RITA
RETIREMENT INDUSTRY TRUST ASSOCIATION

Mary L. Mohr, MBA, JD
Executive Director
mmohr@ritaus.org

Filed Electronically

September 22, 2015

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

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

Dear Sir or Madam:

The Retirement Industry Trust Association ("RITA") appreciates this opportunity to once again comment on the proposed regulation (the "Proposal") published by the Department of Labor (the "Department") on April 20, 2014, which would redefine the definition of "recommendation," create a "Best Interest Contract" exemption, and make other changes relevant to the prohibited transaction provisions of the Internal Revenue Code (the "Code").

RITA is a non-profit national trade group comprised of federally and state- regulated banks and trust companies, third party administrators, and various other interested service companies that engage in the various aspects of the custody and administration of more than 500,000 retirement accounts holding more than $60 billion in assets. Our members do not act as investment advisors to our clients. Nevertheless, we fully support the proposal for the Best Interest requirement for those who do act as investment advisors as we agree with the Department that such provisions will further help investment savers from unscrupulous advisors who may act in their own "Best Interest" and not in the interest of their clients.

RITA members generally act as directed custodians or non-discretionary trustees of self-directed IRAs and business retirement plans, many holding alternative assets that are not traded on public exchanges. Such assets may include real estate (domestic and foreign), private equity, private debt, promissory notes, trust deeds, tax liens, REITs, hedge funds, limited partnership and

limited liability company interests, and precious metals allowed under the Internal Revenue Code.

Since 1987, RITA has provided its members with a forum to share best practices regarding the various rules and regulations of the Department and the Internal Revenue Service (the "IRS") in connection with the services RITA members provide to their clients. RITA and its members proactively participate in the regulatory process governing retirement accounts and have testified before the Department and the IRS. In that spirit, we are providing our input on your important proposal, which could be potentially harmful to our industry and the working Americans that we serve.

The Focus of Our Concern

First, we agree with the Department that any retirement service company or individual that acts as an advisor, act in the "best interest" of their clients. Second, we are pleased that the current proposal has addressed several of our previous concerns, in particular by making clear that when RITA members merely pass along valuation provided by a third party, no fiduciary obligations are created. As in the past, we support a revision to the definition of investment advice "fiduciary."

Our only concern at this point is the provision in the proposed Best Interest Contract Exemption (BICE) which limits its availability to certain types of assets. The BICE is a critical component of the Department's proposal because many brokers and financial advisors will be required to comply with its conditions. As was discussed in some detail during the administrative hearings on August 10-13, the BICE's definition of "Assets" does not generally include assets termed "alternatives."

Alternative assets generally are attributed to providing the following benefits to investors:

- Returns independent of Stock Market Performance
- Reduction of risk via portfolio diversification
- Have performed well historically during market crises (Oct. 1987, Asian crisis 1998, 9/11 tragedy, current credit crisis 2007-2008), and the most recent stock market volatility
- Low correlation to traditional investments such as stocks and bonds

Thus, investors looking to enhance the return of their retirement accounts' might consider replacing a portion of their fixed income or stock portfolio allocation with one or more alternatives. As with other investments, the rate of return on alternative forms of investment is not guaranteed. However, many financial professionals project that the rate of return for these investments is usually higher than that for traditional investments.

Similarly, investors attempting to create a hedge against stock market volatility might look to one or more "alternatives" (alternative to the stock market) to protect against downside risk. Usually, the performance of traditional investments moves with the stock market. But this is typically not the case with non-traditional or "alternative" investments; therefore, they can help

4251 Pasadena Circle Sarasota, FL 34233 | Ph 941.724.0900 | mmohr@ritaus.org | www.ritaus.org

Blog: www.self-directed-retirement.org

to balance the overall performance of the IRA. To restrict retirement savers from access to alternatives to the stock market will reduce their ability to optimize their investment return. This may harm them by exposing their retirement portfolio to greater risk by limiting investment choices to correlated assets only.

The Department has long recognized the importance of investment diversification. In fact**,** ERISA §404(a)(1)(C) requires that plan investments must be diversified so as to minimize the risk of large losses unless, under the circumstances, it is clearly prudent not to do so. In fact a fiduciary subject to ERISA § 404 *must* include an asset class if the fiduciary determines that asset class is necessary to ensure proper diversification. Furthermore, under the Department's § 404(c) regulations, participant-directed plans must provide a diversified set of options. It would seem to us that a similar policy would apply to IRAs, including those managed by someone other than the IRA owner (now deemed to be a fiduciary similar to a trustee), and the IRA owner similar to a participant who directs his investments.

