MassMutual
FINANCIAL GROUP®

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Submitted Electronically

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
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Re: Definition of the Term "Fiduciary" (RIN 1210-AB32)
Best Interest Contract Exemption (ZRIN 1210-ZA25)
Amendment of PTE 84-24 (ZRIN 1210-ZA25)

Ladies and Gentlemen:

Massachusetts Mutual Life Insurance Company ("MassMutual") respectfully submits its comments on the Department of Labor's (the "Department") proposed rule redefining the term "fiduciary" and related exemptions (the "Proposal"). Given the significant costs and wide-ranging impact the Proposal will have on the availability of advice for retirement plans and Individual Retirement Accounts ("IRAs"), we appreciate the Department meeting recently with us to discuss our concerns and expressing its interest in modifying the Proposal to create a workable rule.

Founded in 1851, MassMutual's mission is to help our customers secure their future and protect the ones they love by making good financial decisions for the long term. We are a leading mutual life insurance company and Fortune 100 Company headquartered in Springfield, Massachusetts. As a mutual company, we operate for the benefit of our members and participating policyholders, and offer a range of quality financial products and solutions, including life, disability and long-term care insurance, annuities and retirement/401(k) plan services. We currently serve almost two million life, disability, long-term care and annuity customers and approximately three million participants in nearly 35,000 retirement plans, the majority of which are for the benefit of small business owners and their employees.

Throughout our history, MassMutual has provided financial and retirement security to millions of Americans. We share the Department's goals of protecting investors and encouraging retirement savings. We are greatly concerned, however, that the Proposal as currently drafted is overly broad and ambiguous and will result in (1) fewer Americans saving for retirement, (2) reduced guidance for retirement investors, increasing costly investment errors, and (3) fewer guaranteed lifetime income products, an increasingly important component of retirement savings

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as defined benefit pension plans are eliminated. It is with the goal of balancing customer choice, access and protection that we offer the following comments.

Section I: Comments on Fiduciary Advice Definition

Comment: The Proposed Expansion of the Fiduciary Advice Definition Should Be Revised to Require a Mutual Understanding of the Parties, Delete the "Specifically Directed" Concept, and Revise the Definition of Recommendation.

The Department has proposed a definition of "investment advice" that is unprecedented in its scope and complexity. The Proposal goes well beyond any definition reasonably ascribed either to the intent of Congress in passing ERISA in 1974 or any interpretation of the statutory definition articulated by the courts or adopted by the Department in the 41 years since the enactment of the statute.[1] It introduces novel concepts that have never previously been implemented under any definition of "investment advice" under any body of law, to our knowledge, and creates uncertainty. And it is broader than is justified by the circumstances identified by the Department as supporting an update of the definition.[2]

Section (a)(2)(ii) of the definition effectively replaces the current five-part test with the following, much broader criteria:

> Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

Mutuality. There has been much confusion about the importance of the omission from the Proposal of the term "mutual" from the existing five-part test, inasmuch as the preamble suggests, and the reference to an "agreement, arrangement or understanding" implies, that a bilateral meeting of the minds between the adviser and the advice recipient is intended. This is not a point on which the Proposal can afford to be uncertain. Investors need certainty and accurate expectations regarding the duty owed to them by their advisers. Advisers and

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[1] *See e.g., Tiblier v. Dlabal*, 743 F.3d 1004 (5th Cir. 2014), *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 74 F.3d 20 (1st Cir. 1996), *American Fed'n of Unions Local 102 Health and Welfare Fund v. Equitable Life Assurance Soc. of the U.S.*, 841 F.2d 658 (5th Cir. 1988), *Farm King Supply Inc. Integrated Profit Sharing Plan & Trust v. Edward D. Jones & Co.*, 884 F.2d 288 (7th Cir. 1989); *Brown v. Roth*, 729 F. Supp. 391 (D.N.J. 1990), *Austin v. General American Life Ins. Co.*, 498 F.Supp. 844 (N.D.Ala.1980).

[2] In both the October 2010 proposal and the Proposal, the Department discussed the fiduciary redefinition exclusively in terms of investment advice to retirement plans and IRAs. There is nothing to suggest that the Department considered whether, or intended, to subject decisions to purchase insurance products related to welfare benefit plans to the expanded scope of the proposed definition; certainly, such matters are beyond the scope of the Regulatory Impact Analysis submitted by the Department in connection with the Proposal. We understand that senior officials at the Department have informally stated that the Department did not intend to address these issues with the Proposal. In the interest of clarity, we recommend the Department explicitly limit the expanded definition in any final regulation to pension benefit plans and IRAs, and retain the existing definition for welfare plans.

investment platform providers must have confidence that ordinary course sales recommendations will not, in hindsight, be subjected to a fiduciary standard that disallows the payment of sales commissions and other traditional forms of distribution-related compensation. Parties engaged in transactions with ERISA plans and IRAs need clear, unambiguous rules by which to determine their duties and obligations in order for the marketplace to function efficiently and to ensure that plans, plan participants and IRA owners continue to have a broad range of products and services available to them, including investment advice and educational services.

The mutuality requirement is also critical because even certain individualized recommendations are clearly not intended to be investment advice. For example, retirement plan sponsors frequently issue request for proposals ("RFPs") inviting responses from multiple investment and service providers. As a condition of responding to the RFP, the provider is often required by the plan sponsor or its adviser to submit a hypothetical investment line-up comparable to the plan's current line-up and which provides sufficient revenue to cover the cost of plan services. The plan sponsor in that case has no reasonable expectation that the investment provider's response is intended as investment advice, yet, in the absence of a mutuality requirement, the response could later be characterized as advice regardless of the parties' intentions in issuing and responding to the RFP.

In order to address the Department's concerns, the determination of whether the parties, in fact, had a mutual understanding could be determined by whether the plan or IRA owner should have reasonably expected that the advice would be provided in the plan or IRA owner's interest.

<u>Specifically Directed</u>. The "specifically directed" component of the proposed definition will lead to line-drawing exercises and inconsistent interpretations. For example, assume that a MassMutual agent mails to her retirement customers information about new MassMutual retirement products. Those mailings would be "specifically directed" to their recipients in the sense that each envelope would bear an individual name and address, but such a mass communication is in no fair sense "investment advice" that should be subject to ERISA fiduciary standards.

Other examples of "specifically directed" investment information that are not in the nature of investment advice include investment information provided by call center employees in response to customer inquiries; mail and email campaigns that target particular classes of participants and include references to investment offerings; and outreach to plan participants who have reached an age that makes them eligible for in-plan annuity options. Simply put, the "specifically directed" concept is overbroad.

It appears from the preamble that the Department included the "specifically directed" language at least in part to address the "bait and switch" problem it has identified as supporting the expanded definition, but section (a)(2)(i) of the proposed definition independently resolves that concern.

