



1401 H Street, NW, Washington, DC 20005-2148, USA
202-326-5800 www.ici.org

July 21, 2015

Email: e-ORI@dol.gov

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

Re: RIN 1210-AB32: Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment Advice

Dear Sir/Madam:

The Investment Company Institute¹ appreciates the opportunity to comment on the Department of Labor’s (the “Department”) proposed regulation defining who is a “fiduciary” of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (“ERISA”), or an individual retirement account (“IRA”) under section 4975 of the Internal Revenue Code of 1986 (“Code”), as a result of giving investment advice to a plan or its participants or beneficiaries, or an IRA or IRA owner (the “Proposed Fiduciary Rule”).²

We understand that after 40 years the Department has an interest in considering revisions to the existing fiduciary definition in light of changes to how American workers save for retirement. The Institute is deeply concerned, however, that the Proposed Fiduciary Rule will have significant unintended consequences and will harm the very persons it is designed to protect—small employers and retirement savers.

¹ The Investment Company Institute is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s U.S. fund members manage total assets of \$18.2 trillion and serve more than 90 million U.S. shareholders.

² Notice of Proposed Rulemaking – Definition of the Term “Fiduciary”: Conflict of Interest Rule – Retirement Investment Advice (“Fiduciary Rule Notice”), 80 Fed. Reg. 21928 (April 20, 2015).

If the proposal is adopted without the revisions we recommend, small business employers and retirement savers will have access to less investment information at many critical points—when considering establishing a plan or retirement account, when considering investment menus and when considering how to invest retirement assets, when considering whether or not to roll account balances to an IRA or keep assets invested in a current plan, and when considering what type of lifetime payment option or strategy may be appropriate. Small business employers and retirement savers also will have fewer choices for accessing critical investment information.

This letter provides a summary of our concerns regarding the Proposed Fiduciary Rule and recommends modifications that are needed to avoid a dramatically detrimental impact on small business employers and retirement savers.

I. Introduction

The Department acknowledges that, if adopted, the Proposed Fiduciary Rule would apply fiduciary status “in a wider array of advice relationships than the existing ERISA and Code regulations.”³ To facilitate the continued provision of advice to employee benefit plans, plan fiduciaries, plan participants or beneficiaries, IRAs, and IRA owners (collectively, “Retirement Investors”),⁴ the Department separately proposes a new exemption (the “Best Interest Contract Exemption” or “BIC Exemption”) that is intended to allow fiduciaries to receive various forms of compensation that, in the absence of an exemption, ERISA and the Code would prohibit.⁵ The BIC Exemption, however, simply is not workable in its current form and will restrict the ability of Retirement Investors to continue to access information and assistance from advisers and financial institutions.⁶ The result is that, without significant modification, the Department’s rule proposal will significantly limit the ability of Retirement Investors—in particular, low and middle-income individuals and small businesses—to receive the investment assistance that they need to make informed investment choices and therefore fails to serve their “best interests.”

³ Fiduciary Rule Notice, 80 Fed. Reg. 21928.

⁴ The definition of the term “Retirement Investor” in the proposed Best Interest Contract Exemption generally is limited to a participant or beneficiary of an ERISA plan, the beneficial owner of an IRA, or a plan sponsor of a non-participant-directed ERISA plan with fewer than 100 participants. 80 Fed. Reg. 21960, 21988. For purposes of this letter, we generally use a broader definition of “Retirement Investor” as the context dictates.

⁵ Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21929.

⁶ The Institute has provided comment on the Best Interest Contract Exemption pursuant to the undersigned’s letter of July 21, 2015, available at www.ici.org/pdf/15_ici_dol_fiduciary_best_interest_ltr.pdf. As explained in greater detail in our comment letter, the conditions to which advice providers are subject under the BIC Exemption essentially present a series of compliance traps and barriers for financial advice professionals and their firms, making the BIC Exemption simply unusable in its current form.

Even if the Department incorporates the changes we and others⁷ recommend to the final BIC Exemption, the Department also must resolve the significant concern with the scope of the Proposed Fiduciary Rule. Simply put, the Department has proposed a fiduciary definition that is excessively and inappropriately broad, and with exceptions that are too limited. The result is that activities that trigger fiduciary status are unclear and, in many circumstances, contrary to the expectations and interests of Retirement Investors.

Fiduciary status entails one of the highest obligations known to law—and carries with it commensurate liabilities. Fiduciary status also underpins the entire ERISA compliance structure. Rules governing who is a fiduciary must provide sharp clarity about who is or is not subject to that status.⁸ Those rules also must not impede commonplace financial interactions. They must allow plans and retirement savers to obtain investments that meet their needs and gather a range of market input on which to make decisions. Fiduciary status should only apply to situations where there is a clear understanding that a true advisory relationship exists.⁹

The proposal would apply fiduciary status in connection with basic exchanges of information, including the provision of investment education, the offering of investment platform products and services, and in many other situations. The result is that many service providers will have no choice but to discontinue providing those information services that Retirement Investors need and expect. If Retirement Investors are able to obtain that information or those services at all, they will have to do so from fiduciary providers requiring that they pay substantially higher fees.

The Institute strongly urges the Department to revise its approach so that any final rule provides clarity on the activities covered; sufficiently exempts ordinary practices like education, marketing and selling investment products and services; does not chill the provision of useful investment information and education; and does not impede Retirement Investor choice over products

⁷ See, e.g., Letter from Marcia E. Asquith, Senior Vice President and Corporate Secretary, Financial Industry Regulatory Authority, to Employee Benefits Security Administration, U.S. Department of Labor, dated July 17, 2015, available at www.finra.org/sites/default/files/FINRACommentLetter_DOL_07-17-15.pdf.

⁸ Testimony of Paul Schott Stevens before the Department (March 1, 2011), available at www.ici.org/policy/ici_testimony/11_dol_fiduciary_tmny.

⁹ The severe consequences associated with a service provider's inadvertently engaging in a prohibited transaction under ERISA cannot be overstated. Specifically, such a service provider would be exposed to significant excise tax penalties under the Code (15% of the amount involved assessed each year the transaction is not corrected, and compounded every year) for even inadvertent violations of the prohibited transaction prescriptions, lawsuits under ERISA for losses to plans and equitable relief, and potential lawsuits for breach of contract.

and services more appropriate to their needs.¹⁰ We summarize below the key principles that should inform the Department's revisions to the Proposed Fiduciary Rule.

