AMERICAN
RETIREMENT
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4245 North Fairfax Drive | Suite 750 | Arlington, VA 22203 • P. 703.516.9300 • F. 703.516.9308

July 20, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D–11712
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington DC 20210

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

Re: Proposed Best Interest Contract Exemption ZRIN 1210-ZA25

Dear Madam or Sir:

The American Retirement Association (the "ARA") thanks the Department of Labor (the "Department") for the thought, time and effort put into the initiative (the "Proposal") to update and redefine fiduciary investment advice under section 3(21) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The ARA is a national organization of more than 20,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-deferred Savings Association ("NTSA") and the ASPPA College of Pension Actuaries ("ACOPA"). ARA members are diverse but united in a common dedication to America's private retirement system.

The ARA and its underlying affiliate organizations have long been supportive of the Department's initiative in this area. We support the principle that informs the Proposal: investors are best served when the interests of advisers and investors are aligned. The experience of our diverse membership confirms this principle both in theory and in practice. In our comments on the 2010 proposal[1], we applauded the Department's goal of providing enhanced protections for plan fiduciaries, participants and beneficiaries.[2] The ARA recognizes that much has changed in the last 40 years regarding how American workers plan for and save for retirement, necessitating an update to the regulation. We agree that investment advice should be impartial and given in an environment that is free from conflicts of interest. At the same time, it is important to ensure that American workers will continue to have access to workplace savings arrangements and professionals to help guide them through the very daunting process of preparing for and living out one's retirement years.

The ARA looks forward to working with the Department to provide input through this comment letter, testifying at the planned hearing and providing additional feedback when the comment period reopens. The ARA supports the idea of putting plan participants, beneficiaries, and IRA owners' interests front and center under a "best interest" standard. Consistent with this support, we believe that a number of changes to the proposed guidance will facilitate the Department's goals in creating a practical "best interest" standard that protects the interests of participants, beneficiaries, and IRA owners while also supporting and enhancing the diverse range of products and services available in the ERISA marketplace.

The ARA shares the Department's objective of promoting advice based on the best interests of investors while discouraging advice tainted by conflicts of interest. In order to foster relationships between advisers and investors whose interests are aligned, the ARA suggests that the Department adopt a separate exemption for advisers who provide "levelized compensation advice." By definition, this compensation arrangement aligns the interests of advisers with the best interests of their clients. A separate exemption is necessary because the proposed Best Interest Contract Exemption (the "BIC Exemption"), principally intended to mitigate the risks of advice given by advisers who receive variable compensation, addresses circumstances distinctly different than those that exist between investors and advisers who receive level compensation. The provisions of the BIC Exemption are designed to protect investors in instances where their advisers receive variable compensation. Where the adviser receives level compensation, however, compliance with these provisions would add unnecessary costs to be ultimately borne by the participant/investor. Put simply, if the policy goal is to foster more aligned advice, the rule should make the provision of such advice less complicated and expensive.

In addition to the ARA's suggested exemption for the provision of levelized compensation advice, the ARA separately includes (1) comments on the definition of fiduciary advice itself, (2) comments on the use of "carve-outs" from the definition of fiduciary advice, and (3) comments on the BIC Exemption. All of these suggestions are constructively made consistent with the Department's intent to protect the interest of retirement savers while ensuring that the retirement services industry remains a birthplace of innovation.

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[1] Definition of the Term "Fiduciary," 75 Fed. Reg. 65263 (Oct.22, 2010)

[2] Comment Letter dated January 27, 2011, available at http://www.asppa.org/Portals/2/PDFs/Comment%20Letters/Definition%20of%20Fiduciary%20Comment%20Letter.pdf

In order to assist the Department in producing a rule that protects investors against conflicts of interest in a practical and workable fashion, the ARA respectfully provides numerous examples of "real world" consequences of the current proposal, in order to supplement the understanding the Department has already gained through its outreach in this matter.

I. The Level Compensation-to-Level Compensation Exemption

A. Introduction

The Proposal, including the BIC Exemption, makes it clear that the Department is seeking to minimize the impact of conflicts of interests in the retirement marketplace. While pursuing this is a worthy objective, it is important to recognize that there are many Service Providers who are paid on a levelized basis and therefore do not have the same conflicts of interest that the Department is seeking to address. As such, the ARA suggests that the Department issue an additional prohibited transaction exemption called the "Level Compensation-to-Level Compensation Exemption" (the "Level-to-Level Exemption").[3] The Level-to-Level Exemption would provide relief to Service Providers[4] who provide services to a plan or IRA in return for levelized compensation. In addition, the Level-to-Level Exemption would apply to the transfer of assets from a qualified plan[5] to an IRA and the subsequent investment of the assets held within the IRA as long as a levelized compensation model is utilized. The Level-to Level Exemption would also apply to the transfer of assets from a qualified plan to another qualified plan.

B. The Need for the Level-to-Level Exemption

The BIC Exemption and ERISA sections 408(b)(14) and 408(g) do not provide adequate relief for Service Providers operating under a levelized compensation model because these provisions require a series of costly and cumbersome actions by the adviser in order to guard against a risk that the adviser might render conflicted advice.

First, the levelized compensation model is distinguishable from the variable compensation models primarily addressed by the BIC Exemption. The BIC Exemption seeks to ensure that Service Provider conflicts are minimized through a complex series of disclosures and processes. Such disclosures and processes will add significant costs for advisers. Yet, the core issue addressed by the BIC Exemption – making sure Service Providers are not recommending investments with qualified plan or IRA assets simply for their own benefit – is specifically addressed by an unconflicted levelized compensation model. A Service Provider receiving compensation under the unconflicted levelized model is inherently "agnostic" with regard to which investments are made in the account. Instead, the Service Provider receiving levelized compensation benefits just as the investor does and only when the investor does – when the account grows in value. In essence, the BIC Exemption imposes a series of complex compliance requirements that are largely designed to encourage participant- and beneficiary-friendly variable compensation models that are intended to approximate the unconflicted level compensation model. It is not necessary to impose these compliance requirements on Service Providers who are already

[3] The Level-to-Level Exemption could alternatively be incorporated as a sub-exemption within the BIC Exemption.
[4] The term "Service Provider" is defined within the text of the Level-to-Level Exemption at section 5(A).
[5] For this purpose, the term "qualified plan" includes an ERISA-governed Code section 403(b) plan.

providing advice free from conflicts. As such, in the context of advice given by Service Providers receiving level-to-level compensation, the BIC Exemption creates an unnecessary regulatory burden.

Second, while the ARA acknowledges that the Department could address unconflicted level compensation models through a number of changes to the BIC Exemption itself, it urges the Department to adopt the Level-to-Level Exemption as a standalone exemption that is separate and distinct from the BIC Exemption.[6] As noted above, the ARA recognizes that the goal of the BIC Exemption is to minimize conflicts in the retirement marketplace. Unconflicted level compensation models inherently contain a far lower risk of conflict and operate in a separate and distinct manner than many of the models directly addressed in the BIC Exemption. Further, there is no disadvantage to participants, beneficiaries, or IRA owners in implementing the Level-to-Level Exemption as a standalone exemption. Accordingly, it makes sense to separate levelized compensation models from the BIC Exemption itself.

Third, we note and appreciate that the existing investment advice statutory exemption under ERISA section 408(b)(14) and ERISA 408(g) looks at the adviser – rather than affiliate – level for determining unconflicted advice. However, the annual audit and complicated disclosure requirements incorporated into this exemption have resulted in its limited usage, especially due to complexity and cost challenges created by these requirements.

Fourth, the ARA acknowledges the Department's concern regarding variable compensation arrangements in discretionary accounts that make it unlikely that the Department would permit discretion in the context of the BIC Exemption. To the contrary, in the levelized compensation environment, discretionary advice should not create concern for the Department. As such, the Level-to-Level Exemption is necessary to permit and provide comfort to advisers that they can, in a levelized environment, engage in unconflicted, discretionary activities without creating additional exposure that could limit these important services.

Because there is no market-friendly and also participant-, beneficiary-, and IRA Holder-protective exemption currently available to a level-to-level Service Provider, the Level-to-Level Exemption is a necessary addition to the existing Proposal framework. The Level-to-Level Exemption would provide participants with the information needed to make an informed decision on rollovers, post-rollover investment decisions, and other investment decisions, but would not burden a Service Provider with the unnecessary complexities contained in the BIC Exemption or ERISA sections 408(b)(14) and 408(g). Further, a streamlined level compensation exemption would encourage plan advisers to continue to work with participants to and through retirement, maintaining these trusted and conflict-free relationships between advisers and participants that choose to received their retirement income through personal IRA accounts. Advice that is free from conflicts of interest works for the participant and can flourish in the marketplace with a carefully created Level-to Level Exemption.

