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BY ELECTRONIC MAIL TO e-OED@dol.gov and e-ORI@dol.gov

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments on Conflicts of Interest Proposed Rule (RIN: 1210–AB32) and Best Interest Contract Exemption (ZRIN: 1210–ZA25)

Ladies and Gentlemen:

Chapman and Cutler LLP represents a number of financial institutions that offer various investment products, including unit investment trusts (*"UITs"*) registered under the Investment Company Act of 1940 (the *"1940 Act"*). Such institutions would be significantly impacted by the Department of Labor's (the *"Department's"*) re-proposed regulations addressing when a person providing investment advice with respect to an employee benefit plan or individual retirement account (an *"IRA"*) is considered a fiduciary under the Employee Retirement Income and Security Act of 1974 (*"ERISA"*).[1] As part of the proposal, the Department is seeking to provide relief for many transactions by issuing the Proposed Best Interest Contract Exemption (the *"Best Interest Contract Exemption"*).[2] We are concerned that a technical aspect of this exemption could have unintended consequences for UITs and UIT investors regarding the way compensation is paid with respect to the sale of UITs and request clarification of these issues. Additionally, we are concerned the re-proposed regulations could have unintended consequences for certain marketing and educational efforts by investment product sponsors, manufacturers, wholesalers and similar persons (including UIT sponsors and other fund distributors). Where these marketing and educational efforts are made with financial intermediaries such as broker-dealers that are themselves investment advice fiduciaries under ERISA, under the re-proposed regulations these firms could be considered fiduciaries under ERISA under certain circumstances even where they have no contact with an employee benefit plan or IRA and we request clarification on this issue.

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1 80 Fed. Reg. 21928 (April 20, 2015).

2 80 Fed. Reg. 21960 (April 20, 2015).

UITs are investment companies registered under the Investment Company Act of 1940 (the "*1940 Act*"). UITs are similar to open-end funds and closed-end funds except that UITs do not have actively-managed portfolios and have defined lives that generally range from approximately one year to more than 30 years. Since UITs are not actively-managed, they do not have an "investment adviser" or pay a management fee and tend to have lower ongoing annual operating expenses than open-end funds and closed-end funds. Similar to open-end funds, UITs issue redeemable shares (called "units") in public offerings registered under the Securities Act of 1933 and are offered through prospectuses that disclose all applicable fees and expenses and also discloses all compensation to selling broker-dealers. Similar to many open-end funds, the public offering price of UIT units includes a sales charge to compensate the sponsor and broker-dealers and the sales charge is set forth in the applicable prospectus. Also similar to open-end funds, investors can redeem UIT units every business day at the redemption price described in the applicable prospectus which is based on the current net asset value of units.

According to information published by the Investment Company Institute (the "*ICI*"), as of December 31, 2014 there were over $100 billion in assets in over 5,000 existing UITs, excluding UITs that are exchange traded funds ("*ETFs*"). This includes over $65 billion in assets in the more than 1,500 UITs created in 2014. The ICI does not publish information about what portion of those UITs are held by IRAs and employee benefit plans and only the financial intermediaries who directly offer the UITs to end-clients have that information. However, we spoke to a number of UIT sponsors who contacted various financial intermediaries to get an estimate of the portion of UIT assets held by IRA and employee benefit plan clients. Based on these conversations, it is estimated that somewhere between 25% and 40% of UIT units are currently held in IRAs or employee benefit plans. Those percentages translate to more than $25 to $40 billion of IRA and employee benefit plan assets in UITs and more than $16 to $26 billion in the UITs launched in 2014.

The Best Interest Contract Exemption would apply to compensation received in connection with a purchase, sale or holding of an "Asset" by a plan, participant or beneficiary accounts or IRA. UITs are covered by the proposed exemption because the proposed exemption defines "Asset" to include "shares or interests in registered investment companies" and UITs are registered investment companies. Section I(c)(2) of the proposed exemption provides that the exemption does not apply to compensation received in connection with a principal transaction with a plan, participant or beneficiary account, or IRA. This creates a significant technical operational issue for transactions in UIT units because UIT units are bought and sold in riskless principal transactions between broker-dealers and their customers. However, footnote 27 in the preamble to the Best Interest Contract Exemption, provides that the Department does not view a riskless principal transaction involving "mutual fund shares" as an excluded principal transaction. Presumably then, riskless principal transactions involving "mutual fund shares" are covered by the Best Interest Contract Exemption. As long as UIT units are covered by footnote 27, riskless principal transactions in UIT units should not present this technical operational issue under the Best Interest Contract Exemption. While we believe that riskless principal transaction in units of UITs should be covered by footnote 27, we are concerned that the use of the term "mutual fund" gives rise to ambiguity.