Recommended Changes

Section (a)(2)(ii) should be modified as follows:

> (ii) Renders the advice (A) pursuant to a written or verbal agreement, arrangement or mutual understanding that the advice is individualized to ~~or that such advice is specifically directed to,~~ the advice recipient for consideration in making investment or managements decisions with respect to securities or other property of the plan or IRA, and (B) under circumstances creating a reasonable expectation on the part of the advice recipient that advice will be provided in the interest of the advice recipient.

Comment: The Definition of Recommendation is Too Broad.

Under the Proposal, a recommendation is "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." This definition, which encompasses virtually any communication that might be construed a "suggestion," is too broad.

We understand from the preamble that the Department looked to FINRA guidance – specifically, NASD Notice to Members 01-23 – as a model for this definition. However, the Proposal leaves out significant language and context from that guidance. The FINRA Notice does not provide that a mere suggestion to engage in behavior is a recommendation. Rather, it focuses on whether, under the facts and circumstances, the communication might be viewed as a "call to action" that would *reasonably influence* an investor to trade *a particular security or group of securities*. The Proposal's definition omits any reference to "influence" or similar concept. It also lacks any limitation that the communication be directed to "taking action" with regard to a particular security or group of securities.

Moreover, the FINRA guidance is directed to whether the conduct in question amounts to selling activity, subject to a suitability standard, not whether that conduct rises to the much higher duty of fiduciary-level investment advice. Logically, the standard for whether a communication rises to the level of fiduciary advice should be higher than the standard for whether the communication is selling activity. The proposed definition has the opposite result.

Recommended Changes

This over-inclusive definition of "recommendation" should be revised so that it does not preclude a provider from marketing products and communicating with investors without becoming a fiduciary. The definition should be revised to limit communications that direct the investor to take prescribed actions that the adviser believes are in the investor's best interest.

Comment: The Proposed Seller's Exception Should be Expanded.

We are concerned that that the proposed "carve-outs" are unnecessarily limited and too narrowly drafted to allow beneficial business models and practices to survive.

Product Sales. One of our primary concerns with the Proposal is that it conflates the sale of insurance or investment products with advice, and seeks to impose on sales activity a regulatory model for advice that does not fit. Sales activities are by definition at arm's length. A core function of all financial regulation in the United States is to properly recognize and implement the distinction between sales activity and impartial financial advice.

DOL recognized these distinct models in the 2010 version of the proposed regulation by providing an exclusion from fiduciary investment advice for those selling products when there is no reasonable expectation of a fiduciary relationship.[3] We believe that the DOL properly preserved this distinction in the 2010 proposal by permitting sales activities to remain non-fiduciary in nature, with clear disclosure of potential conflicts. While the Department partially retained this concept in the Proposal through its large plan "carve-out" that permits sales activities to plans with more than 100 participants or more than $100 million in assets, this exclusion should not be limited to large plans. The Department should expand this carve-out to include sales to IRAs and retirement plans regardless of plan size, with reasonable and clear disclosures.

The rationale articulated by the Department in the Proposal for only providing a carve-out for large plans is not valid as the size of the plan is not an acceptable proxy for sophistication. Small plan sponsors and IRA owners understand the difference between sales and advice; these concepts are not foreign. Indeed, even if financial sophistication were required to understand the difference between sales and advice, a fiduciary to a plan with more than 100 participants or $100 million in assets may know less about investing than a small plan fiduciary or IRA owner who is an expert investor — the large plan carve-out merely discriminates against small plans and individuals by denying them choices in the marketplace that are available to large plans. And all plans are required under ERISA to bring financial expertise to investment decision making – by engaging a third party expert if the plan fiduciaries themselves are not sufficiently expert[4] – which means that intermediaries engaged in a sales transaction can appropriately deal at arm's length with the plan (or its third party expert) without risk of "conflicted" advice.

Proprietary Products. This gap in the Proposal is most clearly illustrated by the sale of proprietary products. Like many financial service providers, MassMutual makes available to its customers investment and insurance products developed and managed by MassMutual. These proprietary products, and the conduct of our sales staff who market them, are overseen by a variety of state and federal regulatory and enforcement agencies. These agencies and the rules they enforce ensure that our employees, agents and affiliates accurately represent the products,[5]

[3] *See* 75 Fed. Reg. 65263 (Oct. 22, 2010).
[4] *See, e.g.*, 29 C.F.R. § 2509.95-1(c)(6)

[5] There are a series of state insurance laws and regulations that, among other things, prohibit any misrepresentations related to an insurance policy. Section 4 of the National Association of Insurance Commissioners ("NAIC") Model Unfair Trade Practices Act makes it an unfair trade practice if anyone "misrepresents the benefits, advantages, conditions or terms of any policy." This NAIC model act serves as the template for nearly all the state definitions of unfair trade practices. With respect to annuity products, many states have adopted suitability regulations that require that the insurance company or its agent have a reasonable basis to believe that the consumer has been "informed of the various features of the annuity." *See* Section 6 of the NAIC Suitability in Annuity Transactions Model Regulation ("Suitability Regulation"). In addition, to the extent that the products being provided are securities such as variable annuities or mutual funds, there are numerous statutes and regulations that impose disclosure obligations on the issuers of such securities, as well as any securities intermediary involved in the sale of those products. Issuers of securities are required to disclose all material facts, and refrain from omitting any material information that would be viewed as important to a reasonable investor. Broker-dealers selling securities are subject to a duty of

disclose their relationship with MassMutual, and abide by legally-mandated duties of care to those purchasing these products. [6]

There can be no reasonable confusion in the marketplace that MassMutual and its sales representatives have an economic interest in the sale of MassMutual products and services. If a retail retirement investor is speaking with a MassMutual representative about a MassMutual product or service, there can be no reasonable expectation that MassMutual or its representative is acting as a wholly impartial adviser to the investor or is providing investment advice free from competing interests. This is, unambiguously, a sales setting.

With proper disclosure that the seller is offering proprietary products, is compensated based on selling those products, and is not providing fiduciary advice, there should be no confusion on the part of small plans, plan participants or IRA owners about whether impartial advice is being provided. There is no need to determine the level of financial sophistication of the plan or individual. Consumers understand that a salesperson representing proprietary products is not giving impartial advice. Clear and prominent disclosure will provide the necessary notice to the plan, participant or IRA owner.

Accordingly, even if the Department does not expand the seller's carve-out to small plans and IRAs, we recommend that the Department provide an additional carve-out from fiduciary advice for sales of proprietary products where appropriate disclosures have been made to the plan fiduciary, plan participant or IRA owner. We further recommend that the Department look to existing SEC disclosure requirements applicable to advisers as the road map for appropriate disclosure that clearly explains the seller's interest in the sale and warns that the seller is not impartial.

