



***Defined Contribution
Institutional Investment
Association***

Submitted electronically [e-ORI@dol.gov]

July 21, 2015

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

Re: RIN 1210-AB32 Conflict of Interest Rule
RIN 1210-ZA25 Proposed Prohibited Transactions Exemptions

Ladies and Gentlemen:

The Defined Contribution Institutional Investment Association (DCIIA) is pleased to provide commentary to the Department of Labor (the Department) on its re-proposal of the Definition of the Term “Fiduciary.”¹ DCIIA appreciates the significance of the proposal and supports the Department’s efforts to be thoughtful in promoting good fiduciary behavior and empowering plan fiduciaries and other industry stakeholders seeking to improve the retirement outcomes of working Americans. While DCIIA supports the Department’s goal of protecting participants and IRA owners against “bad actors”, DCIIA believes it is as important for the Department to empower plan sponsors and advice-providers to be “good actors”, thus promoting decision-making in the best interest of plan participants and IRA owners. DCIIA believes that plan fiduciaries and service providers should be supported in providing investment education, advice and other needed services, and in their efforts to create new and innovative products and solutions. DCIIA also commends the Department’s efforts to solicit comments from across the industry to achieve shared policy goals and to provide clear guidance and tools to assist in those efforts.

In providing this commentary, DCIIA seeks to respond to the questions raised by the Department. Additionally, DCIIA has included other comments to help inform the Department on the proposal’s potential impact, or potential unintended consequences, and to be a resource to the Department on how plans are administered and how products, services and educational programs are currently made available to plans. DCIIA would also be pleased to participate in a dialogue with the Department on these issues and to join in its efforts to better the retirement programs available to working Americans.

¹ Definition of “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice; Proposed Rule (“Fiduciary Proposal”) 80 Federal Register. 21,928 et seq. (proposed April 20, 2015).

With this in mind, DCIIA urges the Department to guide plan fiduciaries and service providers alike and promote good outcomes by providing examples of non-fiduciary activities and supporting efforts to:

- Communicate to participants the benefits of keeping their money invested in their plan;
- Inform participants on the benefits of rolling over other retirement accounts into their employer's plan; and
- Report account balances as a monthly or annual income stream (as expressed in a prior DCIIA comment letter).

Established principles of behavioral economics support the notion that helpful examples can nudge plan sponsors, fiduciaries and providers to continue to adopt improvements in retirement plan and IRA programs, products and services, and aid in achieving policy goals. For that reason, DCIIA has also directed many of our comments on the Department's carve-outs to the definition of "fiduciary investment advice" and the need for additional examples.

Core Definition of Fiduciary

A. Mutuality of Understanding

DCIIA appreciates the concern the Department seeks to address in eliminating the "mutuality of understanding" component of the definition of fiduciary investment advice in the Department's current regulations. DCIIA supports the view that consultants, advisors and others should not be able to give the appearance of offering fiduciary advice to plans and plan participants, yet avoid responsibility for that advice based on a disclaimer that is buried in small print or will most likely never be read. DCIIA is concerned, however, that eliminating the mutuality component, particularly when combined with the Department's other proposed changes, would have the unintended effect of causing people to be deemed fiduciaries in situations where it is clear that the communication is not intended to be fiduciary in nature. To help address this concern, DCIIA recommends that the following phrase be added at the end of the sentence contained in proposed Section 2510.3-21(a)(2)(ii):

"... and where, based on the content and context of the communication, there is a reasonable expectation that the advice is being offered in a fiduciary capacity."

DCIIA also suggests that the Department revise its proposed definition of "recommendation" to require advocacy (instead of only a suggestion). For example, a recommendation could be defined as "a communication that, based on its content, context and presentation would reasonably be viewed as *advocacy* to take a particular investment-related action or to refrain from taking a particular investment-related action."²

We also note that the Financial Industry Regulatory Authority, Inc. (FINRA) has advised in this context whether a communication is a recommendation within the meaning of its suitability rule, that: "An important factor ... is whether—given its content, context and manner of presentation—a particular communication ... reasonably would be viewed as a suggestion that the customer take action or refrain

² Fiduciary Proposal, 80 Fed. Reg. at 21,960 (emphasis added).

from taking action regarding a security or investment strategy.”³ FINRA further clarifies this explanation with the following text: “[T]he more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation.”⁴ Moreover, FINRA’s predecessor, the National Association of Securities Dealers (NASD) suggested that “any communication ... that reasonably could be viewed as a ‘call to action’ and that they direct or appear to direct to a particular individual or targeted group of individuals—as opposed to statements that are generally made available to all customers or the public at large ...” is more likely to be considered a recommendation. These types of additional clarifications would be helpful to have included in the regulation.

These suggested changes would also support the continuation of a broad range of routine services that are not expected to be fiduciary activities, such as routine conversations with customer service representatives and targeted mailings. The following are examples of helpful communications that would be better supported if either recommended edit were made:

1. Targeted Mailings and Web-Based Communications. In recent years significant effort has gone into creating participant communication programs and methodologies based on lessons from behavioral science regarding action-based communications. For example, rather than sending every plan participant information about the importance of diversification, this information may be more effective when sent only to participants invested heavily in employer securities or a single non-diversified investment option. Similarly, a newly enrolled participant may receive information about rolling their account balance from a prior plan into their new employer’s plan, or a person nearing retirement age may receive information about distribution planning. As another example, in a web-based communication, a participant may ask for information on how to improve their retirement readiness or change their investment allocation, or for information on target date funds, or a managed account service. Under the Department’s proposal, it is unclear whether these communications could be otherwise considered fiduciary in nature.
2. Sales Conversations. There are numerous examples of sales conversations where it is clear to both the person selling and the person to whom they are selling that there is no expectation of a fiduciary relationship. This includes responding to Requests for Proposals (RFPs) and Requests for Information (RFIs), in which the person selling may respond to a request for a sample line-up, or a description of their firm’s fiduciary services, or participate in meetings where vendors take turns making their case to plan fiduciaries. Under the Department’s proposal, these communications risk creating fiduciary status even though the recipient clearly understands that the seller’s purpose is to sell their services, and not to provide fiduciary advice.
3. Call Center Communications: Participants routinely call in to call centers to ask questions about distributions or investing. Even when the communication is directed to the participant, the participant understands that they are asking for help and that the call has been randomly answered by a call center representative who would provide the same information to anyone in a similar situation calling with a similar question; the advice is not specifically tailored to that participant; and does not take into account all of the caller’s personal circumstances. It is not realistic for call center representatives to provide

³ FINRA Regulatory Notice 11-02 (Jan. 2011) at 3.