The term "mutual fund" is not defined in the Best Interest Contract Exemption. Further, the term "mutual fund" is not a legal term and is not defined or used in the 1940 Act or rules thereunder. The 1940 Act establishes three basic types of investment companies: face amount certificate companies, unit investment trusts and management companies.[3] Management companies are further defined as either open-end companies and closed-end companies.[4] The term "mutual fund" is often, but not always, used colloquially to refer to open-end funds. Existing and proposed prohibited transaction exemptions also do not use the term "mutual fund" consistently. For example, in the proposed amendments to PTE 84-24, the Department uses the term "mutual fund" to mean "an investment company registered under the Investment Company Act of 1940".[5] Proposed PTE 84-24 also defines the term "Mutual Fund Commission" to mean "a commission or sales load paid either by the plan or the *investment company* for the service of effecting or executing the purchase or sale of *investment company* shares, but does not include a 12b-1 fee, revenue sharing payment, administrative fee or marketing fee."[6] This usage clearly covers UITs because UITs are registered investment companies. On the other hand, proposed PTE 86-128 defines "Mutual Fund" to mean only "an open end investment company registered under the Investment Company Act of 1940".[7] Accordingly, we request that the Department clarify that the view set forth in footnote 27 applies to riskless principal transactions in shares of "an investment company registered under the Investment Company Act of 1940" or in "redeemable securities of an open-end company or unit investment trust registered under the Investment Company Act of 1940" rather than to "mutual fund shares".

In the Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, the Department generally indicated that the purchase or sale of a security in a principal transaction between a plan or IRA and a fiduciary raises issues under Section 406(b) of ERISA and Section 4975(c)(1)(E) of the Internal Revenue Code of 1986, as amended.[8] The Department has expressed that a fiduciary may have difficulty reconciling its duty to avoid conflicts of interest with its concern for its own financial interests when acting as principal in a transaction.[9] The Department has indicated that it is primarily concerned with issues involving liquidity, pricing, transparency, and the fiduciary's possible incentive to "dump" unwanted assets.[10] The Department presumably indicated with the inclusion of footnote 27 in the Best Interest Contract

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3 15 U.S.C. § 80a-4.

4 15 U.S.C. § 80a-5.

5 80 Fed. Reg. 22010, at 22011-22012 (Apr. 20, 2015).

6 80 Fed. Reg. 22010, at 22020 (Apr. 20, 2015) (emphasis added).

7 80 Fed. Reg. 22021, at 22030 (Apr. 20, 2015).

8 80 Fed. Reg. 21989, at 21993 (April 20, 2015).

9 80 Fed. Reg. 21989, at 21994 (April 20, 2015).

10 80 Fed. Reg. 21989, at 21994 (April 20, 2015).

Exemption that these concerns are not present in principal transactions in "mutual fund" shares. Riskless principal transactions in UIT units and open-end fund shares do not present these concerns. Shares of open-end funds and units of UITs are both "redeemable securities" under the 1940 Act and are subject to the same regulatory requirements regarding pricing for purposes of sales and redemptions. Because open-end funds and UITs are governed by stringent regulated pricing and disclosure requirements, riskless principal transactions in shares of open-end funds and UITs do not present the concerns raised by principal transactions in certain other securities.

Liquidity—The 1940 Act imposes strict liquidity obligations on both open-end funds and UITs. The 1940 Act defines a UIT as an investment company that, among other things, "issues only redeemable securities". The 1940 Act defines an open-end company as a management company which is offering for sale or has outstanding any "redeemable security" of which it is the issuer. Under the 1940 Act and rules thereunder an investor must be able to present a "redeemable security" to the fund for redemption each day, Monday through Friday, other than customary business holidays. This means that investors in both UITs and open-end funds have the same absolute right to liquidate their investment on each business day. As a result, UITs possess the same liquidity as open-end funds and should not present any concern from a principal transactions standpoint.

Pricing—The 1940 Act requires that shares of open-end funds and UITs be sold and redeemed at specific prices computed as described under the 1940 Act and rules thereunder. Section 22(d) of the 1940 Act requires that redeemable securities of a registered investment company must be sold only at a current public offering price described in the prospectus. This is known as "retail price maintenance" and requires that all broker-dealers sell units of a UIT at a stated price applicable for a given day computed by the UIT after receipt of a purchase or sale order. The sales charge applicable to each transaction is defined by the prospectus and broker-dealers are not permitted to vary from the prospectus sales charge. Most UITs offer sales charge discounts to various classes of investors or transactions (such as large quantity purchases) as permitted under 1940 Act Rule 22d-1. This rule requires that broker-dealers apply any sales charge discount uniformly to all investors or transactions in the class specified in the prospectus. In addition, the rules of the Financial Industry Regulatory Authority, Inc. (formerly, the National Association of Securities Dealers, Inc.) ("*FINRA*") set forth additional obligations for broker-dealers selling shares of open-end funds and UITs and require broker-dealers to sell units at the price stated in the prospectus. NASD Conduct Rule 2830(d) sets forth detailed limits on the maximum sales charge that can be charged by broker-dealers when selling open-end fund shares and UIT units to ensure that the sales charge is not excessive. The same "retail price maintenance" concept applies when a UIT investor liquidates units. The 1940 Act and rules thereunder require that when an investor redeems UIT units, the investor must receive a redemption price based on the current net asset value of such units which is next computed after receipt of a tender of such units for redemption.