Wholesalers. It is our understanding that the Department has informally confirmed its intent that recommendations made by the representatives of retirement plan providers, insurance companies, and mutual funds (commonly called "wholesalers") to investment advisers (who are themselves fiduciaries by virtue of providing advice to plans, participants, or IRAs) would not constitute advice under the Proposal. We request that the Department formalize this interpretation in any final rule.

Recommended Changes

The Proposal should be modified as follows:

1. Make the seller's carve-out available with respect to all plans as well as participants and IRA owners, conditioned on clear, useful and prominent

fair dealing to their customers and are required to comply with "just and equitable principles of trade" under FINRA rules. *See* Supplementary Material .01 of FINRA Rule 2111 (fair dealing) and FINRA Rule 2010 (just and equitable principles of trade)

[6] Under state insurance laws, insurance producers and insurers must comply with the Suitability Regulation which imposes a duty that all recommendations of annuities be suitable for the purchaser. Broker-dealers offering securities products are required to comply with FINRA's "know your customer" rule (FINRA Rule 2090) as well as its general suitability rule (FINRA Rule 2111). In addition, broker-dealers offering deferred variable annuities must also comply with a product-specific suitability rule for the offer and sale of variable annuity contracts (FINRA Rule 2320).

disclosures that: (a) the seller receives compensation as a result of the transaction; (b) that such compensation presents a conflict of interest and gives the seller an incentive to recommend products based on the compensation received; and (c) that the investor can obtain similar services from other sellers for similar, lower or higher fees. At a minimum, the carve-out should be available with respect to proprietary products and services.

2. Clarify that investment recommendations made by wholesalers to fiduciary advisers do not constitute advice.

Comment: The Education Carve-Out for Participants and IRA Owners Should Allow Model Portfolios to Identify Specific Investments.

Interpretive Bulletin 96-1 ("IB 96-1"),[7] adopted during the Clinton Administration, has been one of the great success stories of ERISA regulation during the last two decades. By codifying on workable terms a sensible distinction between investment education and investment advice, it facilitated the delivery of practical information to plan participants early in the shift from defined benefit to defined contribution plans. Advisers, platform providers and others have been able to help participants understand and implement changes to their accounts in a way that would not be possible otherwise. To our knowledge, there is no record that the terms of IB 96-1 have been abused or have otherwise caused harm to participants during the nearly 20 years IB 96-1 has been available for use.

Accordingly, we applaud the Department for the elements of the Proposal's education carve-out that expand the definition of education to include information provided to plan fiduciaries and IRA owners, as well as to participants, and to include information regarding retirement income needs and risks. These changes would be very helpful in increasing information available to plans, participants and IRA owners.

Unfortunately, the proposed restriction on model asset allocation portfolios referencing specific investments is a regrettable step backwards. Model portfolios have been an efficient and effective means to educate retirement investors about the investment of their accounts. As presented in participant education meetings, for example, or as made available online by platform providers, model portfolios have proven to be among the most useful tools for participants making independent decisions regarding their plan investments. Prohibiting such models from linking the allocations to the available investments selected by the plan fiduciary or the IRA investment platform, would render them nearly useless to investors. Forcing each individual retirement investor separately to ascertain the classification of those available investments would be extraordinarily and needlessly inefficient and will likely result in fewer retirement investors taking action to save for retirement. And none of this activity includes the sort of interactions that the Department is concerned might be confusing to retail investors.

Given the proposed expansion of fiduciary status and its potential chilling effects on advisers, the education carve-out takes on greater importance in both the IRA and plan context. The Department will seriously compromise the real-world utility of educational model portfolios if the educator is prohibited from connecting the model allocations to available investments. The

[7] 29 CFR §2509.96-1.

disclosures provided in IB 96-1 provide sufficient notice to participants and IRA owners that other investment alternatives are available.

Recommended Changes

The Proposal should retain the terms of IB 96-1 within the education carve-out and should (1) allow model asset allocations referencing specific investments for plans and IRA owners and (2) make the carve-out available for specific investments with respect to decumulation products.

Comment: The Platform Carve-Out Should Be Improved.

Responses Provided by a Platform Provider. It is imperative that any final rule retain the distinction between platform providers offering hypothetical investment line-ups or product packages, and fiduciary investment advice. When a plan fiduciary or IRA owner decides to hire a platform provider and selects from among its available investments and services, the platform provider is not and should not be a fiduciary for offering products and investment line-ups that a plan fiduciary or IRA owner may select.

Specifically, we are concerned about the phrase "without regard to the individualized needs ...." It is not clear to us what conduct the Department intends to exclude with this language, as it would be nearly impossible for any service provider to offer a platform or hypothetical investment line-up that does not take into account the individualized needs of the counterparty in some manner. There is a difference between making investment recommendations, and responding to the requests of the plan or IRA owner with a selection of available options that meet the investor's criteria.

Under section (b)(4) of the proposed fiduciary definition, the Department permits selection and monitoring assistance related to the platform as long as the person "[m]erely identifies the investment alternatives that meet objective criteria specified by the plan fiduciary (e.g., stated parameters concerning expense ratios, size of the fund, type of asset, credit quality)." This provision, while helpful, is too narrow. It appears to ignore a common industry practice that provides valuable assistance to plan fiduciaries when transferring plan assets to a new investment platform by providing hypothetical investment line-ups that can be used for mapping current investments to those available from the new provider. The issue from a fiduciary perspective is not whether the response to the plan or IRA owner is individualized, i.e., providing the type of products or services requested, but whether the platform provider is recommending that the plan select certain products or services. Responding to an inquiry from a plan fiduciary for specific information about products and services, even with a response that is based on a request that is individualized by the plan fiduciaries or IRA owner, is not advice.

For example, a plan fiduciary might ask a platform provider to create a hypothetical investment line-up that satisfies the requirements for the 404(c)(4) mapping safe harbor, that has target date funds that qualify for QDIA default protections, that meet certain share class and/or expense ratio criteria, that satisfy certain performance standards, and that provide a specified level of revenue sharing. With appropriate disclosures, and based on the criteria established by the fiduciaries, there should be no rational basis for the investor to assume that the provider was recommending those investments or services.

Mandatory Automatic Rollover and Investment Services Available Through Retirement Plan Platforms. The Proposal indicates that the recommendation of an investment manager or adviser is a fiduciary act. Since investment services offered on a platform are analogous to the selection and monitoring of investment products, the Department should clarify that such services also are within the scope of the platform carve-out.