⁴ Id.

personalized fiduciary advice, nor is it reasonable for the caller to expect to receive personalized advice. By adding a “reasonable expectation” standard to its proposal, the Department would prevent call center representatives from promoting specific products or services as solutions for a particular participant without inhibiting helpful communications.

Another important consideration for the Department is that the application of the definition of fiduciary to a specific transaction or situation should not require that multiple parties be deemed to be fiduciaries as a result. For example, consider a plan fiduciary that appoints a fiduciary advisor to help the plan fiduciary create the plan’s investment line-up. Soliciting ideas from current or prospective providers should not, absent other considerations, give rise to fiduciary considerations. As another example, consider a provider with multiple affiliates, one that serves as a fiduciary advisor and others that provide information and education, such as through a call center. The call center might provide information about or support to the activities of the fiduciary advisor. DCIIA suggests that policy considerations should not dictate that multiple entities need to be fiduciaries, even in circumstances where critical communications and advocacy are the focus of the advice fiduciary.

B. Service Providers’ Conflicts of Interest

DCIIA appreciates the Department’s desire to help plan fiduciaries identify potential conflicts of interest of their service providers, but believes that the Department should allow for the referral of fiduciary services without the referral being deemed fiduciary investment advice. Plan fiduciaries commonly look to their existing consultants, attorneys and accountants for referrals to other service providers, including for fiduciary services. DCIIA agrees that it is important that the plan fiduciary be made aware of any payments or other benefits resulting from the referral. However, causing the referral to be a fiduciary act, with potential liability for future acts of the referred fiduciary, would cut fiduciaries off from referral sources that are familiar with the needs of the plan and with the services being sought. Also, for services provided, the plan fiduciary would have the protection of the fiduciary rules contained in the Employee Retirement Income Security Act of 1974, as amended (ERISA).

In addition, DCIIA respectfully asks the Department to consider that many referral programs for financial professionals are already regulated by SEC Rule 206(4)-3, which allows referrals to be made and referral fees to be paid, as long as there is appropriate disclosure of potential conflicts of interest. DCIIA encourages the Department to follow this model of allowing compensation for referrals, as long as the person receiving the referral knows about any potential conflicts and is able to take that information into account in their decision-making. Alternatively, DCIIA would suggest that the Department clarify, as it did in Interpretive Bulletin 96-1 (Bulletin) regarding the “Selection and Monitoring of Educators and Advisors”, that the referral would not give rise to fiduciary responsibility where the person making the referral does not select, endorse or control the decision or otherwise make arrangements with the party being referred to provide such services.

Specific Comments on the Carve-Outs to the Definition of Investment Advice

In considering the interplay between the proposed definition of fiduciary investment advice and the Department’s proposed carve-outs, DCIIA believes it would be helpful to define the carve-outs as interpretive examples. Drafting them as carve-outs has caused some to question if the carve-outs stand counter to the principles of the general definition. For example, why would the mere construction and availability of a platform be deemed fiduciary investment advice? Similarly, why would investment education, as previously defined by the Department, be deemed fiduciary investment advice?

Characterizing the exceptions as interpretive examples would clarify the use and intent of both the general definition and the carve-outs, as well as confirm that the carve-outs are intended only as illustrations. Thus, through the Seller's Carve-Out (as defined below), the Department could illustrate one example of how a sale may be non-fiduciary. A failure to meet one of the required elements of the general definition of fiduciary investment advice would be another example. Alternatively, the Department could clarify, in a manner similar to the Department's historical position as to its exemption program, that the carve-outs do not limit the principles of the general definition or imply that the activity would otherwise constitute fiduciary investment advice.

DCIIA also believes it is important for the Department to conduct a "gap analysis" to confirm that ordinary and necessary plan activities either are clearly not fiduciary or qualify for a carve-out, or that an exemption is readily available.

A. Seller's Counterparty Carve-Out

In its proposal, the Department included the following request regarding its proposed seller's counterparty carve-out exclusion (Seller's Carve-Out): "[T]he Department invites comments on the scope of the seller's carve-out and whether the plan size limitation of 100 plan participants or 100 million dollar assets requirement in the proposal are appropriate conditions or whether other conditions would be more appropriate conditions or whether other conditions would be more appropriate proxies for identifying persons with sufficient investment-related expertise to be included in a seller's carve-out."⁵

In response, DCIIA respectfully asks the Department to reconsider its proposal of the 100-participant and \$100 million in assets thresholds. As a general matter, DCIIA believes it is important that the Department encourages the flow of information, education and tools to fiduciaries of small plans and their participants and IRAs and IRA owners. While we appreciate the Department's concern that small plan fiduciaries may be less familiar with certain technical matters, including how fees are charged, this concern may instead be better addressed by requiring a "cigarette warning"-style disclosure or alert disclosing that potential conflicts may exist and directing plan fiduciaries to take care to review the disclosures that are provided to them and to seek expert advice if needed. In considering this proposal, it is generally accepted that plan fiduciaries have duties to act prudently regardless of plan size. In addition, it is important to consider that many small plans and IRAs are aided by professionals such as consultants, attorneys, accountants and advisors that are sophisticated investors. In many cases, participants and IRA owners may themselves be sophisticated investors (such as those that are accredited investors or qualified purchasers under SEC rules). Sophisticated investors participating in small plans and IRAs should have access to institutional products, services and investments when available and also should be able to purchase assets in their retirement accounts that are otherwise available in their non-retirement accounts (assuming other ERISA and, as applicable, tax qualification compliance requirements are met).

Accordingly, DCIIA recommends that:

- (1) The Seller's Carve-Out be characterized as a non-exclusive means for sales advice and recommendations to be non-fiduciary, i.e., a seller is otherwise free to demonstrate that the general threshold conditions of the definition of fiduciary investment advice has not been met.

⁵ Fiduciary Proposal, 80 Fed. Reg. at 21,942.

