph (b)(3), the subdivision of a provider's overall investment platform into separate platform offerings for different market segments, but not for a particular plan, shall not be treated as taking into account the individualized needs of the plan, its participants or beneficiaries."

Most if not all providers of investment platforms in the marketplace offer not the sum total of all the investment products and securities that they have available, but rather various subsets of that overall investment universe; each subset is organized so as to consist of investment products that tend to appeal to a particular marketplace segment (e.g., individual IRA investors, small 401(k) plans, medium sized 401(k) plans, etc.). IRI is concerned that if not clarified, the language as proposed could be construed as requiring a provider to offer its full array of investment products to each and every investor, even though certain of those products would have little appeal to certain segments of the marketplace or be inapplicable (e.g., commingled pools in IRA context). IRI urges the Department to make the language modification as suggested above as a means of assuring the availability of the carve-out to these sorts of common platform subdivisions.

c. An annuity product that makes available a selection of securities and other investment options is functionally identical to a retirement plan platform, and therefore should itself be deemed a "platform" for purposes of the platform providers carve-out.

The Department should clarify that a variable annuity contract (whether group or individual) constitutes a "platform" for purposes of the carve-out. Variable annuity contracts ("VAs") are

offered both in the group and individual markets. Group VAs offer employees access to a number of mutual fund or separate account investment options and fixed investment options among which participants can direct their account balances during their working years as they accumulate retirement assets. The key advantage offered by VAs is that they give participants and beneficiaries the ability to convert their accumulated plan balances to lifetime income streams at retirement. A VA contract can include anywhere from tens to hundreds of different investment options. In the context of an ERISA-covered plan, the plan fiduciary selects which of the available investment options will be made available under the plan. As such, a group variable annuity contract is functionally identical to a platform of investments made available by a recordkeeper or other platform provider, but offers the added benefit of lifetime income protection through the annuitization guarantee.

Individual VAs operate identically to group VAs but are offered to individuals. These products are often offered to participants who may be considering rolling their account balances out of an ERISA plan to an IRA. Like group VAs, an individual VA contract will offer the individual access to numerous investment alternatives, including mutual funds, separate accounts and fixed options.

Under the current language of the platform providers carve-out, it is not clear that the Department intended to cover group VAs and individual VAs. With respect to group VAs, the Department should make clear that a group VA contract qualifies as a "platform" for purposes of the carve-out. Given that individual VAs function identically to group VAs, IRI believes there is no rational basis for treating group VAs offered to plan investors differently under the platform providers carve-out than individual VAs offered to participants and IRA holders. To be very clear, IRI is not suggesting that the recommendation to a participant or IRA holder of specific mutual funds or other investment options available through an individual VA contract should necessarily always be exempt from the definition of fiduciary investment advice. Rather, IRI strongly believes that making available and presenting an individual annuity contract to a participant or IRA holder, without any specific recommendations respecting the investments that are available through the individual VA contract, should fall within the platform providers carve-out. Accordingly, we ask the Department to provide this clarification by adding to the end of paragraph (b)(3) (following the additional language that IRI has proposed in section 4.b. of this comment) the following language: "the term 'platform' shall include a variable annuity contract that offers the investor access to a number of investment alternatives."

4. ***Specific Comment*: The investment education carve-out should, consistent with the current language of I.B. 96-1, permit the identification of specific investment alternatives in connection with asset allocation education and specific distribution products in connection with distribution information when accompanied by a statement that other investment products with similar risk and return**

characteristics and other distribution products may be available under the plan and indicating where to obtain information about those other products.

IRI supports the Department's proposal to include a carve-out for the provision of investment education largely modeled after the existing carve-out found in Interpretive Bulletin 96-1, 29 C.F.R. § 25.09.96-1 ("IB 96-1"). We believe that the framework reflected in IB 96-1 has led to greater access to educational information for countless individuals over the past two decades, thereby improving their chances at a financially secure retirement.

The Department proposes to modify IB 96-1 in two significant ways. One proposed modification would expand the scope of the education carve-out to cover education relating to post-retirement planning. IRI supports this proposed modification, as we strongly believe that individuals are far less likely to achieve retirement security without an adequate understanding of post-retirement needs, including longevity risk and inflation risk.

However, IRI is deeply concerned about the Department's proposal to modify IB 96-1 by including new requirements that any materials used to educate retirement investors refrain from identifying any specific investment products available under the plan or IRA. We appreciate the Department's acknowledgement that this "represents a significant change" and its invitation to comment on whether the change is appropriate.[37] In our view, the change would have the effect of dramatically reducing the value of participant education initiatives by making it exceedingly difficult, if not impossible, to impart the information needed by participants to implement their investment and distribution decisions.

A rule designed to protect retirement investors by prohibiting references to specific investment and distribution products available under a retirement investor's plan or IRA ignores the critical fact that many retirement investors specifically request such information. They do so because they find it to be helpful information to be taken into account when making decisions about how to plan for retirement. For many retirement investors – especially those retirement investors who lack financial expertise, and whose interests the Department seeks to protect in this rulemaking – the most important question that educational information can answer is, "how does this information impact *my* retirement?" This is particularly the case with distribution-related education. It is difficult, if not impossible, to educate participants and IRA owners about the features of one or more annuity products without making some reference to the provider of the annuity because the details of annuity distribution features may differ considerably from one provider to another.

The following example shows that this proposed requirement, whatever its merits in theory, would be counterproductive in practice. Consider an adviser who is speaking to a group of employees enrolled in a 401(k) plan. The presentation includes a discussion of proper asset

[37] 80 FR 21945.

allocation based on each individual participant's risk profile and time horizon. Afterwards, an employee approaches the adviser and says, "I really enjoyed your presentation. I'm just starting my career, so my time horizon is long, and I'm comfortable with some level of risk. I would like to invest my portfolio primarily in growth and income funds – say, 70% to 80% – with the rest divided between fixed income and cash. Could you please identify for me which of the investment options available in my plan fall within the growth and income class? I would like to make sure I am selecting funds that fall within that asset class."

Under IB 96-1, the adviser can answer this question by identifying one or more of the particular funds available under the plan that the participant could use to implement his asset allocation plan. As long as the adviser furnishes a statement that other investment alternatives with similar risk and return characteristics may also be available, and informs the participant where information about those alternatives can be found, the provision of this information in response to the employee's request would not render the adviser a fiduciary.

But under the Proposed Regulation, the adviser has a dilemma. The answer described above would cause the adviser to be an investment advice fiduciary, even though the "advice" consisted of factual information provided in response to a specific request from a participant. To avoid fiduciary status, the adviser would have two choices in deciding how to respond. First, the adviser could decline to provide an answer in order to stay within the education carve-out. This outcome frustrates, rather than furthers, the Department's goal of increasing retirement investors' access to educational information. The second option is for the adviser to express a willingness to answer the participant's question, but only after the participant reviews and signs a lengthy written contract that complies with the requirements of the Best Interest Contract exemption. Based on the experience of our members, we doubt seriously whether many retirement investors would proceed in the face of such a request.

In support of the proposed departure from IB 96-1, the Department states that it "now believes that, even when accompanied by a statement as to the availability of other investment alternatives, these types of specific asset allocations that identify specific investment alternatives function as tailored, individualized investment recommendations, and can effectively steer recipients to particular investments, but without adequate protections against potential abuse."[38] But less drastic solutions are readily available to address this "steering" concern.

For example, before issuing IB 96-1, the Department released an exposure draft of the rule for public comment which included a requirement that if "a model asset allocation identifies or matches any specific investment alternative available under the plan with a generic asset class, then all investment alternatives under the plan with similar risk and return characteristics must

[38] 80 FR 21945.

be similarly identified or matched."[39] Noting the difficulty that would arise if investment alternatives with multiple service providers are offered under a single plan, the Department did not include this requirement in the final version of IB 96-1. Instead, in the preamble to IB 96-1, the Department "encouraged" service providers to identify other available investment alternatives where possible.[40]

In our view, the Final Rule should be conformed to IB 96-1 by permitting educational materials to identify specific investments or products, but only if accompanied by a statement indicating other investments or products with similar characteristics may be available under the plan and identifying where information on those products and investments may be obtained.