[6] Although, as noted at footnote 3, if more expedient, it could be incorporated as a streamlined sub-exemption within the BIC Exemption.

C. Concerns to Be Addressed By the Level-to-Level Exemption

We highlight the concerns that would be addressed by the Level-to-Level Exemption with the following two examples.

1. No Prior Adviser-Participant/Plan Relationship Prior to Rollover

The first example involves a Service Provider[7] who has no prior relationship to a qualified plan participant.

In this example, Adviser A, who has no prior relationship to a plan participant, approaches Anne and proposes to provide investment advice (for the investment of her IRA assets) for level compensation of 75 basis points in connection with rolling Anne's qualified plan account into an IRA. Adviser A does not receive any compensation when explaining Adviser A's service offerings to Anne and recommending his or her IRA services to Anne. Notwithstanding the fact that Adviser A is not compensated for his or her explanation and recommendation, many are concerned that if Adviser A is hired by Anne to provide services to Anne's rollover IRA for 75 basis points, Adviser A would be engaging in a non-exempt prohibited transaction under ERISA. The fear is that, once hired by Anne to advise with respect to her IRA, the compensation received by Adviser A would be 'in connection with" the recommendation provided by Adviser A regarding his or her rollover management services, and would therefore be a prohibited transaction.

Having Adviser A provide these services meets an important need in the marketplace – helping participants who have a significant decision whether or not to move their assets out of their qualified plans into an IRA and how to invest these funds. Regardless of whether the Department views this process as a single integrated transaction or two transactions (*i.e.*, offering services and then providing advice to an IRA), it is essential that these advisory activities be supported while minimizing potential conflicts of interests. The Level-to-Level Exemption would provide a practical solution to the Department's conflict of interest concerns and preserve these vital services.

2. Prior Relationship Adviser-Participant/Plan Relationship Prior to Rollover

The second example involves a Service Provider who has a long history of advising a qualified plan in which an individual participates.

In this example, Juan has been working with Adviser B, the adviser to Juan's qualified plan, for more than 20 years. Juan is about to retire and Juan's qualified plan does not offer systematic withdrawals. Like many working Americans, the only adviser Juan has ever worked with is Adviser B because of Adviser B's services to Juan's qualified plan. Juan wants to work with Adviser B on a rollover because he trusts Adviser B and the plan does not offer Juan an effective way to manage his money in retirement.

[7] Capitalized terms are defined in the proposed Level-to-Level Exemption language.

Adviser B operates as an ERISA fiduciary to the plan and receives level compensation of 30 basis points for those services. Adviser B is proposing level compensation of 75 basis points on the rollover IRA because Juan is going to require personalized financial advisory services.

Even though Juan is moving from one level fee relationship to another, and even though Adviser B would be receiving levelized compensation, Adviser B would still have to comply with all of the substantial requirements of the BIC Exemption[8]. Without the Level-to-Level Exemption, trusted qualified plan advisers who receive level compensation at both the qualified plan and IRA levels would be severely limited in their ability to serve participants after retirement if the level of compensation received from the IRA is higher than that received from the plan. This would be true even though the compensation is appropriate and commensurate for the services provided to an IRA participant.

D. Conditions of the Level-to-Level Exemption

Utilizing the Level-to-Level Exemption would have six core conditions:

- Levelized Compensation;
- Eligible Service Provider Status;
- Required Documentation;
- Compliance With An ERISA Section 404 Prudence Standard;
- Disclosures; and
- Service Provider Documentation.

1. Levelized Compensation

As already noted, levelized compensation should be a core feature of the Level-to-Level Exemption. Level compensation arrangements should be required to be identified in a similar manner as set forth in 29 C.F.R. § 2550.408g-1. There, the Department provides that compensation will be considered levelized if an adviser does not receive from "any party (including an affiliate of the fiduciary adviser), directly or indirectly, any fee or other compensation (including commissions, salary, bonuses, awards, promotions, or other things of value) that varies depending on the basis of a participant or beneficiary's selection of a particular investment option." 29 C.F.R. § 2550.408g-1(b)(3)(D).

Under the Level-to-Level Exemption, compensation would be considered level if a Service Provider's compensation does not change among investment options. However, in the case of annuity and lifetime income products, this rule would be applied in a separate manner providing that, so long as compensation is level across the annuity and lifetime income products considered by the Service Provider, these products would satisfy the Level-to-Level Exemption requirements. For this purpose, the ARA would define annuity and lifetime income products as products that either provide an immediate, fixed stream of income or provide a fixed, lifetime stream of income, such as through a qualifying longevity annuity contract. Notably, because the investments

[8] In addition, because, as noted above, the BIC Exemption does not currently provide any relief for the provision of discretionary management, the BIC Exemption might not even be available.

underlying such an annuity or lifetime income product could vary widely from insurer to insurer, the actual investments underlying an annuity or lifetime income product should not be a consideration as part of the Level-to-Level Exemption. The ARA believes that this special approach to applying the Level-to-Level Exemption to annuity and lifetime income products is necessary for a number of reasons. First, the ARA believes this special manner of application is important to allow for the purchases and sales of annuity products under the Level-to-Level Exemption given the Department's ongoing interest in promoting lifetime income solutions in retirement plans. Second, while lifetime income products may, in some cases, be more expensive than another investment alternative, these products should be made available to participants and IRA owners as they provide significant benefits to participants and IRA Holders during the decumulation phase of their retirement. Third, simply requiring annuity products to be levelized in the same manner as mutual funds while also satisfying state insurance law requirements would not be practical.

In addition, the Level-to-Level Exemption would not consider whether a financial institution as a whole receives differentiated compensation as long as the Service Provider's compensation remains levelized among investment options. This requirement would recognize that the industry continues to consolidate, creating situations where a Service Provider may operate on a level compensation basis while the broker-dealer, insurance company or other affiliated institution receives remuneration that varies among the investments selected. The fact that the Service Provider's institution may receive remuneration should not disqualify the Service Provider who is otherwise operating under a level compensation arrangement that functions in the best interest of a participant or IRA. The ARA notes that this approach is consistent with the principles underlying the statutory exemption set forth in ERISA sections 408(b)(14) and 408(g) and, thus, has a strong precedential grounding upon which the Department can rely as a basis for adopting levelization at the Service Provider level.

2. Eligible Service Provider Status

The Level-to-Level Exemption should be available to "Service Providers" of all types including individuals working for or affiliated with broker-dealers, registered investment advisers, and insurance agents. In addition, broker-dealers, registered investment advisers and insurance entities themselves (with the conditions applied at the contracting entity level) should also be eligible to use the Level-to-Level Exemption for their direct sales activities. Thus, the Level-to-Level Exemption would be "agnostic," favoring no industry, and available to any Service Provider offering their services on a levelized basis.

3. Required Documentation

The Level-to-Level Exemption should require that an agreement be provided to a Retirement Investor prior to <u>effecting</u> the rollover transaction and any subsequent investment transaction. The ARA believes this approach would align with current business practices; requiring that a written agreement be provided to a Retirement Investor prior to the provision of advice would not. In addition, requiring a Retirement Investor to sign an agreement prior to receiving any advice would prove cumbersome and awkward for all parties involved. Like any other product or service, consumers want to know what they are receiving prior to signing on the dotted line. Thus, requiring a contract be signed prior to the Retirement Investor knowing the Service Provider's plan for their account may stifle transactions from occurring and reduce the advice available to ordinary American workers.

In addition, the concept of a "written agreement" should include agreements that are executed via an electronic medium. In this day and age, requiring a paper written contract is not only an antiquated form of doing business, but could lead to inadvertent failures to comply with the Level-to-Level Exemption. A provision not requiring that the agreement be executed in paper form could proactively preempt potential foot faults that could inadvertently take a transaction out of the scope of the Level-to-Level Exemption. This point could be easily made in the preamble rather than within the actual text of the Level-to-Level Exemption.