- (2) The Department confirm DCIIA's view that the Seller's Carve-Out applies to proposals to solicit and to sell both products *and services*. DCIIA recognizes that service contracts are typically "bilateral contracts" (an example used in the Seller's Carve-Out), yet are usually not defined as such. Advisors should be able to tout their services without triggering fiduciary responsibilities. DCIIA also notes that service contracts are already exempted without regard to the size of the plan in existing Department regulations (see 2550.408b-2). For that reason, DCIIA believes it is appropriate for the Department to expressly clarify in the Seller's Carve-Out, or through an example, that the scope of the Seller's Carve-Out includes agreements to provide services.
- (3) The Department clarify that the Seller's Carve-Out applies to responses to RFPs, RFIs or similar information collection techniques. Plans use RFPs and RFIs to gain an understanding of the types of services and products available to plans and to assess the reasonableness of fees. We are concerned that, under the fiduciary proposal, responses to RFPs and RFIs could be deemed fiduciary advice if respondents provide information such as sample fund line-ups as part of that process. The RFP process is an arm's-length sales process in which no fee is paid until a provider is chosen. In fact, many RFP responses are "blind", and the responding organization does not know the plan asset size or number of covered participants.

As a result, we ask the Department to revise the proposal to affirmatively state that sales of services and responding to RFPs and RFIs fall within the Seller's Carve-Out or, alternatively, do not fall within the definition of a "recommendation."

- (4) The Department consider whether the Seller's Carve-Out should also be extended to sales to small ERISA plans, participants and IRAs, under appropriate circumstances. For example, a carve-out for smaller plans or IRAs could require an additional "cigarette warning"-style disclosure when potential conflicts exist, explicitly directing them to take care to review the disclosures provided and to seek expert advice if needed. Alternatively, the threshold should be satisfied when the plan fiduciary, participant or IRA owner is advised by a professional consultant or other adviser that meets the applicable standards. The Department could also consider extending the Seller's Carve-Out to sales to "accredited investors" or "qualified purchasers", or individuals who meet other minimum standards.
- (5) The \$100 million assets-under-management standard be revised to include other assets subject to the fiduciary oversight of the plan fiduciary, and not only employee benefit plan assets. The Department may also wish to consider other assets-under-management thresholds, such as FINRA's institutional account threshold at \$50 million, the SEC's qualified purchaser standard at \$25 million, or the Commodity Exchange Act's (CEA) \$10 million participant standard.
- (6) Regardless of whether the limitations on participants and assets under management are retained as proposed or revised, the matter of whether the participant and assets-under-management thresholds are satisfied should be determined on a one-time basis. Participants and assets fluctuate over time, and it would not be practical to monitor, or to have the fiduciary nature of the relationship change, only as a result of such fluctuations. DCIIA expects that an employer who is deemed sophisticated on the basis of having 100

- participants will not then fail to be sophisticated only because that number subsequently drops to 99. Another important consideration is that if a program is established as non-fiduciary on the basis that the plan has 100 or more participants, the provider will understandably not have acknowledged its fiduciary status. Were the plan to then drop below 100 participants, no fiduciary acknowledgement or other required compliance measures would be in place, leaving a gap due to reasons purely outside of the provider's control. (Alternatively, transition allowances—similar to those that are provided for fluctuations in participant numbers when determining eligibility to use the small benefit plan Form 5500—would be helpful, although they would not address the compliance gap created were the Contract Exemption (as defined below) subsequently becomes unavailable). As a result, other means for transition should be considered, such as ones that would allow for easy corrections to confirm compliance in the ordinary course without incurring a penalty.
- (7) The Department revise the Seller's Carve-Out to apply to any authorized (or responsible) plan fiduciary that receives sales communications, and not require that it be received by only "the plan fiduciary ... who exercises authority or control respecting the management or disposition of the plan's assets."⁶ There may well be cases in which advice that satisfies the Seller's Carve-Out requirements should instead be provided to other plan fiduciaries (e.g., the plan administrator or other fiduciary responsible for approving service provider fees). Understanding that in institutional plans, fiduciary governance is often divided between the plan administrator and administrative and investment named fiduciaries, DCIIA is not aware as to why the Seller's Carve-Out should apply only to communications to the plan's investment fiduciary. Thus, the Seller's Carve-Out could be revised to also apply to covered disclosures provided to the "responsible plan fiduciary", as defined in the regulations under ERISA Section 408(b)(2).

B. Platform Provider Carve-Outs

Regarding the "platform provider" carve-outs, DCIIA would like to comment on the following: **"[The Department] requests specific comment as to the types of platforms and options that may be offered to IRA owners, how they may be similar to or different from platforms offered in connection with participant-directed individual account plans, and whether it would be appropriate for service providers not to be treated as fiduciaries under this carve-out when marketing such platforms to IRA owners."**⁷

DCIIA requests that the Department confirm that the mere creation and offering of a broad-based platform would not constitute fiduciary advice for which a carve-out is required. DCIIA views the structuring and offering of a platform as a non-individualized, broad-based business initiative not directed to any specific customer and, as such, one that should continue to be considered non-fiduciary in nature. Court decisions support this conclusion.⁸ DCIIA is also of the view that this analysis should apply to IRA platforms.

⁶ Fiduciary Proposal, 80 Fed. Reg. at 21,941.

⁷ Fiduciary Proposal, 80 Fed. Reg. at 21,944.

⁸ *Hecker v. Deere & Co.*, 556 F.3d 525 (7th Cir. 2009); *see also* *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013), *Zang v. Paychex*, 728 F.Supp.2d 261 (W.D.N.Y. 2010); *Santomenno v. John Hancock Life Ins. Co.*, No 2:10-cv-01655 (WJM), 2013 WL 3864395 (D.N.J. 2013).

DCIIA believes that the Department could distinguish between the general offering of the platform and services, and specific recommendations or sales that are tailored to a particular plan, participant or IRA owner. Another way the Department could consider the question would be similar to how it currently distinguishes between a settlor's decision-making and the fiduciary's implementation.

Further, DCIIA encourages the Department to clarify the scope of this carve-out by providing additional examples to define the carve-out, so that platform providers have guideposts they can follow. As currently drafted, and because the term "platform" is not specifically defined, it is unclear whether the platform provider exception encompasses services commonly offered to defined contribution (DC) plans as part of a provider's platform. For instance, is the mere offering (versus implementation) by a platform provider of the following services excepted: plan design consulting, a broad range of investment options, managed account and investment advice services, various different types of lifetime income products, brokerage window options, and qualified domestic relation order (QDRO) services? We suggest the Department consider that merely including this array of investment options, products and services on a platform could fall within the platform provider carve-out, but individualized recommendations or advice concerning specific products and services could be distinguished and covered by the Seller's Carve-Out, the Contract Exemption or the Department's regulation under Section 408(b)(2).

