CAMBRIDGE

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Via Federal eRulemaking Portal

Office of Exemption Determinations
Employee Benefits Security Administration
United States Department of Labor
200 Constitution Ave, N.W.
Washington, D.C. 20210

RE: Department of Labor Improving Advice for Workers & Retirees Notice of Proposed Class Exemption Comment Letter, ZRIN 1210-ZA29
Application No. D-12011

To whom it may concern:

I. Introduction

Cambridge Investment Research, Inc. and Cambridge Investment Research Advisors, Inc. (collectively "Cambridge") appreciates the opportunity to comment on The Department of Labor's (the "Department") published notice of a proposed rulemaking exemption ("Proposed Exemption") from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the Internal Revenue Code of 1986, as amended (the "Code").

Cambridge is a privately-controlled financial solutions firm located in Fairfield, Iowa, focused on serving independent financial professionals and their investing clients. Cambridge's national reach includes, Cambridge Investment Research, Inc., an independent broker-dealer, member FINRA/SIPC, and Cambridge Investment Research Advisors, Inc., a corporate Registered Investment Advisor ("RIA") federally registered with the Securities and Exchange Commission ("SEC"). Cambridge is among the largest privately-controlled independent broker-dealers/RIAs in the country supporting over 3,500 advisors nationwide who serve more than 550,000 individual retirement accounts and 7,000 retirement plans.

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II. Overview of Proposed Exemption

The prohibited transaction provisions of ERISA and the Code generally prohibit fiduciaries with respect to a Plan or IRA from self-dealing and receiving compensation from third parties.

The Proposed Exemption would allow investment advice fiduciaries under both ERISA and the Code to receive both transaction-based and fee-based compensation, including compensation for advice to roll over assets from a Plan to an IRA, and to engage in principal transactions, that would otherwise constitute prohibited transactions.

The Proposed Exemption's principles based approach is rooted in the Impartial Conduct Standards for fiduciaries providing retirement investment advice. The Impartial Conduct Standards is comprised of three components: a best interest standard; a reasonable compensation standard; and a requirement to avoid misleading statements about investment transactions or other relevant matters.

Additionally the Proposed Exemption includes protections designed to safeguard the interests of Plans, participants and beneficiaries. Such protections include a requirement to disclose to Retirement Investors material conflicts of interests, fees and the nature and scope of services, a fiduciary status, conflict mitigation and the results of an annual, retrospective compliance review.

III. Cambridge Supports the Proposed Exemption

Cambridge has consistently supported the implementation of a thoughtful, well-crafted, and effective best interest standard aligned with other industry regulations. Cambridge supports the Proposed Exemption because it satisfies these criteria.

The Proposed Exemption's alignment with other regulatory standards of conduct will help harmonize regulatory requirements placed on Financial Institutions which, in turn, will permit an efficient allocation of firm resources, allow compliance associates to focus on clear and common regulatory standards, reduce costs to retirement investors and eliminate regulatory confusion. Notably, many Financial Institutions have developed compliance regimes, and policies and procedures to comply with the best interest standards of other regulatory agencies. As such, deploying the Proposed Exemption regulatory regime would complement established compliance practices with minimal disruption.

In addition to promoting regulatory efficiencies, the Proposed Exemption would provide broader relief and greater flexibility than the Department's existing prohibited transaction exemptions. Likewise the Proposed Exemption would provide additional certainty regarding covered compensation arrangements and avoid the complexity of investment advice fiduciaries' reliance on multiple exemptions. Cambridge believes the Department carefully balanced the need to provide investment advice fiduciaries with more flexible transaction relief while safeguarding the interests of retirement investors.

Cambridge supports the Proposed Exemption's reasonable compensation requirement. The Department has stated a reasonable compensation standard requires compensation not be excessive, as measured by market value of particular services, rights and benefits including complexity of the product and the scope of monitoring. Reasonable compensation has long been recognized under ERISA and the Code, and the proposed standard is clearly aligned with such regulations. Moreover, many if not most Financial Institutions have established compliance practices that currently comply with the reasonable compensation standards as provided in the Department's Proposed Exemption.

Cambridge shares a strong and committed interest with the financial services industry and the Department in enhancing investor protections. The Proposed Exemption would generate many benefits for investor protection. The Proposed Exemption includes conditions designed to support investment advice that meets the Impartial Conduct Standards, including provisions requiring written policies and procedures, documentation of rollover recommendations and a retrospective annual review.

Financial Institutions will be required to create policies and procedures to mitigate conflicts of interest, prudently designed to avoid misalignment of interests with Retirement Investors. Thus, supporting the elimination of excessive trading, and the purchase of investment products not in the best interest of the investor.