4. Compliance with an ERISA Section 404 Prudence Standard

The Level-to-Level Exemption should require that a Service Provider represent in the required agreement that it will operate in accordance with ERISA's section 404 prudence standards. The ARA agrees with the Department that Service Providers should act in their clients' "best interest" and that Service Providers should be held to a high standard of conduct when advising and managing the assets of American workers. That being said, the ARA is concerned that the Department's "Best Interest Standard" included in the BIC Exemption may be interpreted inconsistently with ERISA's standard of care. While the Department has suggested that it intends for the Best Interest Standard to be interpreted consistent with case law interpreting ERISA's duty of prudence, the language proposed by the Department is different and warrants concern that courts interpreting those provisions could adopt a different standard. Thus, to alleviate any potential confusion between the standard of care known to the industry and the standard ultimately applied by the courts, the exact wording of ERISA section 404 should be used in the Level-to-Level Exemption, or, alternatively, ERISA section 404 should be cross-referenced in the Level-to-Level Exemption.

5. Disclosure Requirements

The ARA also understands and agrees with the Department's belief that American workers should know how their trusted advisers are compensated for their services. Therefore, disclosure should be a key component of the Level-to-Level Exemption. Notwithstanding the foregoing, because of the levelized nature of the compensation contemplated by the Level-to-Level Exemption, the disclosure mandated by the Level-to-Level Exemption should be less complex than what is required under the BIC Exemption. At the same time, those disclosures should provide American workers with the information necessary to analyze the reasonableness of the services being provided by a Service Provider.

A. Compensation Addressed by the Disclosure

To accomplish this important objective, the Level-to-Level Exemption's disclosures to a Retirement Investor should include a description of the compensation to be paid to the Service Provider (at the plan level with respect to plan advice and at the IRA level with respect to IRA rollovers). Further, in the case of a rollover transaction from a plan to an IRA that is advised or managed by the Service Provider, the disclosure should also include a comparison of the direct and indirect compensation payable to the Service Provider from the plan or the plan sponsor and the compensation that will be paid to the Service Provider from the IRA. The specific nature of the investment or product being utilized (*e.g.*, individual equities, mutual funds, etc.) in the plan or IRA would not be relevant and would not be required to be broken out separately in the disclosure. The description of the underlying investment would not be necessary because the Service Provider will be investment agnostic with respect to the underlying investments.[9]

However, for purposes of clarity, the definition of "compensation" used for purposes of the Level-to-Level Exemption should not include educational support, educational conferences, or other activities that are primarily educational in nature. Further, any activity that is in furtherance of education under FINRA Rule 1250 (Continuing Education Requirements), should not be considered "compensation" for purposes of disclosure as described in FINRA Rule 2320(g)(4)(C) and NASD Rule 2830(l)(5)(C). These educational activities are useful not only to the Service Provider receiving such education, but the benefits also flow through to the Service Provider's clients. Additionally, in many cases, it would be virtually impossible to place a value on the various types of educational support available to Service Providers.

In addition, to facilitate consistency across ERISA compliance requirements within the Department's purview, the Level-to-Level Exemption should incorporate the concept of "Excludable Non-Monetary Compensation" found within the Form 5500, Schedule C instructions. Thus, the Level-to-Level Exemption would exclude non-monetary compensation of insubstantial value (such as gifts or meals of insubstantial value) that is tax-deductible for federal income tax purposes by the person providing the gift and not taxable to the recipient. The gift would need to be valued at less than $50, and the aggregate value less than $100 annually, but gifts of less than $10 would not need to be counted towards the $100 limit.

Lastly, the disclosure requirements under the Level-to-Level Exemption should not include any projection of fees because projecting fees to be retained by the Service Provider is inconsistent with existing FINRA guidance described. In addition, because levelized compensation is, by construct, simple and transparent, disclosures should not be complex and confusing.

B. Method of Disclosure

Separately, as noted above, it is important that the method of disclosure not be so complex as to limit the value of the disclosure to Retirement Investors. Accordingly, the ARA recommends that a Service Provider's Level-to-Level Exemption disclosure for Retirement Investors be a hybrid (with flexibility in design to minimize major systems design challenges) that can utilize the same disclosure elements used in the already-programmed ERISA section 404(a) and 408(b)(2) disclosure regimens currently in place.

6. Service Provider Documentation

[9] An exception to this rule could be made, however, if the Department were to adopt the exception from the Level-to-Level requirement for annuity and lifetime income products as described in section I.D.1 of this letter.

Lastly, the Level-to-Level Exemption should require that a Service Provider include written documentation as to why a rollover was in the best interest of the Retirement Investor. The ARA suggests that the DOL require Service Providers maintain an analysis in their files describing the factors that led to the Retirement Investor's decision to effect a rollover. The purpose of the documentation is to ensure that the rollover was in the Retirement Investor's best interest and not a subterfuge for the purpose of generating additional fees. This analysis would be in the form similar to that described in FINRA Notice 13-45, which requires, as relevant, that the recommendation be in the best interests of the customer, based on information about the options obtained through reasonable diligence, and taking into account factors such as tax implications, legal ramifications, and differences in services, fees and expenses between the retirement savings alternatives.

E. Proposed Exemption Language

The Level-to-Level Exemption should contain the following formal language:

(a) ***In general.***

(1) The exemption provides relief from the restrictions of ERISA sections 406(a) and 406(b) and the sanctions imposed by Code sections 4975(a) and 4975(b) for certain transactions in connection with the provision of investment advice to Retirement Investors for:

(A) The decision to transfer assets from a Plan or an IRA into a Plan or an IRA, and

(B) The provision of investment advice or discretionary management to a Plan or IRA subsequent to a transfer described in (1)(A) of this section, if the following conditions are met:

(2) **(A)** *Levelized Compensation.* The Service Provider (including any employee, agent, or registered representative) that provides investment advice does not receive from any party (including an affiliate of the Service Provider), directly or indirectly, any fee or other compensation (including commissions, salary, bonuses, awards, promotions, or other things of value, other than educational support or services) that varies depending on the basis of a Retirement Investor's selection of a particular investment option; provided, however, that in the case of an annuity or Lifetime Income Product, the fee or other compensation received by a Service Provider shall not vary within the range of annuities or Lifetime Income Products considered and documented pursuant to the section 4(A) of this section rather than across multiple classes of investment options;

(B) *Agreement Prior to Effecting a Transaction.* The Service Provider and Retirement Investor enter into an agreement prior to effecting any transaction related to the investment advice or discretionary management; and

(C) *ERISA Section 404 Duty of Prudence.* The Service Provider represents within the agreement described in section (2)(B) of this section that the Service Provider will discharge his duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(3) **(A)** *Disclosure of Compensation – Investment Advice or Discretionary Management*. The agreement described in section 2(B) of this section shall include a description of the compensation to be paid to the Service Provider for investment advice or discretionary management. Such disclosure shall include a description of any direct or indirect compensation that the Service Provider reasonably expects to receive in connection with the investment advice or discretionary management.

(B) *Disclosure of Compensation – Rollover Recommendations*. For transactions involving the transfer of assets from a Retirement Plan to an IRA that is advised or managed by the Service Provider, the Service Provider must disclose all compensation payable to the Service Provider, with a comparison of the direct and indirect compensation (if any) payable to the Service Provider from the Plan or the sponsor of the Plan versus the compensation paid to the Service Provider from the IRA.

(4) **(A)** *Documentation of Best Interests Standard*. To the extent a rollover transaction occurs, for a period of six years after the transaction, the Service Provider must maintain documentation that a rollover transaction was in the best interest of the Retirement Investor. Such documentation shall include a description that the recommendation is in the best interests of the Retirement Investor based on information about the options obtained through reasonable diligence, and taking into account factors such as tax implications, legal ramifications, and differences in services, fees and expenses between the retirement savings alternatives.

(5) *Definitions.*

(A) *Individual Retirement Account or IRA.* The term "Individual Retirement Account" or "IRA" means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in Code section

408(a) and a health savings account described in Code section 223(d).

(B) *Lifetime Income Product.* The term "Lifetime Income Product" means products that either provide an immediate, fixed stream of income or provide a fixed, lifetime stream of income, such as through a qualifying longevity annuity contract.

(C) *Plan.* The term "Plan" means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(D) *Retirement Investor*. The term ''Retirement Investor'' means:

(1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution, and

(2) The beneficial owner of an IRA acting on behalf of the IRA.

(E) *Service Provider*. The term "Service Provider" means any broker-dealer, registered representative, investment adviser, investment adviser representative, insurance salesperson, or other adviser of any kind, that provides investment advice to a Retirement Investor on a levelized basis as described in the Level Compensation-to-Level Compensation exemption.

II. Existing Guidance Should Not Be Impacted

In addition to the Level-to-Level Exemption, the ARA believes it is important that the Department affirm the application of the existing guidance contained in Advisory Opinion 97-15A[10] (the "Frost Opinion") and consider applying the underlying holding more broadly, consistent with the new landscape created by the Proposal.

