EXECUTIVE SUMMARY

By U.S. Mail and Email: e-ORI@dol.gov

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

Re: RIN 1210-AB32

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is pleased to provide comments regarding the Department of Labor's ("Department") proposed regulation under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") that would redefine the term "fiduciary" under section 3(21) of ERISA and section 4975(e) of the Internal Revenue Code of 1986, as amended (the "Code"). SIFMA appreciates the opportunity to comment and hopes that our comments are helpful to the Department as it assesses the dramatic impact of the proposal on the millions of American investors benefitting today through participation in retirement plans, Individual Retirement Accounts ("IRAs") and other retail accounts.[2] We respectfully request an opportunity to testify at the Department's August 10-13, 2015 hearing.

Our comments reflect SIFMA's deep concerns that the Department has proposed a rule that would harm American investors, while completely re-casting the ERISA definition of who is a fiduciary when providing investment advice for a fee. The Department has greatly expanded the scope of service providers subject to the fiduciary requirements of ERISA and the Code, and the significant prohibited transactions that come with such status under ERISA and the Code, while creating very limited, inflexible, and prescriptive exceptions and exemptions that do not work and will not be in the best interest of American retirement investors. The net effect is that this proposal, if enacted, would limit the ability of Americans to continue to receive personalized

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[1] SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] The rule covers all employer sponsored retirement plans, all employer sponsored welfare plans, IRAs, Individual Retirement Annuities, Coverdell Education Savings Accounts, Archer MSAs and Health Savings Accounts.

investment guidance for retirement plan accounts, which would result in a less secure retirement for many Americans already seeking to save and invest for their financial futures.

Much of the discussion around the Department's recently proposed retirement regulation focuses on the question of a "best interest standard" for financial advisors providing guidance to IRA holders and employees who participate in 401(k) plans. SIFMA and the broader financial services industry have long advocated for such a best interest standard when providing personalized investment advice. However, the Department has added hundreds of pages of extraneous conditions, restrictions, and prescriptions on top of its proposed best interest standard. The clear consequence of the Department's heavy hand with its proposed regulation is the explicit and implicit limitation on the types of investments individuals may choose to utilize with their retirement funds, as well as how they choose to pay for the service they seek.

Expanded Definition under Section 3(21) of ERISA

The Department seeks to turn sales pitches and cold calls into fiduciary conversations. The proposal so narrows "financial education" that only those already educated will understand what they are being told under the Department's new regime. The proposed education exception is expanded to cover IRAs; however, it does not allow for the naming of individual investment options. The provider would only be able to provide guidance that includes broad asset classes. Giving asset classes without allowing examples will not help participants. The Department's proposal would morph all of these educational and common sense conversations that are intended to help people prepare for retirement into "fiduciary" conversations, subject to a whole new restrictive, burdensome and liability-filled regime.

Further, the Department has proposed to expand the definition of providing investment advice so broadly that conversations that are merely designed to sell or pitch one's services would fall within its scope. Therefore, the Department wants to capture in its regulatory "fiduciary" web situations where a provider is merely speaking about the benefits of its services to an individual or small business owner to help them, and their employees, save for retirement.

The Department's proposal would also pull in all distribution and "rollover" conversations. These are conversations that a provider has with an individual about moving their assets out of their old employer's plan and into an IRA, which might help that individual keep better track of the funds, and take a more active role in managing their funds. SIFMA does not believe distribution recommendations are fiduciary advice. We do not believe that it is in the best interest of plan participants to discourage all conversations regarding distributions. By discouraging these conversations, leakage (dropping) out of the retirement system becomes far more likely.

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Narrowed Exceptions

The proposal has many exceptions that were drafted too narrowly. In particular, the education exception and the seller's exception are both too narrowly drawn. The proposed seller's exception only applies to large institutional clients. Small plans and all retail investors are left out. It should apply to IRAs and small plans as well. It is simply not reasonable, and is entirely inconsistent with the views of primary securities regulators, that the Department can not offer an amount or type of disclosure that would be found sufficient to alert a listener to the fact that a conversation involves selling. There simply is no legal difference when one is selling in the retail context versus a large plan context.

Another major failing of this carve-out is that it does not currently cover services, such as brokerage services, futures execution and clearing services, prime brokerage services, custody services, and other appropriate and necessary services provided to plans. There is no reason for the Department to have such a limitation.