Many platforms provide access to investment services, such as independent third party investment advice and investment management, in addition to investment options. These optional services are offered on the platform to facilitate investment advice for plan participants or plan sponsors that lack investment expertise. A platform provider should not be a fiduciary under the Proposal as a result of making these services available, since the availability of the investment manager is not intended to be advice that is individualized or specifically directed to the plan sponsor as a recommendation. Instead, the platform provider simply offers the service and provides information about the nature and cost of those services. If the plan sponsor ultimately selects the investment advice or investment management service, the adviser or manager will be a fiduciary with the accountability to the plan that the Proposal is intended ensure.

Similarly, it is common for a recordkeeper to offer an IRA provider on its platform. The IRA is generally offered as a service along with the "bundle" of other recordkeeping services and is necessary to enable plan sponsors to satisfy a plan's mandatory automatic rollover ("MAR") provisions. Such mandatory rollovers are, of course, a tax qualification requirement for section 401(a) plans. The Department has provided safe harbor rules and exemptive relief for this process, and plan sponsors expect providers to support these requirements with a rollover IRA option and necessary functionality. It is impractical for a recordkeeper to offer more than one alternative to satisfy MAR. Given the broad and sweeping language in the Proposal and its preambles,[8] it is unclear whether the mere identification of the mandatory rollover provider might constitute fiduciary advice. That service is, however, surely integral to offering a retirement platform, and the Department should clarify that such services also are within the scope of the platform carve-out. In considering this comment, the Department should keep in mind that the MAR IRA is offered to plan fiduciaries for their consideration and decision about whether to use it for their plan. It is only after approval by the plan fiduciaries that the service is implemented.

IRA Platforms. The exclusion of IRA platforms from the platform carve-out leaves those structures in unacceptable limbo. It is indisputable that an IRA platform provider, like a plan platform provider, must be permitted to develop and maintain the platform to serve its own business interests. Without a platform carve-out, however, those providers are exposed to private litigation for merely constructing a product -- an exposure that the Department would impose on those providers with its expanded fiduciary definition. And the point at which, in the Department's view, the IRA platform provider is obliged to subordinate its interests to those of IRA owners would be entirely unclear without a platform exception. Neither of those points can be left to resolution through litigation after adoption of a final rule. The platform carve-out must be available for IRAs as well as plans.

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[8] *See, e.g.,* the preamble to the proposed definition, 80 Fed. Reg. at 21938 n. 16.

As an example, an IRA platform would ordinarily have hundreds (or more) of investment options (e.g., mutual funds). It would not be workable as a practical matter to treat a large and diverse platform of potential IRA investments as a fiduciary recommendation to use all of these investments. First, there would never be a recommendation to use all of the investments. Second, the disclosures required by the Best Interest Contract Exemption – if the offering were viewed as an investment recommendation – would be so voluminous as to overwhelm investors with thousands of data points.

Recommended Changes

The platform and related selection and monitoring assistance carve-outs should be modified to include IRA platforms and delete the "without regard to the individualized needs" clause. The status of investment advisers and managers and other service providers included on platforms, as well as the identification of IRA providers to receive mandatory rollovers, should also be clarified.

Comment: The Application of the Proposal to Rollover Advice Must be Clarified.

The most aggressive position taken by the Department in the Proposal is the 'ERISAfication' of IRAs, including rollover advice. As the Proposal stands, however, it is entirely unclear how the Department intends advisers and other providers will deliver rollover services to participants, which are badly needed, *inter alia*, to minimize "leakage" from the retirement system. It appears the mere offer to provide rollover advice, under any service or compensation model, would be fiduciary advice, by reason of section (a)(1)(iv). There is no exemption in the Proposal that explicitly provides relief for making that offer. And there is no exemption that provides relief for the rollover advice *per se*, as distinguished from investment purchases made in a plan or IRA reflecting that advice. Such an expansion of the scope of "investment advice" to encompass IRAs would be a significant departure from precedent and appears to be irreconcilable with Congressional intent and the Department's longstanding position. If the Department is determined to bring rollover advice into the ERISA fiduciary environment, it is incumbent upon the Department to provide a clear, reliable means to deliver that advice in a compliant manner and to provide an adequate explanation as to why practices it previously deemed acceptable are now problematic.

Recommended Change

The rules for rollover advice must be clarified to avoid any inadvertent gaps in the scope of relief provided, and expressly include distribution and rollover advice within the scope of the final exemptions.

Section II: Comments on the Impartial Conduct Standards

Comment: The Definition of "Best Interest" Must be Modified.

The definition of "best interest," which is a core provision under the impartial conduct standards in both the Best Interest Contract Exemption ("BICE") and PTE 84-24, should be clarified to avoid an implication that a retirement adviser is barred from having any financial interest.

BICE Section II(c)(1) provides:

> When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (i.e. advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, *without regard* to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party)(emphasis added).

PTE 84-24 Section II (a) requires the following condition be met:

> When exercising fiduciary authority described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) with respect to the assets involved in the transaction, the insurance agent or broker, pension consultant, insurance company or investment company principal underwriter act in the Best Interest of the plan or IRA.

And PTE 84-24 Section VI (b) states that a fiduciary acts in the "Best Interest" of the plan or IRA when:

> [T]he fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, *without regard* to the financial or other interests of the fiduciary, any affiliate or other party (emphasis added).

The reference to "without regard" under the impartial conduct standards would subject advisers and financial institutions to unnecessary litigation claiming that this language prohibits the adviser or financial institution from having *any* financial interest in or receiving *any* compensation as a result of the transaction. We do not believe that is the Department's intent. Longstanding interpretations, including by the U.S. Supreme Court[9], make clear that ERISA section 404(a) permits "incidental benefits" to fiduciaries.[10] And the preambles to BICE and PTE 84-24 provide clarity on this issue:

[9] See *Hughes Aircraft v. Jacobson*, 535 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).

[10] *See e.g.,* Advisory Opinions 2011-05A, 2003-04A, and 2001-01A.

Under this standard, the Adviser and Financial Institution must put the interests of the Retirement Investor ahead of the financial interests of the Adviser, Financial Institution or their Affiliates, Related Entities or any other party.[11]

Recommended Changes

We suggest replacing the reference to "without regard" in both BICE and PTE 84-24, respectively, with the following language:

For BICE: without ~~regard to~~ putting the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party ahead of the Retirement Investor.

For 84-24: without ~~regard to~~ putting the financial or other interests of the fiduciary, any affiliate or other party ahead of the plan or IRA.

More generally, if it is intended that the section 404(a) standards comprise the Best Interest standard, the Department should say so on the face of the exemptions.[12] If any other standard is intended, it is incumbent on the Department to justify the variation from section 404(a) and previous interpretations and to provide much more specific guidance about that standard than it has to date; it is untenable to leave this essential standard to be interpreted through enforcement and litigation after adoption.

Comment: The Impartial Conduct Standards Must Accommodate the Benefits Provided to Career Insurance Agents.