Congress clearly intended that IRAs would be invested in many kinds of assets; Congress specifically prohibited certain asset classes in Code section 408 (life insurance, collectibles) while otherwise allowing IRAs to hold all other asset classes. It is not consistent with Congress' clear statutory provision for the Department to place its thumb on certain asset classes. And the Department's excluding asset classes that Congress chose not to exclude in ERISA unnecessarily leaves the regulation open to challenge that the Department exceeded its authority. In any event, the Department's economic analysis did not address what effect this exclusion would have on diversification, capital formation, and job creation; we think the effect would be very negative for little or no gain – since any recommendation under the BICE would need to be made in the client's best interest.

For these reasons, we would request that the Department reconsider its BICE so as not to exclude any asset type permitted by the Code to be included in an IRA. If an advisor, acting in a client's best interest, determines that an alternative asset is an appropriate and suitable recommendation, and the other conditions of the BICE are followed, we see no need to impose any further restrictions. We do not believe it is appropriate for the Department to predetermine investment choices for savers. Also, since the Proposal now imposes a "Best Interest" standard on advisers and brokers, we see no need to carve-out any permitted asset type, particularly, when, as discussed above, such assets may well be in the investors' "best interests" due to the aforementioned attributes potentially improving investment return and reducing risk from a lack of diversification.

Two of the largest components of the average American's net worth are direct ownership interests in real estate and private equity or small business ownership. These assets are the bread and butter of the American economy and the largest percentage of the average American's wealth. They are as well understood to the average investor as apple pie. Although Americans are very familiar with these asset classes, under the Department's current proposal, only because these investments are not liquid they would be excluded from the BICE exemption. It would seem that such discrimination would unfairly and unnecessarily restrict Americans' ability to invest in assets with which they are very familiar. Furthermore, IRA investors have long been a valuable resource for capital formation as IRAs have often been used to fund new businesses, in

4251 Pasadena Circle Sarasota, FL 34233 | Ph 941.724.0900 | mmohr@ritaus.org | www.ritaus.org

Blog: www.self-directed-retirement.org

turn, creating new jobs. Therefore, to restrict an investor, who is interested in investing in these asset classes or any of the others previously mentioned, from the ability to work with an adviser who would not have a BICE exemption, seems to be arbitrary and not well-founded. In addition, an unintended consequence would include placing a greater burden on new business formation by restricting sources of capital from retirement accounts, as well as removing non-correlated assets that could otherwise serve to protect their retirement portfolio from the fluctuations of the stock market.

The investments of RITA members' clients are typically in direct investments in real estate and private equity. These are tangible assets. As such, these types of investments are intermediate to long-term with a focus on current income, preservation of capital and potential growth. Again, as these are non-traded investments, they typically have less daily volatility than exchange-listed assets, and tend to have a low correlation to other asset financial classes. These features, together with added diversification, can help to enhance an investor's overall portfolio return while reducing risk. Alternatives offer many other benefits to investors, including the potential for higher yields, the potential for protecting IRAs from significant losses associated with a portfolio fully-invested in the market, and the ability to work with experts in these asset classes. Alternatives clearly serve an important purpose in a retirement or other investment portfolio.

The Modern Portfolio Theory further establishes the benefits that alternatives and diversification offer an investment portfolio. Therefore, there does not appear to be a reasonable argument to exclude certain assets that heretofore have never been restricted under the Code. Why deprive Americans from investing in asset classes that are the backbone of the American economy in which they have been investing their retirement accounts in since 1974? The current BICE requirement and fiduciary status of investment advisors under the Department's proposal would impose the same standards on advisors as traded assets if "alternatives" were included. In fact, we don't believe there is any reason to exclude any asset types acceptable for IRAs under the Code, since the same fiduciary and best interest considerations under the Proposal would apply to any asset under the Code. Concerns such as liquidity and the lack of a public market should not be reason enough to restrict an advisor's ability to adequate evaluate the merit of any alternative investment, and the Proposal contains enough requirements for complete disclosure to the retirement investor regardless of the asset type.

For all the reasons we mention above, we urge the Department to revise the Proposal to include all assets currently permitted under the Code. While we are in full support of the Best Interest aspects of the Proposal, we can see no valid reason to restrict an advisor's ability to recommend any alternative that they feel is valuable to a client's portfolio based on all the benefits that such an alternative may offer. Under the proposal, we feel investors will be adequately protected from unscrupulous advisors by the new requirements for due diligence that comes from their fiduciary status and disclosure requirements, without limiting advisors' Best Interest Contract Exemption.

* * * *

4251 Pasadena Circle Sarasota, FL 34233 | Ph 941.724.0900 | mmohr@ritaus.org | www.ritaus.org

Blog: www.self-directed-retirement.org

Thank you for your efforts to protect American retirement savers, and for your consideration of our request.

Respectfully submitted,

Tom W. Anderson
President, Retirement Industry Trust Association (RITA)
Mary Mohr, Executive Director, RITA

4251 Pasadena Circle Sarasota, FL 34233 | Ph 941.724.0900 | mmohr@ritaus.org | www.ritaus.org

Blog: www.self-directed-retirement.org