In addition, should a traditional brokerage window or account, whether offered within a plan or to an IRA, be separately carved out or included in the definition of a platform? As a practical matter, brokerage windows typically impose some limits on available investments based on general criteria such as whether the customer is retail versus institutional, or whether the window permits investments in individual stocks and bonds, or only mutual funds, etc. In some cases, pre-screening may also take place, based on objective criteria, to reflect quality control (e.g., excluding mutual funds in the bottom quartile for some pre-determined period, or establishing minimum criteria for private investment funds). These screens often apply generally to all similarly situated customers (e.g., all retail accounts) or are not customized for a specific plan or IRA. Other screens may impose limits based on the nature of the account, such as those required by ERISA and the IRA/Code section 4975 prohibited transaction rules to avoid unrelated business taxable income in otherwise tax-exempt accounts, or restrictions on margin accounts to avoid losses in excess of the value of the account (which would be inappropriate for individual account plans and IRAs). Such limitations, DCIIA believes, would not cause a brokerage window to represent a "selection of investment vehicles to participant-directed individual account plans"⁹ (or IRAs), since there is no specific or individualized selection for a particular plan or IRA. The provider offering the brokerage window is typically not engaging in "selection." Rather the provider supports custody, trading and recordkeeping services with respect to a broad universe of securities. This can be distinguished from the provision of advice regarding a particular security or program for investment.

The Department should also consider that its definition not be so limited so as to impede innovation. For example, the Department might consider a platform for investment advisers or other types of products and services.

DCIIA has also considered the following invitation posed by the Department: **"We also invite comments, alternatively, on whether the scope of this [platform] carve-out should be limited to large plans, similar to the scope of the 'Seller's Carve-out'."**¹⁰

⁹ Fiduciary Proposal, 80 Fed. Reg. at 21,943.

¹⁰ Fiduciary Proposal, 80 Fed. Reg. at 21,944.

DCIIA believes that the platform provider carve-out should apply to DC plans of all sizes. As reflected in ERISA Section 404(c) and the Department's 404(c) regulations, all types of DC plans can benefit from access to a broad range of investment options. Extending the carve-out to small plans helps to ensure against the unintended consequence that small plans and IRAs would be restricted from having access to a broad array of investments, including institutional investments when available, and the types of products and services described above.

DCIIA would like to respond to the following request from the Department: “[T]he selection and monitoring assistance carve-out is ... not available in the IRA and other non-ERISA plans context. Commenters on the platform provider restriction are encouraged to offer their views on the effect of this restriction in the non-ERISA plan marketplace.”¹¹

DCIIA believes this carve-out should include IRAs so that IRA owners will continue to have access to needed investment information that meets objective selection criteria. Purely objective information should be available as an added tool to assist IRA owners in making their investment decisions, as it would be for plans, fiduciaries and participants.

The Department should also provide examples identifying the investment criteria a platform provider can provide without being deemed to be providing fiduciary investment advice. For instance, a platform provider should be able to identify categories of funds, such as those provided by Morningstar and BrightScope, to its clients when such information is prepared by qualified third parties. By providing additional examples, we believe the Department can help ensure that objective information is being developed and freely made available.

C. Defining Education versus Advice

DCIIA applauds the Department for recognizing the importance of investment education and for continuing to allow for a carve-out from the definition of fiduciary investment advice for investment education. DCIIA also agrees with the Department's approach to have the proposal cover information and materials whether provided to the Plan, the Plan fiduciary, or a participant, beneficiary or IRA owner, and not just a DC plan participant. DCIIA also believes the Department should leave room in its guidance for innovation, including innovation in the area of investment education. For example, DCIIA expects that the increased focus on lifetime income products, such as those that are designed to provide payout options, could change the conversation and questions about plans and IRAs regarding the decumulation phase. In fact, we would urge the Department to continue supporting those discussions.

DCIIA would also like to provide three responses to the following request posed by the Department: “[The Department] welcomes input on other types of information that would help clarify the line between advice and education [regarding the distinction between non-fiduciary education and investment advice] in this context [of discussing distributions and rollovers].”¹²

1. Call Centers

DCIIA supports the Department's goal of providing greater clarity in outlining the distinction between non-fiduciary education and fiduciary investment advice, such as in the context of call center employees and other representatives discussing distributions and/or rollovers with plan participants and

¹¹ Id.

¹² Fiduciary Proposal, 80 Fed. Reg. at 21,939.

IRA owners. Although the preamble to the proposed rule states that an individual does not act as a fiduciary merely by providing participants with information about plan or IRA distribution options (including the consequences associated with the available types of benefit distributions) because of the fluid nature of live conversations, additional clarity would be helpful. If “suggestions” are the threshold for investment advice, do call center representatives need to be trained not to suggest alternative solutions, even if doing so would educate participants and IRA owners about their available options?

The following examples illustrate the practical challenges that DCIIA believes the Department needs to balance:

Consider a call center staffed by entry-level employees who are trained to work from a script that is designed to prohibit the marketing and selling of investment products:

- The representative receives a call from a participant contributing at a 3% deferral rate and suggests to the participant that the plan permits the participant to increase the participant’s contribution levels. The representative’s employer may receive compensation based on plan account balances.
- The representative receives a call from a participant who is entitled to receive a distribution from the plan. The participant tells the representative she would like to cash out her entire account balance. The call center representative states that the plan permits partial distributions and asks the participant if she would still like to liquidate her entire account. Is this discussion of alternative plan terms (i.e., the availability of a partial distribution) considered fiduciary investment advice, given that the representative's employer receives compensation based on plan account balances?
- What if instead the representative explains the tax implications of rolling over the account balance into an IRA and keeping part of the account balance in the plan? The participant chooses to roll over part of her account balance into an IRA and asks the representative for help in deciding how to invest the funds in the IRA. The plan fiduciary has identified a preferred investment consultant to whom representatives are to refer participants who ask for investment assistance with investing their IRAs. The representative provides the participant with the contact information for the investment consultant chosen by the plan fiduciary.

DCIIA’s expectation is that none of those involved—not the provider, the call center representative nor the plan fiduciary—should be deemed to be providing fiduciary investment advice in these examples. On the other hand, DCIIA expects that the plan fiduciary would need to exercise prudence in designating an investment consultant and it is expected that the investment consultant would be a fiduciary.

