Bank Insurance & Securities Association

July 20, 2015

FILED ELECTRONICALLY

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice (RIN 1210-AB32); Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)

Ladies and Gentlemen:

The Bank Insurance & Securities Association ("BISA") is pleased to have the opportunity to provide comments with respect to the Department of Labor's (the "Department's") notice of proposed rulemaking concerning the Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice (the "Proposed Regulation") and the related proposed Best Interest Contract Exemption (the "BIC Exemption"). BISA is the leading financial services industry association dedicated to serving those responsible for the marketing, sales and distribution of securities, insurance, and other financial products and advisory services through the bank channel. Member companies include depository institutions of all sizes from all regions across the United States, their broker-dealer and mutual fund subsidiaries, third-party marketing companies, product manufacturers and firms providing products, technology and services to support these enterprises. Our members are constructively involved in the retirement market, providing services and facilitating investments for retirement plan sponsors, participants and IRA owners that enhance the retirement security of working Americans.

BISA and its member companies fully support regulations that protect investors. We are concerned however, that the Proposed Regulation and BIC Exemption, without modification, will negatively impact the availability of objective advice for retirement investors through unintended consequences for mainstream consumers. BISA understands that the intended outcome of the regulation is to make it possible for the average American to receive quality, objective retirement investment advice at minimal costs but we are concerned that the proposal will actually increase the cost of delivering that advice and limit advisers' ability to provide the advice average investors require as they seek advice in establishing a strong investment plan for their retirement, especially holders of smaller retirement accounts.

This comment letter addresses the Proposed Regulation and the BIC Exemption. We would be happy to meet with the Department to discuss BISA's concerns in greater detail.

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The Proposed Regulation

The Definition of "Fiduciary" Should Be Focused on Activities that Clearly Are Fiduciary in Nature

BISA believes that the Proposed Regulation should cover only conduct that is reasonably characterized as fiduciary in nature, rather than extend to any investment-related activities in connection with which sales recommendations are made. Under the Proposed Regulation, fiduciary status results virtually any time there is a communication that might be viewed as merely suggesting an investment or investment management activity and is individualized, or specifically-directed, for consideration in making investment or management decisions. Financial services professionals engage in a variety of activities that we believe should not be considered "advice" under the rulemaking but that would be swept into the Proposed Regulation's broad definition of "fiduciary." Contrast the examples of a financial planner who makes recommendations and whose compensation is based on assets under management, or a registered representative who is paid commissions from the investments in the investor's account, with, on the other hand, call center employees who are paid salaries for answering questions such as whether the glide path of a certain target date fund is designed for investors belonging to a particular age cohort, or a salaried bank employee who tells a customer about an IRA as an alternative to a savings account and suggests putting an opening deposit into a 5-year traditional bank CD. The informal assistance provided by call center employees and bank staff cannot fairly be characterized as fiduciary in nature and should be available without the risk of fiduciary liability, yet it appears to be characterized as such under the Proposed Regulation.

We understand that the Department intends to include in the definition of "fiduciary" genuine advisory relationships where the advice provider is in a position of trust as to the advice recipient. In the context of a relationship where there is a reasonable expectation that an investment adviser representative, for example, has assumed a duty to act impartially and provide advice solely in the interest of the advice recipient without regard to its own, BISA supports ascribing fiduciary status and standards of conduct. Our members, however, are concerned that the broad scope of the definition will have the effect of characterizing as fiduciary investment advice many activities that are not intended or reasonably expected to represent that a qualitative judgment has been given and received. BISA believes that the Department's concerns with the current regulation can be satisfied with a more tailored definition of "investment recommendation." At a minimum, this definition should (i) omit any provisions that expand the definition beyond activities conventionally understood in the law to be investment advice, such as discussion of rollovers or other distribution recommendations, and (ii) clarify that a person is not a fiduciary absent a reasonable expectation that he or she has undertaken to act impartially for the investor.