Unworkable Exemptions

In addition, SIFMA has filed today several comment letters on the Department's exemptive proposals that are part of this package, but it should be clear from the outset that virtually all of the exemption amendments, as well as the new exemptions, are not administrable, as required under ERISA, nor do they meet the requirements that govern the Department's exemption granting authority under ERISA and the Code. The Best Interest Contract Exemption raises significant and insurmountable obstacles for broker-dealers, along with disclosure requirements that will not only overwhelm the customer with more information than they can possibly digest, but also impedes customer transactions and create losses for certain retirement accounts.

In addition, many of the requirements of the exemptions are so broad, subjective, and ambiguous in certain areas that it would be impossible to build systems and processes to ensure compliance. Compliance with the terms and conditions of any, or all, of these exemptions, would impose significant additional costs and liability on brokers-dealers which could likely cause them to change their business models in an effort to avoid unnecessary risk and punitive excise taxes that the Department is seeking to broadly expand. This change would lead to decreased access to one-on-one financial guidance for smaller retirement accounts, as well as potentially increased costs.

We believe the Department's proposal, if enacted, would result in fewer Americans having access to the help and guidance they need to save for retirement. The Department, in its own analysis of the 2011 final rule implementing the investment advice provision of the Pension Protection Act, found that financial losses from investing mistakes due to lack of advice likely amounted to more than $114 billion in 2010. The Department's new, and more complicated, proposal risks reducing many investors' access to meaningful guidance and education while unnecessarily increasing their costs. This is particularly troublesome for low to middle-income savers who rely heavily on the brokerage model. Currently, 98 percent of IRA investors with less than $25,000 are in brokerage relationships.

Regulatory Impact Analysis

Not only does the regulatory impact analysis fail to show how this proposal would benefit the public quantitatively, but it also underestimates greatly the harm that this would cause American investors. The Department has no study data to compare the performance of accounts with a financial advisor who is a fiduciary to the performance of accounts with a broker or other financial advisor who is not a fiduciary. The Department cannot reasonably conclude that investors would be better off under an expanded fiduciary standard on the basis of the studies cited. In fact, NERA's analysis of actual account level data demonstrates that commission-based accounts do not underperform relative to fee-based fiduciary accounts. In addition, in its analysis of the "benefits" of the proposal associated with curtailing purportedly conflicted advice, the Department misapplied academic research that is key to its conclusions. The range of estimates of benefits is so wide as to raise serious questions about its applicability and credibility.

To help provide a relevant data set, SIFMA is including in its analysis of the Department's proposal a review, conducted by NERA Economic Consulting, of data from tens of thousands of IRA and 401(k) accounts provided by SIFMA member firms. It is highly likely that most firms that offer retirement account services will be unable to offer commission-based accounts to retirement savings customers under the proposal, even under the Best Interest Contract exemption. Based on that premise, we can draw several key conclusions:

- Some commission-based accounts would become significantly more expensive when converted to a fee-based account under the Department's proposal;
- A large number of accounts do not meet the minimum account balance to qualify for an advisory account;
- There is no evidence that commission-based accounts underperform fee-based accounts; and
- The Department's own economic analysis is so broad as to undermine its validity and further it misinterprets the referenced academic literature.

In addition, a key finding of the NERA study is that customers do choose the fee model that best suits their needs and trading behavior. In 2014, the median trade frequency in commission-based accounts was just six trades. By comparison, in fee-based accounts the median trade frequency was 57 trades, with larger accounts generally trading more frequently than smaller ones. Thus, the data are consistent with the idea that investors who expect to trade often rationally choose fee-based accounts whereas those that do not trade often are likely to choose commission-based account.