In this respect, it is significant that "the Department believes that FINRA's guidance in this area may provide useful standards and guideposts for distinguishing investment education from investment advice under ERISA."[41] The Department has asked for comments on the discussion in FINRA's "Frequently Asked Questions, FINRA Rule 2111 (Suitability)" of the term "recommendation" in the context of asset allocation models and general investment strategies.[42] IRI has reviewed FINRA's guidance in this area, and it clearly supports the position that an otherwise educational asset allocation model does not become fiduciary investment advice merely because it identifies a specific investment alternative.

The identification of a specific investment alternative is not seen by FINRA as a determinative factor as to whether educational information about investment strategies is subject to the Suitability Rule. More broadly, FINRA's approach in this context recognizes that "recommending" a particular security is a distinct action from the mere identification of a particular security in an asset allocation model. In its answers to the questions posed in Regulatory Notice 12-25, FINRA repeatedly refers to *recommendations based on* asset allocation models.[43] Put another way, FINRA's focus is on whether a *recommendation* has been made which identifies particular securities, not on simply whether such securities have been identified.

II. Comments Relating to the Proposed Amendment to PTE 84-24

A. ***General Comment on the Proposed Removal of Variable Annuities Sold to IRAs from the Scope of PTE 84-24*: All fixed and variable annuities, whether registered as securities or not, are insurance products that provide guaranteed lifetime income, and therefore should be treated the same under PTE 84-24. Given the need for a level playing field for**

[39] 61 FR 29586, 29587.
[40] *Id.*
[41] 80 FR 21945, FN 24.
[42] *Id.*
[43] *See, e.g.*, FINRA Regulatory Notice 12-25, at Q&A-8 (Suitability Rule would not apply to a recommendation "if the recommendation is based on an asset allocation model that meets the above criteria . . . .")

all annuities, exemptive relief should be available for sales of both variable annuities and fixed annuities to IRAs under both the Proposed Amendment to PTE 84-24 and the Proposed BIC Exemption.

IRI estimates that approximately 30 million Americans own variable and fixed annuities. PTE 84-24 has for decades been the primary pathway for exempting the sale of annuity and insurance products to plans, including IRAs, and IRI believes it should continue to be available to exempt the sale of all such products. Under the Proposed Amendment to PTE 84-24, variable annuities sold to IRAs would no longer be eligible for this exemption. The Department has not provided any evidence to support the need for this disparate treatment and IRI therefore strongly urges the Department to remove the exclusion for variable annuity IRA sales from the Proposed Amendment to PTE 84-24.

The Proposed BIC Exemption is available to cover the sale of both fixed and variable annuity products to IRAs. That same even-handed treatment, which facilitates the application of uniform sets of exemptive relief conditions to sales of annuity contracts of all types, whether fixed or variable, should prevail under PTE 84-24. Given that the Proposed Amendment to PTE 84-24 includes the same "best interest" and "reasonable compensation" requirements as the Proposed BIC Exemption, IRI does not believe excluding IRA sales of variable annuities from PTE 84-24 would provide a greater level of protection for consumers. Moreover, IRI believes it is critical that exemptive relief for transactions involving the purchase of *both* variable and fixed annuity products by IRAs be available under *both* the Proposed BIC Exemption and PTE 84-24.

The Department's decision to propose this change to PTE 84-24 appears to be based on an inaccurate perception that variable annuities are nothing more than a "package" or "bundle" of mutual funds. IRI strenuously rejects this notion. Like fixed annuities, variable annuity products contain lifetime income guarantees. Those guaranteed lifetime income features, and not merely the product's investment features, are the primary attribute of the variable annuity contract. In that vein, IRI observes that variable annuity contracts have more in common with fixed annuity contracts than with mutual funds. The same concerns cited by the Department in not restricting the availability of exemptive relief for the purchase of fixed annuities by IRAs pertain equally to variable annuity products – namely, the BIC exemption's focus on expense comparisons, when applied to variable annuity products, tends to foster the false conclusion that all variable annuity contract expenses are investment related and are too expensive relative to non-insurance products. In fact, variable annuity contract expenses include both investment-related expenses and expenses associated with guaranteed lifetime income product features.

For these reasons, many financial institutions may wish to utilize PTE 84-24 as the exclusive pathway for exempting the sale of all annuity products, fixed as well as variable, to IRAs. In light

of the lifetime income guarantees available under both types of products, PTE 84-24 should be revised to allow the same exemptive relief for all fixed and variable annuity product sales.

By contrast, some financial institutions engaged in the sale of annuity and other products to IRAs may decide to develop systems and compliance support designed to support sales of products under the Proposed BIC Exemption exclusively. Since the Proposed BIC Exemption is available to cover sales of both variable and fixed annuity products to IRAs, financial institutions would have the ability to make this decision if they so choose. Our recommendation to restore variable annuities to PTE 84-24 is not intended and should not be interpreted to infer any suggestion about changing the availability of the Proposed BIC Exemption for all annuities.

B. *General Comment on Definition of Term "Insurance Commission"*: The definition of the term "Insurance Commission" in the Proposed Amendment to PTE 84-24 is overly narrow and should be broadened to ensure that advisers are not inadvertently prohibited from receiving customary employee benefits, such as health insurance coverage and access to an employer-sponsored retirement plan.

For purposes of maintaining a highly trained and professional sales force, a number of annuity providers maintain "career" or "captive" agent sales forces. Individual members of these distribution arms agree to devote all or substantially all of their sales efforts to the products of single insurance carrier. In exchange for that commitment, the insurance carrier provides member of its selling force with various benefits, all of which are subject to continuing production and service requirements, such as health and retirement plan coverage and contributions, office allowances, travel expense reimbursements and other benefits customary in the industry. The re-proposed definition of "Insurance Commission" describes only "sales commissions" including "renewal fees and trailers." The Department needs to clarify to annuity providers and their career agents that the other forms of compensation described above are also covered under the definition so these vital and longstanding insurance product distribution channels are assured of coverage under the exemption.

As such, we recommend that the Deparment revise the definition of "Insurance Commission" the Proposed Amendment to PTE 84-24 to conform to the definition used in the instructions to Schedule A of the Form 5500 Annual Report:

> …commissions and fees includ[ing] sales and base commissions and all other monetary and non-monetary forms of compensation where the [insurance agent or broker or pension consultant's] eligibility for the payment or the amount of the payment is based, in whole or in part, on the value (e.g., policy amounts, premiums) of contracts or policies (or classes thereof) placed with or retained by an ERISA plan [or IRA], including, for example, persistency and profitability bonuses.

C. *General Comment on Definition of "Best Interest" Standard*: The definition of the term "Best Interest" in the Proposed Amendment to PTE 84-24 is overly prescriptive and should be revised to make clear that advisers and financial institutions must always put their clients' interests first, but would not be required to completely disregard their own legitimate business interests.

IRI fully and unequivocally supports the fundamental notion that a "best interest" standard of care should govern the conduct of a fiduciary to a plan or an IRA as a condition to obtaining exemptive relief under the Proposed BIC Exemption. However, IRI is gravely concerned that the best interest standard articulated by the Department appears to require a complete disregard of any financial interest of the fiduciary and its affiliates. In particular, the phrase "without regard to the financial or other interests of the fiduciary, any affiliate or any other party" is problematic because it appears to require that any advice provided wholly ignore the business and economic reality that advisers and annuity providers have to generate enough revenue to cover their costs and earn a reasonable profit in order to stay in business.

We do not believe the Department intended to require annuity advisers and providers to completely disregard their own business interests. Rather, IRI believes that the Department intended to require compliance with ERISA's prudence rule and ensure that the investor's interests are always considered first and foremost. Accordingly, we respectfully urge the Department to modify the text of the best interest standard to more clearly reflect this intent. Without this clarity, it will be impossible for any adviser or financial institution to rely on PTE 84-24, meaning millions of Americans would lose access to advice.

