July 20, 2015

VIA EMAIL: e-ORI@dol.gov
Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Conflict of Interest Rule, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

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

Re: RIN 1210-AB32, Conflict of Interest Rule – Retirement Investment Advice and ZRIN 1210-ZA25 (Attention: D-11712) – Proposed Best Interest Contract Exemption

Dear Sir/Madam:

We respectfully submit the following comments with respect to the proposed definition of the term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice (the "Conflict Rule") and on the Proposed Best Interest Contract Exemption (the "Proposed BIC") issued on Monday April 20, 2015.

Conflict Rule

The Proposed Conflict Rule defines as a fiduciary, a person who renders investment advice with respect to monies or other properties of a plan or individual retirement account if (1) such person provides, directly to a plan, plan fiduciary, plan disbursements or beneficiary, IRA, or IRA Owner the following types of advice in exchange for a fee or other compensation, whether direct or indirect:

(i) A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits, or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from a plan or IRA;

(ii) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from a plan or IRA;

(iii) An appraisal, fairness opinion, or similar statement, whether verbal or written, concerning the value of securities or other property, if provided in connection with the specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other properties by plan or IRA;

(iv) The recommendation of a person who is also going to receive a fee or other compensation for providing any types of advice described in paragraphs (i) through (iii);

> and such person either directly or indirectly acknowledges that he is acting as a fiduciary under ERISA, or pursuant to a written or verbal agreement or understanding that the advice is individualized or that such advice is specifically directed to the advice recipient for consideration with respect to the security or other property of a plan or IRA.

While the Conflict Rule has a number of carve outs, many of the carve outs from the definition of a fiduciary do not address the fundamental services provided by professionals and professional advisors to individuals which are normally considered pure tax advice. One example of such commonly occurring professional advice is advice related to taking a retirement plan or IRA distribution. Frequently advice on taking a retirement plan or IRA distribution is provided by CPAs, estate planning attorneys, and income tax advisors and such advice is provided to individuals for a fee and the advice is pure tax advice. Such advice regarding whether or not to take or the amount of a distribution from their retirement plan or individual retirement account is part of the planning of the individual's taxes, finances and estate plan and it is at times unrelated to the use or investment of such distributions. This can be advice regarding retirement plan compliance such as advice to take minimum required distributions under Code section 401(a)(9), or advice as to whether to convert a Traditional IRA into a Roth IRA (which is treated as a distribution), which is tax planning advice and which may or may not be part of more complex tax, financial planning or wealth transfer planning. Some advisors providing such advice are not involved in recommending investments or how to invest any amounts received as a distribution, but are solely involved in tax, estate or financial planning for the individual for a fee. None of these individuals would normally consider that they are fiduciaries to a plan or an individual retirement account as a result of providing financial, income tax and estate planning advice to an individual. Employees in human resources departments also provide this type of advice without any fee being paid or incurred. These individuals are not receiving further compensation from investments or from other investment or insurance products as a result of their professional advice with respect to estate planning, income tax planning or financial planning. Thus, we recommend there be a carve out provided to exclude such professional services from the definition of a fiduciary act and to exclude advice where other laws provide fiduciary protections for the individuals. In some cases, the advice is provided by a CPA who is also a registered investment advisor, which means the individual is already a fiduciary under ERISA and the securities laws and thus, there is no need to expand the ERISA fiduciary definition to cover such individuals because it would be redundant to the protections provided under federal and state securities laws.

One of the carve outs from the fiduciary definition provides for counterparties to the plan if the plan fiduciary has financial expertise to avoid being defined as a fiduciary, but this carve out is limited to plan fiduciaries of plans with over 100 participants and who are managing at least $100 million in employee benefit plan assets, and thus it will not protect many professionals providing professional advice, because this only protects professionals providing service to a select group of very large employee benefit plans. Many smaller plans are advised by registered investment advisors, who are not eligible to use one of the carve outs for counterparties or swap or security based swap transactions, do not qualify as platform providers, nor are they providing solely the services defined as investment education or solely involved in financial reports and valuations. The regulations are broad enough to define these individuals as fiduciaries when they are engaging in normal professional advice within the scope of their professions providing services to smaller plans, yet the carve outs appear biased toward large plans and small plans will not be able to utilize some of the carve outs or have the economic power to negotiate to fit within a carve out.

