July 20, 2015

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 Avenue, N.W.
Washington, D.C. 20210

Re: RIN1210-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 will 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 hope that our comments are helpful to the Department as it assesses the impact of the proposal on plans and their participants as well as IRAs and other retail accounts.[2]

SIFMA shares the Department's concern that American workers are not saving enough for retirement. SIFMA members know that financial professionals are already subject to a suitability standard that requires that they put the interests of their clients first and SIFMA

[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.

welcomes a best interest standard, implemented by the appropriate regulatory authorities, when financial professionals are providing investment recommendations. While SIFMA may differ with the Department on the appropriate means to remedy the lack of adequate retirement savings on the part of American workers, we look forward to working with the Department to increase and improve retirement security and to preserve the current investment choices available to retirement investors, as well as their choice of the type of professional services they want and need. SIFMA respectfully requests an opportunity to testify at the Department's August 10-13, 2015 hearing.

Attached hereto are SIFMA's submissions for the related rulemakings being undertaken by the Department. These attachments are an integral part of this submission.[3]

Overview

While SIFMA believes that the provision of individualized advice should be covered by a best interest standard when both the financial professional and the client agree that a fiduciary account is what they both expect, this proposed rule goes too far and will have significant adverse consequences for Americans trying to save for retirement. The following is a list of only some of the consequences of the Department's proposed rule.

- The proposed rule will curtail access to many beneficial services and products available to retail retirement investors.
- The proposed rule will significantly limit retail retirement investors' ability to tailor the kind of services they want in light of their individual circumstances and instead will be forced into a "one size fits all" solution.

[3] See Appendices numbered 1-8.

- Fiduciary liability will attach, with either no exemptive relief or limited and operationally difficult relief, without any reliance by the client and without a mutual understanding of the services for which the client is contracting.
- A person could become a fiduciary merely by marketing his or her own services, advertising one-on-one counseling and the business generally, and urging a potential client to hire the financial professional.
- Fiduciary liability could attach to generally available, non-individualized materials from a financial institution, including research, product brochures, and lists of investments that a financial institution "follows".
- The newly created best interest contract exemption proposed a best interest standard with conditions and elements that are, for all practical purposes, impossible to meet: providing advice without regard to what one might earn requires that the financial professional not know what he could be paid. Retail retirement investors overwhelmingly will be offered only wrap programs or fee based advisory accounts to avoid the logistical issues of complying with the BIC exemption's numerous and onerous conditions. Where an advisory account is not suitable or where the account holds less than $50,000, the account will likely be terminated and the IRA often will have no one-on-one professional assistance available to them.
- Bond quotes, account statements, and periodic reporting of pooled fund values could make the dealer, the custodian or the pooled fund sponsor fiduciaries.
- The Department's reversal of its long held view that distribution advice is not investment advice translates all distribution conversations into a fiduciary breach with no exemptive relief at all for the rollover or for any fees charged in the IRA.
- The education carve-out will be virtually useless to a participant who is not financially literate and can't translate generalities into some realistic choices.
- The effective date for the proposed rule is unrealistically short.

- There are more cost effective ways to achieve the Department's goal of ensuring that a best interest standard applies to IRAs.

SIFMA understands that the Department wants to ensure financial services providers are looking out for their customer's best interest. The industry and its many regulators shares that goal. But this proposal will not achieve that goal without significant revisions. In addition, SIFMA has filed comments on the 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, and thus fail to meet ERISA's statutory requirement that the Secretary may not promulgate an exemption unless it is administrable.[4]

It should also be clear that SIFMA does not share the Department's assessment of current practices and purported costs in the financial services industry, nor does it agree with the Department's assessment of the benefits and costs that would result from implementation of these proposals. SIFMA is submitting separate reports on those topics today, prepared by NERA[5] and Deloitte Consulting[6].

