

P I M C O

Via Electronic Submission

July 21, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Definition of the Term “Fiduciary” (RIN 1210-AB32); Best Interest Contract Exemption (RIN 1210-ZA25)

Dear Sir or Madam:

Pacific Investment Management Company LLC (“PIMCO”) appreciates the opportunity provided by the Department of Labor (“DOL”) to comment on its proposed rulemaking to expand the definition of the term “fiduciary” under the Employee Retirement Security Act of 1974 (“ERISA”) as it relates to the provision of investment advice to a Plan¹ or to a Plan’s participants and accompanying proposed exemptions and proposed changes to existing exemptions (the “Proposal”). For the purposes of this letter, we will provide several general observations about the Proposal with a focus on 1) the DOL’s proposed Low Fee Streamlined Exemption (“Low Fee Exemption” or “Exemption”) under the proposed Best Interest Contract exemption (“BIC Exemption”)² and 2) elements of the architecture of the Proposal that may adversely impact Plan investors and the ability of asset managers to provide the level of services that Plan clients have come to expect.

By way of background, PIMCO is registered as an investment adviser with the U.S. Securities and Exchange Commission (“SEC”) and as a commodity trading adviser and a commodity pool operator with the U.S. Commodity Futures Trading Commission (“CFTC”). As of June 30, 2015, PIMCO managed approximately \$1.52 trillion in assets on behalf of millions of individuals and thousands of institutions in the United States and globally, including state retirement plans, unions, and corporate defined contribution and defined benefit plans. PIMCO manages both separately managed accounts in accordance with custom investment guidelines, and commingled funds, such as U.S. mutual funds, that are offered to both institutional and individual investors. In all of these cases, PIMCO functions as a fiduciary with a distinct legal requirement to act in the best interest of our clients.

¹ We refer to “Plans” generally as those employee benefit plans subject to Title I of ERISA, “plans” subject to Section 4975 of the Internal Revenue Code of 1986, as amended (the “Code”) and entities deemed to constitute the assets of one or more Benefit Plan Investors (as defined in and as contemplated by 29 CFR 2510.3-101 as modified by Section 3(42) of ERISA). Our comments thus relate both to ERISA Plans and other Plans such as IRAs subject to the Code.

² 80 Fed. Reg. 21960 (Apr. 20, 2015) (proposal to amend 29 CFR Part 2550) (“Proposed Best Interest Contract Exemption”).

PIMCO is one of the largest active managers of fixed income assets globally, and as a fiduciary and a steward of our clients' assets, our principal goal is to make sound, long-term investments that will meet our clients' objectives and provide them with stable returns that are consistent with their risk preferences over their desired time horizons. In our 44 year history, PIMCO has garnered much attention for the innovation and long-term performance of its funds and separately managed accounts. For instance, PIMCO's flagship fund, the Total Return Fund, which is the largest active bond fund globally, has outperformed its benchmark, the Barclays Aggregate Bond Index, by a cumulative 51.8% *net of fees* since inception as of June 30, 2015.³ Further, PIMCO has been recognized on numerous occasions for its strength of management, performance and strategy. We noted that certain of its portfolio management personnel have received the prestigious Morningstar Fund Manager of the Year awards for 2012 and 2013.

As noted above, PIMCO provides investment management services to both institutions and individuals. The institutions that we serve are typically sophisticated investors with dedicated investment personnel and consultants to help them evaluate and select investment managers, oftentimes through a request for proposal process. PIMCO reaches individual investors primarily through financial intermediaries, such as registered investment advisers, independent broker-dealers, wirehouses and bank trust channels. These institutions rely on licensed professionals to serve the individual needs of the individual investors. In all of these cases, PIMCO's fees are fully transparent and completely disclosed either in a mutual fund prospectus or other commingled fund offering document or in the case of separate accounts, in the applicable client agreement such as the Investment Management Agreement and in otherwise required disclosures such as 408(b)(2) fee disclosures.