Our belief regarding the intent of the standard derives from the Department's statement that it "expect[s] the standard to be interpreted in light of forty years of judicial experience with ERISA's fiduciary standards and hundreds more with the duties imposed on trustees under the common law of trusts." Judicial authorities interpreting ERISA's general fiduciary standards have agreed that an ERISA fiduciary's receipt of an incidental benefit from a transaction that otherwise is primarily for the benefit of a plan, will not itself cause a violation of ERISA's fiduciary standards. In other words, many courts have held that where taking the best course of action for a participant or beneficiary would lead to an "incidental benefit" to a plan fiduciary, such incidental benefit is permitted by ERISA.

In addition, the Department's Fact Sheet about the Proposal described the best interest standard as follows:

> The "best interest contract exemption" will allow firms to continue to set their own compensation practices so long as they, among other things, commit to putting their client's best interest first and disclose any conflicts that may prevent them from doing so. Common forms of compensation in use today in

> the financial services industry, such as commissions and revenue sharing, will be permitted under this exemption, whether paid by the client or a third party such as a mutual fund.

This notion of putting the investor's interests first is repeated by the Department in numerous places throughout the Proposal to describe the best interest standard. Moreover, the Department has repeatedly described the exemption as preserving the ability of financial Advisers to rely on common compensation practices such as payments from third parties and funds.

To ensure the best interest standard is implemented and interpreted consistent with the referenced authorities, IRI urges the Department to revise the definition in Section VI(b) of the Proposed Amendment to PTE 84-24 to read as follows (new language is underlined):

> ...the "Best Interest" of the Plan or IRA is when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, <u>and that subordinates the financial or other interests of the fiduciary and its affiliates to those of the plan or IRA. [or, "and that places the interests of the plan or IRA ahead of the financial or other interests of the fiduciary and its affiliates."]</u>

D. Other Comments on the Proposed Amendment to PTE 84-24

1. *<u>Specific Comment</u>*: The Department should clarify that a recommendation to rollover a plan account balance or an existing IRA to an annuity is covered by PTE 84-24.

The Proposed Amendment to PTE 84-24 specifies that the exemption may be used to cover recommendations to an IRA or IRA holder to purchase annuity products that are not securities (e.g., fixed annuities). We believe a recommendation to roll an existing IRA to a second IRA product – or to roll an ERISA plan account balance into an IRA product – that will be invested in an annuity, should be covered by PTE 84-24. Specifically, these recommendations should be encompassed within the transactions described in Section I(a)(1) (receipt of an Insurance Commission in connection with a purchase of an annuity contract), Section I(a)(3) (the "effecting" of a purchase of an annuity contract), and/or Section I(a)(4) (the purchase of an annuity contract with plan assets from an insurance company).

We also note that a recommendation to roll an existing IRA to a second IRA – or to roll an ERISA plan account balance into an IRA – that will be invested in an annuity necessarily involves an implicit recommendation to sell securities held in the existing IRA or ERISA plan. We believe the

Department should make clear that PTE 84-24 would also cover any implied recommendation to sell securities in an existing IRA or plan account in order to purchase an annuity.

2. ***Specific Comment*: The Department should clarify that the exemptive relief provided by PTE 84-24 is available for both the purchase of the annuity and the selection of investments under the annuity contract.**

The Department should clarify that the exemptive relief available for purchases of insurance or annuity contracts under PTE 84-24 also applies to "downstream" transactions which occur pursuant to the operation of such contracts. This clarification is necessary in light of the proposed definitions of "Insurance Commission" and "Mutual Fund Commission" for purposes of PTE 84-24, both of which expressly exclude revenue sharing and certain other payments.

In a typical transaction involving the purchase of an annuity, the selling agent receives a commission from the insurance company. The investor who purchases the contract will then make selections from a menu of investment options available under the contract. The selected underlying investments commonly pay fees to the issuing insurance company pursuant to revenue sharing arrangements between the insurance company and the underlying investments. Under current law, the relief provided by PTE 84-24 applies to the entire transaction, including any payments made to the insurance company relating to underlying investments.

It is unclear whether the same relief would be available under the Proposed Amendment to PTE 84-24. The exclusion of revenue sharing and certain other payments from the definitions of the terms "Insurance Commission" and "Mutual Fund Commission" casts doubt as to whether exemptive relief is available for commissions paid in connection with sales of annuity contracts that include such "downstream" payments.

IRI does not believe the Department intended to preclude payments relating to the underlying investments held pursuant to an insurance contract. Foreclosing relief under PTE 84-24 whenever such arrangements are present in a transaction would lead to adverse consequences for many retirement investors. For example, the receipt of such payments by insurance companies permits those companies to charge lower fees to self-directed defined contribution plans for investment, recordkeeping, and other services.

IRI therefore urges the Department to clarify that, under the Proposed Amendment to PTE 84-24, an insurance company issuer of a variable annuity contract, or an underwriter of a mutual fund, can still receive 12b-1 fees, administrative fees, marketing payments, revenue sharing payments, and other payments that are excluded from the proposed definitions of "Insurance Commission" and "Mutual Fund Commission.

3. ***Specific Comment*: To level the playing field for annuities and mutual funds under PTE 84-24, the Department should extend to annuities the same independent fiduciary approval presumption provision that applies to mutual fund transactions.**

IRI believes the same independent approval presumption available for transactions involving the purchase of securities issued by a mutual fund (or the receipt of a Mutual Fund Commission thereon) should be available for transactions involving the purchase of an insurance or annuity contract (or the receipt of an Insurance Commission thereon).

The proposed amendment carries forward the different treatment afforded to mutual fund transactions relative to annuity and insurance transactions under PTE 84-24 with respect to satisfying the condition that an independent fiduciary approve the transaction following the receipt of the disclosure materials required to be delivered to the independent fiduciary in advance of the transactions.

In the case of an annuity transaction relying on PTE 84-24, an insurance agent or broker is generally required to disclose to an independent fiduciary with respect to the plan or IRA: (i) whether it is an affiliate of the insurer whose product is being recommended and whether its advice is limited by the insurer; (ii) initial and ongoing commission amounts; and (iii) a description of any fees and charges under the contract. After receiving these disclosures, the independent fiduciary for the plan or IRA must acknowledge "in writing" the receipt of the information *and approve the transaction* (impliedly, the approval of the transaction must also be in writing).

By contrast, PTE 84-24 provides that for mutual fund transactions, the independent plan fiduciary's "approval may be presumed if the fiduciary permits the transaction to proceed after receipt" of the disclosures, absent facts or circumstances to the contrary.

No reasonable basis exists for the disparate and more onerous independent fiduciary approval condition that applies to annuity transactions. The presumption of independent fiduciary approval that applies to mutual fund purchase transactions should also be available for annuity transactions. There is simply no reason to apply more rigorous requirements for annuity transactions than those that apply to mutual funds. IRI believes the playing field should be level between mutual funds and insurance products, and therefore urges the Department to extend the presumption approval provision to annuity transactions.

Accordingly, IRI respectfully requests that the Department remove the words "in writing" from the first sentence of Section IV(b)(2), and add the following as the second sentence thereof: "Unless facts or circumstances would indicate the contrary, the approval may be presumed if the fiduciary permits the transaction to proceed after receipt of the written disclosure."

III. Comments Relating to the Proposed Best Interest Contract ("BIC") Exemption

As noted in part II of this letter, IRI believes it is essential for the exemptive relief available under *both* PTE 84-24 and the Proposed BIC exemption be available to cover recommendations for the purchase of *both* fixed and variable annuity products by IRAs. IRI anticipates that some distributors of annuity products that also engage in the distribution of mutual funds and general securities may prefer a single prohibited transaction compliance regime to cover all IRA product recommendations and sales. In order to preserve the availability of these distribution channels as a source of annuity products and guaranteed lifetime income information to consumers, it is essential that the Proposed BIC Exemption be modified as discussed below. If the Proposed BIC Exemption is not modified, IRI believes its conditions will prove to be so onerous and so difficult to comply with that vital sources of annuity product distribution information to consumers will cease to be available, thereby denying consumers access to lifetime income.