SIFMA shares the Department's interest in ensuring that investors receive appropriate, informed assistance with decisions concerning retirement. However, SIFMA respectfully believes that this proposed exemption, and the package of proposals accompanying it, are not the proper way of proceeding. SIFMA also does not believe that the Department may use a new definition of "fiduciary," in combination with its exemptive authority, as a means of establishing a new regulatory and enforcement program for financial professionals, ERISA plans, and non-ERISA

[4] ERISA Section 408(a).
[5] Appendix 1
[6] Appendix 2

plans such as IRAs. SIFMA expresses this objection with regard to the BIC Exemption, and the other, related exemptive rules that have been proposed.

Finally, SIFMA believes that the Department's proposals exceed its statutory authority, the SEC and FINRA are that the appropriate authorities to develop and implement a best interest standard for financial professionals, and that the Department should defer to those regulatory authorities rather than adopt this new definition of "fiduciary" and the related exemptive rules. Nothing in these comments should be understood to mean that SIFMA concurs with the construction of ERISA and the Code underlying the Department's proposals. Rather, SIFMA offers these comments to assist the Department in improving its proposals in the event it decides to move forward with this package of regulatory changes despite the serious concerns they present.

Comments on specific provisions can be found on the pages indicated below:

Background and Current Law

The statutory definition of "fiduciary" (ERISA § 3(21), paralleled almost verbatim in Code § 4975(e)(3)) has three parts, two of which pertain to plan investments. First, persons who exercise discretionary authority or control over the investment of plan assets are fiduciaries. Second, a person who does not have that degree of control but who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan" is also a fiduciary (ERISA §3(21)(A)(ii)).

Very soon after the enactment of ERISA, the DOL issued a regulation[7] defining the circumstances under which a person would be treated as providing investment advice under ERISA § 3(21)(A)(ii). That regulation remains in effect today. It provides that a person will be deemed to be providing "investment advice" within the meaning of Section 3(21)(A)(ii) only if:

> (i) Such person *renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property*; and
>
> (ii) Such person either directly or indirectly (*e.g.*, through or together with any affiliate)—
>
> > …
> >
> > (B) Renders any advice described in paragraph (c)(1)(i) of this section *on a regular basis* to the plan *pursuant to a mutual agreement, arrangement or understanding*, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, *that such services will serve as a primary basis for investment decisions* with respect to plan assets, *and that such person will render individualized investment advice* to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

[7] 29 C.F.R. § 2510.3-21(c) (filed with the Federal Register on October 28, 1975) ("1975 regulation").

The italicized language establishes a five-part test with respect to advice regarding securities or their value: to provide "investment advice," a person must (1) render advice as to the value of securities or other property or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding that (4) the advice will serve as a primary basis for investment decisions, and that (5) the advice will be individualized based on the particular needs of the plan.

The April 2015 Proposal

The Definition of Advice

In a marked departure from current law, the Department has proposed a rule that re-imagines Section 3(21) of ERISA and goes well beyond what was contemplated by the statute.[8] The proposed rule adds two significant categories to the kind of advice that would make one a fiduciary, and significantly revises the test for the provision of such advice to eliminate any

[8] See the remarks of Georgetown University Law Professor Roy Schotland on the careful balancing that the Department now attempts to reverse:

> "While flat prohibitions [of all conflicts of interest] would be more 'pure,' such a course would not only disrupt arrangements that seems unwarranted absent a far plainer direction to do so; in addition, such a course would result in serious long-range harm to plan beneficiaries. . . . Congress [just] concluded an intensive look at the securities markets and industry and dealt quite explicitly . . . with the relationship between the broker-dealer function and the investment management function. Absent very clear direction, it would be questionable to treat the same problem, in the same industry more sweepingly than Congress deemed appropriate . . . . [I]n the name of protection against abuse, flat prohibitions would inflict greater injury than is likely to occur from abuse of conflicts of interest . . . . [I]t does seem necessary, in considering broker-dealers' conflicts, to keep in mind the anomaly which would occur if flat, sweeping prohibitions were imposed in this area, while the conflicts problems in . . . non-pension accounts were not subjected to appropriate safeguards. All these areas present conflicts, and by the nature of the problems and the reasons causing them to arise in the first place, intricate balancing to preserve potential benefits, and protect against potential dangers, is a difficult course but simply the only reasonable one."

reliance or even mutual understanding on the part of the advice recipient with respect to the role that the advice will play in his or her decision-making.