The Frost Opinion has been embraced by investment advice fiduciaries as a way to provide unconflicted investment advice while still receiving payments from third parties. The advisory opinion considered an arrangement under which Frost Bank, as an investment advice fiduciary, made recommendations to plan fiduciaries with regard to the mutual funds into which plan assets should be invested. Frost Bank received fees directly from some of the mutual funds which would, on the face, have been a violation of ERISA sections 406(b)(1) and (b)(3).[11] Frost Bank's agreement with the plans investing in these funds, however, was structured so that the third party fees it received were used ". . . to benefit the plan either as a dollar-for-dollar offset against the fees the plans would be obligated to pay Frost for its services or as amounts credited directly to the Plans." Based on this factual predicate, the Department opined that Frost had not violated the

[10] DOL Adv. Op. 97-15A (May 22, 1997); *see also* Field Assistance Bulletin 2007-1 (February 2, 2007).
[11] It is not clear from the facts presented whether the mutual funds paid varying or level fees.

prohibition against dealing with the assets of an ERISA plan in its own interest or receiving payments for its own personal account in violation of ERISA section 406(b)(1) or (b)(3).

There is nothing in the Proposal that would contravene the holding of the Frost Opinion. The reasoning underlying the factual analysis would apply to an investment advice fiduciary irrespective of the regulatory definition used to characterize such status. Because of the unconflicted nature of the advice given under the template of the Frost Opinion, the ARA recommends that the Department specifically affirm its continued validity in the preamble to the final rule or in other Department guidance.

In addition, the ARA believes that to further the Department's goal that unconflicted investment advice be widely available, the final rule (or accompanying guidance) should clarify that the reasoning of the Frost Opinion would apply in any circumstance where third party payments to a fiduciary are level, reasonable for the services provided and otherwise disclosed to the responsible plan fiduciary or Retirement Investor.[12] In other words, it should not be necessary to enter into a formal "offset" agreement as long as the compensation being received by the investment advice fiduciary, whether paid as commissions, 12b-1 payments or otherwise, is level and disclosed. The economic substance of the service provider's compensation in either model is the same. For this reason, the Department should acknowledge in the preamble to the final rule or in other guidance, that the substance of the transaction is the determinative factor. As such, the receipt of levelized compensation with appropriate disclosure would not violate ERISA sections 406(b)(1) or (b)(3) irrespective of whether there exists a formalized "offset" arrangement.

III. Definition of Fiduciary Advice

The ARA agrees with the Department that the current regulatory definition of fiduciary advice may be antiquated and that an update to the ERISA section 3(21) definition of investment advice fiduciary may be necessary to reflect current realities. The ARA, however, has some concerns regarding the general breadth of the Proposal. In particular, the ARA is very concerned that certain aspects of the Proposal would have such a broad sweep as currently drafted that it could deny access to critical services and information to fiduciaries, participants, beneficiaries and IRA Holders. As such, the ARA explains it concerns below and makes suggestions to enhance the existing Proposal to address these concerns in a participant- and market-friendly manner.

A. Concerns about the "Specifically Directed" Portion of the Definition

Under proposed regulation section 2510.3-21(a)(2)(ii), conversations with clients or a prospective client about an investment, a distribution or rollover, or the hiring of an investment adviser or manager will potentially be a fiduciary act if the recommendation is either individualized or "specifically directed" to the advice recipient. Because any such recommendation need only be "specifically directed" to the individual for their general consideration, the ARA suggests that this prong of the functional test be eliminated. The implications of this broad standard appear to be sweeping and would apparently treat the following as fiduciary acts:

[12] In this regard, the disclosures required under ERISA section 408(b)(2) would already meet this requirement with respect to plans subject to ERISA.

- *Ordinary Sales and Support Activities.* Ordinary sales and support activities (beyond the limited relief described in the Proposal's carve-outs) if coupled with any kind of discussion, comparison or identification of available investment options or strategies, may be a fiduciary act because such activities could be considered specifically directed to an investor. Many plan sponsors and fiduciaries use the sales and support process as a learning tool to enhance their knowledge of the products, services, and additional tools available in the industry. For example, a plan fiduciary may request information about new products in the industry. If an adviser then provides this information as part of the sales process in a presentation specifically directed to the potential client, to the extent that these products could be considered investment products, the adviser, if subsequently hired, could be categorized as a fiduciary with respect to these sales-related activities.
- *Providing a Research Report, List of Potential Investments or List of Service Providers.* The simple act of handing a research report that discusses a potential investment, or a select list of potential investments or service providers, to an investor may be a fiduciary act because it could be considered specifically directed to the investor. Advisers are regularly asked to provide (for no specific compensation) information on other services – such us outside education vendors – that have no affiliation or compensation arrangement with the adviser.
- *Sample Fund Menu.* Presenting a non-customized sample participant-directed plan menu may be a fiduciary act in connection with a response to an RFP if the potential client ultimately selects the adviser. As plan sponsors and plan fiduciaries have heeded the advice of the Department, they are increasingly focused on conducting RFPs, RFIs, and other benchmarking exercises. Requests for a sample work product addressing the potential client's needs are a key part of many RFP, RFI, and other exercises.
- *Responding Without Advice to Participant Inquiries about Investment Funds.* Responding to plan participants' questions about which designated investment options under their 401(k) plan may fall within a particular asset class would be a fiduciary act. In an era of tight corporate budgets, an adviser will often serve as a resource for employees to understand the operation of their retirement plan. As such, advisers may be asked questions seeking basic information – such as whether a fund is called a "growth" or a "bond" fund. In response, they will often point to (without formally recommending) specific funds in a lineup to answer the question.
- *Adviser-Wholesaler/Other Service Provider Interaction.* Wholesalers who promote their funds to a fiduciary adviser to a plan may be deemed a fiduciary because that recommendation could be considered specifically directed to the plan. Further, professional advisers regularly receive similar sales and support activities that are educational in nature from wholesalers and other service providers that help enhance their services and support to their end participants, plan sponsors, and plan fiduciary clients.

None of these activities are fiduciary activities under current law, and, as highlighted, they play a significant role in facilitating the efficient utilization of retirement plans and beneficial retirement plan products. As such, it is important that the Department recognize that sales and informational activities should continue as a key part of the retirement plan marketplace that promotes innovation. Statements or recommendations written for the general public about particular investments do not create the fiduciary relationship of trust between the publisher and plan fiduciaries, participants or IRA holders. To address these concerns, the ARA suggests that the Department revise the Proposal to ensure investor access to basic information and allow financial advisers and other service providers to educate, inform and sell products and services by eliminating the "specifically directed" provision in the advice definition. At a minimum, the ARA respectfully requests that the Department include a section in the preamble to the final regulation that states that the activities described above either do not constitute fiduciary acts or fall within the Department's carve-outs.

B. Concerns about the "Recommendation" Portion of the Definition

Under proposed regulation section 2510.3-21(a)(1)(iv), advice would include "[A] recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (i) through (iii)." The ARA is concerned because anyone providing a simple referral of another consultant, adviser, or other service provider, or even a list of multiple providers, could conceivably be classified as a fiduciary under this proposed language. The ARA does not believe that this outcome was the Department's intent, and encourages the Department to limit its scope significantly. This concern applies in many situations, including the following:

- Recommending other service providers,
- Recommending platform providers, and
- Advising on the availability of additional products or services.

Further, while the ARA understands that the Department is particularly concerned about abuses in the IRA context, the ARA believes that its own concerns noted above are also relevant to services recommended to IRAs as well.

1. Recommending Other Service Providers

Some advisers and other service providers elect to focus on a carefully defined menu of services, such as investment option selection only. The ARA is concerned that advisers who elect to specialize in this way may be considered fiduciaries for other purposes because they, often out of a desire to help their clients find other specialized advisers, make recommendations of other similarly specialized service providers for services they do not provide. The ARA suggests that the Department make it clear that such a recommendation, when no compensation is specifically paid to the adviser (whether from the plan sponsor, plan fiduciary, or the other adviser) for the recommendation is not a fiduciary act. This need for clarification is illustrated as follows:

Adviser C has contractually agreed to provide investment advice as an ERISA section 3(21) investment adviser to a plan but does not agree to provide advice on plan distributions (including rollovers) and has specifically carved out such services from Adviser C's duties. Adviser C is compensated on a level basis by the plan (*i.e.*, a fixed fee or compensation equal to a specified basis point level applied to plan assets). The plan fiduciary (which may be the plan sponsor itself) may request a recommendation from Adviser C regarding the availability of a separate adviser that may provide IRA advisory services to participants that roll assets out of the plan. Adviser C will receive no direct or indirect compensation for services of the rollover adviser or from the rollover adviser. Even though Adviser C will not receive compensation in connection with the recommendation of rollover adviser or in connection with the rollover adviser's services, Adviser C would appear to be an ERISA section 3(21) fiduciary for purposes of the rollover advice because he or she "recommended" the rollover adviser.