The Investment Education Carve-Out Should Permit Identification of Specific Investment Alternatives in Connection with Asset Allocation Education and Interactive Guidance

BISA supports the Department's incorporation of many of the principles of the existing carve-out for investment education found in Interpretive Bulletin 96-1, 29 C.F.R. § 2509.96-1 ("IB 96-1") into the Proposed Regulation, which have permitted access to investment education to myriad investors for nearly two decades. However, by omitting some of the provisions of IB 96-1 from the education carve-out, the Department is, by its own description, proposing a "significant change." We believe that this change will make it more difficult and costly for average investors to obtain quality objective investment advice.

BISA is deeply concerned about the requirement precluding the identification of specific investment products in asset allocation models and interactive investment materials used to educate retirement investors. All models of returns and comparisons would need to be based on hypothetical products. We believe this would

have the effect of dramatically reducing the value of participant education efforts by making it exceedingly difficult, if not impossible, to impart the information participants need to implement their investment decisions. Investors, presumably, would be left to research specific products on their own, at their own cost – an inefficient and counterproductive approach.

Conceptually, this restriction in the education carve-out seems to diverge from the Department's expressed goal of facilitating financial literacy. Current practices of providing investment options for illustrative purposes, even if accompanied by disclaimers that other investments with comparable risk and reward profiles may be offered by other institutions, would no longer comply with the requirements of investment education under the Proposed Regulation. The net effect of these substantial changes may be to chill financial services professionals' appetite for providing any sort of investment education that might be considered to approach the line, with the result of decreasing access to important and needed information for the average retirement investor. The carve-out should be revised to retain the current rule of IB 96-1 in this regard.

The Platform Provider Carve-out Should Be Expanded to Include IRA Platforms

BISA and its members believe that the principles informing the Proposed Regulation's carve-out for platform providers apply equally to IRAs, and that providers offering platforms to IRAs should therefore be covered by the carve-out. The platform carve-out appears to be intended to allow platform providers who provide access to investments through a retirement plan platform and help plan fiduciaries select or monitor investment alternatives perform those services without triggering fiduciary status. This exception recognizes that the platform provider and the plan fiduciary will clearly understand that the provider has financial or other relationships with the offered investments and is not purporting to provide impartial investment advice and that the general financial information that may be provided by platform providers falls short of actual investment advice or recommendations. Despite the fact that these premises apply equally in the IRA market, the Proposed Regulation does not extend the platform carve-outs to IRAs, under the theory that there typically is not a separate independent plan fiduciary interacting with the IRA provider to protect the interest of the IRA account holders. BISA believes that, like participants in employer-sponsored retirement plans, IRA owners need more, not less, education on investment options and that including IRA platform providers in the carve-out simply makes sense. Moreover, without a carve-out for IRA platforms, providers may not, without assuming fiduciary liability, be able to be fully responsive to IRA owners' requests for investments meeting objective criteria specified by the IRA owner. Accordingly, the platform carve-out should be extended to IRA platforms.

The Counterparty Carve-Out Should Be Expanded to Include Small Plans and Sophisticated IRA Investors

BISA believes that an effective carve-out of counterparties from the proposed definition of fiduciary investment advice is essential for avoiding the imposition of ERISA fiduciary obligations where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser. In that regard, the Department expressed the view (80 Fed. Reg. 21928, 21942 (April 20, 2015) that investment recommendations to retail investors, including small plans, IRA owners, and plan participants and beneficiaries do not fit the "arms-length" characteristics of this carve-out. By making the counterparty carve-out unavailable for transactions with small plans, these plans will be constrained from any desired arm's length bargaining with sellers even where they are not relying on and represent their non-reliance on a counterparty for impartial advice. BISA believes that this considerable limitation will needlessly restrict some small plans and IRA owners' investment alternatives. The limited scope of this carve-out fails to recognize that some small plans and financially-sophisticated IRA investors and participants may fit the arm's length characteristics that the seller's carve-out is designed to preserve. We believe that the counterparty carve-out should be expanded to include these investors.

This is more consistent with the stated purpose of the carve-out than a bright-line exclusion, which fails to account for the expectations of some investors.

The BIC Exemption

We support the Department's efforts to develop an exemption based on principles that will accommodate the business practices of a dynamic marketplace. We believe, however, the BIC exemption is unworkable as proposed, for the reasons below. We urge the Department to revise the BIC Exemption to provide a viable method for ERISA fiduciaries to continue receiving variable compensation.