The proposed rule specifies four types of advice that may – when provided *directly* to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner in exchange for a fee or other compensation – make a person a fiduciary if the person represents or acknowledges that it is acting as a fiduciary within the meaning of ERISA, or if the person "[r]enders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA."

The four types of advice are:

> (i) A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;
>
> (ii) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;
>
> (iii) An appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA;
>
> (iv) 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).

SIFMA believes that it is sensible to define advice with respect to individualized recommendations provided directly to a person regarding investments and managers (subparts (i) and (iv)) although the recommendation and any action taken based on that recommendation should be close in time.[9] However, we have three concerns about this definition:

(i) the second prong of the definition is too vague and the language used – recommendation as to the management of securities or other properties -- needs to be revised to reflect the quite different purpose that is described in the preamble to avoid confusion and misunderstanding;

(ii) the third prong of the definition on valuation should be reserved until it can be fully and appropriately addressed by the Department; and

(iii) based on language in the preamble, it appears that the fourth prong of the definition should cover not only recommendations of investment advice fiduciaries but also other referrals.

Each of these concerns is described in more detail below. But as an overarching point, SIFMA strongly disagrees that distribution recommendations are fiduciary advice within the meaning of ERISA. They are not investment advice. Nothing in the statutory language or the legislative history is consistent with the Department's interpretation, and the Department's "new" view is flatly inconsistent with its own legal interpretation in 2005.

1. The Prong Dealing with "Management"

The proposed regulation provides that fiduciary advice includes a recommendation as to the management of securities or other property, including recommendations as to the management of

[9] We think that the rule needs a time proximity test. If a financial professional unsuccessfully attempts to sell an IRA to a plan participant, but months or years later, the participant on his or her own, opens an IRA at the financial institution (not through that same financial professional) and that financial institution receives a fee, the future looking receipt of compensation definition is drafted to make the financial institution a fiduciary without any exceptions or carve-outs. SIFMA urges the Department to add a time proximity standard to the definition.

securities or other property to be rolled over or otherwise distributed from the plan or IRA. "Management of securities" is a broad and vague formulation, and would appear to duplicate the first prong of the definition. The preamble, however, provides helpful clarification on the Department's meaning with respect to "management". It suggests that the second prong of the advice definition was intended to cover advice regarding the rights appurtenant to securities and other properties held by a plan.[10] We respectfully request that the Department use this very clear language instead of the over-inclusive term "management". SIFMA members are concerned that this vague language at best appears duplicative of the first prong, and at worst, hides a variety of issues that could be a trap for the unwary. If the Department's intention is as described in the preamble, the language should be more narrowly drafted to reference these duties. If the Department has other issues in mind, SIFMA would welcome a discussion of those issues. We suggest that this prong be rewritten to provide as follows:

> (ii) A recommendation as to the exercise of rights appurtenant to assets of the plan;

Such a revision would clearly indicate the meaning of "management" in this context and distinguish it from prongs (i) and (iv) of the definition.

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[10] "(2) Recommendations as to the Management of Plan Investments

The preamble to the 2010 Proposal stated that the ``management of securities or other property'' would include advice and recommendations as to the exercise of rights appurtenant to shares of stock (e.g., voting proxies). 75 FR 65266 (Oct. 22, 2010). The Department has long viewed the exercise of ownership rights as a fiduciary responsibility because of its material effect on plan investment goals. 29 CFR 2509.08-2 (2008). Consequently, individualized or specifically directed advice and recommendations on the exercise of proxy or other ownership rights are appropriately treated as fiduciary in nature. Accordingly, the proposed regulation's provision on advice regarding the management of securities or other property would continue to cover individualized advice or recommendations as to proxy voting and the management of retirement assets in paragraph (a)(1)(ii).