- **The Department must provide certainty about whether service providers' activities trigger fiduciary status.** Service providers should not face the significant risk that an agreement with a Retirement Investor to provide non-fiduciary services is treated, after the fact, as a fiduciary services arrangement. Any final rule must therefore provide clear and unambiguous thresholds for determining when fiduciary advice is being provided and must allow service providers to continue offering meaningful investment education and retirement saving products to Retirement Investors without inadvertently triggering fiduciary status.
- **The Department must consider carefully the implications of the proposal for American workers saving for retirement and efforts to encourage appropriate asset allocations and discourage "leakage" from the retirement savings system.** The Proposed Fiduciary Rule would have the unintended consequence of severely curtailing the assistance that can be given to participants both in providing basic asset allocation assistance and in helping Retirement Investors understand post-termination options (*e.g.*, distributions, rollovers, and roll-ins). Limiting access to distribution and rollover information will only result in reduced opportunities to educate a consumer regarding options that may help to keep assets within the retirement system rather than being distributed and spent prior to retirement.
- **Simply selling an investment product or service cannot be a fiduciary act.** Retirement Investors need access to a wide range of investment products and services. Service providers should be able to provide information and data on investment options to Retirement Investors, both during the sales process and on an ongoing basis, if the service provider expressly discloses that it is providing such information in a non-fiduciary capacity as a seller and that it has a financial interest regarding any decisions that the potential customer may make in connection with an actual transaction. There is ample evidence Congress did not intend ERISA to disrupt the functioning of the securities markets, prevent Retirement Investors from accessing information on investments, or turn the "ordinary functions of consultants and advisers" into fiduciary functions, and the Proposed Fiduciary Rule should conform to Congressional intent.¹¹

¹⁰ We note, however, that the proposal would not (nor could it) affect the statutory exclusions in ERISA section 3(21)(B) and section 401(b)(1) on the status of an adviser to a mutual fund in which employee benefit plans invest. *See* Advisory Opinion 2009-04A (December 4, 2009) ("Congress concluded that it did not need to apply ERISA's fiduciary rules to the operation of mutual funds in addition to the Investment Company Act's regulatory scheme. H.R. Rep. No. 1280, 93d Cong., 2nd Sess., at 296 (1974).")

¹¹ *See* ERISA Conference Report, P.L. 93-406, at 323 ("...the ordinary functions of consultants and advisers (other than investment advisers) may not be considered as fiduciary functions..."), *id.* at 309 (some otherwise prohibited transactions

- **The Department should make clear that fiduciary status applies only in situations in which a reasonable person would believe that a position of trust and confidence exists.** As proposed, the expanded fiduciary definition goes too far and the “carve-outs” from the fiduciary definition are too limited with the consequence that fiduciary status would be triggered in a broad range of circumstances where Congress did not intend to reach because the circumstances do not suggest ERISA’s protections are appropriate or necessary. Like consumers generally, Retirement Investors are not confused into thinking that the provision of common educational, platform narrowing, marketing and sales activities means that the person engaged in those activities is acting as their fiduciary.
- **The Department must make clear that ministerial custodial valuations and pricing services are not fiduciary activities.** Service providers need to be able to continue to provide valuation information necessary to plan sponsors, participants and IRA owners in connection with the performance of day-to-day administrative functions without the fear that doing so will result in fiduciary status.

The Institute believes that modifications based on these principles will accomplish the Department’s goals in protecting Retirement Investors, while also allowing such investors to continue to benefit from the receipt of non-fiduciary products and services they need at a reasonable fee—and often at no cost. Our concerns and additional recommendations regarding specific aspects of the Proposed Fiduciary Rule are discussed in detail below.

II. Rule Proposal

A. The Department Must Revise the Operative Fiduciary Definition to More Narrowly Focus on Relationships of Trust and Confidence

The Department must provide clear and unambiguous thresholds for determining when fiduciary advice is being provided and must allow service providers to continue to offer meaningful investment education to retirement savers and plan sponsors without inadvertently triggering fiduciary status. Towards this end, the Institute makes the following suggestions.

The Department should apply the functional part of the fiduciary definition only to advice or recommendations individualized to the plan or participant – The Proposed Fiduciary Rule would eliminate the current five-part test for determining fiduciary status, and subject a person to ERISA’s fiduciary prohibitions if—for a fee or other compensation—the person provides advice concerning one

“nevertheless should be allowed in order not to disrupt the established business practices of financial institutions” and directing the Secretaries of Labor and Treasury to grant an administrative exemption for brokerage services).

of the four types of covered advice and the recommendation is *either* “individualized to” or “specifically directed to” the recipient.¹² Therefore, under the Proposed Fiduciary Rule, if *specifically directed*, the advice need not be *individualized to* the needs of a particular plan or participant.

This sweeps too broadly. In the absence of clarifying language, a “specifically directed to” standard could apply to the distribution or handing over to clients or prospective clients of any investment newsletter, investment explanatory materials or selection list, analyst report or even a Form ADV. The standard would arguably encompass anything making statements or providing explanations about investment options or an investment advisory program whether such information is transmitted through a website or by other means.

While the Department acknowledges that “recommendations made to the general public, or to no one in particular”¹³ are not investment advice, it fails to recognize that financial services firms target the distribution of such informational materials to their existing and prospective client bases. For example, the distribution to clients or prospective clients of a bona fide investment newsletter of general and regular circulation that endorses the benefits of one or a class of investments would appear to meet the Proposed Fiduciary Rule’s test, even if the investment newsletter is written for the general public and the author is not preparing his or her remarks for consumption by a particular Retirement Investor. We note that, under section 202(a)(11)(D) of the Investment Advisers Act of 1940 (“Advisers Act”), this activity would *not* result in the person writing the newsletter being an “investment adviser.” The standard also could apply to explanatory and/or informational materials distributed based solely on demographic factors or current investment allocations and intended solely to encourage the recipient to evaluate existing portfolio holdings. For example, a message targeted to plan participants with 100 percent of their account assets invested in company stock might encourage the participants to consider their appetite for market volatility and the benefits of reallocating to a more diversified portfolio or a particular product that offers a more diversified portfolio or periodic rebalancing.

The ambiguous nature of the proposal’s fiduciary definition also would appear to capture informational materials prepared by investment product sponsors for use by financial intermediaries in assisting consumers, who could include Retirement Investors, in understanding their products. Again, the product sponsor has no connection to a particular Retirement Investor in such circumstances. Such materials, which are subject to SEC regulation and oversight,¹⁴ promote the product sponsor’s interest in ensuring that the investment policies, risks and other material information relevant to their

¹² Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21957.

¹³ *Id.* at 21940.

¹⁴ Rules 156 and 482 of the Securities Act of 1933 and Rule 34b-1 of the Investment Company Act of 1940 govern the content of “marketing materials” and sales literature.

products are properly conveyed to the investing public. Similarly, mutual fund wholesalers service independent financial advisers, providing needed education and support, including services designed to educate such advisers in understanding the specific mutual fund offerings available from the fund family and the appropriateness of such products to different classes of investors. Like product sponsors, mutual fund wholesalers typically have no connection with the particular 401(k) plan or IRA owner being serviced by the independent financial adviser. Section (a)(1) of the Proposed Fiduciary Rule broadly extends not only to IRA owners and 401(k) plans, but also to fiduciaries to 401(k) plans. The independent financial adviser would typically be a 401(k) plan fiduciary under the Department's proposal to the extent that the independent financial adviser works with any 401(k) plan clients. Because of the breadth of the definition, the mutual fund wholesaler who engages in the wholesaling activities described above when interacting with an independent financial adviser could be treated as having provided fiduciary advice under the proposed rule.