Like many of its peer companies, MassMutual distributes annuity and insurance products through a "career agency system" of financial professionals. In contrast to independent insurance agents – who owe no particular loyalty to any one company – career agents agree to primarily represent one insurance company and principally sell and service that company's insurance and annuity products. Under a legal framework that has been in place for over 60 years, this arrangement makes career agents "full-time life insurance salesmen," eligible under section 7701(a)(20) of the Internal Revenue Code to participate in their company's health and retirement plans. In addition, career agents also receive substantial training and education support from the insurance company they represent. The career agent model seeks to foster a long-term relationship between the insurance company and its customers – a relationship that is maintained by a highly-trained, well supervised agent and that is beneficial to both the customer and the company.

The Department's proposal would re-characterize the selling and servicing activities of career agents to plan participants, beneficiaries and IRA owners as fiduciary in nature and subject these activities to the impartial conduct standards under PTE 84-24 and BICE. Advisers and Financial

[11] 80 Fed. Reg. 21,960, 21,970; *see also* 80 Fed. Reg. 22,010, 22,014 (Apr. 20, 2015) (preamble to proposed PTE 84-24 amendments).

[12] That approach would avoid two different standards for investment advice fiduciaries to Title I plans, under the statute and under the class exemptions, which seems hard to defend. It would also bring the body of section 404(a) precedents to bear under the Best Interest standard rather than starting anew, which would be of great assistance in the implementation of the Proposal.

Institutions seeking to comply with BICE are obligated to follow policies and procedures to mitigate the impact of Material Conflicts (defined as a financial interest that *could* affect the exercise of the adviser's best judgment). Advisers and Financial Institutions would also be required to "affirmatively warrant" that neither the Financial Institution, Affiliate, or Related Entity "uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they *would tend to encourage* individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor." (emphasis added)

While there is nothing in the Proposal or accompanying cost benefit analysis that suggests the Department intended to preclude an insurance company from providing health and retirement benefits to its career agents (or that the issue was even considered)[13], the text of the proposal, without additional clarification, raises the specter of legal challenges that the provision of such benefits based on the aggregate sale of company products violates the provisions of the Proposal discussed above. This would be an unwarranted result since the tax code requires that retirement benefits be based exclusively on the compensation received by the career agent for sales of the sponsoring insurance company's products.

So long as the legal obligations of the career agent to the insurance company and the benefits provided to the agent are based on overall production for the company and not on specific transactions in the retirement market, there is nothing in this structure inconsistent with the objectives of the impartial conduct standards. And unlike the majority of the other forms of compensation listed in BICE, in which there is an immediate and tangible benefit to the adviser resulting from each specific transaction, the employee benefits earned by career agents do not incent agents with respect to any particular transaction. Retirement benefits are unrealized until some future date, and the value of welfare benefits are uncertain, depending on unpredictable future events. These plan benefits are simply different in kind and should be treated as such. Accordingly, there is no reason for the Department's proposal to leave this issue in doubt.

Recommended Changes

To avoid any implication that the provision of benefits to career agents is incompatible with the Proposal, we recommend the following:

1. As discussed in our comments above on the best interest standard, replace the "without regard" language in BICE and PTE 84-24 with language that prohibits an adviser from putting his or her interests ahead of the customer.

2. Revise section II(d)(4) of BICE to read as follows:

    Neither the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards~~, differential compensation~~ or other actions or incentives ~~to the extent they would tend to encourage individual Advisers to make~~

[13] This would be an especially unfortunate result for a rule proposed by the federal department whose very mission is to "assure work-related benefits and rights". Department of Labor Mission Statement, *available at* http://www.dol.gov/opa/aboutdol/mission.htm

~~recommendations that are not in~~ which result in recommendations that are contrary to the Best Interest of the Retirement Investor.

3. Provide additional clarification on this issue through the addition of an example in the preamble or by other means.

Comment: The Impartial Conduct Standards Must Not Preclude Variations in Compensation among Product Types and Specific Product Offerings.

In the context of a legal standard that is intended to cause retirement advisers to ignore sales compensation when providing advice to retirement investors, the Proposal, and BICE in particular, demands that advisers give obsessive attention to such compensation in their compliance procedures. This goes too far. The competitive marketplace has, for many years, used compensation structures for insurance agents and brokers, and for registered representatives of broker-dealers, which reflect the differences in products and investments, as well as the nature and extent of services required to sell each of those types of products. It would be incorrect to assume that considerations, such as time, effort, supervisory requirements, training and education, and so on, were not already reflected in the compensation structures.

Furthermore, the Proposal already has adequate requirements and conditions to properly manage the risks that the Department is concerned about. First, the fiduciary advice definition, and both "sales" exemptions (PTE 84-24 and BICE), require that the fiduciary adviser make prudent recommendations to the plan, participant and IRA owner, taking into account the needs of the investor. As noted earlier, the preambles to both exemptions explain that the standard of care also requires that the fiduciary adviser put the interests of the investor ahead of his own. The failure to satisfy those standards of care would, in most cases, result in a breach for which damages are available. And, in all cases, it would result in a prohibited transaction for which the investor could recover the compensation paid to the fiduciary adviser. As a second reason, the compensation of the fiduciary adviser would be required to be reasonable. If the amounts paid to the adviser exceeded that amount, the excess could be recouped by the investor. As a result, the potential for self-serving advice which could result in imprudent recommendations or which could result in excessive compensation for the fiduciary adviser are already fully regulated, without the need for further "management" of the compensation of the adviser.

The BICE preamble suggests that different levels of compensation by product type could be permissible under the impartial conduct standards if supported by differences in the work, training and expertise required to support the product, but does not articulate that position in a reliable way. Nor does the preamble clearly address the possibility that different compensation levels within a particular product type could be squared with the best interest standard. Product manufacturers – annuity issuers, mutual fund sponsors and other product managers – have entirely legitimate business reasons to offer higher levels of sales compensation for particular products, for example, to promote sales to sufficient numbers of purchasers to reach the actuarial law of large numbers or scale in investments and expenses. And ERISA does not supersede the antitrust laws; product manufacturers compete on sales compensation as well as product terms. It is entirely possible that a product with an above-average level of sales compensation will serve the best interests of a plan participant or IRA owner, but without further clarification the

Proposal creates such a level of uncertainty and risk on this point that retirement advisers will hesitate to recommend that product – a perverse result given the objectives of the Proposal.

These are not points on which the Department can leave the regulated community to take positions at their own risk. By examples in the final preambles or otherwise, it is essential that the Department confirm these points.

Recommended Changes

The preamble to BICE should provide clear examples where differential compensation by product type would be permissible under the impartial conduct standards. The preamble should also make clear that differential compensation within particular product types is not prohibited under the impartial conduct standards and provide clear examples where varying compensation would be permissible.