We received comments on the 2010 proposal seeking some clarification regarding its application to certain practices. In this regard, it is the Department's view that guidelines or other information on voting policies for proxies that are provided to a broad class of investors without regard to a client's individual interests or investment policy, and which are not directed or presented as a recommended policy for the plan or IRA to adopt, would not rise to the level of fiduciary investment advice under the proposal. Additionally, a recommendation addressed to all shareholders in a proxy statement would not result in fiduciary status on the part of the issuer of the statement or the person who distributes the proxy statement. These positions are clarified in the proposed regulation." 80 FR 21939 (Apr. 20, 2015)

2. Valuation as Part of the Advice Definition

SIFMA also urges the Department to apply the same reasoning it applied to ESOP valuations and reserve the valuation section of the proposed regulation entirely. First, valuation information is not a recommendation and should not be investment advice. The point of the regulation is to capture the person recommending the investment, not the person providing the values from market sources. Nothing in the statutory language of ERISA or the Code, nor their legislative history, would support the Department's view that a value placed on an asset is investment advice. Values placed on assets are neither a call to action, nor an explicit endorsement. The Department has no authority to expand the concept of investment advice to include valuation information.

As drafted, however, apparently all statements of value are fiduciary advice, regardless of whether they are part of investment recommendations. SIFMA agrees that valuations should be accurate and complete and made in good faith, but those standards do not transform pricing information and administrative functions into fiduciary advice.

In determining not to include ESOP valuations in this rulemaking, the Department has apparently correctly concluded that it is not appropriate to expand the definition of investment advice to remedy every theoretical or potential abuse and uncertainty. In describing why the valuation provisions were included in the 2010 proposal, the Department noted:

> First, the proposal specifically includes the provision of appraisals and fairness opinions. As discussed above, the Department concluded in AO 76-65A that a valuation of closely held employer securities that would be relied on in the purchase of the securities by an ESOP would not constitute investment advice under the current regulation. However, a common problem identified in the Department's recent ESOP national enforcement

project involves the incorrect valuation of employer securities. Among these are cases where plan fiduciaries have reasonably relied on faulty valuations prepared by professional appraisers. The Department believes that application of the proposal to appraisals and fairness opinions rendered in connection with plan transactions may directly or indirectly address these issues, and align the duties of persons who provide these opinions with those of fiduciaries who rely on them. Accordingly, paragraph (c)(1)(i)(A)(1) of the proposal specifically includes the provision of appraisals and fairness opinions concerning the value of securities or other property. This paragraph is intended to supersede the Department's conclusion in AO 76-65A, but is not limited to employer securities. Therefore, if a person is retained by a plan fiduciary to appraise real estate being offered to the plan for purchase, then the provision of the appraisal would fall within paragraph (c)(1)(i)(A)(1) of the proposal, and may result in fiduciary status under ERISA section 3(21)(A)(ii). The Department would expect a fiduciary appraiser's determination of value to be unbiased, fair, and objective, and to be made in good faith and based on a prudent investigation under the prevailing circumstances then known to the appraiser.

> Fn. 7: The Department's Employee Benefits Security Administration (EBSA) maintains a national enforcement project designed to identify and correct violations of ERISA in connection with Employee Stock Ownership Plans. One of the most common violations found is the incorrect valuation of employer securities. …[11]

The Department has not stated that there is evidence that valuations outside of the context of ESOPs have been unfair, abusive, or otherwise unlawful.[12] There is no justification for causing an investment adviser, custodian bank, broker-dealer or other entity that provides regular reporting of values to participants as required by the account agreement, the constituent documents of the investment vehicle, the securities law or Commodity Futures Trading Commission ("CFTC") requirements regarding marking of collateral to become an ERISA fiduciary without a demonstrated need to remedy or prevent bias or abuse and SIFMA does not

[11] 75 FR 65265, and fn. 7 thereto.

[12] We note that while the Department has alleged ESOP valuation abuses, courts have properly imposed liability on the fiduciary who knew or should have known that the valuation was flawed, not on the appraiser. Simplifying the Department's enforcement burden is not a substitute for statutory authority.

believe that the Department intended this result.[13] This is especially true where the Department affirmatively intends that those firms that provide privately held stock valuation for ESOP purposes may continue to be outside of these rules. The Department has recognized that existing professional standards for appraisals are consistent with the fiduciary duty as proposed, but has not demonstrated a need for the proposed "additional layer of protection for consumers" set forth in the proposal.