Both product sponsors and securities wholesalers are concerned about the potential “daisy-chain” effect of the Department's proposed fiduciary definition. They are concerned that the ambiguous language could be construed to make them fiduciary advice providers under ERISA simply by providing such needed services to those financial intermediaries who would truly be fiduciaries by virtue of the application of the expanded fiduciary definition contemplated by the Proposed Fiduciary Rule.¹⁵

Unless the final rule is more tailored, Retirement Investors will lose the benefit of needed information in all the critical materials referenced above.¹⁶ Moreover, even investors who are not Retirement Investors also would lose access to this information. This is because these important information sources are often available directly to or included on websites available to the general public and investment providers would have no ability to limit the availability of such materials to customers who are not Retirement Investors. Those providers would have no choice but to close down the information sources for fear that a Retirement Investor could gain access.

Information providers need to know who is relying on the information as fiduciary advice for another important reason—to ensure that any opinions provided in the materials are not acted on

¹⁵We urge the Department to expressly reference the important services provided by product sponsors and securities wholesalers in the preamble to the final rule, noting that it does not intend to extend fiduciary status to such service and product providers solely by virtue of the provider's distribution to financial intermediaries of informational and educational services or provision of wholesaler services. Rather, fiduciary status is intended to be placed on the party interacting directly with the Retirement Investor in such circumstances.

¹⁶Directing a client or prospective client to an investment newsletter or web page are common examples, but there are others. For example, firms often publish and distribute generic “buy/sell/watch” lists. Firms also sponsor conferences for clients and prospective clients at which investment products are discussed.

without first being fully vetted against the unique circumstances of the Retirement Investor. Thus, a Retirement Investor relying solely on an opinion in a newsletter to make an investment may have found, upon discussion with a financial professional, that the particular investment being referenced in the newsletter is actually inappropriate for the Retirement Investor's needs in light of the fund's limited market segment, redemption policies or other factors not fully considered by the Retirement Investor. It is untenable and contrary to public policy to impose ERISA fiduciary status on financial institutions and investment professionals who are not in a position to know who is relying on commentary that is intended as general guidance and not individualized to the Retirement Investor.

For the reasons discussed above, it appears that the words "specifically directed to" are superfluous to the operative definition and instead only serve to create ambiguity and confusion. The Institute recommends deletion of the words "or that such advice is specifically directed to" from the operative fiduciary definition and modification of the definition to clarify that personalized investment advice is required in order to trigger ERISA fiduciary status. The Institute also recommends reinforcing the remaining functional definition by adding a "reliance" or "materiality" concept to substitute for the ambiguous "for consideration" element of the test. In this regard, the information provided to the Retirement Investor should not just be provided for his or her potential consideration, but the investor should have in fact considered and relied on the information as a material part of their decision making.

In addition, we recommend explicitly incorporating "mutuality" into the definition. While it is commonly understood that agreements and arrangements are mutual, the complete removal of the word from the Proposed Fiduciary Rule, in addition to informal comments made by the Department, have made the Department's position regarding mutuality unclear in the context of "understandings." Therefore, the Institute asks the Department to explicitly add "mutual" into the definition. Only under circumstances where the adviser believes that he or she is providing advice should there be a fiduciary relationship.

More specifically, the Institute recommends revising paragraph (a)(2)(ii) to read as follows:

- (ii) Renders the advice pursuant to a written or verbal agreement, arrangement or **other mutual** understanding that the advice is individualized to, **and reasonably intended to be relied on by**, the advice recipient in making investment or management decisions with respect to securities or other property of the plan or IRA.

These modifications will help assure that the rule only applies where a reasonable person would believe a true advisory relationship exists. No reasonable person would believe that statements or recommendations about investments, potential investment strategies or the financial markets written for general distribution—even where targeted to individuals in similar circumstances—create an

advisory relationship of trust and confidence between the provider and every plan fiduciary, participant, or IRA owner that might consider the information in making decisions.

The changes to the operative fiduciary definition described above are based on the assumption that the Department will not make wholesale changes to the definitional language. An entirely new operative definition, however, would be more consistent with the presumed scope of the proposed rule in light of the intended carve-outs. In this respect, the Department's approach of setting forth an overly expansive fiduciary definition and then "carving out" activities that are not "fiduciary" in application presents an unnecessarily cumbersome approach. We therefore present below an alternative approach. Specifically, we suggest that the Department delete the currently proposed functional test found in 29 CFR 2510.3-21(a)(2)(ii) and replace it with the following—

(ii) Renders the advice in a manner where an advice recipient reasonably believes that such person is acting in their best interest in providing such advice and is not acting in an educational, marketing or sales capacity. This determination is based on the relevant facts and circumstances as applied to a reasonable person. Under this clause, relevant factors include the individualized nature of the advice provided, the intent that it be relied upon, the reliance placed on it by the advice recipient and any disclosures provided to the advice recipient; however, no single factor is determinative.¹⁷

This approach addresses the Department's key concerns about potential gaps under the current regulation's five-part test. For example, under this definition, a person acting in a way to create Retirement Investor reliance (*e.g.*, by providing individualized and specific recommendations relied on by the recipient) could still be a fiduciary even if that person disclaimed fiduciary status. It would, moreover, treat service providers who make personalized "one-time" recommendations as fiduciaries. The approach would also more objectively reflect the critical importance of educational, marketing and sales activities in ensuring that Retirement Investors have the critical information they need to make informed investment decisions.

¹⁷ We note that other commentators have proposed alternative formulations of the fiduciary definition that similarly attempt to address the importance of determining fiduciary status on the totality of the content, context and presentation of the communication. One commentator, for example, has recommended that the Department should define investment advice to mean an individualized recommendation as to the purchase, sale or holding of an investment in an ERISA plan or IRA account where "the circumstances surrounding the recommendation create an objectively reasonable expectation that the person providing the recommendation is acting for the exclusive benefit of the recipient with respect to the prescribed action." See Letter from Margaret H. Raymond, Vice President and Managing Counsel, T. Rowe Price, to Employee Benefits Security Administration, U.S. Department of Labor, dated July 21, 2015. We find merit in this and many other similar formulations.