2. Recommending Platform Providers

The ARA is concerned that advisers and third party administrators who make recommendations (including a simple list) of potential recordkeepers who offer a platform of investment options may be considered fiduciaries because of these recommendations, even though the platform providers themselves may be able to use the platform provider carve-out discussed in further detail below. The ARA suggests that the Department make it clear that it is not a fiduciary act to recommend a recordkeeper or other service provider who makes available a platform (or similar investment mechanism) that includes a broad range of investment options that are made available for designation by a plan fiduciary as plan investment alternatives. This approach will acknowledge and reflect the key role of helpful intermediaries – whether TPAs or advisers – in many segments of the retirement market. While the ARA recognizes that this group might be addressed via a carve-out rather than a change to the definition itself, because this group should be excluded in a broad-based manner, the ARA suggests it is better placed in the definition itself. The need for this clarification is illustrated as follows:

Consider two plan sponsors – Akemi's Piano Movers and Lorena's Surgical Supplies. Akemi's Piano Movers has four employees and goes directly to Platform Providers 1, 2, and 3 and asks for proposals to service its plan. Lorena's Surgical Supplies has fifty employees and has hired Adviser D to assist with a platform provider search. At Adviser D's recommendation, Lorena's Surgical Supplies contacts Platform Providers 1, 2, and 3. In both cases, Platform Providers 1, 2, and 3 may provide the exact same proposals and information. However, under the Proposal, Adviser D would appear to be a fiduciary for "recommending" Platform Providers 1, 2, and 3. Just because Adviser D has assisted with this process, Adviser D should not be considered a fiduciary to Lorena's Surgical Supplies.

3. Advising on the Availability of Additional Products or Services

The ARA is also concerned that the broad concept of a "recommendation" is inconsistent with prior Department guidance under ERISA section 408(b)(2) as set forth in existing regulation section 2550.408b-2(e) and the examples at 2550.408b-2(f) allowing for sales by a person with an existing, but distinctly separate, relationship with a plan. To ensure consistency with longstanding guidance and common practice, the ARA recommends that the Department should specifically exclude "self-recommendations" to provide a service as only a sale, not fiduciary advice, so long as the adviser has not specifically agreed by contract to already serve as a fiduciary for this purpose. As noted above, because of the importance of such a broad-based protection, the ARA suggests that this provision is better placed in the definition itself rather than in a carve-out. The need for this clarification is illustrated as follows:

The Duane Architectural Services Retirement Committee previously hired Adviser E to assist the Committee in evaluating and selecting investment options in the Duane Architectural Services 401(k) Plan. Adviser E's contract provides that Adviser E serves as an ERISA section 3(21) fiduciary in making investment recommendations to the Committee. Due to a slowdown in new design and construction, Duane Architectural Services has seen a dramatic drop off in its business and the leadership of the Duane Architectural Services has refocused its efforts on dramatically ramping up its sale activities. Hearing that the members of the Duane Architectural Services Retirement Committee will need more time to focus on its core business, Adviser E offers to assume full discretion as an ERISA section 3(38) fiduciary for selecting the Duane Architectural Services 401(k) Plan's investment options. Adviser E has never served in this role before and should not be a fiduciary (and thus potentially committing a prohibited transaction under ERISA section 406(b)) for simply offering his or her additional ERISA section 3(38) services at a different or higher fee to the Duane Architectural Services Retirement Committee.

4. Impact on the IRA Marketplace

As noted above, the ARA acknowledges the Department's concern that the IRA marketplace is unique because of the lack of "plan level" or similar intervening fiduciaries that may provide a level of diligence and protection to IRA Holders. However, the ARA suggests that a similar relaxation of the "recommendation" prong of the Proposal, as outlined above, is appropriate for IRAs as well. With respect to recommending other providers or platforms, if a provider is not receiving compensation from a third party in connection with a recommendation, there is no conflict of interest, whether at a plan or IRA level, and therefore no distinction should be made by the Department.

In addition, the retirement services industry already widely recognizes that an adviser should not recommend themselves for additional fiduciary services when that recommendation is made in a fiduciary capacity. To the extent that an adviser might be conflicted, there are numerous independent services that are now regularly engaged to advise an IRA Holder on whether to move his or her IRA into a consolidated arrangement with an adviser with whom the IRA Holder has an arrangement. These independent services have developed specifically to provide the protections to the IRA Holder that the Department might feel are missing in the IRA marketplace. As such, given the high degree of recognition that independent services are necessary in many situations involving potential conflicts in the IRA marketplace, it is not necessary to impose stricter restrictions with respect to "recommendations" of service providers or ancillary services in the IRA marketplace.

IV. Carve-Outs

A. The Concept of "Carve-Outs" In General

As an initial matter, the ARA is concerned that many of the carve-outs described below contain several conditions that a person must satisfy in order to obtain the benefit of the carve-out. The negative inference within those conditions is that if a person does not satisfy every condition to the carve-out, then the person will be a fiduciary, and in most cases, the transaction will result in a non-exempt prohibited transaction. To avoid foot faults in satisfying the carve-outs that result in dramatic consequences, such as causing a non-exempt prohibited transaction, the ARA suggests that the Department offer persons relying on the carve-out some ability to cure any missteps before falling outside of the carve-out. The ARA believes that this approach would be protective of the classes of investors and the transactions that the Department is seeking to protect while providing service providers with the ability to avoid the dramatic consequences that may come with inadvertent errors in complying with these new rules.

B. Counterparty Carve-Out

The ARA is concerned that the scope of the counterparty carve-out set forth in proposed regulation section 2510.3-21(b)(1) (the "Counterparty Carve-Out") is too narrow. As drafted, the Counterparty Carve-Out effectively provides a safe harbor for persons who sell to plans with at least 100 participants or to fiduciaries who manage more than $100 million in assets as long as certain requirements are met. As described in section III.B.3 of this letter, the ARA is concerned that as a result of the Proposal, there is no ability for persons with existing relationships with plans to sell additional products or services to small plans. This result is particularly troublesome for the small plan marketplace where plan sponsors often require different levels of service and have limited internal resources available to expend on their retirement plan programs. Thus, if the Department is unwilling to exclude "self-recommendations" from the definition of fiduciary advice, the ARA recommends that the Department include a limited counterparty carve-out to small plans for these sales.

C. Platform Provider Carve-Out

As already noted above, the ARA also has concerns about the platform provider carve-out set forth in proposed regulation section 2510.3-21(b)(3) (the "Platform Provider Carve-Out"). These concerns are categorized into the following four areas:

- Offering a platform is not a fiduciary act;
- The carve-out does not reflect the operation of the marketplace;
- Certain Platform Provider Carve-Out definitional provisions should be revised and expanded; and
- IRAs should be included in the Platform Provider Carve-Out.

1. Offering a Platform is Not a Fiduciary Act

The ARA is concerned that the Platform Provider Carve-Out itself marks a significant departure from the traditional regulatory landscape. Offering and making a platform available has not been viewed as a fiduciary act by courts interpreting ERISA.[13] Thus, and in accordance with well-established case law, the Proposal should not assume that offering these products is fiduciary in nature and there should be no need for a "carve-out." At a minimum, this is a strong example of why a reasonable opportunity to cure "foot faults" without negative consequences, as discussed above, is important and necessary.

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[13] *Hecker v. Deere & Co.*, 556 F.3d 525 (7th Cir. 2009); *see also Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013), *Zang v. Paychex*, 728 F.Supp.2d 261 (W.D.N.Y. 2010); *Santomenno v. John Hancock Life Ins. Co.*, No 2:10-cv-01655 (WJM), 2013 WL 3864395 (D.N.J. 2013).

2. The Carve-Out Does Not Reflect the Operation of the Marketplace

The ARA is concerned that the Platform Provider Carve-Out does not reflect the long-standing operation of the retirement industry. Although the sale of a platform directly to a plan fiduciary (commonly the plan sponsor itself) is common in small plans, beyond this distinct segment of the retirement plan marketplace, there are numerous intermediary parties who play a key and valuable role in selecting a platform provider whose activities should be included within the scope of the Platform Provider Carve-Out.