A. *General Comment on the Department's Formulation of a Best Interest Standard and the Conditions Requiring the Formation of a Best Interest Contract*: To avoid disruptions in the availability of annuity products and their guaranteed lifetime income features to millions of retirement savers, and advice about whether these products fit their needs, the requirements in the Proposed BIC Exemption must be revised in a workable manner.

IRI believes the interests of retirement investors are best protected when they are aligned with the financial professionals that advise them. A properly trained and supervised professional acts in a client's best interest by recommending the product that fits that client's needs. Where a financial professional will be compensated on the basis of a recommended transaction, an alignment of interests will take place where the client's needs are met and the adviser has been fairly compensated; the adviser can only be compensated fairly where the client has been well served. Further, the administrative processes for implementing the best interest standard need to be sufficiently streamlined to afford advisers the opportunity to freely interact with clients and prospective clients. The Department's proposed methods of implementation do not conform with common business practices and would deprive millions of retirement investors of access to retirement planning advice. We understand the Department has expressed a willingness to make the Proposed BIC Exemption administratively workable. The following comments are intended to help the Department achieve this critical objective.

1. ***Specific Comment*: The terms of the BIC exemption should be clarified to indicate that a counter-signature on the part of the advice recipient is not needed to satisfy the condition. Advisers and financial institutions should be permitted to comply with this requirement through a unilateral agreement furnished to the advice recipient.**

In many circumstances, it may be administratively unfeasible for an advice provider to procure a manual or so-called "wet" signature on a best interest contract before acting upon a client's request to implement a recommended transaction. The parties may be doing business over the phone, for example. It is also foreseeable that some advice recipients may not be willing to sign a best interest contract notwithstanding the fact that the same client wishes to accept a recommended transaction. The contract requirement would be especially problematic with respect to existing annuity contracts. As noted in the attached Deloitte report, if Advisers and Financial Institutions are required to enter into contracts with existing clients, they would have to build systems and processes to identify, contact and track implementation. Given the fact that approximately 30 million Americans currently own variable and fixed annuities, this would be an extremely onerous undertaking that would likely take several years to fully complete.[44] In light of these practical difficulties, it should be sufficient that the Adviser and the Financial Institution unilaterally agree to the terms required to be contained in the best interest contract described by the exemption, either orally or in writing (including electronic written form).[45]

In a unilateral contract, only one of the contracting parties makes a promise; the other party manifests assent by performance.[46] Accordingly, "[t]he legal result is that the promisor is the only party who is under an enforceable legal duty. The other party to this contract is the one to whom the promise is made, and this promisee is the only one in whom the contract creates an enforceable legal right."[47]

Moreover, no signature is required for a unilateral contract to be enforceable. Rather, parties may become contractually bound by indicating their assent through a variety of other means, such as by accepting and acting upon the contract, ratifying the contract, or accepting the performance by the other.[48]

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[44] Deloitte & Touche LLP. *Anticipated Operational Impacts to the Insured Retirement Industry of the Department of Labor's Proposed Rules for the Definition of Fiduciary Advice*.

[45] IRI urges the Department to clarify that, where more than one Financial Institution is involved in the sale of product (e.g., a broker-dealer firm engaged in the distribution of a variable annuity product and the insurance company issuer of the product), the Financial Institution primarily responsible for supervising the conduct of the Adviser with respect to the Adviser's recommendation is the proper party to the contract.

[46] Corbin on Contracts § 1.23 (3d ed. 2004); see also United States ex rel. Modern Elec., Inc. v. Ideal Elec. Security Co., 81 F.3d 240, 241 (D.C. Cir. 1996) (citing the "well-recognized" principle that "in a unilateral contract, performance constitutes acceptance of an offer").

[47] Corbin on Contracts § 1.23.

[48] 17A Am. Jur. Contracts 2d § 173; see also Words, Inc. v. Xerox Corp., 205 F.3d 1336, at *1 (4th Cir. 2000) (per curiam) ("If the party against whom the contract is being enforced has indicated through some unequivocal act or through performance that it intends to adopt the contract, then a signature by that party is not required for the contract to be binding.").

The unilateral contract is supported by the same consideration that would support a signed bilateral contract. That is, engagement of the financial services firm by the customer constitutes sufficient consideration to create a legally binding relationship.

The principles of the unilateral contract are perfectly-suited to the BIC exemption, where the goal should be to hold a single party – the financial services firm – to an enforceable legal duty. This can be achieved by requiring firms wishing to use the exemption to post a statement on their website (or other accessible venue) that sets forth the BIC standards and commits to act in accordance with those standards when providing covered investment services. The client would be advised of this promise, the standards, and where to review them at the time covered services were offered. This could be done orally, when the interaction is by telephone or in person, or in writing, when the interaction is computer-based. The client would accept the firm's offer by proceeding to use the firm's services, thereby forming an enforceable agreement under basic principles of contract law.[49]

These principles of contract law would be sufficient to bind financial services firms to the BIC without the unnecessarily cumbersome and costly difficulties associated with an actual signed written agreement. However, the doctrine of promissory estoppel would serve as an additional means to enforce the BIC's terms. Under promissory estoppel, if a party changes its position substantially either by acting or forbearing from acting in reliance upon a clear and unambiguous promise, then that party can enforce the promise even though the essential elements of a contract are not present.[50]

In the context of the Proposed BIC Exemption, that doctrine would apply if a firm represented to a customer that it would abide by the best interest standards when providing services, and the customer accepted those services in reliance on that assurance. In these circumstances, even if a court were to determine that for some reason no enforceable contract exists, a customer could use the doctrine of promissory estoppel to enforce the firm's representations. The customer's enforcement rights could be further enhanced if, on its website (or in some other publicly-accessible format), the firm is required, as a condition of the exemption, to

[49] *See* Corbin, supra; see also Coulier v. United Airlines, Inc., 2015 WL 2452393, at *5 (S.D. Tex. May 21, 2015) (the portion of defendant's website guaranteeing lower price for tickets purchased on the website was a "unilateral contract that the customer must accept by performance"); Edquist v. Bidz.com, Inc., 2013 WL 1290130, at *1 (D. Mass. Mar. 29, 2013) ("[A] person such as the plaintiff who accepts the terms offered by the defendant on its website by participating in an online auction governed by those terms has entered into a contractual relationship with the defendant.").

[50] Restatement (Second) of Contracts § 90; see also Williston on Contracts § 8:7 (4th ed. 2008) ("[B]oth versions of the Restatement recognize that in certain circumstances, a promise might be enforced despite the absence of consideration – and, according to some courts, despite the absence of other elements necessary to form a traditional contract – based on the promisee's foreseeable, reasonable, justified and detrimental reliance on the promise"); Allen v. A.G. Edwards & Sons, Inc., 606 F.2d 84, 87 (5th Cir. 1979) (recognizing promissory estoppel where broker-dealer, "[h]aving benefitted from oral agreements transacted through local agents, [ ] cannot now be heard to complain of failure to observe formalities").

acknowledge the enforceability of its BIC promise and the client's reliance on that promise in engaging in the interaction.

For all of these reasons, there is no need for the Department to require a signed, bilateral contract for the BIC. The proposed exemption should be revised to permit firms to become legally bound in the manner described.

2. ***Specific Comment*: The contract timing requirement under the Proposed BIC Exemption should require the contract to be executed prior to the transaction, not prior to the recommendation.**

The contract timing rule set forth in the Proposed BIC Exemption is simply unworkable in many respects. Due to the breadth of the Proposed Regulation's definition of "recommendations" that will rise to the level of fiduciary advice, IRI is concerned that most sales presentations involving retirement investors will be swept into the status of fiduciary conduct. Accordingly, the Proposed BIC Exemption will become a key compliance strategy for insurance brokers and agents in their dealings with ERISA plans, participants and IRA holders.