The Department should codify FINRA’s guidance about what constitutes a “recommendation”
– The Department proposes to define “recommendation” to mean “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.”¹⁸ The Department appears largely to have based the definition, as discussed below, on one of the guiding principles the Financial Industry Regulatory Authority (“FINRA”) (f/k/a “NASD”) has provided to help determine whether a particular communication is a recommendation. The Department has not, however, incorporated other aspects of FINRA guidance into this definition, but has requested comment on “whether it should adopt some or all of the standards developed by FINRA in defining communications that rise to the level of a recommendation for purposes of distinguishing between investment education and investment advice under ERISA.”¹⁹ Given the significant consequences associated with inadvertently entering into a prohibited transaction,²⁰ it is not appropriate in any circumstance to define the term “recommendation” to be broader under ERISA’s fiduciary advice rule than under FINRA’s rules. Having differing standards of care that apply if the definition is met is troubling enough.

As acknowledged by the Department, FINRA generally takes the view that whether a communication constitutes a recommendation is a facts and circumstances inquiry to be determined on a case-by-case basis.²¹ The regulatory framework to which brokers are subject, however, recognizes the need for objective standards for determining when a communication does not give rise to a recommendation in order to facilitate the dissemination of investment information. As noted by FINRA, “[t]he determination of whether a ‘recommendation’ has been made, moreover, is an objective rather than subjective inquiry.”²² To help ensure Retirement Investors continue to have access to important educational information, it is critical that the Department adopt relevant standards developed by FINRA in defining communications that rise to the level of a recommendation for purposes of distinguishing between investment education and investment advice under ERISA. The Department can accomplish this by adding additional clarifying principles to the definition of “recommendation,” or by expanding the education carve-out in a similarly consistent manner.

According to FINRA, “[a]n important factor in [determining whether a ‘recommendation’ has been made] is whether—given its content, context and manner of presentation—a particular communication from a firm or associated person to a customer reasonably would be viewed as a

¹⁸ Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21938.

¹⁹ *Id.*

²⁰ See note 9 and accompanying text, *supra*.

²¹ See, e.g., NASD, Online Suitability, Notice to Members 01-23 (April 2001) at page 2 (“NASD Notice to Members 01-23”), available at www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003887.pdf

²² Know Your Customer and Suitability, FINRA Regulatory Notice 11-02 (Jan. 2011) (“FINRA Regulatory Notice 11-02”).

suggestion that the customer take action or refrain from taking action regarding a security or investment strategy.”²³ Another principle that broker-dealers should keep in mind, according to FINRA, is that “the more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation.”²⁴

Significantly, FINRA recognizes that a disclaimer can in certain circumstances be helpful to a customer in understanding the context under which information is provided. In determining whether a recommendation is intended, FINRA will also consider “any other facts and circumstances, such as any accompanying explanatory message from the broker/dealer.”²⁵ FINRA has explained, however, that “a broker cannot avoid suitability obligations through a disclaimer where—given the content, context and presentation—the particular communication would be viewed as a recommendation.”²⁶ But “a member that sends a customer or group of customers information about a security might include a statement that the member is not providing the information based on the customers’ particular financial situations or needs. Members may properly disclose to customers that the opinions or recommendations expressed in research do not take into account individual investors’ circumstances and are not intended to represent ‘recommendations’ by the member of particular stocks to particular customers.”²⁷ Thus, FINRA guidance is clear that a disclaimer cannot have the effect of making what, when viewed in its entire context, would be a “recommendation,” escape such a classification. This clarification as to the use of disclaimers would effectively deal with the Department’s concern about the use of “fine print disclaimers,” as the entire content of the communication, and not the disclaimer alone, would be relevant to the determination of whether a “recommendation” was intended.

FINRA guidance also acknowledges the importance of online or Internet-provided resources and tools for facilitating the provision of investment information to consumers. In the context of online communications, for example, FINRA makes clear that the following “pulled” communications (*i.e.*, those provided at the request of a customer) are outside the scope of a recommendation:

- A website that is available to customers or groups of customers that contains research pages or “electronic libraries” with research reports (which may include buy/sell recommendations from the author of the report), news, quotes, and charts that customers can obtain or request.²⁸

²³ *Id.*; see also NASD Notice to Members 01-23.

²⁴ FINRA Regulatory Notice 11-02; see also NASD Notice to Members 01-23.

²⁵ NASD Notice to Members 01-23.

²⁶ FINRA Regulatory Notice 11-02.

²⁷ NASD Notice to Members 01-23.

²⁸ NASD Notice to Members 01-23, at page 3.

- Research tools on a website that allow customers to screen through a wide universe of securities (*e.g.*, all exchange-listed and Nasdaq securities) or an externally recognized group of securities (*e.g.*, certain indexes) and to request lists of securities that meet broad, objective criteria (*e.g.*, all companies in a certain sector with 25 percent annual earnings growth). The website imposes no limits on the manner in which the research tool searches through a wide universe of securities, nor does it control the generation of the list in order to favor certain securities.

Further, the broker-dealer and associated person registration framework implicitly recognizes that the provision of information that customers can retrieve at their convenience or upon request, absent a solicitation, is not a call to action that gives rise to the investor protection concerns typically associated with a recommendation. The SEC staff, for example, has given no-action relief, in the context of broker-dealer registration, to companies that provide communications services to support or assist securities transactions.²⁹ A common condition in these letters is that the service providers not provide or make recommendations.

In this vein, FINRA has also taken the view that responding to a customer's request for information does not require that a FINRA-licensed person provide the information, presumably because the provision to customers of information they request does not, in itself, result in a recommendation and does not raise the investor protection and public policy concerns that registration is intended to address. In 1999, FINRA (then NASD) responded to an interpretive request regarding the registration categories of persons engaged in inbound and outbound call center activities on behalf of broker-dealers.³⁰ Among other things, FINRA took the view that no licensing requirement was necessary when a person received and responded to inbound calls from customers requesting information regarding:

- General market data, such as market performance, market indices, volumes, and similar data;

²⁹ See, *e.g.*, e-Media, LLC, SEC No-Action Letter (Dec. 14, 2000) (no-action relief granted to e-Media which proposed to offer and perform its transmission services to unaffiliated issuers through its registered broker-dealer clients' websites); Evare, LLC, SEC No-Action Letter (Nov. 30, 1998) (no-action relief granted to Evare which proposed to offer an online communication system linking professional money managers, broker-dealers, and custodians that would enable managers to obtain quotes from, and enter orders with, broker-dealers, and to communicate information to custodians for settlement of trades); Vedder, Price, Kaufman & Kammholz, SEC No-Action Letter (May 21, 1997) (no-action relief granted to financial research centers which proposed to install dedicated communication links between the centers and a registered broker-dealer to accommodate the broker-dealer's customers using the research centers at a fixed flat per use fee).

³⁰ See NASD Interpretive Letter to Karen Steighner, Brokerage Administrators Corporation (Dec. 23, 1999) ("BAC Letter").