* * * * *

PIMCO supports the general principle that financial advisers and other intermediaries should act in the best interests of their clients when providing personalized investment advice; however, we believe that the complexity, viability and effectiveness of the Proposal in its current form could have significant unintended consequences that would be detrimental to the goal of helping Americans save for retirement. We encourage the DOL to take heed of the thoughtful and well-researched comments submitted by the Investment Company Institute ("ICI"), the Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG"), the Investment Adviser Association ("IAA") and the Insured Retirement Institute, among others, of which PIMCO is an active member. Although we do not address each of the issues raised by the various industry comment letters, we support the comments, concerns and suggestions in those letters, which seek to make any final rulemaking beneficial for the goal of helping Americans save for retirement. We discuss in more detail the Low Fee Exemption and other aspects of the Proposal that may inadvertently hinder asset managers' ability to provide the level of services that Plan clients have come to expect.

³ All PIMCO Total Return Fund data cited in this letter is from Morningstar and relates to the Administrative share class. The Administrative share class is primarily offered through employee benefit plans, broker-dealers and other intermediaries. The inception date of the Administrative share class was September 8, 1994.

A. LOW FEE EXEMPTION

As currently drafted, the Proposal includes a Low Fee Exemption, which is a safe harbor from the proposed BIC Exemption for those investment advisers who recommend “high-quality low-fee investments.”⁴ The Low Fee Exemption is problematic as currently proposed because: 1) the tacit assumption that passive management is in the best interest of clients under all circumstances, when there are demonstrated advantages to active management, especially within the fixed income sector; 2) the potential underappreciated risks that limiting investors to passively managed products may present; 3) the lack of sufficient choice of investment vehicles and services for Plan fiduciaries and end-users; and 4) the process and context in which the Low Fee Exemption is being considered.

1. *The Low Fee Exemption may incentivize investment professionals to recommend low fee, likely passive, products to avoid fiduciary status, even when actively managed products may be in the best interest of the Plan.*

Although the Low Fee Exemption is generally vague and fails to define specifically the types of products that would qualify as “high-quality low-fee investments” and therefore be eligible for the safe harbor, the Exemption indicates that the DOL envisions these products to be passively managed:

Facilitating investments in such high-quality low-fee products would be consistent with the prevailing...view in academic literature that posits that the optimal investment strategy is often to buy and hold a diversified portfolio of assets calibrated to track the overall performance of financial markets. Under this view, for example, a long-term recommendation to buy and hold a low-priced (often passively managed) target date fund that is consistent with the investor’s future risk appetite trajectory is likely to be sound.⁵

While we welcome the opportunity to compete with both passive and active investment management mandates, we are concerned that the Exemption will provide investment professionals with a regulatory incentive to recommend low-fee investment products in order to qualify for the safe harbor, even though the recommendation or selection of such products may not be in the best interest of the Plan. Such advisers may be incentivized to provide such advice to avoid regulatory scrutiny, litigation risk or otherwise minimize compliance costs.

Moreover, we strongly disagree with the underlying assumption on which the Low Fee Exemption is predicated that “low-fee” investment products are by definition “high-quality” or that these investment products are *necessarily* in the best interests of the millions of Americans who could potentially be impacted by the use of the safe harbor by their financial adviser. While cost is one factor that investors consider, investment performance, strategy, diversification,

⁴ Proposed Best Interest Contract Exemption, *supra* note 2 at 21964, 21978.

⁵ *Id.* at 21978.

management style, return objectives, and risk management are among the multitude of other factors that investors may consider when evaluating an investment product.⁶

Further, even if cost is a primary consideration, most investors do not consider cost on an absolute basis, but *relative* to a fund's underlying investment performance. In fact, in many instances, actively managed funds can deliver performance significantly in excess of their costs, outperforming the underlying benchmark *and* passively managed funds with similar strategies, even when fees are considered. This is particularly the case in the fixed income markets, such as the intermediate bond market in which numerous structural inefficiencies exist that may distort the market and subsequently provide active managers attractive opportunities to generate strong, after-fee performance.