The Proposed BIC Exemption requires that the contract be entered into prior to "recommending" that the investor purchase, sell or hold an Asset. As a practical matter, this timing requirement will be impossible to satisfy in many cases, particularly with respect to activities that have been historically viewed as sales activities but will now be considered fiduciary "recommendations."

Typically, an adviser would make a "recommendation" in the context of a sales presentation before an investor has had the opportunity to make a judgment about whether the recommendation is worthy of serious consideration. We believe many ERISA investors would be unwilling to enter into a contract with an adviser before they understand the nature of the recommendations that the adviser will make. Moreover, requiring a prospective investor to sign a detailed, tri-party contract before the adviser is permitted to give the client any of his or her recommendations whatsoever will have the unnecessary effect of stopping sales presentations dead in their tracks.

IRI believes the point in time when it is most critical for a customer to understand the nature of the relationship between the parties is prior to the execution of the transaction, meaning the time that the investor acts on the advice and either purchases, sells or holds an asset based on the recommendations of the adviser. Accordingly, IRI requests that the Department revise Section II(a) of the Proposed BIC Exemption to state:

(b) *Contract*. Prior to the transaction for which relief is sought under Section I, the Adviser and Financial Institution provide a unilateral agreement to the Retirement Investor that incorporates the terms required by Section II(b) – (e).

3. *Specific Comment*: The definition of the term "Best Interest" in the Proposed BIC Exemption is overly prescriptive and should be revised to make clear that advisers and financial institutions must always put their clients' interests first, but would not be required to completely disregard their own legitimate business interests.

IRI fully and unequivocally supports the fundamental notion that a "best interest" standard of care should govern the conduct of a fiduciary Adviser to Retirement Investors as a condition to obtaining exemptive relief under the Proposed BIC Exemption. However, IRI is gravely concerned that the best interest standard articulated by the Department appears to require a complete disregard of any financial interest of the Adviser, the Financial Institution or any Affiliate, Related Entity or other party to the transaction. In particular, the phrase "without regard to the financial or other interests of the Adviser, Financial Institution or an Affiliate, Related Entity or other party" is problematic because it appears to require that any advice provided wholly ignore the business and economic reality that advisers and financial institutions have to generate enough revenue to cover their costs and earn a reasonable profit in order to stay in business.

We do not believe the Department intended to require an Adviser and Financial Institution to completely disregard their own legitimate business interests. In our view, if the Adviser, Financial Institution and their Affiliates have absolutely "zero" interest in a transaction, there would be no potential conflict of interest and therefore no need for the transaction to comply with an exemption in the first place. Rather, IRI believes that the Department intended to require compliance with ERISA's prudence rule and ensure that the investor's interests are always considered first and foremost. Accordingly, we respectfully urge the Department to modify the text of the best interest standard to more clearly reflect this intent. Without this clarity, it will be impossible for any adviser or financial institution to rely on the Proposed BIC Exemption, meaning millions of Americans would lose access to advice.

Our belief regarding the intent of the standard derives from the Department's statement that it "expect[s] the standard to be interpreted in light of forty years of judicial experience with ERISA's fiduciary standards and hundreds more with the duties imposed on trustees under the common law of trusts."[51] Judicial authorities interpreting ERISA's general fiduciary standards have agreed that an ERISA fiduciary's receipt of an incidental benefit from a transaction that otherwise is primarily for the benefit of a plan, will not itself cause a violation of ERISA's fiduciary standards. In other words, many courts have held that where taking the best course of action for a participant or beneficiary would lead to an "incidental benefit" to a plan fiduciary, such incidental benefit is permitted by ERISA.[52]

[51] 80 FR 21970.

[52] *See, e.g.*, *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982). ("[O]fficers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial

In addition, the Department's Fact Sheet about the Proposal described the best interest standard as follows:

> The "best interest contract exemption" will allow firms to continue to set their own compensation practices so long as they, among other things, commit to putting their client's best interest first and disclose any conflicts that may prevent them from doing so. Common forms of compensation in use today in the financial services industry, such as commissions and revenue sharing, will be permitted under this exemption, whether paid by the client or a third party such as a mutual fund.[53]

This notion of putting the investor's interests first is repeated by the Department in numerous places throughout the Proposal to describe the best interest standard.[54] Moreover, the Department has repeatedly described the exemption as preserving the ability of financial Advisers to rely on common compensation practices such as payments from third parties and funds.[55]

To ensure the best interest standard is implemented and interpreted consistent with the referenced authorities, IRI urges the Department to revise the definition in Section VIII(d) of the Proposed BIC Exemption to read as follows (new language is underlined):

> Investment advice is in the "Best Interest" of the Retirement Investor when the Adviser and Financial Institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance,

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investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves . . . ."); *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 764 (1999) (incidental benefits conferred upon an employer when it amends a plan do not constitute a fiduciary breach under section 404); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987) ("[T]he fact that a fiduciary's action incidentally benefits an employer does not necessarily mean that the fiduciary has breached his duty."); *Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 506 (2d Cir. 1995). *See also*, Restatement (Third) of Trusts § 78 cmt. d (2007) ("[A] trustee's action or decision that is motivated by and taken in the best interest of the beneficiaries does not violate [the trustee's duty of loyalty] merely because there may be an incidental benefit to the trustee.").

[53] EBSA Fact Sheet: Department of Labor Proposes Rule, *available at* http://www.dol.gov/protectyoursavings/FactSheetCOI.pdf.

[54] *See, e.g.*, 80 Fed. Reg. at 21970 ("Under this standard, the Adviser and the Financial Institution must put the interests of the Retirement Investor ahead of the financial interests of the Adviser, Financial Institution or their Affiliates, Related Entities or any other party.").

[55] *See, e.g.*, 80 FR 21961 ("Certain types of fees and compensation common in the retail market, such as brokerage or insurance commissions, 12b-1 fees and revenue sharing payments, fall within these prohibitions . . . . [T]he exemption would allow certain investment advice fiduciaries, including broker-dealers and insurance agents, to receive these various forms of compensation "); *see also* 80 FR 21966 ("[The BIC Exemption] seeks to preserve beneficial business models by taking a standards-based approach that will broadly permit firms to continue to rely on common fee practices, as long as they are willing to adhere to basic standards aimed at ensuring that their advice is in the best interest of their customers.")

financial circumstances, and needs of the Retirement Investor, and that subordinates the financial or other interests of the Adviser, Financial Institution, or any Affiliate, Related Entity or other party to those of the Retirement Investor. [or, "and that places the interests of the Retirement Investor ahead of the financial or other interests of the Adviser…."]

For consistency, a similar change should also be made to the parenthetical language in Section II(c)(1).

4. ***Specific Comment*: Given that the duty to act in a client's best interest is contained in the required contract under the Proposed BIC Exemption, the warranties required under the Exemption serve no useful consumer purpose but expose Advisers and Financial Institutions to risks of frivolous and costly litigation, adding to the expense associated with serving retirement investors.**

The primary enforcement mechanism under the Proposed BIC Exemption is the contractual promise that the Adviser and Financial Institution will act in the client's best interest. An advice recipient who believes the best interest promise has been breached can pursue contractual remedies. IRI believes the requirement that the Adviser and Financial Institution also promise to adhere to extremely rigorous warranties will likely give rise to nuisance litigation claims for warranty violations in circumstances where a claim of a failure to act in the advice recipient's best interest cannot be supported. These warranties would not provide any additional benefits for consumers beyond the protections provided by the best interest standard, but would provide ample fodder for frivolous litigation. For those reasons, IRI strongly urges the Department to remove the written warranties required under paragraph II(d) of the BIC.