Plan sponsors and plan fiduciaries often ask third party administrators and advisers to recommend recordkeepers that may present an investment platform to a plan sponsor. This situation is highlighted in the example set forth in Section III.B.2 above. As suggested above, the ARA recommends that the Department clearly state that these types of recommendations are not "fiduciary advice" in the first place. However, recognizing that the Department may decide to retain the Platform Provider Carve-Out, the ARA makes additional definitional suggestions designed to include these key intermediaries in the scope of the carve-out's relief as set forth in Section IV.C.3 below.

3. Certain Platform Provider Carve-Out Definitional Provisions Should be Revised and Expanded

The ARA suggests that three key definitional concepts be clarified and defined broadly:

First, the ARA notes that the Department does not define the term "platform or similar mechanism" within the Platform Provider Carve-Out itself. Given that the industry is constantly evolving, a principles-based approach would be the best way to help define the term "platform or similar mechanism." Using this approach, the ARA would suggest that the term "platform provider" include not only a provider itself, but an intermediary facilitating the involvement of a platform provider, whether a third party administrator, adviser, or other service provider, who makes a recommendation of an unrelated service provider for consideration in any manner (but levelized at the intermediary level regardless of the platform provider selected) so long as the facilitator reasonably believes that the actual platform provider will satisfy the requirements for utilizing the Platform Provider Carve-Out.

Second, the ARA suggests that the Department define a platform as one that includes a broad definition of a "broad range of investment alternatives." In doing so, the ARA suggests that the Department clarify that a financial institution may qualify as a "platform provider" that offers a "broad range of investment alternatives" even if the platform incorporates some of the financial institution's core products without unrelated third-party products being included. This inclusion would be based upon the same rationale that the Department used in the BIC Exemption that many financial institutions rely on the ability to sell proprietary products to support their business models. Thus, where a platform provides its own core products (*e.g.*, a stable value fund) for valid business reasons, the use of a proprietary product in one or more asset classes should not preclude the usage of the Platform Provider Carve-Out.

Third, the ARA suggests that the Department clarify the Platform Provider Carve-Out to make it clear that it applies to all qualified plans. The ARA recognizes that the reference to ERISA section 3(3) appears to be intended to reflect the full range of qualified plans, because the Proposal also includes a reference to default investments. Some ARA members, however, have expressed a concern that this language could be read to mean that the Platform Provider Carve-Out is only available to participant-directed defined contribution plans. A simple clarification or explanation in preamble language would address this concern.

4. IRAs Should Be Included in the Platform Provider Carve Out

The ARA recommends that the Platform Provider Carve-Out be made specifically applicable to providers who offer platforms to IRAs. As described in Section IV.C.1, the ARA asserts that offering a platform (whether for a qualified plan or an IRA) with a broad range of investment options should not be considered a fiduciary act. The Platform Provider Carve-Out itself appears to have been designed for direct sales without the need for a fiduciary intermediary between a small business and a sophisticated provider. The relationship between an IRA Holder and a platform provider is the same. Accordingly, IRAs should be included in the Platform Provider Carve-Out.

Notwithstanding the foregoing, the ARA recognizes that the Department may still be hesitant to expand the Platform Provider Carve Out to IRAs. As such, the ARA suggests that the Platform Provider Carve Out could be extended to IRAs as long as any one of the following three requirements are satisfied:

- *Open Architecture IRA Platform*. A platform provider (as defined as suggested in Section III.C.3) provides a broad, "open architecture"-style IRA platform and provides a notice to the IRA Holder consistent with the requirements that are addressed in an ERISA section 404(c) notice that would be provided in a participant-directed ERISA plan. Notably, using an ERISA section 404(c) standard applies a well-understood concept, thus reducing regulatory burden.
- *Platforms with No Proprietary Investments*. A platform provider with no proprietary investments on the IRA platform receives levelized compensation and makes a contractual representation to the IRA Holder that it is receiving levelized, unconflicted compensation from the investments on the platform and, as such, is accepting fiduciary responsibility for such selections.
- *Platforms With Proprietary Investments or Providing Platform Providers Compensation That Is Not Level*. A platform provider who has proprietary investments on the IRA platform, or who receives compensation in connection with the platform that is not levelized, must have a third-party fiduciary to identify and approve the funds for inclusion on the platform.

The ARA suggests that this approach protects the interests of IRA Holders while continuing to allow IRA Holders access to the wide range of investment options available under most IRA platforms. Similarly, this approach should permit platform providers to continue to provide IRA platforms to their customers without subjecting them to a severe regulatory burden.

D. Investment Education Carve-Out

The ARA appreciates the Department's ongoing efforts to recognize the important distinction between fiduciary investment advice and non-fiduciary investment education. Individuals who neither render investment advice to plan participants nor serve in a fiduciary capacity with respect to those participants often deliver plan important and useful education and enrollment assistance. These educators and enrollers provide a valuable service to plan participants without the added costs that a plan would incur if they were classified as fiduciaries. The ARA has two specific areas of concern with respect to the investment education carve-out set forth in proposed regulation section 2510.3-21(b)(6) (the "Investment Education Carve-Out"):

- The Investment Education Carve-Out's treatment of actual investment options in asset allocation education, and
- Investment education in defined benefit plans.

1. The Investment Education Carve-Out's Treatment of Actual Investment Options in Asset Allocation Education

While the ARA appreciates the Department's thoughtful approach to the issue of education, the ARA is concerned that the Investment Education Carve-Out unnecessarily changes the education and advice framework established by Interpretive Bulletin 96-1. Specifically, the ARA believes that modification of the Investment Education Carve-Out is necessary to avoid unnecessary complexity for plan participants and foster sound investment decisions.

The ARA recommends that the Department revise the Investment Education Carve-Out to permit the use of asset-allocation models that refer to specific investment alternatives under the plan without giving rise to fiduciary status, provided such models are "pre-defined asset-allocation models" that satisfy all of the following conditions:

- *Unconflicted Fiduciary Selects the Investment Products Within the Model*. The investment products within the model must be determined by a plan fiduciary who has no affiliation with any product provider included in the model.
- *Levelized Compensation*. Any compensation received by a plan service provider providing the education must be level across all investment products available in the plan and, therefore, not changed by the inclusion of any specific investment product within the model.
- *Generally Accepted Investment Theory.* The models must be constructed based on a prudent process using generally accepted investment theory.

This modification to the Investment Education Carve-Out would apply solely to participant-directed individual account plans and is necessary because:

- *Role of Educators*. Plan education and enrollment assistance are often delivered by individuals who neither render investment advice to plan participants nor serve in a fiduciary capacity with respect to those participants. These educators and enrollers provide a valuable service to plan participants without the added costs that a plan would incur if they were classified as fiduciaries.

- *Connecting the Dots.* For plan participants, connecting the dots from asset classes to specific funds is critical, especially for unsophisticated investors who are not inclined or experienced enough to analyze the characteristics of each investment option. For example, while Julie might be told that an asset allocation model should include a large-cap stock fund and an intermediate-term bond fund, she may not know that high-dividend stock funds are less volatile than momentum-oriented stock funds, or that short-term government bond funds are affected by market conditions in a way that is completely different from low-duration high-yield bonds. Many participants instinctively choose funds based on historical returns without regard to important fund characteristics. For this reason, participants would be better served by providing them with pre-defined asset allocation models, wherein plan fiduciaries use a rigorous and prudent process to determine appropriate funds for each asset class based on the models' risk/return objectives.

Accordingly, the ARA strongly believes that this recommended modification to the Investment Education Carve-Out would preclude conflicts of interest, avoid unnecessary complexity for plan participants, and improve participant investment results.

2. Investment Education in Defined Benefit Plans

The ARA is concerned that the Proposal does not make it clear that the Investment Education Carve-Out would apply to a number of common defined benefit plan situations. In the defined benefit plan context, actuaries and third party administrators are often asked to advise on the impact of investment strategy on plan funding or operations. Given the broad sweep of the Proposal, these activities might be read to be investment advice, thus giving rise to fiduciary status. The ARA believes that the Department did not intend to create this outcome and suggests that the Department specifically include common defined benefit plan scenarios within the scope of the Investment Education Carve-Out. The following two examples highlight this concern and suggestion:

Actuary F provides actuarial services to Carol's Lighting Co.'s defined benefit plan. The defined benefit plan fiduciaries are considering two investments: (1) a real estate partnership and (2) a private equity investment vehicle. The plan's investment consultant has already recommended these two investments. Actuary F is asked to educate the fiduciaries of Carol's Lighting Co.'s defined benefit plan on the liquidity impact of both of these investments and to make recommendations relating to future cash flow needs. Because Actuary F is educating fiduciaries on specific investments, Actuary F could be seen as a fiduciary under the Proposal. The Investment Education Carve-Out should specifically cover the activities of Actuary F described in this example.