These structural inefficiencies include, but are not limited to the following:

- **Some bond market participants have varying objectives and are restricted in what they can buy, creating opportunities for active managers.** The global bond market is comprised of numerous investors who are constrained by guidelines or whose primary objectives may include other considerations than simply maximizing profits. For instance, central banks may buy and sell foreign bonds to influence their exchange rates; insurance companies may have to sell corporate bonds if their credit ratings fall below a certain threshold in order to meet specific guideline constraints; and passive investment funds may be limited to buying only the largest offerings to match what is included in the underlying index. For active managers in the fixed income markets, these constraints can provide attractive price distortions and resulting premia (including liquidity, term and credit premia) that can be garnered for the benefit of their clients, including Plans.
- **Bond indices are comprised of the largest debtors, which may not necessarily represent the most attractive investment opportunities.** The composition of bond indices are driven largely by the amount of outstanding debt issuers have, *i.e.*, the more debt an issuer has outstanding, the bigger part of the index it is. This means that bond indices could favor companies with more financial leverage and passive managers *must* buy the holdings of those issuers with ever-increasing debt loads if they want to track the underlying index. Active managers, on the other hand, can decide whether it makes sense to increase the holding of a bond issued by a company or country that is taking on more financial leverage or if there are other more attractive opportunities from a risk-return perspective.
- **Bond market structure favors active managers.** Unlike in the equity market, where there is a high degree of standardization and trading on electronic platforms, the vast majority of the bond market trades “over-the-counter” – *i.e.*, bilaterally between an asset manager and a dealer. This means that transactions become a negotiation between two parties. This dynamic can favor active managers who have strong, established relationships with dealers and who have the resources to garner superior terms for their clients.

⁶ In fact, many investment professionals agree that any well balanced portfolio would consist of both active and passive mandates. The ability to choose the right investment option for a plan requires thoughtful, unbiased analysis. See Karabell, Zachary, *Solving the Active Vs. Passive Investing Debate*, Barrons (Jan. 26, 2015).

- **New issuance is important to the fixed income markets, making active credit analysis essential.** In 2013, U.S. corporate bond issuance was approximately \$1.4 trillion, while U.S. equity issuance was small in comparison at \$255 billion, according to SIFMA. As such, an active presence in the new issuance market is an important element to maximizing performance for fixed income investors, which typically favors active managers. For one, allocations of new issues are made by investment bankers that may differentiate among participants in an offering, such as managers who have larger interests and more consistently active in those markets. Also, we have observed that some new issues can sometimes be less liquid after their initial offering; thus clients appreciate having an active manager that as part of its regular processes conducts extensive credit analysis to determine whether participating in the new issue would be in the best interests of the client. This is in contrast to the approach of passive investing, where the asset manager must indiscriminately buy and hold the components of an index irrespective of the underlying fundamentals of a particular component.

These structural inefficiencies, in addition to tactical strategies and robust investment processes, help active managers, such as PIMCO, to add value in excess of the fees charged, benefiting the savers and retirees invested in such products. As a case in point, consider the performance of PIMCO's flagship active intermediate bond fund, the Total Return Fund: for the ten years ended 6/30/2015, the Total Return Fund returned 5.46% on an *after-fee*, annualized basis vs. 4.44% for the Barclays Aggregate Bond Index for the same time period.⁷ This represents outperformance of an annualized 1.02% *net of fees* over the benchmark while taking benchmark-like risk.⁸ In other words, the performance of the Total Return Fund has exceeded its benchmark's returns by more than a cumulative 10.5% over the decade, which translates into significant value for its underlying investors. For instance, if an investor had invested \$10,000 over this time period, she would have made \$1,068 more for retirement *after fees* as of 6/30/2015, compared to what she would have had if she invested in the benchmark.⁹

The Total Return Fund's outperformance is generally directionally consistent with the performance other active managers within the intermediate bond category during similar time periods. According to Morningstar, for the five years ended December 31, 2014, active intermediate bond funds returned 5.10% net of fees vs. 4.38% for passive funds; for the ten years ended December 30, 2014, active bond funds returned 4.96% *net of fees* vs. 4.56% for passive funds.¹⁰

In a time where personal retirement savings is more integral than ever to the future financial viability of retirees, providing an incentive to financial intermediaries to recommend investments based exclusively on cost and not on the plethora of other important characteristics, including after-fee performance, seems antithetical to the DOL's goal of adopting new regulations that seek to provide enhanced protections for investors. It also could severely limit consumer choice

⁷ See note 4.