5. ***Specific Comment*: The "reasonable compensation" conditions of the Proposed BIC Exemption are focused on the value of services and fail to take into account the costs of annuity products' guaranteed features. Moreover, the conditions unfairly disadvantage proprietary products. For purposes of annuity product recommendations, the definition of "reasonable compensation" contained in the Proposed BIC exemption should be conformed to the corresponding provision in the Proposed Amendment to PTE 84-24.**

Section III(c) of PTE 84-24, as re-proposed, contains a "reasonable compensation" condition that distinguishes between (1) amounts paid for the provision of services to a plan or an IRA, and (2) amounts paid in connection with the purchase of the annuity contract itself. The total of both such amounts may not exceed reasonable limits, yet the distinction between amounts paid for services and amounts paid for insurance is useful for purposes of ascertaining compliance with the condition.

The Proposed BIC Exemption contains "reasonable compensation" conditions in Sections II(c)(2) and IV(b)(2). The measurement of reasonable compensation for purposes of the BIC exemption, however, lacks PTE 84-24's distinctions between costs of services and costs of insurance. Instead, the proposed BIC exemption measures reasonable compensation strictly in relation to the services they provide.

By measuring the reasonableness of total annuity costs purely in relation to the provision of services, the Proposed BIC Exemption overlooks the fact that much of the value provided by annuities (and to which many of the costs of annuities are attributable) pertains to their guaranteed features. The assumptions of risk associated with the provision of annuity guarantees has significant value, but it is not a value that can be measured in relation to the services provided by the Adviser.

This same difficulty is magnified in the case of proprietary annuities. The BIC Exemption's reasonable compensation test measures the reasonableness of *total compensation* received by the Adviser, Financial Institution, Affiliates and Related Entities against services provided to a retirement investor. An Adviser offering a non-proprietary product would be required to test only the reasonableness of the amounts he and the Financial Institution he represents receive (since the issuing insurer is not an Affiliate of the Adviser, amounts payable to the insurer would not be counted). By contrast, where an Adviser offers a proprietary product for the same price and for the same level of services, the total compensation would have to include the amounts paid to the Affiliated annuity issuer in addition to the amounts received by the Adviser and the Financial Institution he represents, making the reasonable compensation condition much more difficult to satisfy despite the fact that the actual amount of compensation paid in these two scenarios would be the same.

To remedy these issues, IRI urges the Department to substitute the same reasonable compensation measure contained in section III(c) of PTE 84-24 in place of the counterpart language contained in Section II(c)(2) and IV(b)(2) of the Proposed BIC Exemption, for purposes of applying the BIC exemption conditions to annuity products. As noted in part II of this comment letter, IRI strongly believes that *both* the BIC Exemption *and* PTE 84-24 should be available as sources of exemptive relief for annuity transaction recommendations to IRAs.

6. ***Specific Comment*: The Adviser's and Financial Institution's agreement to comply with the Impartial Conduct Standards by delivering a Best Interest Contract should be sufficient to satisfy the conditions of section II(c) of the Proposed BIC Exemption. Violations of the Impartial Conduct Standards should not result in loss of the exemption.**

The Department has proposed the contractual enforcement mechanism described by the Proposed BIC Exemption as the means by which plans, plan participants and IRA holders may

hold their Adviser and the Financial Institution accountable for a breach of the Impartial Conduct Standards. This is particularly important for IRA holders who would have no remedies under ERISA for breaches of fiduciary duty. As proposed, the exemption would not only subject Advisers and Financial Institutions alleged to have breached the Impartial Conduct Standards to potential contract liability but would also subject them to excise tax liability under section 4975 of the Code in connection with prohibited transactions associated with the provision of advice.

IRI is concerned that the lack of clarity regarding the best interest standard will create unnecessary disputes and uncertainty as to when the exemption applies and when it does not. Excise tax liability is a self-assessed and self-reported tax under section 4975 of the Code. Although it is generally 15% of the amount involved in the prohibited transaction, the tax escalates to 100% of the amount involved if the IRS asserts liability for the tax before it has been self-reported and assessed.[56] Needless to say, these amounts can be substantial and there are penalties and interest associated with failures to timely file and pay excise tax liabilities.

It is essential that Financial Institutions and Advisers know for certain when their activities will be covered by the BIC Exemption and when the BIC Exemption may be lost. In order to give Financial Institutions and Advisers certainty regarding when excise tax liability arises, IRI asks the Department to revise the Proposed BIC Exemption so that compliance with the Impartial Conduct Standards is not a condition of the Proposed BIC Exemption, but remains a requirement of the contract. Specifically, the phrase "and comply with" should be removed from section II(c) and should solely be a requirement of the contract entered into under the BIC Exemption. This would be consistent with the treatment of the warranties under the Proposed BIC Exemption, under which the best interest contract is required to contain the warranties, but violations of the warranties would not cause the exemption to be lost.

B. ***General Comment on Treatment of Propriety Products under the Proposed BIC Exemption*: The Department should take steps to preserve proprietary annuity distribution models, which provide consumers with invaluable and irreplaceable sources of knowledge about annuity products and how annuities can be used to provide guaranteed lifetime income to retirees. To that end, the "Limited Range of Investment Options" requirements included in section IV of the Proposed BIC Exemption should not apply to Advisers and Financial Institutions that offer only proprietary products.**

Some IRI members only offer proprietary investment menus in connection with individual or variable annuity contracts and IRA products. There are good reasons why this type of business model exists. A number of insurers maintain career agent distribution forces, comprised of individuals who contractually agree to limit their annuity sales and servicing efforts primarily or exclusively on products offered by a single insurance carrier. In consideration of that

[56] I.R.C. § 4975(b).

commitment, an insurer may sponsor benefit plans to cover qualifying career agents, provide office housing allowances and offer substantial training and education support. Yet section IV of the Proposed BIC Exemption seems to imply that such arrangements are inherently problematic by imposing an additional layer of conditions on Advisers and Financial Institutions that offer only proprietary products. Specifically, under section IV(b) the Financial Institution must make a written finding that the limitations it has imposed on Assets made available to an Adviser do not prevent the Adviser from providing advice in the Best Interest of the investor. Moreover, before giving recommendations to the investor, the Adviser or Financial Institution must give the investor written notice of the limitations placed on the Adviser. The Adviser must notify the investor if it does not recommend a sufficiently broad range of Assets to meet the investor's needs.

IRI asks that the Department make clear that the use of a proprietary-only product platform would not necessarily and in every case require the provider to be subject to the "Limited Range of Investment Options" requirements of section IV(b) of the Proposed BIC Exemption. In other words, the Department should clarify that an annuity provider that exclusively offers proprietary products is not subject to section IV(a), and will not be subject to the disclosure conditions of section IV(b).

IRI also believes Section IV(b) should not apply when a plan participant or IRA investor seeks investment advice solely on a source of guaranteed lifetime income.Similarly, the Department should clarify that an Adviser can provide investment recommendations on a limited range of asset classes specified by the investor without requiring compliance with section IV(b) of the Proposed BIC Exemption.

Finally, IRI is concerned that it may not be possible to offer a platform of exclusively affiliated investments and still satisfy the Best Interest standard as proposed. In this regard, the Proposed BIC Exemption requires an Adviser and Financial Institution to act in the "Best Interest" of a Retirement Investor; and this standard is met if they provide "advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party."[57] The final phrase of this standard – requiring that both the Adviser and Financial Institution act "*without regard to"* the financial interests of themselves, Affiliates and other parties – raises the question of whether a proprietary-only platform could be consistent with this standard. We do not believe that the Department intended the Best Interest standard to be a complete bar to the use of a proprietary-only platform. Given the significant concern in the industry on this point, we urge

[57] Prop. BIC Exemption, § VIII(d).

the Department to make clear that the Proposed BIC Exemption is still available, and the Best Interest standard itself can still be satisfied, where a Financial Institution offers (or an Adviser makes available) exclusively proprietary products. We note that our earlier recommendation in section III.A.3 of this letter to delete the phrase "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party" is consistent with this comment.

C. *General Comment on the Disclosure Conditions of the Proposed BIC Exemption*: The proposed point of sale, website, annual and ongoing information maintenance requirements impose exceedingly burdensome, expensive and duplicative disclosure requirements on annuity product providers and distributors, and should be removed from the Proposed BIC Exemption.