Furthermore, small plans cannot choose to limit the services offered to them to fit within the carve outs for platform providers because smaller plans only are offered certain packages of services for

plans of such size on a take it or leave it basis by the vendors providing services. Under the Conflict Rule, registered investment advisors serving the small plan market are subject to much more onerous restrictions under the Conflict Rule and the Proposed BIC, without the relief available to the advisors to the very large plans, because such advisors to larger plans can use one of the Conflict Rule's carve outs.

The special carve out in the Conflict Rule for employees only exempts employees with respect to advice to a plan fiduciary which is provided without receiving any additional fee or other compensation. Yet employees who are employed in a plan sponsor's human resources department or tax or accounting departments in smaller employers are frequently involved in providing recommendations with respect to advisability of distribution from the plan, e.g., whether a distribution should be rolled over to an IRA, or to an employee electing to take a minimum required distribution. The employee exception is limited to only employees providing advice to a plan fiduciary for which they receive no fee or other compensation, yet employees of the plan sponsor can become fiduciaries in many other respects. This carve out should be broadened so that it also covers employees providing advice to participants in the plan for which they receive no additional fee or compensation beyond their normal compensation for the work performed for the employer and the employee carve out should not be limited just to advice to the plan fiduciary. The employees assisting other employees with distribution elections within the scope of their daily work duties presents no conflict of interest issues, and plan sponsors need to permit such assistance of employees to continue so there is someone with some understanding of the plan and legal limits on elections guiding the employees. Furthermore, no employee receives additional compensation for assisting other employees when this is part of their job, so no conflict of interest exists.

The carve out for platform providers does not permit the platform provider to consider the individualized needs of the plan or the plan participants in providing their advice. There are registered investment advisors that provide professional investment advice to a particular industry or profession which may be industry specific (e.g., because there are similar types of plans offered within an industry, or individuals with similar financial situations in an industry, e.g., an industry of professionals who all require substantial capital outlay to enter their profession, or to a different group of professionals who do not require substantial capital outlay to enter their profession) and such advice may be somewhat customized to the individuals (e.g., some parties who provide a package of services include consideration of the individual's assets and liabilities and such considerations would remove such vendor from being a platform provider). Such investment advisors would otherwise be within the platform provider carve out, but for the individualization or customization of the advice, because they are really providing platforms of alternatives from which the plan fiduciaries in those industries may select and such package would otherwise qualify for the carve out for platform providers, but for the fact that such investment advisors customize the advice for the plan and individuals involved. The platform provider carve out is currently drafted to limit it to only certain platform providers serving very large entities to a very broad market with no customization of the advice, yet there are providers of a platform of services who are equally deserving of using the exemption and who provide investment advice services to smaller employers in particular industries or to employees in particular industries that would not otherwise receive any investment advice and might not even establish a retirement plan, but for the assistance of the investment advisor/financial planner. Since the advice is being provided by registered investment advisors in these situations, the individuals or plan sponsors in these situations already have the protection that the advice is being provided by a person in a fiduciary relationship to them under the Investment Advisors Act and adding the Conflict Rule is merely adding a redundant definition and redundant regulation; thus, the Conflict Rule should be revised to either exclude such services from being within its reach so individuals and smaller plans will have access to professional advice, or by broadening the carve out for platform providers to permit individuals' needs or plan needs to be considered in the advice provided. Revising the platform provider carve out to permit customization of the advice by the plan sponsor's industry, the age

of the plan participant, or the level of other savings or assets or risk tolerance would enable smaller plans to have access to platforms on the market and often provided via computer programs.