Finally, the Proposed Exemption would call for more comprehensive exemption relief expanding the range of products and transaction arrangements available to the retirement investor. Thus, the Department's Proposed Exemption will serve to enhance investor protection while expanding investment choices and arrangements.

IV. Cambridge's Comments and Request For Clarity Regarding Certain Aspects of the Proposed Exemption

A. Estimating Fees and Costs of 401(k) Rollovers

Cambridge supports the Department's Proposed Exemption but respectfully requests the Department modify the Proposed Exemption to clarify certain aspects.

Cambridge understands the decision to roll over ERISA-covered Plan assets to an IRA is a very consequential financial decision for a Retirement Investor. There may be transaction costs associated with moving rolled over assets into new investments and accounts such that the cost of investing through an IRA may exceed the costs of merely remaining in a Plan. However, that potential cost differential alone is not, without more, a sufficient basis for concluding that there is a breach of fiduciary duty or the rollover is not in the best interest of the Retirement Investor.

While Cambridge supports the exemption requirement for the Investment Professional and the Financial Institution to make diligent and prudent efforts to obtain information about the existing Plan and the participant's interests in it, Retirement Investors may be unwilling or unable to provide information related to the fees, costs, features or other aspects of their current plan, even after careful research and a full explanation of its significance. In such circumstances, and where the information is not otherwise available, the Department proposes to require the Investment Professional to make a reasonable estimation of expenses, asset values, risk, and returns.

While the requirement to make certain estimates or assumptions may be essential to servicing the client, this requirement may inadvertently expose the Investment Professional to liability as a result of unintentionally providing the Retirement Investor with inaccurate information. In the absence of attainable information, the Investment Professional should not be compelled to estimate but allowed to disclose to the Retirement Investor that certain information is lacking and a recommendation is being made absent such information. If the Investment Professional believes an estimate is appropriate, the Investment Professional should be permitted to disclose that any estimate is an approximated value but should not be assumed to be verifiably accurate. So long as reasonable efforts are made to provide estimates to the Retirement Investor, the Department should clarify that the Investment Professional should not bear the risk of liability.

Retirement plan information is often difficult to obtain particularly at the participant level. Certain types of Plans may not provide plan information to plan participants. Furthermore, Plans very greatly in costs, expenses and features. Plan comparisons to publicly available information may be highly speculative. In the absence of attainable information, the Investment Professional should not be compelled to estimate. Alternatively, Cambridge would recommend, when appropriate, documented information include any reasons, why in the absence of certain information, other information supports a recommendation. Moreover, the documented information could include that either the Retirement Investor was unwilling to provide the relevant information, or that the Investment Professional, after best efforts, was unable to obtain the relevant information.

B. Regulatory Enforcement Overlay

Cambridge supports the Department's effort to align its Proposed Exemption with regulatory efforts of other agencies through application of the Proposed Exemption. However, neither the Preamble nor the Proposed Exemption addresses any overlap that might occur between or among the Department's enforcement efforts and those efforts of other regulatory agencies.

As an example, would the findings or actions of other regulatory agencies perfunctorily become violations under ERISA or the Code as such violations relates to a prohibited transaction and the Proposed Exemption? Would a finding by the SEC or FINRA by default become a finding of a violation under the Proposed Exemption and thereby trigger sanctions under ERISA or the Code? Would the Department consider a Financial Institution's agreement to a settlement as evidence of a violation of the Proposed Exemption? If so, the overlaying of another regulatory agency's sanctions either solely or in support of the Department's findings may reduce the incentives for regulatory settlements. Such disincentives to Financial Institutions to settle, could, in turn, disadvantage Retirement Investors as it would delay in addressing any regulatory shortcomings, and the associated implementation of corrective actions. Moreover, in light of the potential of overlaying of regulatory findings and sanctions, Financial Institutions would be required to reconsider other regulatory regimes' compliance policies and procedures.

Whereas Cambridge believes the protective measures in the Proposed Exemption suitably safeguard Retirement Investors' protections, clarity as to the application of other regulatory agencies' enforcement actions would be greatly beneficial to Financial Institutions in assessing current compliance regimes.

C. Executive Certification

Under the proposal, Financial Institutions would be required to conduct a retrospective review at least annually that is reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The results would be included in a written report certified annually by the Financial Institution's chief executive officer.

Given the alignment of the Proposed Exemption with the SEC's Regulation Best Interest Rule that requires firms to have written policies and procedures in place to support the rule, and due to FINRA Rule 3130 and SEC Rule 206(4)-7, Cambridge believes the chief executive officer's certification under the Proposed Exemption is unnecessary and duplicative. As such, Cambridge believes the Proposed Exemption should eliminate this requirement for both broker-dealers and registered investment advisors.