- Specific security data for mutual funds and variable annuities, such as price quotes, news, performance and similar data; and
- Specific security information for mutual funds and variable annuities, such as prospectuses, research reports, news and other similar information.

We urge the Department to more explicitly adopt FINRA's guidance to add a degree of objectivity and certainty to the determination of whether a communication is a recommendation. We believe that this can best be accomplished by adding the following language at the end of §2510.3-21(a)(1) or by adding similar language to the investment education carve-out in §2510.3-21(b)(6):³¹

An important factor in determining whether a recommendation has been made under paragraph (a)(1), is whether—given its content, context and manner of presentation—a particular communication from a person to a customer reasonably would be viewed as a suggestion that the customer take a specific action or refrain from taking a specific action regarding a security or investment strategy. In this regard, the more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation. While any other facts and circumstances, such as any accompanying explanatory message used to help a customer in understanding the context under which information is provided, may be relevant in determining whether a recommendation is intended, fiduciary status cannot be avoided through a disclaimer where—given the content, context and presentation—the particular communication in its entirety would be viewed as a recommendation. Additionally, the provision of information through “electronic libraries” and research tools available on websites or call-centers that customers can retrieve at their convenience or upon request, absent a solicitation, would not on its own be considered a call to action that gives rise to a recommendation for purposes of paragraph (a)(1), provided no limits exist on the manner in which the research tool searches through a specified universe of securities, and provided it does not control the generation of the list in order to favor certain securities. Similarly, a person will not be considered to be engaged in making a recommendation solely by responding to inbound calls from customers requesting general market data, such as market performance, market indices, volumes, and similar data, or specific security data for mutual funds, bank collective trust funds and variable annuities, such as price quotes, performance and similar data, prospectuses, research reports, news and other similar information, or by identifying specific investment products meeting objective criteria specified by the customer.

³¹ See text accompanying footnotes 39 through 45, *infra*.

The above text will add needed clarity and objectivity to the meaning of “recommendation” for purposes of the fiduciary definition, providing greater certainty as to a service provider’s role and whether a fiduciary relationship is expected.

The Department should promote, not effectively prohibit, advice and information that encourages the preservation of assets for retirement – Call centers and retirement professionals play a critical role in preventing “leakage” of retirement assets. This leakage occurs, for example, when a plan participant switches employers and is presented with the opportunity to remove assets from an employer plan. If the participant takes a distribution, the participant will pay taxes and penalties, and otherwise not have those assets available for retirement. Speaking with a call center representative quite frequently results in the participant rolling over the assets into an IRA or moving them to a new employer plan where the assets stand a better chance of staying retirement savings rather than being used for current consumption. When a participant calls one of these centers seeking a distribution, this call center employee may be the last best chance to retain those assets for retirement savings.

The Department should encourage—not effectively prohibit—the retention of assets intended for retirement in retirement vehicles, be they IRA or employer based vehicles. Under the Proposed Fiduciary Rule, discussing the availability of an IRA custodied at their financial institution would result in a call center employee offering fiduciary advice, which has the effect of preventing those conversations from happening.³² But there are real benefits to rollovers—the IRA may provide a less expensive option than the former employer’s plan, may offer more expansive investment options and may offer distribution options unavailable in a new employer’s plan. Retirement Investors value the convenience of consolidation of retirement assets. Rollovers are not, and should not be viewed as, inherently detrimental to Retirement Investors. The Department needs to take a more realistic and balanced view of retirement asset retention and encourage activities that prevent leakage without the need to jump through the contorted (and in very many cases unworkable) hoops of the BIC Exemption.

The Institute requests that the Department provide clear examples of permitted rollover conversations that do not constitute investment advice.³³ The Department must draw clear lines and provide examples that make clear what type of information and education avoids a recommendation that crosses the line to fiduciary conduct. In particular, we request that in circumstances where

³² Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21957.

³³ While the Department suggests in its discussion of the proposed education carve-out that conversations regarding specific investment products or investment managers will not be treated as education covered by the carve-out, it is difficult to see how a service provider could engage in a conversation with a Retirement Investor about the advantages and disadvantages of leaving money in her current plan or rolling over such assets to a new employer plan or an IRA without considering the specific investment products offered in the current plan as contrasted by the various available alternatives. See FINRA Regulatory Notice 13-45.

participants call in to a call center (rather than representatives calling out) or when paper/electronic mailings are sent in connection with a plan termination, the existence of an IRA product can be discussed so long as there is no specific call or preference for a recommended action and the words “recommendation” or “advise” are not used by the provider as a call to action. This would be particularly useful in situations where a participant caller asks “do you offer an IRA?” To avoid confusion, the Department could require each such communication to state that there are IRAs sponsored by others that would also be available to the participant.

In addition, to prevent leakage, the Department should provide a carve-out for activities such as rollover advice (rollover to a particular IRA, or plan) in which there is only a *de minimis* compensation interest that should not affect the service provider’s judgment. We envision this carve-out applying in situations where a call center representative does not receive any additional compensation for either the number or size of the rollovers achieved. There is a *de minimis* interest in the call center representative’s employer receiving or retaining the assets under management that should not give rise to an impermissible conflict of interest.

Providing an appraisal or fairness opinion should not result in fiduciary status if not part of a covered transaction – The Department has excluded ESOP valuations from the coverage of the Proposed Fiduciary Rule and purportedly will address the issue in a separate regulatory initiative.³⁴ We fail to see how valuations associated with ESOPs raise issues that are distinct from appraisals and valuations generally and we urge the Department to exclude all appraisals and valuations from the coverage of the Proposed Fiduciary Rule and consider them in its separate regulatory project focused on ESOP valuations.

If the Department does not follow this logical approach, it needs to be significantly clearer in identifying what valuations are fiduciary in nature. In this respect, rather than broadly categorizing appraisals or fairness opinions as “covered advice” without the need for a further recommendation or call to action, the Department should provide examples of the specific appraisals and fairness opinions that the Department intends to trigger fiduciary status.³⁵ It is particularly inappropriate to include such sweeping coverage in an area that does not require the provider to actually recommend a course of action.³⁶ Specifically identifying the particular types of transactions for which there is a need to impose fiduciary standards of care upon an appraiser provides greater certainty and should address concerns raised by the Department.

³⁴ Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21939.

³⁵ *Id.* at 21958.

³⁶ *Id.* at 21939–21940.