The investment education carve out applies to a party providing investment education information and materials, but it is limited just to investment education. In many cases when investment education is provided, it comes with additional services, such as financial planning on how much savings an individual should have to retire, but the provision of additional services beyond investment education would bump the services out of the carve out for investment education, even if the plan has no choice but to take the entire package of services and cannot limit the amount or type of services it receives in the package. Smaller plans only have choices of the service packages provided to their size of plan and they cannot pick and choose service; thus the carve out for investment education provides little assistance to smaller plans with little negotiating power. Limiting the investment education carve out as it is currently drafted will limit the plans which can utilize it.

Proposed BIC

Many of the plans may not be able to fit within some of the requirements of the Proposed BIC exemption because they already have platforms for their plans that do not necessarily include only a limited number of investment alternatives or they may include as an investment alternative an option which is not an "asset" but which includes protections similar to those found in registered investment companies or collective investment funds. The Proposed BIC exemption only applies to "assets" as defined in the Proposed BIC which does not include professionally managed accounts, while "assets" include collective investment funds, collective investment funds and professionally managed accounts are very similar investment vehicles, they are not included. Only investments qualifying as "assets" can be protected by the Proposed BIC. Professionally managed accounts held in a plan's trust name by a professional custodian are subject to the ERISA 408b-2 fee disclosure requirements which provides information on the investment expenses on a basis that is sometimes more detailed than the information a plan receives from a regulated investment company which is included as an "asset." A professionally managed account may be a qualified default investment alternative, thus the Department of Labor has sanctioned such an account as an appropriate investment vehicle, so it should also be considered an "asset" which is covered by the Proposed BIC. Professionally managed accounts are similar to the Bank Collective Investment Funds which are treated as "assets" covered by the Proposed BIC. Thus, we recommend that "assets" be defined within the Proposed BIC to include professionally managed accounts, particularly since professionally managed accounts are one of the choices sanctioned as a qualified default investment alternative ("QDIA") under U.S. Department of Labor's ("DOL") regulation §2550.404c-5(e)(4) and the professionally managed accounts would satisfy those requirements, and because the investment managers of such professionally managed accounts will already be in a status which provides fiduciary protections to the investors under applicable state and federal laws.

Proposed BIC Data Capture, Retention and Disclosure Requirements

The Proposed BIC also requires extensive data capture, retention and disclosures. The disclosures under the Proposed BIC are far more extensive than those under DOL regulation §2550.408b-2(c) which requires disclosure of fees paid, directly and indirectly, by a pension plan. The fees to be disclosed are only one element in determining whether an investment is proper for inclusion in a plan or as an investment alternative for an individual retirement account, and low fees alone do not make an investment prudent, particularly if the investment has little or no return, there is a lack of balance or diversification in the portfolio leaving the investment vulnerable to large market swings, or the investment does not have an appropriate investment strategy for the market or economic conditions.

The data collection and furnishing upon request requirements under the Proposed BIC will present problems because gathering the data requires that every plan and that every IRA account is appropriately coded and data on the transactions and holdings of each can be pulled from the system for six years of transactions. Some of the data to be provided on a financial institution level, but requires individual transaction or per account data and it is unclear how the apparent conflict is to be addressed.

Inflows

The data request requirements in the Proposed BIC impose new data capture and retention requirements on the financial institution with respect to inflows of assets, outflows of assets, holdings and returns on such assets for the six prior years. This information is required to be accessible and maintained for each quarter by a financial institution, which is defined as the entity which employs an advisor who provides investment advice to a plan or IRA. A "financial institution" under the Proposed BIC includes anyone employing persons advising retirement plans (or accounts) or IRA accounts; thus, this will impact far more than just banks and brokerage firms serving plans and IRAs.