Third Party Administrator G has long worked with Tonyal Architectural Design and the fiduciaries of the Tonyal Architectural Design Defined Benefit Pension Plan. At a quarterly fiduciary meeting, Third Party Administrator G is asked to provide, and provides, education to the fiduciaries of the Tonyal Architectural Design Pension Plan about one of the plan's investments that has a high degree of volatility. This education involves the pros and cons of continuing to hold the investment. Plan Administrator G could be seen as a fiduciary under the Proposal. The Investment Education Carve-Out should specifically cover the activities of Third Party Administrator G described in this example.

E. Service Providers

Historically, there has been little concern that accountants, actuaries, and attorneys acting in their professional roles would be considered fiduciaries under the current five-factor test. Consistent with this long-standing view, the preamble to the Proposal specifically states that "[t]he new proposal clarifies that attorneys, accountants, and actuaries would not be treated as fiduciaries merely because they provide such professional assistance in connection with a particular investment transaction." However, the Proposal itself does not contain this clarification. The ARA recommends that the Department either clarify the Employee Carve-Out in Proposal section 2510.3-21(b)(2) to include professional service providers providing professional services in connection with a particular investment transaction or include a new carve-out specifically providing this clarification.

In addition, consistent with its comments in Section IV.D.2 above with respect to defined benefit plans, the ARA is concerned that the scope of the intended clarification itself is too narrow given the broad scope of the definition of "investment advice" in the Proposal. Many professionals are often asked, as part of their role as a trusted adviser, for recommendations of persons who might be able to provide services that could constitute investment advice under Proposed Regulation section 2510.3-21(a)(1). The recommendation of such a person would itself appear to be an act described in Proposal section 2510.3-21(a)(1)(iv). As such, a professional could easily be inadvertently caught in the definition of "investment advice" because he or she is likely providing this recommendation while engaged by the client in return for payment of a fee as described in Proposal section 2510.3-21(a)(1) and he or she is specifically directing the recommendation to the client as described in Proposal section 2510.3-21(a)(2)(ii). To avoid this inappropriate result, especially considering the significant professional obligations of loyalty accountants, actuaries, and attorneys already have to their clients, the ARA recommends that the carve-out for these professionals specifically recognize that the recommendation by a professional of a person to provide potential "investment advice" is not a fiduciary act. Failure to provide this relief will stymie the ability of professionals to provide the comprehensive, professionally governed services upon which their clients rely on a daily basis.

V. The Best Interest Contract Exemption

The ARA appreciates the Department's significant efforts to develop the BIC Exemption. However, the ARA believes compliance with the requirements of the BIC Exemption, as proposed, will be difficult, regardless of the service provider involved – whether an adviser, a financial institution or its affiliates, or related entities. The following highlights the challenges created by the BIC Exemption as proposed and includes suggestions that are designed to address these challenges.

A. The BIC Imposes Significant Costs

The ARA is concerned that the BIC Exemption will require that service providers invest significant resources – both time and financial – to attempt to ensure compliance with its terms. While ongoing disclosures could be considered a laudable objective, given the limited focus by plan fiduciaries and participants on ERISA section 404(a) and 408(b)(2) disclosures, the actual benefits derived by IRA Holders or plan fiduciaries is likely to be minimal. With respect to service providers, the need to provide real-time updates will require significant ongoing compliance resources that will, in the end, limit the ability of many service providers (especially at the smaller end of the market) to service the retirement industry and will likely be factored into increased costs for plans and IRAs. However, small service providers will not be the only persons adversely affected by the BIC Exemption's scope and cost. Due to the consolidation trend in the retirement services industry, large service providers will face similar challenges, but at a greater scale because of the complexity of their corporate structures. Neither large nor small entities should face the significant regulatory burdens triggered by the BIC Exemption's terms because of an entity's complexity or, alternatively, lack of resources.

B. Clarification of Where the BIC Exemption Is, and Is Not, Required

Consistent with the ARA's comments regarding the Level-to-Level Exemption in Section I above, the ARA suggests that the Department clarify that exemptive relief under ERISA section 406(b) is not required for service providers who are compensated on a level and unconflicted basis because those service providers are unable to affect the amount and timing of their compensation. The preamble to the BIC Exemption states that its purpose is to permit advisers to receive variable compensation in connection with services provided to Retirement Investors.[14] Notwithstanding this statement, examples elsewhere in the preamble to the BIC Exemption also suggest that the BIC Exemption may be necessary to provide relief for advisers working within a level compensation environment.[15] The ARA suggests that the Department clarify that these examples were not meant to override the 40 years of guidance that stands for the proposition that there is no ERISA section 406(b) violation if a service provider cannot affect the amount or timing of their compensation.[16] The ARA suggests that the Department could provide this clarification by clearly stating in the preamble to the final BIC Exemption that advisers who are paid on a levelized basis (whether directly or through third party payments) are not receiving compensation that triggers a prohibited transaction requiring the utilization of the BIC Exemption.

C. The BIC Exemption Should Be Made Available and Modified to Address Small Plans

1. Inclusion of Small Plans in the BIC Exemption

The ARA suggests that the definition of "Retirement Investor" set forth in the BIC Exemption be expanded to include small, participant-directed plans. Small, participant-directed plans currently comprise a very large segment of the retirement plan marketplace, and many

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[14] 80 Fed. Reg. 21967. The capitalized term "Retirement Investor" in this Section V refers to the definition of "Retirement Investor" in BIC Exemption section VIII(l).
[15] 80 Fed. Reg. 21971.
[16] DOL Adv. Op. 99-03A (Jan. 25, 1999); DOL Adv. Op. 86-20A (Aug. 29, 1986).

advisers that service the small plan market are reliant on the compensation models permitted under the existing pre-Proposal exemption framework that would become unavailable under the Proposal. Further, when coupled with the exclusion of small plans from the Counterparty Carve-Out, the small plan market would wind up significantly underserved as noted in Section IV.B. As such, the ARA views extending the term "Retirement Investor" to include small, participant-directed plans a key item necessary to preserve the diverse services available to the small plan marketplace.

2. Special BIC Exemption Provisions for Small Plan

If the Department makes the BIC Exemption available to small, participant-directed plans, the ARA suggests that the BIC Exemption be revised to reflect the fact that small, ERISA-covered plans are already subject to ERISA's robust enforcement protocol. Thus, the BIC Exemption's significant contractual obligations and disclosure requirements are not necessary and should not apply to small ERISA-covered plans. Also, as described in Section II, the ARA recommends that the Department clarify that service providers that are compensated on a levelized basis, whether received directly or indirectly (including from third-party payment sources), should not be required to satisfy the BIC Exemption. From an economic standpoint, it should not matter where a service provider's compensation originates, as long as the service provider is paid on a level basis and the amount compensation is disclosed. To require service providers to restructure their contracts when they are already receiving unconflicted levelized compensation simply because a third party is making direct payments through commissions or other structures is an unnecessary financial and regulatory burden.

In addition, the ARA recommends that the following special rules apply to small ERISA-covered plans eligible to utilize the BIC Exemption:

- *Cash and Cash Equivalents*. A special rule should be included clearly stating that cash or cash equivalent investments do not result in variable compensation that would require the use of the BIC Exemption. This is because, currently, most advisers are not paid plan assets that are invested in cash and cash equivalents. Thus, an adviser's compensation cannot be levelized across investments when the plan offers cash and cash equivalents because the compensation on those assets will be zero while the compensation on the plan's remaining assets will be some amount more than that. The ARA recommends this change because, as a result of the Proposal, many advisers will move from their current variable compensation models to a level fee model. Those advisers will need sufficient regulatory flexibility to permit them to avoid having to comply with the BIC Exemption if they wish to forego charging a fee with respect to investments in cash and cash equivalent vehicles. Without this special rule, the Department may inadvertently favor one investment vehicle (*e.g.*, group annuity contracts) over another (*e.g.*, trust structures). This potential outcome is because it may be easier to justify a group annuity contract with a contract-level fee that incorporates fund costs and fees for cash management than a trust-based product where an advisory or other service provider fee may not normally be applied to a cash investment fund.
- *Self-Directed Brokerage Accounts*. A special rule should be included which provides that a self-directed brokerage account that pays levelized compensation to a service

provider regardless of the actual investments in the self-directed brokerage account does not result in variable compensation that necessitates the use of the BIC Exemption. The rule should also permit a service provider to exclude assets invested in a self-directed brokerage account when providing services to a small plan on a fee basis. Requiring a look-through to the extremely wide range of investments in a self-directed brokerage account would impose a regulatory burden that may be impossible to meet given the number of potential investments. However, requiring level compensation would protect small ERISA-covered plan participants and beneficiaries.