DCIIA recommends that the Department consider the following potential solutions:

- 1) The Department could add a call center example, which clearly shows that there is no fiduciary relationship between the call center representative and the participant. In the example, the call center representative would be available to help describe plan features and other available products and services. This example would cover situations where call center representatives: (i) inform participants about the options permitted by the plan with respect to increasing contributions, distributions and rollovers or provide information that is already required to be disclosed (e.g., in a summary plan description (SPD) or fee disclosure), or has been directed by the plan sponsor or plan fiduciary; and (ii) refer participants to investment consultants selected by the plan fiduciary. The Department

could make clear in the example that the call center representative must provide a verbal disclaimer about the non-fiduciary nature of the conversation prior to providing additional information. The example could also outline procedures that require periodic training, oversight and monitoring in the matter of education versus advice.

- 2) The education carve-out could also be revised to include an example that covers call center representatives who (in contrast to the representative described in the examples above) are licensed brokers and are permitted to make recommendations relating to investment products and services in connection with plan distributions. These representatives are already subject to existing regulatory guidance, including suitability standards and disclosure requirements. More specifically, FINRA Notice 13-45 contains guidelines for representatives to follow when marketing rollovers, IRAs and associated services. Information provided consistent with the FINRA Notice could also fall within the education carve-out.

For example, the FINRA Notice already requires that information provided to a participant be fair, balanced and not misleading, and that any discussion regarding a rollover to an IRA include a broad discussion addressing fees, services, investment options, protection from creditors, and distribution options. It also addresses the need to ensure that any potential conflicts of interest not impair the judgment of the representative in providing a balanced discussion of the available options. Broker dealers must have written supervisory procedures designed to ensure that these requirements are complied with. In short, the Department could consider relying on the FINRA rule and providing a carve-out for call center representatives subject to the rule to avoid the unintended consequences of creating potential conflicts between the Department's and FINRA's rules and/or preventing participants from getting critically needed information.

2. Asset Allocation Models

As essential as it is to clarify the distinction between education and advice in the context of distributions and rollovers, DCIIA believes participants' retirement outcomes can be improved when plan fiduciaries, participants and IRA owners have access to meaningful investment education. While it is helpful to reaffirm that service providers can offer general information that "helps an individual assess and understand retirement income needs past retirement and associated risks," and that "explains general methods for the individual to manage those risks,"¹³ without fiduciary status attaching, DCIIA believes that the inability to provide information regarding specific plan investments can significantly limit the utility of the information provided. It is difficult for individuals to connect asset allocation models to actual investments without also receiving examples of how to connect the concept of asset classes to specific investment alternatives. DCIIA suggests modifying the definition of investment education to permit the inclusion of specific investment alternatives generated by models or investment tools.

As background, providers often readily make model portfolios and investment tools available without charge to the general public on their websites. These tools and model portfolios are designed to provide investment education and to make the asset allocation process easier for investors, regardless of whether those investors are investing through retirement accounts. The Department has acknowledged that it recognizes the importance of investing in diversified products across asset classes because such

¹³ Fiduciary Proposal, 80 Fed. Reg. at 21,944.

diversification can improve a portfolio's risk and return efficiency. Asset allocation models can simplify the diversification process in a cost-effective manner by providing sample portfolios based on risk profiles, investing horizons, etc. for hypothetical investors. These models are not specifically tailored or targeted to any particular investors. Similarly, an investment tool is simply a calculator that provides assistance to potential investors, helping them sort through potentially appropriate investments that may meet their needs; it does not provide an individualized solution. If fiduciary status were to attach to a model or investment tool provider, it would be impossible for the provider to satisfy its fiduciary obligations as it would not know the identity or the needs of the information recipient. Presumably, this uncertainty would reduce the availability of free, accessible investment education. The alternative of limiting the output of models and tools to the asset class level does not give the average retirement investor enough information to understand investment allocations.

While DCIIA recognizes the Department's initial concern that individuals may not clearly differentiate between examples of investment options as education and recommendations for investments, DCIIA believes that making it more difficult for individuals to connect information about asset allocation to actual products will harm their savings levels and returns on investment. DCIIA believes that the continued ability to include specific investment alternatives in educational materials is critical to supporting increased savings. Without the additional information, the particulars necessary to make an investment decision would need to be gathered separately. Many investors are discouraged from saving and investing, or become overwhelmed, when the process is inefficient and involves multiple steps.

DCIIA would also like to point out that in the case of participant-directed DC plans, it is expected that a plan fiduciary will have selected the plan's investment line-up. In that case, a fiduciary will already be responsible for making the asset allocation decision to a specific plan investment option. Thus, it is not clear why requiring more than one fiduciary over the selection of these plan investment alternatives would be necessary, particularly if it would impinge upon the use of these tools.

DCIIA's proposed approach would be consistent with what is currently permitted under the Bulletin. Under the Bulletin, asset allocation models can provide examples of products that meet an allocation without constituting fiduciary investment advice. These examples are accompanied by qualifiers telling the investor that (i) other investment alternatives with similar risk and return characteristics may be available under the plan, and where information about those alternatives can be obtained, and (ii) when applying particular asset allocation models to their individual situations, participants should consider their other assets, income and investments. In the preamble, 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."¹⁴ DCIIA is not aware of the specific concerns that might form the basis for this statement, and would expect that any such concerns could be addressed by other means. For example, the Department could permit lists of available investment alternatives by asset class without highlighting any particular fund or the Department could require that the plan fiduciary direct the specific investment alternatives identified by the model or tool. These lists of investment alternatives could also be validated by an independent third party, or could be accompanied by appropriate disclosures, including statements that the investment alternatives listed are intended only as examples, along with information about where additional investment alternatives can be

¹⁴ Fiduciary Proposal, 80 Fed. Reg. at 21,945.

found, noting that the listed investment alternatives are not the entirety of what is available and that other investment alternatives may be similar or superior.

Regardless, the Department should permit such information to be provided to plan sponsors. In order to satisfy their fiduciary obligations to select and monitor investments, plan fiduciaries rely on information and education regarding all aspects of the establishment and maintenance of their plans, including alternative plan designs and how to increase savings levels and improve retirement outcomes for participants.¹⁵ For their conversations to be meaningful and helpful, the provider needs to be able to discuss with the plan fiduciary not only asset allocation and diversification, but also specific investment alternatives available under the plan and how their use may help the plan fiduciary improve retirement outcomes for plan participants.