SIFMA also questions the Department's cost estimates for complying with its proposal. The Department's cost estimates rely primarily on data submitted by SIFMA to the SEC in regard to a request for information related to Dodd-Frank Section 913 in 2013 (the "SIFMA Data").[3] Such reliance is inappropriate. The SIFMA Data was collected and submitted by SIFMA to the SEC for the sole purpose of estimating the costs of complying with a prospective SEC fiduciary rule established under Dodd-Frank Section 913, under specific assumptions that were applied to such a contemplated SEC approach.[4] Although the Department concedes that "*there will be substantive differences between the [DOL]'s new proposal and exemptions and any future SEC regulation that would establish a uniform fiduciary standard…* ", the Department nevertheless elects to rely on the SIFMA Data as the basis for its cost estimates.[5] The Department's stated reason for doing so is that there are *"some similarities between the cost components"* in the SIFMA Data and the costs that would be required to comply with the Department's proposal.[6]

The SIFMA Data was custom-generated for a wholly different prospective rule by the SEC, and is specific and exclusive to that purpose. The Department's proposal, on the other hand, introduces an entirely new and different set of requirements, obligations, liabilities and costs, which were not known or even contemplated at the time the SIFMA Data was generated nearly two years earlier. It is not possible and would be improper to use the SIFMA Data to estimate the cost of a separate and distinct Department regime. Because the Department did so, they started with a false premise, followed a flawed methodology, and generated costs estimates that are unfounded, inaccurate, and otherwise fatally flawed.

To help more appropriately understand the costs of compliance related to the Department's proposal, SIFMA conducted a survey of start up and ongoing compliance costs as documented in the Deloitte Report.[7] SIFMA's survey found that the estimated cost to comply with the Department's proposal is considerably greater than the estimates for the broker-dealer industry provided by the Department in its Regulatory Impact Analysis. The results of the survey estimate that, for large and medium firms in the broker-dealer industry, total start-up costs alone would be

[3] Regulatory Impact Analysis, http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf, at pp. 160 – 65.

[4] SIFMA Comment to SEC dated July 5, 2013, http://www.sifma.org/issues/item.aspx?id=8589944317.

[5] Regulatory Impact Analysis at p. 161.

[6] *Id.*

[7] Report on the Anticipated Operational Impacts to Broker-Dealers of the Department of Labor's Proposed Conflicts of Interest Rule dated July 17, 2015

$4.7 billion and on-going costs would be $1.1 billion. This is nearly double the estimated cost provided by the Department in its analysis. This is not surprising, given that the Department's estimate was based on a narrow dataset that was never intended to measure costs for compliance with this proposal.

Impact on Asset Managers

The impact of the Department's proposed retirement regulation raises concerns for asset managers who are already fiduciaries under ERISA when they act as discretionary investment managers or provide investment advice for clients that are retirement plans and IRAs. Asset managers are concerned that the expanded definition of investment advice definition will hamper their ability to act in the best interest of these clients. Asset managers will be less able to provide information and education than they are able to do currently. They may also be restricted in making available services and/or products or may only be able to do so at greater expense. In addition, because the proposal broadly imposes fiduciary obligations on market participants with whom asset managers transact on behalf of plans, those market participants will be less willing to engage in activities and services that assist in carrying out one's fiduciary duties, and will restrict information where providing it may transform their role into a fiduciary one. Moreover, asset managers and investors, already deemed sophisticated, will be burdened by standards designed for retail retirement savers.

Further, asset managers, separate and apart from their role as fiduciaries to plans, create and manage registered mutual funds, exchange traded funds, real estate investment trusts and hedge funds and other private funds that are purchased as investments for plans. Because different plans will have different investment objectives, different products and strategies will be best suited to help investors achieve their objectives. As drafted, the proposed rule and Best Interest Contract Exemption will result in substituting the variety of products currently available with a *de jure* or *de facto* "legal list," and make the burdens of offering many funds and products effectively prohibitive. The asset managers are concerned that both the proposed rule and the Best Interest Contract Exemption will have the effect of limiting or restricting asset managers' products that are available to plans and promoting certain types of products (*e.g.*, low-cost index products) over others.

Conclusion

SIFMA reiterates its long and much-documented support for a best interests of the customer standard, and in many ways, through the highly regulated securities industry overseen by the SEC and FINRA, the industry is already headed in that direction. Those regulatory bodies should remain in the lead on the issue, and best interests standard should apply across the entire retail market, not just the tax deferred retirement market. The proposal's voluminous and overreaching terms, prescriptions and conditions - separate and apart from the best interests standard – would create a myriad of new requirements and systems that would make the process of helping American savers prepare for retirement far too complex to implement without causing undue harm. In the end, the very same investors the Department seeks to protect would likely inadvertently be harmed with limited choices, less access to retirement advice, and higher costs.

Sincerely,

Kenneth E. Bentsen, Jr.
President and CEO