- *Company Stock.* A special rule should be included which provides that "company stock" is per se compliant under the BIC Exemption. For this purpose, "company stock" means an equity security issued by a plan sponsor. Whether it is appropriate for a plan sponsor to make available company stock within their retirement plan is usually determined by fiduciaries who are employed by the plan sponsor or a separate independent fiduciary. In other words, a service provider typically would have no input on the appropriateness of including company stock in a plan. As such, a service provider serving as a fiduciary to a Plan typically "carves out" company stock from their fiduciary agreement. Because the service provider is not providing advice or serving as a fiduciary with respect to company stock, these service providers typically do not charge a fee with respect to assets of a plan invested in company stock. Because a service provider's compensation is decreased when a participant invests in company stock, any potential "conflict of interest" posed by company stock is actually decreased. Thus, it makes sense to exclude company stock from the complex analysis and disclosure requirements in the BIC Exemption

D. Applicability of the BIC Exemption to Rollovers

The ARA notes that as drafted, it is unclear whether the BIC Exemption applies to rollover transactions. In this respect, the BIC Exemption focuses on transactions relating to "Assets."[17] While the ARA understands from informal comments that the Department intends for the BIC Exemption to apply to rollover transactions, the ARA suggests that the Department make this clear in any final rulemaking.

E. Potential Changes to Required Disclosures

1. Point of Sale Disclosures

The ARA suggests that the Department should make changes to the disclosure regime required by the BIC Exemption to increase its practicality, while continuing to protect the interests of Retirement Investors in a meaningful way. The BIC Exemption requires a point of sale disclosure be provided prior to the execution of an investment transaction that shows the all-in cost and the anticipated future costs of recommended investments.[18] However, this requirement to project future fees is seen by many as inconsistent with laws promulgated by both the SEC and FINRA. In this respect, FINRA Rule 2210 strictly prohibits communications from projecting performance. The SEC also maintains advertising rules under Rule 482 and 34b-1 that do not

[17] BIC Exemption section VIII(c).
[18] 80 Fed. Reg. 21960, 21985.

permit performance projections and require that any performance information be presented based on standard methodologies.

Even if the Department can coordinate the BIC Exemption's disclosure requirements with the above-mentioned SEC and FINRA guidance, the ARA is concerned that requiring service providers to estimate fees for one, five, and 10-year periods may also be potentially misleading to Retirement Investors.

2. Other Disclosures

The ARA is also concerned about the breadth and scope of the disclosure requirements of the BIC Exemption. In addition to the point of sale disclosure referenced above, the Department is also requiring a public web site showing the direct and indirect compensation payable to a service provider in connection with each investment a Retirement Investor is able to purchase, hold or sell through the service provider and that a Retirement Investor has purchased, held or sold within the last 365 days – including the source of compensation, how compensation varies among investments, and a robust annual written disclosure provided within 45 days of the end of each year. The ARA believes that such disclosure requirements will not actually assist Retirement Investors to make better choices with their retirement accounts. The ARA is also concerned with the costs that will be associated with generating such disclosures and the impact of compliance on both small and large Advisers and Financial Institutions.

In this respect, the ARA believes that the Department has already painstakingly drafted complete disclosure regimes that should be imported into the BIC Exemption. Disclosure obligations under ERISA sections 408(b)(2) and 404(a) took years to formulate and have resulted in significant transparency within the retirement services industry. Thus, for plan fiduciaries that qualify as Retirement Investors under the BIC Exemption, the disclosures currently made available under ERISA section 408(b)(2) should be a condition of obtaining relief described within the BIC Exemption. Moreover, participants in individual account plans already receive robust disclosures pursuant to the ERISA section 404(a) disclosure requirements. Rather than create a new set of disclosures, the Department should simply rely on these existing disclosure structures for any disclosures made to Retirement Investors under the BIC Exemption. The ARA believes that this fix will help substantially reduce costs of complying with the BIC Exemption and will provide Retirement Investors with information that is directly useful and applicable to them.

Similarly, the web site proposed under the BIC Exemption will provide so much information to Retirement Investors that it will be confusing. Rather than helping Retirement Investors with investment decisions regarding their accounts, the likely result of the BIC Exemption's web site requirement will be to reveal trade secrets and other business information to the public. Instead, the ARA suggests that the BIC Exemption should simply rely on existing web site disclosures required under ERISA section 404(a). The retirement services industry has already expended significant resources to create platforms providing these web site disclosures so any additional costs to provide them to Retirement Investors under the BIC Exemption would be manageable. Similar to the ARA's proposed changes to the BIC Exemption's disclosure regime, the ARA believes that this fix will help substantially reduce the costs of complying with the BIC

Exemption and will provide Retirement Investors with information that is directly useful and applicable to them.

F. Electronic Signatures and Negative Consents

As described in the ARA's Level-to-Level Exemption proposed above, the ARA suggests that the Department approve the use of electronic contracts and e-signatures when complying with the BIC Exemption's written contract requirement. Most financial transactions now occur online and many advisers regularly run their businesses through Internet communication with their customers. In addition, because of the ongoing technological sophistication of ordinary, everyday Americans, many Retirement Investors prefer to do business online and over the Internet. It will also be impractical to obtain the written signatures of Retirement Investors that have outstanding relationships with their service providers.

In addition, the ARA suggests that the Department confirm that contracts may be amended through negative consent in order to ensure that a binding contractual relationship is established. While the ARA understands that the Department has been reluctant to bless negative consent in the past, the Department should be willing to do so in this instance where an existing contract is simply being amended to recognize that a service provider will be assuming new duties and responsibilities in connection with the Retirement Investor's account.

G. Transition Relief

A final but very important concern relates to the transition period for implementing the Proposal and related exemptions. As already alluded to, the Proposal will be the most significant regulatory change since the initial release of guidance under ERISA. Business arrangements that have become the norm over the last 40 years will have to be reconstructed to ensure they fit within the Department's desired template for ensuring unconflicted advice. This will mean hundreds of thousands of contracts will need to be redrafted to fit within the new desired paradigm. As part of this process, new disclosure regimes will need to be developed and approved by numerous internal and external compliance departments. Finally, plan fiduciaries will need to review all the new documentation (and do the necessary analysis) to fulfill their responsibilities to ensure the new arrangements are appropriate for their plan.

Because of all the work that will need to be done, it is particularly important that all parties be given sufficient time to transition business models to the new regime of unconflicted advice and levelized compensation. Eight months is simply not enough time to accomplish all the due diligence that will be necessary. The proposed eight month transition period will result in a costlier than necessary disruption to existing business arrangements. For example, the ARA estimates that at a minimum, the existing advisor arrangements relating to more than 400,000 qualified retirement plans will need to be amended in order to accommodate the finalized rule. It is for this reason the ARA strongly recommends that the transition period and applicability date be extended to a date that is at least two years after the date of publication of the final rule. This would allow all parties the time necessary to accomplish the Department's goal of moving to a business model where investment advice is provided in a manner that is free from conflicts of interest. As part the transition relief, the Department should clarify that any prohibited transaction that may occur because of a service provider moving from their current fee structure to a level fee structure or to a structure that complies with the BIC Exemption will be deemed be an exempt prohibited transaction during the transition period. The ARA believes that this extended period of two years will be critical to transition business models in an efficient and cost effective way so that service providers are incentivized to fit within the new landscape that the Department will have established.

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The ARA appreciates the opportunity to work with the Department on these issues of great importance to our diverse membership of retirement marketplace participants. We would welcome the opportunity to discuss these comments further with you. Please contact Craig Hoffman, ARA General Counsel, at CHoffman@USARetirement.org with respect to any questions regarding the matters discussed herein. Thank you for your time and consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/
Judy A. Miller, MSPA
Executive Director, ACOPA

/s/
Craig P. Hoffman, Esq., APM
General Counsel
American Retirement Association

/s/
Thomas J. Finnegan, MSPA, CPC, QPA
President
American Retirement Association

/s/
Marcy L. Supovitz, CPC, QPA, QKA
President-Elect
American Retirement Association