Comment: The Impartial Conduct Standards Must Not Disadvantage Proprietary Products.

We are also concerned that the Proposal's ambiguous language regarding impartial conduct standards may place proprietary products at a distinct disadvantage to nonproprietary products. It would be an inexplicable outcome if MassMutual agents were disadvantaged by the Proposal, relative to unrelated brokers or agents, in offering MassMutual's products and services to retirement investors.

At a minimum, the final rule must reconcile the offering of proprietary products and services with the impartial conduct standards proposed for several class exemptions (discussed above). For example, the suggestion in BICE's preamble that special constraints may apply to sales compensation for proprietary products,[14] or the difference in the formulation of BICE's "reasonable compensation" requirement generally and for proprietary products,[15] is unwarranted. The Department must make it clear that the provider's inherent interest in its own products and services is not a violation of the impartial conduct and related standards. The Department has indicated that the Proposal is not intended to prohibit current business models and practices. However, as discussed above, the Proposal could have the opposite effect with respect to our career agency system and the sale of proprietary products leading to truly illogical consequences at odds with the best interests of investors.

Recommended Change

The Department should clarify that the sale of proprietary products and receipt of "differential compensation" are not inconsistent with the Impartial Conduct Standards.

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[14] 80 Fed. Reg. at 21972.

[15] Cf. section II(c)(2) and section IV(b)(2) of the proposed BICE

Section III. Refine and Expand PTE 84-24

Comment: Variable Annuities Should Remain Within the Scope of PTE 84-24.

We fully support the Department's decision to continue to make PTE 84-24 available to fixed annuities. We believe, however, that the Department should reverse its decision to exclude variable annuities sold to IRA owners from PTE 84-24, which appears to be premised on the belief that such contracts are principally in the nature of investment rather than insurance products and therefore can successfully be accommodated under BICE. That is a significant misperception.

Fundamentally, variable annuities include significant insurance features, similar and at times in addition to those provided by fixed annuities. For example, variable annuity contracts routinely include not only separate account options, but also access to a fixed account option, the return of which is guaranteed by the insurance company. That is, these contracts are typically a combination of fixed and variable options. Variable annuities may also offer "living benefits" (insurance features that provide guaranteed accumulation, guaranteed income, or guaranteed withdrawal benefits) and "enhanced death benefits" (insurance features that protect principal in the event of the owner's death). Living benefits and enhanced death benefits result in the transfer of longevity and investment risk to the insurer. And perhaps most importantly, variable annuities offer something no other security covered under BICE can offer – guaranteed lifetime income through annuitization at guaranteed minimum rates.

The key insurance features of a variable annuity make it incompatible with BICE. This is especially apparent with respect to BICE's disclosure regime which is not designed to take into account the current or potential value of a product's guaranteed insurance features such as a future income stream or death benefit. Simply put, PTE 84-24 is the logical exemption for variable annuities for the same reasons that it remains the logical choice for fixed annuities. The bifurcated approach of the Proposal draws an artificial line that would add unnecessary complexity to the sales process when both types of annuities are being discussed. Moreover, consolidating all types of annuities under PTE 84-24 will have no deleterious impact on investor protection as a result of the incorporation of BICE's impartial advice standard into that exemption. Not only would advisers and financial institutions be held to the same standard of care regardless of product-type, because variable annuities can only be sold by broker-dealers and their registered representatives, investors would be able to assert any legal claims – including claims relating to ERISA standards of care – through the FINRA arbitration process, and class claims, not eligible for FINRA arbitration, could be asserted in civil litigation.[16]

Recommended Change

Variable annuities should remain within the scope of PTE 84-24 as is the case today.

[16] Additionally, under state insurance laws annuities carry "free-look" provisions extending for 10 days or more. These provisions give clients a meaningful opportunity to evaluate purchases after the sale and to get their money back for any reason.

Comment: Non-Proprietary Mutual Funds Should be Added to PTE 84-24 for Retirement Plans.

As the Department has informally acknowledged, the proposed complex of exemptions for investment activity inadvertently omitted any product-specific relief for non-proprietary mutual fund transactions sold to plans on an agency basis. This omission needs to be corrected – such transactions are the most common investment activity in the retirement system – and, particularly in light of the expanded definition of investment advice fiduciary, relief must be provided for fiduciary advice with respect to such transactions.

Inasmuch as the protections of PTE 84-24 have been determined and proven to be appropriate for proprietary mutual fund transactions, they should more than suffice for non-proprietary fund transactions. Accordingly, we recommend that such transactions be added to PTE 84-24 for retirement plans.

Recommended Changes

The relief in PTE 84-24 for mutual funds should not be limited to proprietary funds, but should include non-proprietary funds as well.

Comment: The Conditions of PTE 84-24 Should be Clarified.

We appreciate the retention of PTE 84-24 in the Proposal and, as discussed above, urge that its coverage be expanded to variable annuities and non-proprietary mutual funds. The Proposal's definition of "Insurance Commission" and "Mutual Fund Commission," however, creates uncertainty about well-established compensation models in the insurance industry. The products covered by PTE 84-24 over time have come to provide for 12b-1 fees and other forms of indirect compensation other than traditional insurance or securities commissions. There is no justifiable reason to exclude any such compensation from the relief provided by PTE 84-24 solely by reason of the form of the compensation; neither the "conflicted" interest nor the appropriate relief for that conflict qualitatively differs with the form the compensation takes – as the proposed BICE properly acknowledges. The proposed exclusion of 12b-1 and similar fees also would needlessly create uncertainty where, as is often the case, those fees are used to defray plan expenses rather than as compensation retained in a distribution channel. And, with respect, the Department has over the years assiduously declined to take a definitive and consistent position as to whether such forms of compensation were covered by PTE 84-24 and certain other exemptions.[17]

In any event, the Proposal needs to make clear that the payment of overrides to individuals other than the selling agent (such as general agents and other supervisors) is permissible as it is simply another component of the compensation paid for the sale of the product. And, as noted earlier, in career agency systems, such as MassMutual's, annuity sales count towards an agent's eligibility for receiving health and retirement benefits. The Proposal should make clear that such arrangements do not run afoul of the exemption's limitation on acceptable forms of compensation.

[17] *See* Advisory Opinions 2006-06A, 2003-09A, 93-12A, and 93-13A.

Recommended Changes

The relief provided by PTE 84-24 should not be limited to any particular kind of compensation. In the preamble or otherwise, the Department should also confirm that the benefits provided to career agents and override payments are within the scope of the relief provided by PTE 84-24. The Department should also revise the definition of "Insurance Commission" and "Mutual Fund Commission" to clarify that affiliates of insurance agents, brokers and pension consultants may receive 12b-1 fees and other forms of indirect compensation while remaining within the scope of PTE 84-24.