The data for inflows of assets is to be provided at the financial institution level. This includes identifying for each Asset held by a plan or an IRA in each quarter at the financial institution, the number of the shares or units and the identity of each asset purchased in the plan and IRA accounts at the financial institution, the total dollar amount invested and the costs to each plan or IRA at the financial institution (it is not clear how the plan level requirement fits within the requirement that the data on the shares or units acquired without requiring the financial institution to report each acquisition by a plan or IRA and the number of shares or units and the cost for each share or unit acquired by each plan or IRA since the prices of each purchase will likely vary and so gathering this information at the financial institution level may just mean gathering it for each Asset in each plan or IRA and then accumulating the number of shares or units of each asset at each purchase price for all acquisitions by IRAs and Plans at the financial institution for that quarter and bringing this all together with plan or IRA names removed).

The revenue received by the financial institution or any affiliate in connection with each of the purchased assets and the reason for such revenue must be identified for the purchase of each asset (e.g., identify the commission paid on each asset acquired by a plan or an IRA to the financial institution or any affiliated entity and why such commission was paid and then aggregate this at the financial institution level for each asset purchased). The revenue received by the financial institution and its affiliates from these purchases must be identified by each revenue source and the reason for such revenue must be broken out separately by source. The data elements regarding the source of each commission received for each Asset purchased by a plan or IRA are not currently part of the data capture or accumulation of any financial institution and progressively to capture such data in such form may require substantial time to reprogram systems.

The Proposed BIC should be revised to permit the financial institution to define what constitutes an "inflow", e.g., is a rollover from a plan to an IRA at the financial institution an inflow if the retirement plan was not a client of the financial institution? or, Is a rollover to an IRA an inflow even when it is only rolling from a plan account at the financial institution to an IRA at the same financial institution? or, Is a rollover to an IRA only an inflow when an account in a plan not at the financial institution rolls into an IRA at a different financial institution? If two plans merge and one is at different financial institutions, is this an inflow if the surviving plan is at the financial institution? Is a plan merger treated differently as an inflow if these plans are at the same financial institution? Are inflows only contributions to a plan or IRA? Absent guidance, the financial institutions should be provided latitude to make the decisions on

what constitutes an inflow or outflow or return in the design of their recordkeeping for the Proposed BIC and such design decisions should not be subject to retrospective challenge by the U.S. Department of Labor absent a definition promulgated through the full regulatory process of notice, proposal, comments and hearings prior to promulgation of a final regulation.

Outflows

Similar data on "outflows" is required to be provided at the financial institution level. The required data on "outflows" must be provided upon request and must be provided for each asset sold by a plan or an IRA in each quarter at the financial institution. The data must include the number of and identity of the shares or units sold, the dollar amount received, the costs to the plan or beneficiary's retirement plan or IRA, or account for each asset sold (this appears to be on a per transaction per account level, but this information must then be aggregated for all of the plan and IRA accounts at the financial institution with the same asset and selling price), and the revenue received by the financial institution, or any affiliate, in connection with the sale of each of these assets and the reason for the revenue. The revenue received by the financial institution must be disaggregated by source (so if the same Asset is sold and two different mutual fund advisors pay a transaction fee on the sale of the same Asset, that transaction must be reported separately for each mutual fund advisor, under reporting by source or buyer) and such transactions must be identified separately with respect to all assets that are sold out of plans and IRAs. The Proposed BIC requires this data at the financial institution level for these disclosures or sales over all, but also requires the net amount received and the cost of the sale to be disclosed on a plan by plan basis. There are no definitions of what expenses relate to the sale or outflow as opposed to merely holding an Asset.

The Proposed BIC does not define what constitutes an outflow, thus financial institutions should be permitted broad latitude when defining whether a rollover to an IRA or a plan spin off following a corporate transaction to a new plan with a new vendor or whether a plan changing a vendor constitutes an outflow that must be reported. Furthermore, if a plan or an IRA leaves an advisor at one financial institution to go to a new advisor at the same financial institution, latitude should be given to the financial institution to define whether it is an outflow. Furthermore, if an individual moves their IRA account invested in Fidelity mutual funds from one brokerage firm to another but remains invested in the same investments, is it an outflow when no assets move and only the broker of record changes? Since these could be interpreted differently when one looks at the financial institution level as to whether they constitute an "outflow" substantial latitude should be afforded the financial institutions when they define these terms and then begin programming their systems to conform to the definitions of the reporting requirements of the Proposed BIC.