B. The Department Must Expand the Exceptions to Fiduciary Status

The Department has provided several “carve-outs” in the Proposed Fiduciary Rule from the general fiduciary definition for communications that the Department believes Congress did not intend to cover as fiduciary “investment advice” and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality.³⁷ As discussed below, the limited scope of the exceptions provided by the Department is inconsistent with clear Congressional intent. The Department must sufficiently expand them to ensure that Retirement Investors are not unnecessarily impeded from access to services on which they have come to depend.³⁸

Investment education must permit the identification of investment alternatives within asset classes – The Department has proposed a carve-out from the definition of fiduciary for four types of investment education: plan information; general financial, investment, and retirement information; asset allocation models; and interactive investment materials. The guidance from the proposed carve-out is similar to Interpretive Bulletin (“IB”) 96-1, but with significant cutbacks such as with respect to the identification of specific securities in connection with the use of investment analysis tools and interactive investment materials.³⁹

We understand that, as proposed, certain permissible types of investment education can be provided to a plan, plan fiduciary, participant or beneficiary, or IRA owner. Further, the carve-out is available regardless of who provides the information (*e.g.*, the plan sponsor, fiduciary, service provider), how often the materials are provided, or the manner in which they are provided (*e.g.*, call centers, websites). This would include, among other things, information that “describe[s] investment objectives and philosophies, risk and return characteristics, historical return information or related prospectuses of investment alternatives under the plan or IRA.”⁴⁰ The communication cannot, however, refer to the appropriateness of any individual investment alternative.⁴¹ In addition, the provision of investment education cannot include a recommendation (whether standing alone or viewed in combination with other materials) with respect to specific investment products or plan or IRA alternatives (*e.g.*, account types) or the investment, management, or value of a security or other property.⁴²

³⁷ *Id.* at 21941.

³⁸ See footnote 11 and accompanying text, *supra*.

³⁹ Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21944-21945.

⁴⁰ Proposed Reg. §2510.3-21(b)(6)(i).

⁴¹ *Id.*

⁴² Proposed Reg. §2510.3-21(b)(6).

The Institute believes that the Department must preserve the important distinction between non-fiduciary investment “education” and fiduciary investment “advice” that has worked very well for almost 20 years.⁴³ Identifying an asset class to an individual or even a plan sponsor without identifying which investment options are within that asset class severely limits the utility of investment education. The Proposed Fiduciary Rule should permit, without triggering fiduciary status, the provision of education described in IB 96-1 that continues to allow consumers to receive examples of investment alternatives within any asset classes discussed in an asset allocation model.

The Institute requests that the Department modify the education carve-out to allow asset allocation models to identify the specific investment choices that fit particular asset classes.⁴⁴ The carve-out should allow specific identification to a participant of the options within the lineup chosen by a plan sponsor. It also should cover potential investments matching allocation models applicable to an IRA so long as at least three examples of potential investments (or, if less than three are offered in an applicable asset class, all applicable investments) are shown and the investments are accompanied by an explanatory message designed to inform the recipient that no recommendation is intended and that other investments matching the identified asset allocation model may be available.⁴⁵ In this respect, the provision of three examples with the required disclaimers would not and could not result in a Retirement Investor misinterpreting the provision of such information as a recommendation to take a specific action. Similar guidance should apply to education provided to plan sponsors.

The Institute also seeks clarification regarding the boundaries of the carve-out for furnishing of information to help participants assess their retirement needs and risks post-retirement. The Department should provide clear parameters for providing such services without triggering fiduciary status. For example, financial institutions should be able to identify any specific retirement income options available under the plan to the participant and their potential advantages and disadvantages.

Counterparties exception must cover traditional selling and marketing if the definition of covered fiduciary advice does not clearly exclude those activities – Neither the counterparty carve-out nor the BIC Exemption is available for services provided to small plans that are participant-directed.⁴⁶ This precludes the ability of financial institutions to market investment products and services to these plans and to provide much needed education and information to such plans and their fiduciaries.

⁴³ 29 C.F.R. §2509.96-1.

⁴⁴ Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21959.

⁴⁵ The disclaimer required by Proposed Reg. §2510.3-21(b)(6)(F) would, of course, also be provided and the communication identifying examples of investment alternatives matching the asset allocation model—when viewed in its entirety—could not otherwise be considered to constitute a direction to take a particular action.

⁴⁶ Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21957.

There is no sound justification for excluding small participant-directed plans from the counterparty carve-out. This is especially inappropriate given that fiduciaries for both small and large plans share the same legal obligations to their plans. As discussed above, the Department should clearly exclude marketing and selling from the expansive definition of fiduciary advice for all plans, including IRAs. At a minimum, however, the Department must extend the counterparty carve-out to cover small plans and IRAs.⁴⁷

The Department properly recognized and preserved this important distinction between advice and marketing and selling activities in the 2010 version of the proposed regulation by providing an exclusion from fiduciary status for those selling products where there was no reasonable expectation of a fiduciary relationship—making that option available to all retirement plans, plan participants and IRA owners.⁴⁸ The Department appears to base its rationale for changing this position on a belief that large plans are sophisticated procurers of financial services while small plans and IRA owners are not, and that status as a plan—and status as a large plan in particular—is a valid proxy for sophistication.

The legitimacy of this rationale is patently wanting, and does not justify the disparate treatment. First, it does not require a high level of financial sophistication to understand that a discussion is a sales discussion especially if it follows a basic disclosure that a service provider is selling a proprietary financial product, is paid to sell the product, and is not in a relationship of trust and confidence. This type of disclosure, similar to what the Department would require in the large plan carve out, is readily understandable to any recipient. The assumption that small plans, participants and IRA owners cannot understand the difference between sales and advice is inconsistent with the real world experience of our members and their employees. The Department can protect participants, IRA owners and small plans with the same kind of disclosures that it requires of large plans under the large plan carve out, but without creating barriers on the ability of Retirement Investors to shop for the products and services that best fit their needs.

Second, there is simply no basis to assume that a plan fiduciary to a plan with 99 or less participants is not financially sophisticated, while a plan with 100 participants is sophisticated. The plan fiduciary may include the company treasurer or chief financial executive officer—a professional with a background in investment finance. We question whether the participant count or asset size thresholds included in the counterparty carve-out offer any rational test of plan sponsor or plan fiduciary sophistication. It seems unreasonable, for example, for the Department to craft such an important component of a rule on the notion that law, engineering, or accounting firms (some of the small employers that sponsor plans) that have 99 participants are not sophisticated enough to

⁴⁷ For this purpose, small plans should be deemed to include “small business” plans described in section 4975(e)(1)(A).

⁴⁸ See 75 Fed. Reg. 65263 (Oct. 22, 2010).

understand a disclaimer.⁴⁹ If the Department's assumptions regarding size and sophistication were true, then the Department should have extended the same logic to participants and IRA owners. A participant or an IRA owner with a large balance should, by the Department's logic, be allowed access to the education, marketing and sales-related information while a small balance account should not.