3. Lifetime Income

DCIIA supports the Department's goal of broadening the guidance currently included in the Bulletin to cover distribution education. However, the proposal also raises questions as to education relating to lifetime income, and DCIIA encourages the Department to support the continued development of lifetime income products and marketplace. For example, income annuities in default target date investment options, which were facilitated by the Department and Treasury Department guidance in October 2014, may necessitate the rolling over of plan assets into an IRA offered by an insurance company for the orderly administration of the income payments commencing at the participant's "normal retirement age." Under the proposal, it is unclear whether the parties involved in the rollover would be deemed fiduciaries. If fiduciary status were to attach as a result of providing such services, that could have the unintended consequence of discouraging the adoption of these features. Encouraging lifetime income options in the DC marketplace is particularly important given the fact that many workers' only source of potential retirement income comes from their DC plans.

D. Financial Reports and Valuations Carve-Out

Plan sponsors rely on custodians and other service providers to report on the value of plan assets for a variety of regulatory and risk management purposes. The information included on the report is often specifically directed by the plan fiduciary. The definition of fiduciary investment advice, together with the carve-out for financial reports and valuations, may reflect an intent to exclude non-discretionary, routine reporting of values by service providers that support prudent and effective plan management.

Although the focus on valuations provided in connection with specific transactions is helpful, the definition requires additional clarifications. For example, a service provider preparing routine, non-discretionary valuation reports could (at a later date) be deemed a fiduciary if the reports were "connected" with a transaction, even if the service provider provided the statements of value for a completely different purpose. Service providers providing routine reports of value could do so with greater confidence if the Department clarified that (1) "advice" in the form of appraisals or valuations must include some element of discretion by the advice provider, and (2) such "advice" is specifically commissioned or provided for purposes of evaluating potential transactions.

¹⁵ See, for example, "Target Date Retirement Funds—Tips for ERISA Plan Fiduciaries," U.S. DEPARTMENT OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, February 2013.

Moreover, DCIIA requests that the Department confirm that the financial reports and valuations carve-out¹⁶ applies to daily valued plans with custom or institutional target date or stable value funds. Such funds provide net asset values (NAVs) on a daily basis to plan participants, including occasions when participants are making investment election and withdrawal or distribution decisions. The reporting on, or making available, of such values should not be deemed a fiduciary activity merely by providing such NAVs, while nearly identical types of valuations provided with respect to registered investment companies or collective funds are not deemed fiduciary acts. The Department has not identified, and DCIIA is not aware of, why similar valuations provided to custom or institutional investment alternatives should be treated differently under the financial reports and valuations carve-out. For that reason, DCIIA encourages the Department to apply the financial reports and valuations carve-out to custom funds and institutional or separately managed accounts in the same manner as it does to registered investment companies and collective funds by specifically referencing these types of investment alternatives in the carve-out.

E. Additional Carve-Outs or Examples

DCIIA also requests that the Department add, as another example of non-fiduciary activities, that accountants, actuaries and attorneys providing professional assistance not be considered to be providing fiduciary investment advice. There has been little concern that accountants, actuaries, and attorneys acting in their professional roles would be deemed fiduciaries under the current five-factor test. Consistent with this long-standing view, the preamble to the proposed regulation specifically states that, “[t]he new proposal clarifies that attorneys, accountants, and actuaries would not be treated as fiduciaries merely because they provide such professional assistance in connection with a particular investment transaction.”¹⁷ However, the proposed regulation itself does not contain this clarification as a carve-out or specific example. DCIIA recommends that the Department either expand the employee carve-out in proposed regulation section 2510.3-21(b)(2) to those providing professional services in connection with a particular investment transaction or include a new carve-out example specifically providing this clarification.

In addition, as noted in the above comments on the core definition of fiduciary investment advice, DCIIA is concerned that the scope of the intended clarification itself is too narrow given the scope of the Department’s proposed definition of “investment advice.” Many professionals are often asked to recommend persons who might be able to provide services that constitute fiduciary investment advice. Even if no fee were charged, the referring firm might otherwise be paid a fee from the plan for unrelated services. Thus, the referral to an investment consultant could itself appear to be a fiduciary act. To avoid this, DCIIA recommends that the Department add a carve-out example, which specifically recognizes that providing a list of referral names of third parties who provide “investment advice” is not a fiduciary act, such as in circumstances where the professional does not select or endorse the third party and does not otherwise make arrangements with the third party to provide such services. If applicable, DCIIA would also expect that any referral fee paid would be disclosed.

F. Impact on Existing Administrative Guidance

With the exception of the existing class exemptions that the Department has proposed to modify, and the references to the statutory investment advice exemption in ERISA section 408(b)(14) (e.g., in connection with so-called “robo-advice”), it would be helpful for the Department to confirm that the

¹⁶ Fiduciary Proposal, 80 Fed. Reg. at 21,958.

¹⁷ Fiduciary Proposal, 80 Fed. Reg. at 21,950.

Department's existing exemptions and administrative guidance, such as the "SunAmerica"¹⁸ advisory opinion, and the "Frost"¹⁹ and "Aetna"²⁰ advisory opinions, will continue to apply in tandem with the platform provider carve-out. Platform providers often use these advisory opinions, so it would be helpful for the Department to confirm such in the final rule.

Another question regarding reliance on existing guidance or exemptions is raised by the applicability of the Seller's Carve-Out to the sale of fee-based services. For example, if marketing one's own services as a fee-based adviser is a separate and distinct provision of investment advice, even the fact that the fee is "level" does not protect the sale itself from being fiduciary investment advice. While the Department's Prohibited Transaction Class Exemption 77-4 by its terms, anticipates that a fiduciary recommending proprietary mutual funds could receive an advisory fee from a plan (subject to waiver or offset), does the exemption cover the fiduciary adviser marketing its own services? Similar questions are also raised concerning the availability of the statutory advice exemption. While it exempts "any transaction in connection with the provision of investment advice,"²¹ it is unclear whether the exemption covers the initial sale of advisory services or only subsequent investment recommendations.