Holdings

The data required and the Proposed BIC with respect to "holding" an Asset is required to be reported and disclosed on a financial institution level. For each quarter the financial institution must identify each of the Assets held at any time during the quarter, the list of holdings, and the aggregate cost incurred by the plan, beneficiary or IRA during the quarter in connection with each of the holdings is required, yet what cost it included in the cost of holding assets is not defined (e.g., does it include only the operation fees charged to the Asset or does it include account maintenance fees for the IRA or plan account?).

This disclosure must include the revenue received by the financial institution with respect to holding each asset for each quarter on a financial institution level by source or asset. The number of

assets or units held at the end of each quarter, the cost of holding during the quarter and the revenue received by the financial institution related to the assets held at any time during the quarter by source or asset and the reason such revenue was paid, and where such revenue came from (source of funds).

Returns

Finally, the Proposed BIC requires reporting of "returns" at the retirement investor levels. Investment returns reporting starts by identifying the investment advisor for each retirement account, and then reporting the beginning of quarter values and end of quarter values of the retirement investor's portfolio and each investor's returns on such accounts. This is information that is not necessarily going to be easy to extract and these disclosures will require significant programming and coding work to determine which amounts are to be considered in calculating returns, e.g., dividends received, realized gains and losses, unrealized gains and losses, operating expenses accrued or paid, individual account fees. In calculating returns on the Assets, how will certain account-related expenses fit in the return calculation, e.g., an IRA maintenance fee, is that a cost in calculating the return, is it a holding cost or is it an outflow, or is it all of the above? It is unclear how individual account fees are treated in calculating returns, such as is a loan fee for a participant loan in a 401(k) plan allocated to calculate the plan's return or plan recordkeeping fees charged to individual participant accounts. How should these fit in the calculation? Are such fees reported as a cost in calculating the return, a holding cost and/or as an outflow? The Proposed BIC data request requirements related to returns require the financial institution report these at the retirement investor level (the plan or IRA holder). This data must include the identity of the advisor, the beginning of the quarter value of the retirement investor's portfolio, the end of quarter value of the same portfolio, and each external cash flow to or from the retirement investor's portfolio during the quarter and the date on which it occurred. Significant time must be allowed for implementation and the eight (8) months following finalization of the Proposed BIC and Conflict Rule is not sufficient to complete the programming and coding necessary for compliance which can only be started after all concepts are defined. Furthermore there needs to be significant latitude granted to the financial institution in the final Proposed BIC to define how these various calculations are performed and only then would the systems be programmed for such definitions, and this will require far longer than 8 months.

The data collection and reporting for each quarter must be available to be produced by a party relying upon the Proposed BIC for the six preceding years. This long of a data collection and retention requirement may force financial institutions to maintain old systems to be able to have access to the data. This will require substantial programming, system storage and operation capacity and we respectfully request that the Proposed BIC and Conflict Rule should not be effective until a date which is at least 24 months following the date it is published in final form in the Federal Register.

Furthermore, such drastic changes in operations and data collection and retention of service providers to retirement plans and IRAs should only be prospectively effective to allow the regulated parties to adjust and develop systems and to re-educate their respective workforces on the new business procedures that will need to be developed and adopted to ensure compliance and to avoid retroactive application of the Proposed BIC to data in old systems no longer maintained. Any retroactive application would be extraordinarily burdensome in costs to potentially run, reprogram and maintain redundant systems to apply these new rules retroactively.

We respectfully submit these as recommendations, with respect to the Conflict of Interest Rule and the Proposed Best Interest Contract Exemption.

Very truly yours,

CAIN WATTERS & ASSOCIATES, PLLC