Section IV. BICE Needs Significant Revisions to be Viable as an Exemption

From any reasonable business perspective, BICE is not workable as proposed. Without significant changes, small plans and IRA owners will be unnecessarily deprived of needed financial advice. At a minimum, the following revisions to its conditions (and corresponding provisions in other exemptions) are necessary.

As more fully discussed in other comment letters, we note at the outset our understanding that the Department intends to clarify that (1) BICE provides relief for the investment product purchase itself as well as compensation related to that purchase, (2) relief is available under BICE for advice with respect to plan investment menus, as well as specific investment transactions, and (3) fiduciary advice with respect to investment service providers is within the scope of BICE. We support those clarifications.

Comment: Timing and Format of the Written Contract is Impractical.

The contract mechanism in BICE must be entirely reconsidered. Requiring that a contract be signed before substantive discussion with a client or potential client can occur ignores the reality of how advisory relationships are established and will serve as a disincentive for clients to comparison shop. Clients should be able to discuss and fully understand the adviser's recommendations before entering into a contract. Allowing the contract to be provided before the recommendation is executed, instead of before the recommendation is made, in no way undermines the Department's goal of requiring that the recommendation be in the retirement investor's best interest. Finally, the tri-party nature of the contract is problematic given that advisers often switch firms. It is for this reason that we typically do not include our representatives as signatories on advisory or similar agreements with our customers. And for call center interactions, it would make no sense to require that customers enter into a formal written agreement with their financial institutions and a randomly assigned customer service representative. The costs of compliance with this contract mechanism, which the Department estimates would be minimal, would in fact be very significant.

Recommended Changes

The contract requirement should be removed or, at the very least, should not be required until implementation of the adviser's recommendation or the time account opening paperwork is completed, with execution of the contract allowed through a "negative consent" process. The adviser should not be a required party to the contract.

Comment: The Warranties are Not Well-Conceived and Will Unnecessarily Expose Advisers and Financial Institutions to Unacceptable Litigation Risk.

The warranty provisions of BICE are highly problematic. Because of the subjective and overly broad nature of the warranties, compliance with the warranties could not be assured in advance, despite a financial institution's best efforts to do so. While the preambles suggest that the Department will consider materiality when exercising its prosecutorial discretion in asserting a violation of the "best interest" component of the exemption, the Department would not be the sole arbiter of these matters given the private right of action it proposes to create. Instead, compliance will be interpreted and enforced (almost certainly in a conflicting manner) by juries and arbitration panels in all 50 states. Given the significant litigation risk, including class actions, it is almost a certainty that advisers and financial institutions will exit markets where the size of the retirement accounts will not justify taking on this risk, and/or increase the costs of their products and services to compensate for this risk. Neither outcome is in the best interest of the retirement investor.

Furthermore, warranty (d)(1) is superfluous in encouraging compliance with other applicable laws, each of which is designed to stand on its own from an enforcement perspective. It may also create private rights of action where Congress or a state legislature purposefully did not provide for private enforcement of such laws and will complicate the settlement of enforcement actions by the agencies responsible for the administration of such laws. Finally, the formulation of the warranties can be read to exclude any economic interest on the part of the retirement adviser and to prohibit anything other than level-fee arrangements, even if the interests of the retirement investor are put first, which is inconsistent with the apparent intent of the Proposal.

Recommended Changes

The warranties should be replaced with a requirement that financial institutions relying on BICE adopt written policies and procedures reasonably designed to (1) identify any Material Conflicts of Interest, (2) mitigate the impact of any Material Conflicts of Interest, and (3) ensure that individual advisers adhere to the Impartial Conduct Standard. This should fully satisfy the Department's objective of mitigating conflicts of interest and providing a remedy to investors, while at the same time eliminating the negative consequences of overly broad and subjective contract guarantees.

If the warranties are retained, they should be subject to a reasonableness standard and a safe harbor should be made available for good faith compliance with the specified requirements.

Comment: Transaction Disclosures and Annual Disclosure Requirements Need to be Amended to Provide Meaningful and Cost Effective Disclosure to Investors.

We support the Department's efforts to ensure retirement investors have access to relevant cost and commission information prior to entering into a securities transaction so that they can make informed investment decisions. However, the extensive disclosure requirements proposed in BICE extend far beyond useful and meaningful point of sale disclosures. They overlap and potentially conflict with existing legally required disclosures (to the extent a projection of future return is required to provide the disclosure, or the format of the disclosure for securities differs from SEC requirements), do not take into account important distinctions between different types of products and services, would require systems capabilities that do not exist today, and would take vastly more time and money to build than estimated in the Proposal. While the Department assumes that only 100 hours will be required to build the required disclosures, our initial IT estimates suggest that it would likely take MassMutual's insurance and retirement businesses collectively over 250,000 IT hours and cost between $25 and $35 million dollars to implement. Put another way, our estimated work effort would be ***2,500*** times greater than predicted by the Department in its cost benefit analysis.

Recommended Changes

In lieu of the disclosures and website requirements, we propose an alternative disclosure approach that focuses on getting critical information into the hands of retirement investors no later than the point of sale. This disclosure would include (1) the direct compensation paid to the adviser in the form of a percent of premiums paid or purchase amount, (2) a narrative description of the indirect compensation received, and (3) a "cigarette type warning" that would highlight existing disclosures contained in product prospectuses that detail the total cost of variable annuities and mutual funds.

Comment: The Data Request Requirement Must Be Eliminated.

The data request requirement, and the Department's unfettered discretion to disclose proprietary information received through such a request even if all legal standards have been satisfied, exceeds any reasonable need of the exemption (given the Department's statutory powers of investigation) and appropriate administrative practice. Given current concerns about uncontrolled government access to private information, recent news headlines on the ability of the government to protect client data, and the lack of a statutory basis, this requirement must be eliminated.

Requested Changes

The data request requirement must be eliminated.

Item V. The Proposed Transitional Periods are Inadequate

Comment: The Proposal Must Allow At Least a 36 Month Transition Period and Fully Grandfather Existing Arrangements.

We have a number of concerns regarding the transition period contemplated by the Department, as well as the "grandfather" provision in BICE related to existing arrangements.

First, eight months is simply not enough time to effect changes of the magnitude required by the Proposal and BICE. The disclosure provisions alone will require substantial modification of internal systems at a significant cost that the Department has not adequately estimated. When the Department made similar changes in connection with the section 408(b)(2) disclosures, service providers had substantially more time in which to reform their information systems; eight months from the final rule is simply impossible at any reasonable expense (and likely impossible even at any unreasonable expense). As these costs will be borne ultimately by the participants and IRA owners, the Department should provide a reasonable transition period of no less than 36 months.