If the Department maintains this requirement, Cambridge requests the Department clearly state in the Final version of the Proposed Exemption that the signing of the certification does not implicate personal ERISA liability for the signing officer.

D. A "Best Execution" Requirement is Unnecessary

The Proposal's Impartial Conduct Standard includes among its obligations that the provider obtain best execution of the Retirement Investor's trades. This obligation already exists under FINRA Rule 5310. Consequently, inclusion of such a requirement in connection with the Proposed Exemption is duplicative and unnecessary.

Moreover, the existence of duplicative, overlapping standards creates an avoidable potential for inconsistent results. Such potential inconsistency needlessly creates additional liability exposure for providers and potentially increases their cost of doing business.

E. Retirement Education Is Not "Advice"

As a Retirement Investor's plan assets may reflect a large percentage of their net worth, it is essential that the Retirement Investor make knowing and informed decisions about the handling of those assets. Education is a critical component of that knowing and informed investment decision making.

Providers need to be able to provide education without the risk of being deemed to be providing investment advice. In this regard, the Exemption Proposal would benefit from an express carve out for investment-education communications. By way of example, this might encompass communications regarding plan-specific features, general financial concepts (i.e. risk and return, impact of inflation, risk tolerance, investment horizon, etc.), asset allocation concepts / models and the use of questionnaires to assist investors in pursuing retirement planning.

Such an approach affords Providers the latitude to arm Retirement Investors with basic, educational information so as to maximize the benefit the Retirement Investor derives from his or her planning efforts.

F. Support of the Exemption Proposal's Application to Insurance Products

Cambridge supports the Exemption Proposal's Application to fixed insurance products. The Exemption Proposal's Preamble recognizes that insurance companies commonly compensate insurance agents on a commission basis. Absent an exemption, this insurance-related commission compensation might otherwise constitute a prohibited transaction where the insurance agent is an investment advice fiduciary providing investment advice to a Retirement Investor in connection with the sales.

Moreover, the Department expresses its understanding that insurance companies often sell fixed insurance products (including indexed annuities) through different distribution channels than broker-dealers and registered investment advisers. While some insurance agents are employees of an insurance company, other insurance agents are independent, and work with multiple insurance companies. The Department asserts the Proposed Exemption would apply to either of these business models. Insurance companies can supervise independent insurance agents and they can also create oversight and compliance systems through contracts with intermediaries such as independent marketing organizations.

This assertion appears to state that insurance agents compensated for the recommendation and sale of fixed insurance products, including indexed annuities to Retirement Investors through distribution channels other than broker-dealers and registered investment advisers are investment advice fiduciaries subject to ERISA's prohibited transactions and thus subject to compliance with the requirements of the Impartial Conduct Standards and other protective measures in order to utilize the Proposed Exemption.

As such, Cambridge requests the Department in the final version of the Proposed Exemption clearly clarify that insurance agents unaffiliated with a broker-dealer or register investment adviser are investment advice fiduciaries when providing investment advice to Retirement Investors through the sale of insurance products and fixed (including indexed) annuities, and are subject to the requirements under the Proposed Exemption.

V. Exemption Timing

Cambridge believes the Proposed Exemption should be effective on publication in the Federal Register. This belief is supported by the nature of the compliance solution aligned with other regulatory agencies which does not displace existing solutions. Given the extensive commentary and public hearings on the prior proposals, Cambridge does not believe any additional input would necessitate a third hearing to augment or clarify the written comments that will be submitted. Undoubtedly, over the past ten years the Department has had public input on every legal, regulatory, and economic view on prevailing issues. As such, Cambridge advocates for the Department to consider the comments submitted for the exemption proposal and prepare for its final adoption.

VI. Conclusion

Cambridge supports the Department's Proposed Exemption. Cambridge believes the Proposed Exemption will generate many benefits to both investment advice fiduciaries and Retirement Investors. Investment Institutions and Financial Professionals will benefit from clear standards, greater flexibility in prohibited transaction relief, the preservation of differing business models and investment advice arrangements. Retirement investors will benefit from the wide array of retirement product availability and the safeguarding of interests predicated on the Impartial Conduct Standards and required disclosure regime.

Cambridge appreciates the Department's efforts related to the proposed rulemaking and the opportunity to provide comments on the Proposed Exemption.

Cambridge looks forward to working collaboratively with the Department during this comment period to bring the process to a successful conclusion and ensure that all Retirement Investors are provided access to high quality, affordable, personalized advice. Cambridge would be happy to further discuss any of the comments or recommendations in this letter with the Department.

Respectfully,

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Chief Risk Officer
Senior Vice President, Risk Management