1. *Specific Comment*: The point of sale disclosures required under the Proposed BIC Exemption should be made through the provision of a prospectus for registered annuity products and should be replaced by a reference to the statutory prospectus disclosure requirement.

The proposed point of sale disclosure requirements under Section III(a) are problematic and not calibrated for annuity products in many respects. As written, the proposed initial disclosure must include: (i) the all-in costs and anticipated future costs of an asset in a summary chart and the total costs to the retirement investor for 1-, 5- and 10- year periods expressed as a dollar amount; and (ii) the total costs of investing in an asset. These disclosures must be expressed based on the specific dollar amount invested by the investor.

As a threshold matter, with respect to variable annuities at least, the proposed point of sale disclosure would appear to ignore the ready availability of appropriate fee and expense disclosures contained in the SEC mandated prospectus for such products.[58] The variable annuity prospectus includes not only a fee table that summarizes the various fees and charges that apply (e.g., sales charges, ongoing asset-based charges, rider charges, and transaction charges) but also hypothetical expense examples for 1, 3, 5, and 10 year periods based on certain assumptions relating to such things as: (a) the amount invested, (b) the performance of such investment, (c) the underlying fund fees applied, and (d) whether the investor surrenders or annuitizes at the end of the stated periods.

The SEC's carefully designed fee table and expense examples, with which the industry and millions of investors have decades of experience, provide ***exactly*** the type of simple, succinct, and uniform disclosure and comparability the Department seeks. The SEC's disclosure regime accommodates the various types of mortality and expense risk charges as well as rider charges

[58] *See, e.g.,* SEC Form N-3, Part A, Item 3 and SEC Form N-4, Part A, Item 3.

that may be imposed under a variable annuity, and addresses countless other matters specific to variable annuities, such as the method for converting flat annual charges into asset based charges for purposes of preparing the required expense examples. In addition, the SEC and the industry have considered and worked out a myriad of other disclosure issues relating to fees and charges, all consistent with investor protection and the public interest. For example, the SEC long ago streamlined the volume of expense information required to be shown regarding underlying funding options by allowing issuers to present a high/low range to avoid overwhelming investors with a paralyzing blizzard of numbers. Moreover, the SEC has developed appropriate disclosure standards for annuity products under which the carrier guarantees a particular interest rate and retains the difference between the rate credited and the earnings on the assets invested rather than imposing fees and charges.

The Department should leverage the SEC's decades of experience to avoid getting mired in the enormous task of trying to create a separate but equal disclosure regime. For example, the Proposed BIC Exemption would require disclosure of the "total costs" of ownership a variable annuity investor might incur over time, but does not explain how an insurance company would calculate this amount. As a practical matter, because many variable annuity fees and charges are based on the amount of the investors' assets, which may fluctuate over time, the Proposed BIC Exemption would appear to require that an insurer assume or "project" some degree of future performance in order to compute the total costs of the investment. The SEC has declared it would be materially misleading to suggest that past performance may be indicative of future results, and FINRA rules on communications with the public expressly prohibit projections of performance except under limited circumstances.[59] For this reason, and to facilitate comparability, the SEC requires the use of an assumed 5% hypothetical return in its fee table expense examples. This point illustrates how a seemingly simple requirement proposed by the Department may actually present a significant challenge were the SEC's disclosure regime not to be followed.

In addition, the Proposed BIC Exemption would require an adviser to develop a unique disclosure tailored to each investor's investment amount. Putting to one side the potential confusion and lack of comparability that might result in the absence of a standard and common set of assumptions for fees and charges, it would be extremely expensive for annuity providers to develop new systems to comply with these disclosure requirements. As a practical matter, it would be impossible for annuity providers to develop these systems within eight months after the Proposed BIC Exemption is finalized. A recent study conducted by Deloitte & Touche for IRI found that creating and implementing the systems changes needed to comply with the

[59] *See, e.g.,* Rule 482(b)(3)(i) and FINRA Rule 2210(d)(1)(F), respectively.

requirements of the Proposed BIC Exemption will be a multi-year process.[60] In addition, the inevitable delays in providing individualized disclosures to annuity investors would likely result in inaction, – which is exactly what the White House does not want to have happen to people on the cusp of retirement who need to take action.

Accordingly, IRI respectfully submits that the Department should permit the point of sale disclosure requirement to be met for annuity products that are registered as securities through the provision of a prospectus or summary prospectus that meets SEC requirements by revising Section III(a) of the Proposed BIC Exemption to add the following as the final sentence thereof:

> With respect to the purchase of an Asset that is an annuity contract registered under the Securities Act of 1933, the requirements of this subsection (a) shall be deemed satisfied if, prior to the execution of the purchase of the Asset by the Plan, participant or beneficiary account, or IRA, the Adviser furnishes to the Retirement Investor a copy of the statutory prospectus or summary prospectus for such Asset.

2. *Specific Comment*: The website disclosure requirements for annuity products should be eliminated in favor of the settled disclosure regimes under applicable federal securities laws and state insurance laws.

IRI is concerned that the website disclosure provision in the Proposed BIC Exemption would require that extensive information about the costs of annuity products be provided by each selling firm rather than the product issuer. This could result in different consumers receiving different information about the same product, which would generally conflict with securities and insurance industry disclosure standards that emphasize accuracy and consistency of product cost disclosure across distribution channels.

In the insurance industry, product disclosures, including cost disclosures, are typically controlled by the product issuer, and not the individual adviser or selling firm. This has the benefit of increased uniformity of disclosure, in that hundreds of sales persons selling for an issuer can use the same consistent, carefully reviewed sales materials. For that reason, insurance product issuers typically contractually prohibit distributors from independently generating product-related sales materials.

In the context of SEC-registered investment products, consistency and comparability of disclosure are critical elements of facilitating investor understanding and informed choice. All issuers of registered securities, such as variable annuities, are required to prepare a standard offering document, *i.e.*, a prospectus that not only must contain specific disclosures, but also

[60] Deloitte & Touche LLP. *Anticipated Operational Impacts to the Insured Retirement Industry of the Department of Labor's Proposed Rules for the Definition of Fiduciary Advice*.

must follow certain "ordering requirements," so that the information conveyed appears in a specific sequence that is intended to facilitate comparability and assist in consumer comprehension and understanding.[61]

Moreover, in the case of a variable annuity product, the website disclosures required under the Proposed BIC Exemption would likely constitute advertising material under state insurance laws, and an advertisement under the federal securities laws that would have to be filed with FINRA, and that would be subject to highly detailed disclosure and computational requirements. For fixed annuities, any advertising material would have to comply with state insurance model advertising regulations.

With respect to annuities that are not registered with the SEC, appropriate disclosure requirements have been established by the National Association of Insurance Commissioners (NAIC) in its Annuity Disclosure Model Regulation.[62] This NAIC model regulation was carefully crafted through the combined efforts of the state insurance regulators, industry representatives, and consumer advocates to ensure that consumers are provided the information they need in order to fully understand annuities and their costs and benefits. IRI encourages the Department to allow advisers and financial institutions to utilize disclosures meeting the requirements of the NAIC model regulation to satisfy the disclosure requirements for non-registered annuities under the Proposed BIC Exemption.

Further, the website disclosure requirements are not at all tailored to the nuances of annuity products. For example, the Proposal would require the website to disclose the direct and indirect compensation paid to the Adviser, the Financial Institution, and any Affiliate in connection with each Asset purchased, held or sold within the last 365 days, and the source of the compensation. Because of the sheer number of transactions for which Financial Institutions will undoubtedly rely on the Proposed BIC Exemption, the website would quickly become so unwieldy as to not provide any useful information to Retirement Investors. Furthermore, the overwhelming investors with such disclosures would make it difficult for them to find the information they most need and want. Investors arguably would benefit most from knowing (a) that the intermediary with whom they are dealing is a compensated and, therefore, motivated sales person, (b) any conflicts of interest that result from such compensation, and (c) the product pricing and pricing variations available to the investor. Details of intercompany revenue sharing arguably would be of little or no meaningful use to the investor, and likely would distract the investor from focusing on the key information that is essential to making an informed investment decision.