UIT unit transactions are not subject to negotiated prices with embedded mark-ups or mark-downs determined by dealers. Instead, UIT units are sold and redeemed only at stated prices described in the prospectus that are based on the current net asset value which is next computed after the broker-dealer receives an order to purchase or sell the units or a tender of units for redemption.

Transparency—The UIT registration statement form requires that a UIT disclose the sales charge, broker-dealer compensation and all fees and expenses of the UIT in the UIT's prospectus. Each UIT prospectus sets forth the sales charge and all fees and expenses in a fee table in the front part of the prospectus similar to open-end fund prospectuses. Each UIT prospectus also describes all sales charges, fees and expenses in greater detail in the textual description of the prospectus. In addition, each UIT prospectus sets forth the specific broker-dealer concession earned by selling broker-dealers and describes any other compensation to which a broker-dealer may be entitled. FINRA rules also impose requirements that enhance transparency with respect to all investment companies, including UITs. NASD Conduct Rule 2830(l) includes detailed limitations and disclosure requirements related to compensation allowed to broker-dealers that sell investment company shares. This rule also specifically prohibits a broker-dealer from accepting any cash compensation related to a UIT or other registered fund unless such compensation is described in the prospectus.

Dumping Unwanted Assets—The final concern that the Department has expressed with respect to principal transactions is a fiduciary's possible incentive to "dump" unwanted assets. Footnote 27 in the Best Interest Contract Exemption release relates only to "riskless principal" transactions. By definition, dumping is not a concern in a riskless principal transaction. In this context a riskless principal transaction would involve a fiduciary purchasing UIT units in its own account for the purpose of covering a purchase order previously received from a plan or IRA, and then selling the units to the plan or IRA to satisfy the order. Because the fiduciary would not have held the units in its proprietary inventory prior to receiving the customer's purchase order, the fiduciary cannot be "dumping" unwanted assets in a riskless principal transaction.

In light of the above, we respectfully request that the Department clarify that the view set forth in footnote 27 applies to riskless principal transactions in shares of "an investment company registered under the Investment Company Act of 1940" or in "redeemable securities of an open-end company or unit investment trust registered under the Investment Company Act of 1940" rather than to riskless principal transactions in "mutual fund shares". For the same reasons outlined above, even ordinary principal transactions in UIT units do not raise the concerns outlined in the re-proposed regulations and exemptions and should not be excluded from the Best Interest Contract Exemption.

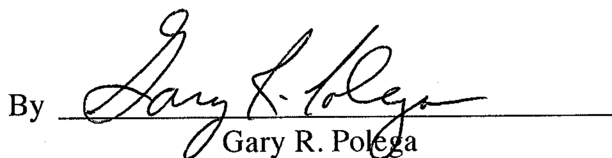
Additionally, investment product sponsors, manufacturers, wholesalers and similar persons (including UIT sponsors and other fund distributors) market investment products to other financial intermediaries such as broker-dealers which offer securities to clients that may include employee benefit plans and IRAs. Firms communicate with financial intermediaries about various investment products including educating them about product features and objectives, discussing potential investment solutions and suggesting specific products to financial intermediaries to meet certain generic investment needs identified by the financial intermediaries. The end clients (e.g. employee benefit plans and IRAs) generally have no relationship with the firms communicating with these financial intermediaries. Because the re-proposed regulations categorize a person providing investment advice to a plan fiduciary as a fiduciary, under certain circumstances this could result in a person being treated as a fiduciary under ERISA based on their marketing efforts and educational communications with a financial intermediary without the person having any relationship with an employee benefit plan or IRA.

Without additional clarity in the re-proposed regulations, product sponsors, manufacturers, wholesalers and similar persons may need to significantly curtail typical marketing efforts including daily discussions with financial intermediaries, educational seminars, and other communications about investment products that are designed to educate broker-dealer representatives and other investment professionals about product terms and features, suitability assessments and investment solutions among other things. This has the potential to have a negative impact on IRA and employee benefit plan investors by adversely impacting the product knowledge of the financial intermediaries that provide them with investment recommendations. We also note that in its release for the re-proposed regulations, the Department pointed to FINRA Regulatory Notices 11-02, 12-25 and 12-55 as providing useful standards for the determination of what constitutes a "recommendation" constituting "advice". These notices all relate to FINRA Rule 2111 which requires that a firm or associated person have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer. FINRA Rule 0160(b)(4) specifically excludes a broker or dealer from the definition of "customer" and we believe that same exclusion makes sense here where an investment product sponsor, manufacturer, wholesaler or similar person is communicating with a financial intermediary such as a broker-dealer that is itself an investment advice fiduciary. In light of the above, we respectfully request that the Department clarify that these types of communications to a financial intermediary such as a broker-dealer that is itself an investment advice fiduciary not cause an investment product sponsor, manufacturer, wholesalers or similar person (including a UIT sponsor or other fund distributor) with no relationship to an employee benefit plan or IRA to be treated as a fiduciary under ERISA.

We appreciate the opportunity to comment on this important proposal and related exemptions. We would welcome the opportunity to discuss these comments or to provide additional information and input as you work to finalize the proposed regulations and the exemptions.

Very truly yours,

CHAPMAN AND CUTLER LLP

By 
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