⁸ Source for performance data is Morningstar. For the ten years ended 6/30/2015, the annualized sharpe ratio for the PIMCO Total Return Fund was 0.99.

⁹ All fund data sourced from Morningstar

¹⁰ "Morningstar's Active/Passive Barometer" at 11 (June 2015).

and runs dangerously close to substituting the DOL’s judgment of what is a prudent investment for that of investment professionals. In fact, based on our experience as an active manager, we would agree with the assertion made in the Proposal that “it is unclear whether mutual funds with the lowest fees necessarily represent the highest quality investments for [r]etirement [i]nvestors.”¹¹ Further, on numerous occasions, the DOL has recognized that cost is but one factor in a fiduciary’s decision making process, a concept that has found expression in the DOL’s final 408(b)(2) and 404(a)(5) disclosure regimes along with those investment options that are permissible as qualified default investment alternatives.

2. *There are possible risks and opportunity costs to passive strategies, especially in certain sectors.*

We believe there is a broad, and at times, erroneous assumption that investment strategies in passively managed funds are inherently less risky than active strategies given the breadth of portfolio holdings and market-tracking characteristics of passive management. In fact, in the fixed income market, passive strategies are subject to the same interest rate and credit risk inherent in all fixed income investing, but may also pose other distinct risks and opportunity costs not found in the active management space.

For one, many indices in fixed income are slow to incorporate new sectors and new types of securities, and many markets within fixed income have significantly limited passively managed options. This can render entire portions of the fixed income universe inaccessible to passive managers, thereby significantly limiting diversification for end-investors. One example of this is the U.S. bank loan market, which has one primary passively managed product¹² that is benchmarked to the S&P/LTSA U.S. Leveraged Loan 100 Index. This index, which includes the 100 largest bank loan issuers, represents only a fraction of the investable bank loan market, which includes approximately 800 to 1,200 issuers. Further, because bank loan indices are composed of issuers based on the size of loans outstanding, some of the riskiest loans associated with leveraged buyouts or restructurings are included in the indices – loans that active managers that engage in robust credit research may avoid. A case in point: in 2014, the PIMCO Senior Floating Rate Fund saw no defaults of the loans it held, whereas the Credit Suisse Institutional benchmark, the index to which it is benchmarked, saw a default rate of 3.1%.¹³

Moreover, since demand for securities in most indices is intense, making them more expensive, some passive managers may be inclined to “tilt” portfolios to include more credit exposure to boost returns. When applied structurally and indiscriminately versus tactically based on extensive credit analysis, the “tilted” passive strategy may only produce modestly higher returns while putting the passive fund at risk by adding credit risk and volatility that most passive managers are not able to avoid by having to purchase and hold the components of the index.

3. *Investment professionals and Plan fiduciaries should retain the ability to select the investment strategies and vehicles that are most suitable for clients.*

¹¹ Proposed Best Interest Contract Exemption, *supra* note 2 at 21978.

¹² PowerShares Senior Loan ETF (BKLN).

¹³ PIMCO, Credit Suisse, Bloomberg Financial Markets.

Historically, the DOL has been reluctant to take an overly prescriptive approach as it relates to the legal interpretation and regulations surrounding ERISA. Instead, it has promulgated a framework that allows fiduciaries to have the flexibility to make investment decisions for the best interest of a Plan and its participants given their particular needs, objectives and risk tolerances, while at the same time establishing clear guardrails and responsibilities around the conduct. This is seemingly in part a recognition that investment styles and trends change over time and that the needs of Plans and their participants change, too (in terms of demographics, return objectives, etc.). This is also likely an acknowledgement that the Plan fiduciary is in the best position to do what is right for the Plan and its participants in terms of understanding and meeting the customized needs of its Plan participants.