The Conditions of the BIC Exemption Should Not Be at Odds with Other Federal Laws and State Insurance Laws

BISA and its members are concerned that certain conditions of the BIC Exemption would conflict with established securities and insurance industry rules, particularly the disclosure standards. For the sake of consistency and to avoid confusion among investors, BISA recommends conforming these requirements to other Federal laws and applicable State insurance laws. For example, the Web page which must be maintained and be "freely accessible to the public" as a condition of exemptive relief could be interpreted as advertising material under state insurance laws and possibly a "prospectus" under federal securities laws, and subject to additional regulation. In addition, for fixed annuity products, we are concerned that any material considered to be advertising would have to comply with state insurance regulations on advertising. Similarly, the transaction disclosures required under the BIC Exemption prior to the execution of an annuity contract raise questions of whether approval from financial services regulators would be required. BISA urges the Department to undertake a careful review of the well-developed body of federal and state laws governing securities and insurance before it promulgates a final rule.

The BIC Exemption's Disclosure Requirements Are Unduly Onerous; Existing Regulatory Disclosure Requirements Should Be Leveraged

BISA is concerned that the extensive data collection, recordkeeping and disclosures required by the BIC Exemption are overly burdensome. The costs of adopting and enforcing policies and procedures and tracking and organizing annual disclosure data for each of the categories of proposed disclosures would entail complex administrative and operational issues. For example, annual disclosure of core data summarizing investments purchased or sold, and the fiduciary adviser's total compensation in addition to that of the financial institution, will require enormous effort on the part of financial service providers, at great expense. Conceivably, this could force all but the largest financial institutions to leave the retirement plan and IRA business, inhibiting the ability of average investors to obtain the advice they require. Moreover, key elements of the information required by the BIC Exemption are already provided to plan participants through the participant-level fee disclosures currently required under section 404(a)(5) of ERISA, to plan sponsors through the ERISA section 408(b)(2) disclosure requirements, and to all retirement investors under other bodies of law. A feasible and comparably cost-effective alternative to the separate disclosures required by the BIC Exemption would be to allow the disclosures required under section 404(a)(5) and/or section 408(b)(2), together with any disclosures required by securities or insurance laws, to satisfy some or all of its conditions.

Clear Standards for Reasonable Compensation Should Permit Existing Compensation Arrangements for Small Plans

BISA is concerned about the multiple articulations of "reasonable compensation" among the conditions for exemptive relief under the BIC Exemption and the amendments to existing exemptions. The absence of a uniform standard or set of criteria for evaluating reasonableness creates potential for confusion and encourages litigation. We believe that small plans, participants and IRA owners will be better protected by exemptions that include clear conditions designed to safeguard their interests, rather than subjective standards subject to multiple interpretations.

Further, as it is structured, as a condition of exemptive relief, the BIC Exemption places the service providers in the position of evaluating the reasonableness of their own compensation. As an example, the impartial conduct standard provides that the fiduciary adviser and the financial institution must affirmatively agree that unless the total compensation to be received is reasonable, an asset will not be recommended. This would, in effect, require the advice professional or institution to benchmark its own compensation. In addition, under the BIC Exemption, a financial institution also now has the burden of determining the reasonableness of its compensation as a condition of being able to offer a limited range of investment options. While the "reasonableness" of compensation is a familiar condition under many ERISA statutory and class exemptions, assigning the service provider the responsibility for determining the reasonableness of its own compensation is not. BISA is concerned that providers will be unable or unwilling to make contractual warranties regarding reasonable compensation, particularly prior to making an investment recommendation, as it would require an accurate on-the-spot market value analysis. This would have a particularly negative effect on small plans and accounts, for which individualized level fee investment advice is often uneconomical or even unavailable. BISA strongly encourages the Department to consider dropping the contractual reasonable compensation warranty from the conditions of the BIC Exemption.

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On behalf of BISA and its member companies, we thank you for considering these comments. We would welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on these important issues.

Very truly yours,

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