The Department's 408(b)(2) regulations, in examples (1), (3) and (4), already support the proposition that selling and marketing additional services as described in these examples is not fiduciary in nature and does not involve self-dealing. As a result, DCIIA recommends that the Department clarify that any existing regulation, exemption, advisory opinion or other guidance not expressly modified by the proposal remain in effect and may be relied upon.

G. The Best Interest Contract Exemption

DCIIA would like to respond to the following question raised by the Department concerning the Department's proposed Best Interest Contract Exemption (Contract Exemption): "[W]ould a "cigarette warning"-style disclosure be as effective and less costly?"²²

The proposed Contract Exemption requires a complex point-of-sale disclosure prior to a purchase transaction covered by the Contract Exemption. DCIIA commends the Department for considering means of disclosure, and agrees that a simple, clear-cut disclosure in the nature of a "cigarette warning" could be more effective than a complex point-of-sale disclosure regimen. DCIIA addresses the Department's request for comment in two parts.

First, regarding the Department's question about whether this warning would be "as effective", it is recognized that as the number of required notices and disclosures has increased, the attention paid to each notice or disclosure has decreased. Specifically, regarding participants and IRA owners, plan providers have reported at industry events that after sending millions of notices required by the Department's participant disclosure regulations in regulation 2550.404a-5, the number of inquiries relating to these disclosures has been minimal. This lack of significant inquiry is anecdotal evidence of the lack of attention being paid by the recipient. DCIIA would instead point to the attention being paid to the simplified and easier to read disclosures for home mortgages now required pursuant to the actions of the Consumer Financial Protection Bureau.²³ While providing more information may be helpful, providing

¹⁸ DEPARTMENT OF LABOR, Advisory Opinion 2001-09A, December 14, 2001.

¹⁹ DEPARTMENT OF LABOR, Advisory Opinion 97-15A, May 22, 1997.

²⁰ DEPARTMENT OF LABOR, Advisory Opinion 97-16A, May 22, 1997.

²¹ ERISA § 408(b)(14).

²² Fiduciary Proposal, 80 Fed. Reg. at 21,974.

²³ The TILA-RESPA Disclosure is located at <http://www.consumerfinance.gov/regulatory-implementation/tila-respa/>.

too much information can lead to paralysis. The “cigarette warning”-style disclosure could address the Department’s concerns by providing a clear statement of risk that could more easily be read and understood by participants and IRA owners. DCIIA believes that a shorter disclosure in bold typeface, placed prominently on key documents (whether in paper or electronic form), is more likely to be noticed and to achieve the objective of raising investor awareness.

DCIIA is also aware that plan fiduciaries are typically expected, unlike participants and beneficiaries, to review complex disclosures. Given that the Contract Exemption is focused on non-participant directed plans with fewer than 100 participants, these plans’ fiduciaries are already tasked with reviewing and evaluating service provider fee disclosures required by the Department’s 408(b)(2) regulation. Any additional disclosures should be streamlined and coordinated with the required fee disclosures.

Second, DCIIA commends the Department for making significant efforts to gauge the regulatory burden and costs imposed by its proposals. However, as the significant cost reflected in the disclosures required by Department regulation 2550.404a-5 highlights, it is likely that the cost of building compliant systems will be high, because multiple sets of data (e.g., fund returns, the financial arrangement underlying each financial product, financial relationships among affiliates) will have to be coordinated, combined and reviewed through multiple corporate and legal compliance functions. DCIIA acknowledges that modifying transactional materials will have a cost, but these costs would be materially less if only a “cigarette warning”-style disclosure is required, especially because specific data sets would not need to be built for each type of transaction and vetted through complex compliance processes.

DCIIA would also like to comment on whether the definition of “Assets” used in the Contract Exemption is complete or should be revised, understanding that the Contract Exemption is only available for compensation received from investments that fall within the definition.²⁴

DCIIA acknowledges that the Department’s principles-based approach to the Contract Exemption is intended to “flexibly accommodate a wide range of current business practices,”²⁵ and includes consumer protection features, such as disclosures, contract terms, etc. However, establishing a non-exhaustive list of Assets (as defined in the Contract Exemption) seems inconsistent with the concept of a principle-based exemption. Many assets not on the list, including public real estate investment trusts (“REITs”), real estate, municipal bonds, futures contracts, and foreign equities, bonds or currencies (among others), often are prudent investments, and there are many reasons that it may be appropriate for such investments to be included in retirement portfolios and, in particular, in institutional investment alternatives. Sales of these assets are already restricted under the securities laws and, in the case of IRAs, other restrictions already exist under Code section 408. An “approved list” approach to investments undermines “modern portfolio theory” as embraced in the Department’s regulations under section 404 of ERISA.

Eliminating some of these investments may also have the effect of raising costs. For example, a plan sponsor may retain an investment manager to establish a series of “white label” institutional target date funds within a plan, for which the manager utilizes a line-up of investment options that may include unregistered offerings, non-traditional asset classes, etc. to provide prudent levels of risk management and diversification. Since the white label “fund” is merely a bookkeeping convention, with the underlying investments actually being allocated to unitized plan accounts, recommending that a participant invest in such a fund may be interpreted as violating the Contract Exemption. Accordingly, the manager must

²⁴ Fiduciary Proposal, 80 Fed. Reg. at 21,967.

²⁵ Fiduciary Proposal, 80 Fed. Reg. at 21,966.

either omit these investments (to the potential detriment of participants' portfolios) or (if permitted) offer them indirectly, such as via a mutual fund, collective trust or pooled separate account—potentially at an additional cost to participants.

DCIIA would also like to respond to the Department's specific question on whether the definition of "Retirement Investor" should be revised.²⁶

If the Department intends for the Contract Exemption to exempt a wide range of business practices and compensation structures, omitting fiduciaries of participant-directed plans will unnecessarily exclude such plans from exemptive relief and make unavailable to those plans any benefits of the Contract Exemption.

For the Department to successfully achieve its goal of benefitting the widest range of participants as possible, the Contract Exemption should apply broadly to all plans. For that reason, DCIIA believes that the Contract Exemption should apply to plans of all sizes—large and small—so that all plan participants are able to obtain the coverage and protections afforded by the contract exemption and so that it can uniformly benefit all plans.