We are concerned that the Low Fee Exemption would be antithetical to the responsibilities of one's fiduciary duty, including the responsibility to act solely in the best interest of Plan participants as well as the requirement to sufficiently diversify Plan investments. In fact, the ability and flexibility for a Plan fiduciary or investment professional to select different styles of management (*e.g.*, active vs. passive), different vehicles (*e.g.*, mutual funds, separate accounts, private funds) and different fee structures depending on the services rendered is paramount to an investment professional's ability to establish a well-balanced portfolio, and by extension, to meet his or her fiduciary duty to his or her client.

We encourage the DOL to abandon this prescriptive approach that effectively promotes specific investment styles, investment vehicles and management approaches by picking "winners and losers" in the retirement savings industry. Instead, as it has for the past forty years, the DOL should permit investment professionals to select the best strategy and product for the end-user, based on the end-user's return and risk objectives, free of arbitrary constraints and pre-existing biases imposed by the DOL.

4. *The process surrounding the proposal of Low Fee Exemption is deeply flawed. Given the vast unintended consequences, the DOL should wait to evaluate the need for the Exemption, and should it decide to proceed, only do so as part of a separate rulemaking proposal.*

In addition to the substance of the Low Fee Exemption, the process in which the Low Fee Exemption was proposed was flawed, especially given the far reach that such an Exemption could have on the marketplace and ultimately on American retirees. Indeed, according to the ICI, one third of U.S. households owned IRAs in 2014, representing \$7.3 trillion in assets or 30 percent of all U.S. retirement market assets, up from 18 percent twenty years ago. In addition, 63 percent of all U.S. households had retirement plans either through work (defined benefit or defined contribution plans) or IRAs (or both), meaning that a large part of retirement assets in the U.S. could be impacted by the Low Fee Exemption.¹⁴

Given the vast impact and the potential unintended consequences of the Low Fee Exemption, we believe it is premature for the DOL to move forward on the Exemption without first adopting the revised fiduciary standard. Once the fiduciary rule is adopted and operating in practice, it would be more appropriate at that time to consider whether any additional exemptions are

¹⁴ See ICI, *The Role of IRAs in U.S. Households' Saving for Retirement* (2014).

prudent or necessary. We encourage the DOL, should it decide to proceed with the Low Fee Exemption, to pursue a distinct regulatory rulemaking process with the required notice and comment process and a robust cost/benefit analysis. As it is currently, the DOL has not provided a sufficient level of detail surrounding the Low Fee Exemption to move forward with adopting such a provision in compliance with the Administrative Procedure Act. Indeed, given the complexity and scope of the Proposal, we would argue that respondents may not pay sufficient attention to the Low Fee Exemption and thus responses adopting it in the context of the Proposal would be incomplete.

B. AVOIDING HARM TO PLAN CLIENTS

While the Proposal is aimed at protecting retail investors, the Proposal, as drafted, could impose burdens and expenses upon “large . . . plans [that] are managed by financial experts who are themselves fiduciaries”¹⁵ as well as other investors advised by sophisticated fiduciaries like PIMCO who already have a duty to act in their clients’ best interests. Indeed, while the DOL’s objective is to help retirement savers, aspects of the Proposal may have a contrary result by restricting products, information and services that asset managers routinely provide to Plan clients in order to help them make decisions in the best interests of their participants. Specifically, under the Proposal, we are concerned that:

- Asset managers will not be able to effectively offer products and services to Plans or enhance or expand existing relationships with ongoing incidental communications;
 - Asset managers will be constrained in the type of helpful information and education that they routinely provide to Plans either as informational or in response to a Plan’s specific request; and
 - Asset managers will be unable to effectively serve as fiduciaries because other market participants from whom we receive valuable generalized information, such as broker-dealers, investment banks, FCMs etc. may not continue to provide such information out of concern that they will become investment advice fiduciaries in their interactions with asset managers.
- 1. Asset Managers should be able to market services and communicate with clients without being deemed a fiduciary.*