Second, the Department should apply the new rule only to new agreements reached after its effective date. To do otherwise, runs contrary to normal expectations that the contractual provisions lawfully reached between private parties will be honored until their expiration. For example, an agreement in which a front-end load has been paid for services should not be changed in mid-contract for a completely different compensation model.

The BICE grandfather provision incents advisers to refrain from providing any new advice; this is not in the best interest of plans, participants or IRA owners. Additionally, the provision applies only to assets that are eligible for BICE. The inequitable result is that advice provided in connection with assets not eligible for BICE has no grandfather period at all. And more generally, the time and expense for the financial services industries to reconsider and, where required, restructure every one of the millions of relationships they currently have with retirement investors exceeds any reasonable regulatory demand.

Recommended Changes

All aspects of the Proposal should take effect at least 36 months after publication in the Federal Register. Existing customer arrangements should be fully grandfathered.

Item VI. Streamlined Exemption Requires Additional Focus

Comment: The Proposal Does Not Provide a Basis for Adopting a "Streamlined" Exemption.

The Department has asked for comments to support a "streamlined" exemption from the BICE for "low cost investments." No hint is given as to what the conditions may be for this exemption or the justification for what would amount to a free pass to fiduciaries who only recommend specific investments favored by the Department.[18] We have deep conceptual concerns about such an exemption. It sends a strong message that cost is the only consideration in evaluating the merit of investments; we are alarmed by the Department's leap that low cost equates to "minimal risk" of abuse. The inevitable result of such an exemption, of course, is that the Department's favored (passive) investments would end up being the only investments available to small retirement plans and accounts.

[18] The Department has asked for input as to what conditions, *if any*, should be required other than low cost.

- There is no universal solution that is in the best interest of all retirement investors. To take just one example, promoting lower cost to the exclusion of features such as lifetime income guarantees would exacerbate the current retirement crisis and is in direct conflict with the Department's and Treasury Department's joint stated policy goal of encouraging the use of lifetime income options in retirement plans – a policy that was just reiterated in Field Assistance Bulletin 2015-02, released during the pendency of the comment period for this Proposal.
- Nor is cost the universal or even principal driver for investment decision making in retirement plans. Under the Department's own regulation governing investment decisions, for example, which will still be in effect if the Proposal is definitively adopted, fiduciaries are to give consideration to all relevant facts and circumstances, including the role of the investment in the plan's portfolio.[19]
- Finally, passive investments are possible only if there are active investors in the market. It would distort our financial markets if the pool of capital represented by retirement plans was all or substantially shifted to passive strategies.

<u>*Recommended Changes*</u>

Given the potential for unintended consequences, together with the Proposal's lack of any detail whatsoever, the streamlined exemption at a minimum must be the subject of a separate regulatory project. Insufficient time and information have been given to analyze and comment on a hypothetical exemption as part of this already voluminous Proposal.

Conclusion

As is widely recognized, America's private retirement system faces pressing challenges:

- More than 53% of adult Americans are not covered by a workplace retirement plan.[20] Even when IRAs are taken into account, more than 31% have no retirement savings.[21]

- As of 2013, the median retirement savings of Americans amounted to $59,000 and is inadequate to their retirement needs.[22]

- Defined contribution plan participants and IRA owners significantly affect their retirement security through the investment choices they make for their accounts. By the Department's own estimate in 2011, they suffer $100 billion or more in investment losses

[19] 29 CFR §2550.404a-1.

[20] Bureau of Labor Statistics, *Establishments Offering Retirement and Healthcare Benefits* (March 2014), *available at* http://www.bls.gov/ncs/ebs/benefits/2014/ownership/private/table01a.htm.

[21] Board of Governors of the Federal Reserve System, Report on the Economic Well-Being of U.S. Households in 2013 26 (July 2014), *available at* http://www.federalreserve.gov/econresdata/2013-report-economic-well-being-us-households-201407.pdf.

[22] Federal Reserve Bulletin 100:4, *Changes in U.S. Family Finances from 2010 to 2013* 17 (Sept. 2014), *available at* http://www.federalreserve.gov/pubs/bulletin/2014/pdf/scf14.pdf .

annually due to flawed investment decision making that could be improved with greater access to professional investment services. [23]

- Finally, these participants and IRA owners face the challenge of making their retirement savings last for increasingly longer lifespans, and would be very well served by greater professional assistance with decumulation strategies and products.[24]

These fundamental issues in the retirement system – the coverage and savings gaps and, in the increasingly prevalent defined contribution environment, deficiencies in investment and decumulation decision making by participants and IRA owners – dwarf the perceived "conflicted advice" problem (which the Administration speculates is on the magnitude of a $17 billion issue annually[25] but which has not been adequately established by reliable evidence). These more fundamental issues would be improved by public policy that enhances the availability of professional investment services. Retirement investors who work with professional advisers have larger retirement savings than those who do not.[26] It is therefore essential that, if the Department determines to proceed, the Proposal be tightened and sharpened to address important and documented concerns, and no more. And while this would be no one's preference, if an additional round of notice and comment is necessary to perfect a Proposal of this scope and consequence, the Department should give serious consideration to that additional step.

* * *

We very much appreciate the opportunity to comment on and discuss these important issues with the Department. As noted at the outset, the best interest of our customers is at the very core of MassMutual's business. We support the objectives of the Proposal and believe it can, with appropriate modifications, advance the purposes of the private retirement system.

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[23] See the Preamble to the final regulation implementing the Pension Protection Act investment advice provisions, 76 Fed. Reg. 66151-66153 (October 25, 2011) ("...the retirement income security of America's workers increasingly depends on their investment decisions. Unfortunately, there is evidence that many participants of these retirement accounts often make costly investment errors due to flawed information or reasoning...Financial losses (including foregone earnings) from such mistakes likely amounted to more than $114 billion in 2010...Such mistakes and consequent losses historically can be attributed at least in part to provisions of the Employee Retirement Income Security Act of 1974 that effectively preclude a variety of arrangements whereby financial professionals might otherwise provide retirement plan participants with expert investment advice.")
[24] Borzi, Phyllis, Statement to the Senate, Special Committee on Aging (June 16, 2010), *available at* https://www.dol.gov/ebsa/newsroom/ty061610.html.
[25] Whitehouse Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings* 3 (Feb. 2015), *available at* https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.
[26] *See, e.g.*,Oliver Wyman, *The Role of Financial Advisors in the US Retirement Market*, July 2015, p. 16, available at http://fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf; LIMRA, *Advisors Positively Influence Consumers' Behavior and Sentiment Toward Preparing for Retirement*, July 2012, *available at* http://www.limra.com/Posts/PR/News_Releases/LIMRA__Advisors_Positively_Influence_Consumers__Behavior_and_Sentiment_Toward_Preparing_for_Retirement.aspx

Please do not hesitate to contact us with any comments or questions, or if further information would be helpful.

Respectfully submitted,

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