The Department must retain the seller's exclusion from its 2010 proposal, but couple that exclusion with simple, clear disclosure. This would preserve choice while providing the information necessary for plans, participants and IRA owners to make informed decisions. At a minimum, if the Department cannot see the flaw in its supposition that size alone is a valid indicator of "sophistication," it should include IRA owners with large balances, such as an "accredited investor" as defined by the federal securities laws,⁵⁰ within the coverage of the counterparty carve-out. There is no rational reason for restricting larger balance and sophisticated IRA investors from access to the education, marketing and sales related information that they need to make informed investment choices. It should also be made clear that the exclusion would apply to the sales of services, including asset management services, and selling activity in connection with acting as agent for a plan (*e.g.*, futures, brokerage).⁵¹

The Department must expand the platform provider exception – The Proposed Fiduciary Rule includes a carve-out for marketing and making available "a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives."⁵² In providing a platform, the platform provider (i) cannot take into account the particular needs of the plan, its participants, or beneficiaries, and (ii) must disclose in writing to the plan fiduciary that the provider is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.⁵³ By its terms, the platform provider carve-out does not extend to platforms made available to IRAs or IRA owners, or to financial professionals who assist plan fiduciaries in selecting an appropriate platform for the plan.

The Institute has concerns with regard to the implications of the platform exception and its intended scope. First, the mere creation and marketing of a platform is not a fiduciary activity that should even require a carve-out from the definition of fiduciary advice. Such a commercial activity is

⁴⁹ We also fail to see a rationale for requiring certain fiduciaries, but not others, to consent to a counterparty carve-out. It is unlikely that any fiduciary would be inclined to sign a consent prior to making a determination that they intend to move forward with a formal relationship. We urge the Department to focus on the content and use of a disclosure and eliminate special requirements associated with plan size or asset holdings.

⁵⁰ Rule 501 of regulation D of the Securities Act of 1933.

⁵¹ Finally, questions arise from the use of the term "counterparty," as to whether the Department intends to limit the application of the carve-out to only those parties covered by a contract. We urge the Department to clarify that the carve-out is intended to apply to services and products of all types, regardless of whether the "seller" engaged in the activity covered by the carve-out is technically a "counterparty."

⁵² Proposed Reg. §2510.3-21(b)(3).

⁵³ *Id.*

done without regard to the needs of a particular plan or IRA and thus there should be no inference that the creation of the platform is a fiduciary action.⁵⁴ We think the Department should broadly state this as an interpretive matter in the preamble to the final rule and also extend the interpretation to IRAs. How could the creation of a platform, even a limited one, by a financial institution constitute a fiduciary relationship with a plan or IRA when it is created before the institution has a client relationship with the plan or IRA?

Second, if the carve-out approach is retained for platform providers, it simply must extend to IRAs. Otherwise there is a negative inference that a purely commercial enterprise of creating a platform from which IRA owners can select investments for their IRAs is a fiduciary action by the financial firm, even though the vast majority of IRA “platforms” offer extensive investments, more extensive than many platforms for retirement plans. So long as the platform is constructed without taking into account the needs of a particular plan or IRA, then it should be carved out.

Third, if retained, the Department should make clear that the carve-out covers segmenting the overall investment platform into separate platform offerings for different market segments (but not for individual plans).

Finally, we recommend expanding the platform carve-out to cover advice that financial professionals may provide to retirement plans concerning the platforms available to them. It is clear under the Proposed Fiduciary Rule that simply recommending a record keeper or third party administrator to a plan is not covered investment advice. But financial professionals, working with plan sponsors and their designated representatives, will often appropriately consider the investment platforms provided by record keepers and third party administrators when discussing the merits of the vendor. Unfortunately, it appears that the platform carve-out is limited to the provider of the platform (in this case, the record keeper or third party administrator).

While the Institute generally believes that the creation and marketing of platforms by service providers is not fiduciary advice in any instance, the provision of the carve-out suggests that the Department believes otherwise. This makes it critically important for the Department to extend the platform carve-out so that financial professionals can assist plan fiduciaries in selecting an appropriate platform for the plan regardless of who offers the platform. Absent such a carve-out, plan fiduciaries will lose access to comparative information regarding available investment platforms by one or more service providers. Moreover, relying on the BIC Exemption for such advice would be particularly problematic since, among other things, it is not possible to provide disclosures that cover all assets on all of the potential platforms available to plans.

⁵⁴ *Santomenno v. John Hancock Life Insurance Company*, 2014 WL 4783665 (3rd Cir. 2014); *Leimkuehler v. American United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013).

The Department must extend and clarify the selection and monitoring carve-out – The Proposed Fiduciary Rule would allow platform providers to offer some assistance to plan fiduciaries in selecting potential investment alternatives. We believe, however, that the narrow and prescriptive nature of the carve-out makes it of limited utility and underestimates the critical role that platform providers play in helping both plan sponsors and IRA owners narrow potential investment alternatives or options from a list of funds that could include thousands of choices. In this respect, the investment selection carve-out is limited to the identification of “investment alternatives that meet objective criteria *specified by the plan fiduciary* (e.g., stated parameters concerning expense ratios, size of fund, type of asset, credit quality)” and does not cover the important role that platform providers play in assisting IRA owners.⁵⁵

The Proposed Fiduciary Rule does not incorporate the full spectrum of assistance that necessarily takes place during the course of interactions between plan sponsors and service providers, including those that take place during the RFP and conversion process. For example, a record keeper would arguably be precluded from presenting a generic line up (not individualized to the plan) in connection with an RFP response if the record keeper is later fortunate enough to win the business. This result is contrary to the expectations of plan sponsors and their designated representatives who routinely ask prospective service providers during the RFP process to provide a sample fund line up for the plan or to identify specific funds from the platform using basic parameters. The parameters may be limited to the plan’s existing funds as a guide, or other general criteria such as information from a plan’s investment policy statement. Additionally, the designated plan fiduciary might inquire about the possibility of liquidating all of the plan assets and transferring or “mapping” them into a single fund or series of funds (e.g., target date funds) pending reinvestment in the investment options that will be used under the new provider’s platform.

When responding to such requests, service providers use available third-party data such as Morningstar “fund fact sheets” to compare and contrast the plan’s existing line up and specified parameters to those investment options available on its platform. They typically provide a chart to the designated plan fiduciary showing side-by-side the comparative fund descriptions. The parties understand that the service provider is matching potential alternative funds based solely on third-party data, but the data and parameters used may be initiated by the service provider. In all cases, platform providers inform the plan sponsor that the information and assistance it provides is not intended to be investment advice and that the plan sponsor must make its own decision based on its particular facts and circumstances.