PIMCO is concerned that under the Proposal fiduciary status would attach to sales and marketing activities due to the proposed expanded scope of what constitutes “investment advice” and a “fiduciary.” If the fiduciary standard attaches to ordinary marketing and sales activities, an asset manager would be precluded from ordinary and routine activities such as submitting an RFP or participating in a finals presentation to a prospective Plan client. If an asset manager wins a mandate as a result of these discussions, the asset manager would not be able to earn a fee

¹⁵ See Fact Sheet: Department of Labor Proposes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle-Class Families Billions of Dollars Every Year (“Fact Sheet”) available at: <http://www.dol.gov/ebsa/newsroom/fsconflictsofinterest.html>

on the services provided to the Plan. This cannot be what the DOL intended.¹⁶ We note that the Proposal broadly treats communications with Plans as “recommendations,” with no exclusion for selling and marketing of services, such as investment management services. While the Proposal contains the “Counterparty Carve-Out,” we note that it applies only to certain “sophisticated” Plans and does not appear to apply to services such as investment management services. We thus read the Proposal as possibly preventing asset managers from selling basic investment management services, even with respect to those sophisticated Plans that are captured under the Counterparty Carve-Out. Such a result not only upends established norms, it prevents asset managers from offering the very services that Plans may want in order to fulfill their duty to act in the best interests of the participants they ultimately serve.

We also worry that the Proposal would have the unintended consequence of hampering an asset manager’s ability to provide market insights and color to its Plan clients given the expanded definition of investment advice and the proposed elimination of the “primary basis,” “mutually agreed” or “individualized” tests that are in the current rule. For example, if a PIMCO client relationship manager wanted to discuss developments in the European bond market with a Plan client, he or she may not be inclined to do so out of a concern that the information could be considered investment advice under the Proposal, which may then preclude PIMCO from earning a fee on any future products that could be considered the result of the discussions on Europe. In that case, the Plan could claim that it relied on the investment advice on Europe in its selection of the product. This could have the unfortunate result of preventing asset managers from providing helpful information or market color to Plans to avoid these types of situations. Clearly this cannot be what the DOL intended. For example, under the Proposal, an asset manager could provide market commentary to the Treasurer of a corporation with respect to her duties in managing the corporation’s investment capital, but could not provide the same information to her if she also happened to be a Plan trustee of the corporation’s 401(k) or defined benefit plan. We respectfully submit that the final rules should make clear that these types of discussions would not be covered as investment advice or such discussions would fall under a

¹⁶ Section 406(b)(1) of ERISA broadly prohibits a fiduciary from dealing “with the assets of the plan in his own interest or for his own account” and Section 406(b)(3) prohibits a fiduciary from receiving “any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.”

See also Proposed Best Interest Contract Exemption, *supra* note 2 at 21960, 21964:

If the Proposed Regulation is adopted, [entities that have not previously been viewed as investment advice fiduciaries but will be under the Proposal] will become subject to the prohibited transaction restrictions in ERISA and the Code that apply specifically to fiduciaries. ERISA section 406(b)(1) and Code section 4975(c)(1)(E) prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his own interest or his own account. ERISA section 406(b)(2) provides that a fiduciary shall not “in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.” As this provision is not in the Code, it does not apply to transactions involving IRAs. ERISA section 406(b)(3) and Code section 4975(c)(1)(F) prohibit a fiduciary from receiving any consideration for his own personal account from any party dealing with the plan or IRA in connection with a transaction involving assets of the plan or IRA. . . . In the Department’s view, receipt by a fiduciary of [12b-1, revenue sharing and other] payments would violate the prohibited transaction provisions of ERISA section 406(b) and Code section 4975(c)(1)(E) and (F) because the amount of the fiduciary’s compensation is affected by the use of its authority in providing investment advice, unless such payments meet the requirements of an exemption.

carve-out. We ask that the DOL find an appropriate way to ensure that Plans are not disadvantaged relative to our other non-Plan clients who would continue to receive such benefits.