DCIIA would also like to comment on the Contract Exemption's Contractual Obligations.²⁷

The Contract Exemption's requirement that an enforceable contract first be in place needs to consider the Department's policy objectives in light of the treatment of what FINRA calls "potential investors." In considering how to approach conversations between broker-dealer representatives and potential investors—investors with whom the firm does not yet have a formal relationship—FINRA has taken a pragmatic approach. Although FINRA Rule 2111 applies only to recommendations made to "customers", FINRA has in effect adopted a look-back approach in determining who is a customer. If a transaction is entered based on a recommendation made before the investor was a customer, the firm is responsible for the suitability of the recommendation, regardless of the existence of any actual customer relationship when the recommendation was made. This pragmatic approach reconciles two interests: (i) that a representative not be allowed to lure an investor into a relationship by making unsuitable recommendations that are not covered by FINRA's suitability rule because the investor was not a customer at the time, and (ii) understanding that many of the systems firms use to monitor suitability, as well as the process by which customer profile information is collected and recorded, only occurs when an investor becomes a customer. In this way, once the investor has become a customer and the firm has collected the customer profile information, the firm can review the suitability of the transaction, notwithstanding that the recommendation may have been made before the customer relationship was formally established. Retroactively concluding that an interaction gives rise to a fiduciary relationship under the Department's proposal would make it impossible for the adviser to meet the Department's Contract Exemption conditions. Given this possibility, the Department's rules should allow for some type of look-back compliance to confirm compliance and good behavior without triggering adverse consequences. For example, the Department could require that recommendations made to current or prospective clients, whether the recommendations are made to plan fiduciaries, participants or IRA owners, meet the required standards of care but not require that any contract be in place until the investment is made or action is otherwise formally taken to effect the recommendation.

²⁶ Fiduciary Proposal, 80 Fed. Reg. at 21,968.

²⁷ Fiduciary Proposal, 80 Fed. Reg. at 21,971.

DCIIA would also like to respond to the following question: **The Department seeks comments on whether there are certain procedures and/or consumer protections that it should adopt or mandate for those disputes not covered by FINRA.**²⁸

In response to that question DCIIA notes that, as FINRA’s own arbitration experience has demonstrated, there is no single ideal solution to efficient dispute resolution. Mandating an arbitration program in a manner similar to FINRA’s process can have its benefits. Arbitration tends to be faster and much less costly than litigation in court. The typical time from filing to hearing in a FINRA arbitration can be as short as eight or ten months and is rarely more than a year. In a court of law, it would common for a case to take at least twice as long. FINRA’s process, in that it allows very little motion practice, does not, generally, allow depositions, interrogatories or requests for admissions, and requires substantial mandatory document production, and is less expensive than litigating in court.

Both sides—the industry and advocates for investors—have found grounds to criticize FINRA’s approach to arbitration. While the industry appreciates that the pleadings, submissions, and arbitration hearings themselves are not open to the public (though the awards are public), advocates for investors resent the “secrecy” of the proceedings. And while the investors undoubtedly benefit from very limited pleading requirements and motion practice (including almost no opportunities to make a motion to dismiss or for summary judgment), the industry finds it difficult to quickly resolve cases that it considers to be baseless. Both sides, moreover, in different situations can consider themselves slighted by the limited grounds on which an arbitration award may be challenged in court. On the whole, a less formal and expensive alternative to litigation in court has substantial advantages and may be valuable as an alternative.

DCIIA would also like to comment on the Policy and Procedure Requirement of the Contract Exemption.²⁹

Understanding that Department’s proposed Contract Exemption requires that policies and procedures be adopted, DCIIA would also suggest that the Department consider FINRA’s approach to supervision. FINRA Rule 3110(a) requires firms to “establish and maintain a system to supervise the activities of each associated person that is *reasonably designed* to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.” The word “reasonable” appears more than a dozen times in the supervisory rule, for example, in describing the firm’s written procedures (“[e]ach member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons that are *reasonably designed* to achieve compliance ...”), with respect to the firm’s audit program (“[t]he review shall be *reasonably designed* to assist the member in detecting and preventing violations ...”), and in the requirement for reviewing trading (“[e]ach member shall include in its supervisory procedures a process for the review of securities transactions that are *reasonably designed* to identify trades that may violate the provisions of the Exchange Act, the rules thereunder, or FINRA rules prohibiting insider trading and manipulative and deceptive device ...”). In 1999, FINRA’s predecessor NASD, expounded on the characteristics of a reasonably designed supervisory system. NASD explained that “[t]his standard recognizes that a supervisory system cannot guarantee firm-wide compliance with all laws and regulations. However, this

²⁸ Fiduciary Proposal, 80 Fed. Reg. at 21,973.

²⁹ Fiduciary Proposal, 80 Fed. Reg. at 21,970.

standard does require that the system be a product of sound thinking within the bounds of common sense, taking into consideration the factors that are unique to a member's business³⁰

Considering how this guidance may apply to the Contract Exemption, DCIIA would suggest that any required policies and procedures be "reasonably designed" to achieve compliance as opposed to a requirement that would be tantamount to a guarantee. What this would mean in the context of a prohibited transaction exemption is that the exemption should also permit supervisory review and remediation of specific matters as they may need to be addressed. In that way, if, for example, a call center representative deviates from the policy, the specific matter should be able to be addressed without jeopardizing a non-exempt prohibited transaction. DCIIA believes that the Department's support of reasonable or good faith compliance would help in mitigating compliance burdens and help promote good oversight and supervisory processes.

DCIIA also notes that other exemptions amended as a part of the Department's proposals do not include a written contract requirement. Accordingly, the Department may wish to consider eliminating the contract requirement and, instead, include whatever conditions it may seek to require. This may be particularly helpful for interactions with plan participants where web-based or phone-based interactions are common and a requirement to have a written contract would stall or halt discussions that are otherwise in the individual's best interest. In lieu of requiring a formal written contract, the Department could simply dictate the conditions that apply and whatever limitations the provider can (or cannot) impose on the relationship.

Conclusion

DCIIA appreciates the opportunity to provide our views to the Department and we look forward to engaging in further dialogue on this important topic. We support the Department's efforts to be thoughtful in promoting good fiduciary behavior and empowering plan fiduciaries and other industry stakeholders seeking to improve the retirement outcomes of working Americans. If you have any questions, please contact me.

Sincerely,



Lew Minsky
Executive Director

³⁰ NASD Notice to Members 99-45 (June 1999) at 295. When FINRA recently adopted Rule 3110, the current version of its supervision rule, it cited the NASD's 1999 guidance. See FINRA Regulatory Notice 14-10 (March 2014) at n. 4.