In addition, a plan fiduciary will consider whether to use investment products that are affiliated with a service provider to a retirement plan together with the plan sponsor’s menu of investment

⁵⁵ Proposed Reg. §2510.3-21(b)(4).

alternatives that meet the needs of the plan's participants and beneficiaries. In this respect, the Department has recognized that inclusion by plans of the proprietary investment products of the plan's service provider or its affiliates in the investment menu of a retirement plan can sometimes impact the pricing of recordkeeping services offered to the plan.⁵⁶ In some cases, the platform provider or its affiliate is recognized in the marketplace as having specific products that are particularly highly rated or widely touted by consultants and other investment professionals. For example, a certain fund or family of funds might be identified in the industry press as a suitable default option. For this reason, it is common for plan sponsors or their designated fiduciaries to request the platform provider to identify potential proprietary products for their consideration in constructing a plan line up or in replacing a low performing option.

We are concerned that the Proposed Fiduciary Rule does not permit the platform providers who have affiliated funds on their platforms to structure their products and services to respond to these requests. These same issues and concerns arise when a plan replaces an investment option. This is clearly a service that plan sponsors desire and one that they are accustomed to receiving without additional cost. Some providers notice that without this assistance, plan sponsors may offer far more funds on their line up than is necessary to build a diverse portfolio. We fear that some plan sponsors may forego paying an advice fiduciary to construct a line up and instead opt for offering a large number of funds. This in turn leads to the plan participant needing to select investments from a more daunting array of possible options.

The Institute requests that the Department permit service providers to provide sample fund line ups and respond to requests for replacing investment options under the selection and monitoring carve-out. The Department might condition the carve-out on the financial institution disclosing to the plan sponsor or plan fiduciary the criteria from which the sample fund line up or replacement fund is derived, using objective investment-related criteria taking into account the options available on a particular platform, regardless of whether the criteria is identified by the plan sponsor or the platform provider.

Finally, the crucial assistance that platform providers play in assisting plan sponsors to narrow potential plan investment alternatives, is equally important to IRA owners. To assist IRA owners in narrowing platform choices, one or more objective third-party criterion is often used as a tool in which to distinguish investment options meeting specified criteria from the larger list. For example, a platform provider may offer tools that identify those funds in a specific asset class that are rated by

⁵⁶ Advisory Opinion 2003-09A (June 25, 2003). In making the decision to use or not use proprietary products, such plan fiduciary must act prudently and solely in the interest of the plan participants and beneficiaries.

Morningstar “4 stars” or higher.⁵⁷ Similarly, a platform provider might offer to assist an IRA owner by identifying funds which have beaten their Lipper ratings for the past three-, five-, and 10-year periods.⁵⁸ Such narrowing is also performed to identify various other factors that are commonly understood to be of particular importance to the IRA owner beyond performance, such as cost, the existence of sales charges, manager tenure, etc. The narrowing criterion used is widely accepted in the retirement investment field and its use is not intended by either party to be fiduciary in nature. It simply is unlikely that all IRA owners will have the preexisting knowledge to specify the criteria used in narrowing potential investment options.

The Institute requests that the Department permit the use of accepted criteria to assist the IRA owner in narrowing potential options under the selection and monitoring carve-out, where the financial institution discloses to the IRA owner the criteria used, regardless of whether the criteria are identified by the IRA owner or the platform provider.

Absent a clarification of, or modification to, the proposed rule, the Department effectively will force platform providers and other service providers to remain silent in response to requests for assistance in narrowing options from platforms (that could include thousands of choices), to avoid being unintentionally and unwillingly treated as fiduciaries and potentially engaging in unintended prohibited transactions. Platform providers and other service providers will simply have no choice but to stop providing the assistance and information that IRA owners need and often demand.

Appraisals, fairness opinions, or statements of value – As noted earlier, we urge the Department to consider the circumstances under which appraisals, fairness opinions and statements of value are considered fiduciary activities at the same time it considers the application of the question to ESOP valuations. In the event the Department decides to move forward notwithstanding this request, it should not broadly characterize appraisals, fairness opinions, or statements of value as “covered advice” (particularly when there is no further recommendation or call to action) and instead should provide specific examples of when it intends appraisals or fairness opinions to qualify as fiduciary advice. Absent this change, it is crucial to have a carve-out for financial reports and valuations and we commend the Department for recognizing this. The proposed exception, however, does not provide clear and sufficient protection that is needed by service providers to be able to continue to provide information necessary to plan sponsors, participants and IRA owners in connection with the performance of day-to-day administrative functions. In this respect, the proposed carve-out’s limitation

⁵⁷ Morningstar is a company that collects and publishes information about mutual funds and other investments. The Morningstar Rating for mutual funds is intended to identify how well a fund has balanced return and risk volatility in the past.

⁵⁸ Lipper is a Thomson Reuters company that supplies mutual fund information, analytical tools, and commentary. All Lipper ratings are based on an equal-weighted average and represented as a percent for each measure of three-, five-, and 10-year periods.

to statements of value provided “for purposes of compliance with the reporting and disclosure provisions. . . .” raises the concern that routine monthly statements (*e.g.*, monthly IRA statements, or statements prepared for a loan or hardship withdrawal) that are not necessarily required by statute or regulation would be treated as fiduciary advice because they are not *required* reporting but, rather, are necessary or helpful in connection with account administration.⁵⁹ For example, record keepers provide benefit statements, maintain call centers and provide web sites for participants to access information about their plan accounts. The account information that is provided is also used for purposes of making distributions. The asset values are generally not determined or established by the service provider that provides the information through the channels noted above. Rather, they are derived from third-party sources.

In light of these concerns and the importance of the affected service to retirement plans, participants and IRA owners, we urge the Department to modify the carve-out exception at issue to provide that a service provider is not a fiduciary as a result of reporting, providing statements, using, relying on or taking any other necessary action for a plan, plan participant or IRA owner based on, or in connection with, the value of any plan assets, including assets that do not have a generally accepted market value. We also urge the Department to provide that a service provider will not become a fiduciary as a result of calculating the value for an investment option that does not itself have a recognized market value, where the value is otherwise determined based on the prices of the investment option’s underlying publicly traded securities.

This is particularly appropriate given that such statement, while it may possibly meet the “in connection with a specific transaction” criterion, is still not a call to action. As discussed above, we believe this prong has inappropriately swept in “non-advice.”

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⁵⁹ Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21958.

Office of Regulations and Interpretations
RIN 1210-AB32
July 21, 2015
Page 25 of 25

We hope you find the foregoing comments helpful to your review of the Proposed Fiduciary Rule and its role in protecting the interests of Retirement Investors. If you need additional information or you have questions regarding our comments, please feel free to contact either David Abbey, Deputy General Counsel – Retirement Policy, at (202) 326-5920 or david.abbey@ici.org or David Blass, General Counsel, at (202) 326-5815 or david.blass@ici.org. We welcome the opportunity to discuss these comments further or to provide additional information to you and your staff as you work on this important issue.

Sincerely,

/s/ David M. Abbey

David M. Abbey
Deputy General Counsel – Retirement Policy

/s/ David W. Blass

David W. Blass
General Counsel