We would also hope that the DOL at a minimum clarify that boilerplate or *non-individualized* marketing or research materials do not constitute investment advice. Such a result would comport with other regulators' attempts to strike an appropriate balance between sales and investment advice. We believe that the aforementioned industry comment letters address many of our concerns and offer constructive solutions that accomplish the DOL's objectives while permitting asset managers to continue to serve their Plan clients as fiduciaries. Without limiting those suggestions, we strongly urge the DOL to adopt a paradigm where any "recommendation" be defined as a communication that is *qualitative* in nature.

2. *Interactions with sophisticated Plans should not confer fiduciary status, unless the sophisticated Plan and the asset manager mutually agree on the existence of such a relationship.*

We understand the DOL's view that sometimes "differentiating investment advice from sales pitches in the context of investment products" can be "difficult,"¹⁷ but we disagree that it should be difficult in the event that a party makes it clear that it is selling a product or service (or the Plan recipient should know under the circumstances that the asset manager is going to earn a fee on the sale of a product). Large Plans that are managed by sophisticated financial experts who are themselves fiduciaries should not be in need of further support, and we thus urge the DOL to presume that no interactions involving a sophisticated Plan as may be defined for purposes of the Proposal should confer investment advice *unless* the parties mutually agree otherwise. As to whom should be considered "sophisticated" for this purpose, we urge the DOL not to draw any artificial lines that invoke standards not already widely adopted in the marketplace. These market accepted standards are articulated in some of the industry comment letters that have been submitted to the DOL.

3. *Investment education should be applicable to all Plans (including IRAs) but retain the substantive features of I.B. 96-1.*

The Proposal wisely calls for an investment education carve-out, but then surprisingly adds a new condition that the information and materials not include advice or recommendations as to specific investment products, specific investment managers, or the value of particular securities or other property."¹⁸ We believe the addition of the new conditions will only work to the detriment of Plans. The DOL appears to believe that "even when accompanied by a statement as to the availability of other investment alternatives, [such types of specific asset allocations that identify specific investment alternatives in I.B. 96-1 investment education] function as tailored, individualized investment recommendations, and *can effectively steer recipients* to particular investments, but without adequate protections against potential abuse."¹⁹ But, respectfully, the DOL has not offered any evidence in support of its assertion. In our experience, the opposite is true. The Proposal ignores the fact that Plans often request analyses

¹⁷ See Fact Sheet, *supra* note 15.

¹⁸ Proposed Best Interest Contract Exemption, *supra* note 2 at 21927, 21944.

¹⁹ *Id.* at 21927, 21945.

and different interactive materials to assist them in making informed decisions. In this regard, we assist clients—including Plans—in helping them crystalize their investment and risk objectives, and provide investment alternatives for their consideration. The education carve-out as crafted would fail to allow us to help Plans in this manner.

Further, the imposition of a restriction on the use of a given asset manager or other market participant’s name or product will almost certainly have the result of decreasing important and needed information for Plans, participants and beneficiaries. We request that the substance of the carve-out be maintained as under I.B. 96-1, but expand its application, as has been indicated in the Proposal, to include all Plans (including IRAs).

4. *The Proposal should not limit information that is helpful to us in performing our jobs as fiduciaries.*

Often times, market participants, such as broker-dealers and prime brokers offer insights, ideas and views on the market and other developments (*e.g.*, identifying where there is liquidity in the markets) without any compensation or direct linkage to further business. Failing to include such services as a carve-out may result in having our counterparties and service providers with whom we do business on behalf of Plans being deemed to be providing investment advice. Because of that risk, these market participants may discontinue providing this helpful information to asset managers.

This result seems inappropriate especially where asset managers such as PIMCO are both large and sophisticated and we do not generally regard such information as anything other than generalized and “data points” that supplement our decision making as fiduciaries. Nevertheless, given the maximalist architecture of the Proposal and the presumption of investment advice absent a specific (and often-time narrowly defined) carve-out, we are genuinely concerned that such information will be limited if not curtailed. This will benefit nobody and we ask that it be squarely addressed.

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If you have any questions, please do not hesitate to call me at (949) 720-6000.

Sincerely,



Douglas M. Hodge
Chief Executive Officer