[61] *See, e.g.,* SEC Forms N-4 (variable annuities) and N-1A (mutual funds).
[62] Available at http://www.naic.org/store/free/MDL-245.pdf.

3. ***Specific Comment*: The annual disclosure requirement under paragraph III(b) of the Proposed BIC Exemption is overly burdensome, would be exceedingly costly to develop and does not advance investor interests, and should therefore be removed.**

IRI notes that much of the information that would be required under the Proposed BIC Exemption's annual disclosure condition is already available to investors through their quarterly account statements, which report sales and purchase activity and which list account holdings. IRI questions the need for an annual restatement of the previous four quarterly statements. The condition would also require complex, dollarized disclosures of fees and expenses paid and amounts received by various parties in connection with account transactions. In this regard, IRI notes that the merits and countervailing costs of such dollarized disclosures were a major topic of the Department's multi-year, recently finalized plan-level and participant-level disclosure regulations under sections 408b-2 and 404a-5 of the Department's ERISA regulation, respectively. In both of those efforts, following extensive public comment and discussion, the Department elected *not* to require dollarized disclosures in its final rulemaking. IRI questions the need to re-open that same issue, which was only recently decided. The annual disclosure requirement of section III(b) should be removed or conformed with the Department's recently finalized disclosure requirements under sections 408b-2 and 404a-5 of the ERISA regulations.

4. ***Specific Comment*: The Proposed BIC Exemption's provision authorizing public disclosure of Adviser return information will provide no meaningful benefit to consumers but will be extremely expensive to implement, and should therefore be deleted.**

IRI is highly concerned about the Department's right to publicly disclose information provided pursuant to the Data Request provision of section IX(d). First, developing the systems necessary to compile the required information on a quarterly basis, including cash flows going to or from the portfolio, for each Retirement Investor will be an enormously expensive and resource-intensive task for Financial Institutions. Moreover, since annuity products feature guaranteed values as well as cash values it is unclear how portfolio beginning and ending "values" should be calculated for individual and group annuity products that include lifetime income guarantees in addition to an investment component.

However, even if Financial Institutions could compile and provide this information at the Retirement Investor level, we are highly concerned that any disclosure of information by DOL, as expressly permitted under section IX(e), would be unhelpful at best and misleading at worst. Advisers who will rely on the Proposed BIC Exemption will be engaged in the marketing and selling of everything from bank deposits and CDs, to bank collective funds and mutual funds and insurance and annuity products, all of which have different risk and return features.

Moreover, these recommendations will be made to unique plans, plan participants, and IRA investors that have very different characteristics as well as investment goals and horizons. The "return" information for these various Assets will not tell any coherent story or be useful to any specific person.

Moreover, DOL's own investment prudence regulation makes clear that the prudence of an investment choice is not measured in hindsight by return alone, but by a consideration of several factors as applied to the investor's unique facts and circumstances at the time the investment is made.[63] We strongly believe that a public disclosure of "return" information alone on a per-Adviser basis sends the wrong information to the public about investment prudence in the ERISA space and will not be informative.

We ask the Department to delete section IX(e) on the basis that compliance with this provision will be extremely costly, while public disclosure of this information will not provide any meaningful information to plan participants or IRA owners.

C. *Other Comments on the Proposed BIC Exemption.*

1. ***Specific Comment*: The condition to the exemption for pre-existing transactions prohibiting additional advice following the applicability date of the regulation would render the exemption worthless in practice, and should therefore be removed.**

While IRI appreciates the Department's efforts to provide relief from ERISA's prohibited transaction rules for certain arrangements entered into prior to the effective date of the proposed regulatory changes, we have serious concerns that the conditions placed on such relief create inappropriate incentives for Advisers and Financial Institutions not to service existing clients that would run counter to the best interests of Retirement Investors. Specifically, section VII(b)(3) of the Proposed BIC Exemption makes exemptive relief available only if "[t]he Adviser and Financial Institution do not provide additional advice to the Plan regarding the purchase, sale or holding of the Asset after the Applicability Date."

In effect, this condition requires Advisers and Financial Institutions to ignore the ongoing needs of their clients in order to take advantage of the relief provided by the Department. Such a result would be contrary to the overall purpose of DOL's broader regulatory proposal, which is aimed at requiring Advisers and Financial Institutions to always act in the Best Interest of Retirement Investors. It would also run afoul of FINRA's regulatory expectations that advisers should periodically check back with clients to see if their needs or objectives have changed and if their holdings remain appropriate. Furthermore, the condition makes no distinction between

[63] See 29 C.F.R. § 2550.404a-1(b); see also DOL Adv. Op. 98-04A (May 28, 1998) (applying this standard to the selection of investment options in a participant-directed 404(c) plan).

advice that is initiated by an Adviser or Financial institution and advice provided in response to a customer-initiated request. This means that if a Retirement Investor, following the applicability date of the Proposed BIC Exemption, contacts his Adviser to ask whether he should continue to hold shares in a mutual fund he purchased on the Adviser's recommendation one year prior, the Adviser would only be able to answer the customer's question if he otherwise satisfies the conditions of the Proposed BIC Exemption because the pre-existing transaction exemption would no longer be available.

In short, the condition requiring that no additional advice be given either: (i) discourages Advisers from their existing customers' ongoing retirement planning needs; or (ii) eliminates any usefulness that the exemption for pre-existing transactions would otherwise provide. In practice, Advisers will be forced to preemptively target all pre-existing customers in order to enter into tri-party contracts which satisfy the Proposed BIC Exemption's requirements, and they will need to do so immediately upon the applicability date of the Proposed BIC Exemption. IRI urges the Department to delete this condition so that Advisers and Financial Institutions may continue to look out for their customers' best interests with respect to pre-existing investments without forfeiting exemptive relief.

IV. Comment on Timing of Implementation for Proposal

A. *The Department should provide an implementation period of at least three years to ensure the industry has adequate time to develop the necessary compliance processes. The proposed eight-month timeline would result in significant and harmful market disruptions.*

IRI is concerned that the Department has significantly underestimated the amount of time annuity providers and distributors will require to come into compliance with the rules under the Proposal. The requirements and conditions included in the Proposal are exceedingly complex and would require massive information technology re-design and build outs to support. Our members believe it would take a minimum of three years to complete this work.[64]

The Department allowed for a two year implementation period for service providers to implement the section 408(b)(2) regulations. By comparison, the Department is proposing a compressed eight month timeframe for the industry to meet the far more challenging and complex requirements under the Proposal.

IRI urges the Department to reconsider its proposed abbreviated timetable. Many institutions will simply not be able to meet the Proposal's requirements within such a short time frame and would be forced to suspend the delivery of services to customers. A timeframe of at least three

[64] Deloitte & Touche LLP. *Anticipated Operational Impacts to the Insured Retirement Industry of the Department of Labor's Proposed Rules for the Definition of Fiduciary Advice*.

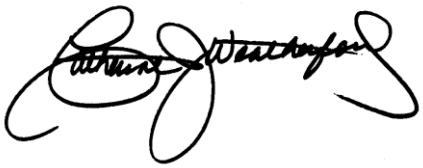
years would be far more realistic and would avoid the unnecessary market disruptions inherent in the Department's eight month timeframe.

Conclusion

In an age when saving and preparing for retirement is squarely on the shoulders of individuals, financial professionals will have an important part in helping their clients develop retirement plans and grow their savings. As currently formulated, IRI and its members are extremely concerned that the Proposal will limit consumer choice or deprive lower- and middle-income consumers from accessing affordable assistance with retirement planning. The revisions recommended in this letter will enable the Department to establish a best interest standard while preserving Americans' access to retirement planning products and advice.

If you have any questions about any of our recommendations or if we can be of any further assistance as the Department works to improve the Proposal, please feel free to contact me or Lee Covington, IRI's Senior Vice President and General Counsel.

Sincerely,



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