If the proposal regarding valuations were part of the final rule, there is a strong risk of uneven treatment of valuation in the marketplace. The potential for additional compliance resources, enforcement actions and liability under ERISA in connection with plan valuation, as opposed to all non-plan valuations, would further complicate contractual arrangements and increase costs.

We note that while the Department believes it has narrowed the rule, it is, in fact, broader than the 2010 proposal. Whether a value given is "in connection with" a transaction is not a clear standard, and encourages looking back in hindsight as to whether a value shown on a regular account statement was "in connection with" a transaction. The carve-out is not helpful: it covers valuations given *to* pooled funds but not valuations given *by* pooled funds to investors on a periodic basis. [14] If a hedge fund or private equity fund could become an ERISA fiduciary simply by providing values to plan investors, their willingness to accept ERISA and IRA

[13] To the extent that the counterparty and swap carve-outs are revised to cover services, including valuation services, this consequence may be avoided for institutional accounts, but it would still remain an issue for all other accounts.

[14] At one point, the preamble notes, in listing the carve-outs: "(6) the provision of an appraisal, fairness opinion or a statement of value to an ESOP regarding employer securities, to a collective investment vehicle holding plan assets, or to a plan for meeting reporting and disclosure requirements; and" which seems to limit the carve-out to plan asset vehicles. Later in the preamble, the explanation reads: "In response to comments, the proposal also contains an entirely new carve-out at paragraph (b)(5)(ii) specifically addressing valuations or appraisals provided to an investment fund (e.g., collective investment fund or pooled separate account) holding assets of various investors in addition to at least one plan or IRA." If the Department means to include all pooled funds, regardless of whether they are subject to the fiduciary requirements of ERISA, we would appreciate that clarification.

investors would be severely impacted. The effect on the capital markets, small and new business, and capital formation would be significant.

The proposed rule is open to the following questions:

- Funds (whether or not plan asset funds) value the fund daily, monthly or quarterly and these values are shown on custody statements for the account in which the fund interests are held, without a legal requirement to do so. Does the proposed rule apply to an unaffiliated fund administrator that calculates NAV for mutual/hedge/private equity funds pursuant to the respective fund's guidelines for calculating the valuation? There does not seem to be a carve-out for providing this information to plans, which potentially could use the information to enter into a transaction.
- Custody, prime brokerage and securities lending also may be impacted because the definition of investment advice is so broad and the valuation carve-out is so narrow. Does providing clients statements of value of assets held in custody or out on loan (normally but not always taken from recognized independent pricing services) constitute investment advice under the proposed rule? We understand from the Department's public statements that it did not mean to cover these kinds of valuations, and even if covered, are intended to be covered by a carve-out for institutional accounts. SIFMA urges the Department to clarify that these types of valuations do not constitute fiduciary investment advice.
- Securities lending also will be impacted. Does the proposed rule apply when the securities lending agent provides a valuation of the value of loaned securities or collateral, or marks collateral to market? The valuation is being provided by the securities lending agent to ensure that there is sufficient collateral as required by the securities lending agreement and if it is an ERISA account, in part to ensure compliance with PTE 2006-16, the securities lending exemption. The Department should clarify that these

types of valuations are excluded from the rule by the carve-outs for counterparties and swaps (modified as discussed below).

- Asset managers seeking to obtain real estate appraisals will be hard pressed to find willing appraisers if they will become fiduciaries by providing an appraisal. The Department fails to assess the impact of the rule on real estate investing for plans and on the acquisition of private equity investments by institutional investors. See, in the connection, the 2010 comments provided by the American Society of Appraisers, National Association of Independent Fee Appraisers, Institute of Business Appraisers, Real Estate Appraisal Coalition, American Society of Appraisers, and the Appraisal Foundation.
- Mergers and acquisitions will be severely impacted if fairness opinions in connection with the transaction will make the investment bank an ERISA fiduciary to the deal if any plans or IRAs are shareholders. Such a result would have massive consequences in the capital markets.
- Does a quote from a dealer in a completely self-directed brokerage account where no recommendations are provided constitute fiduciary advice, if the plan, participant or IRA owner goes ahead and purchases the bond based on the quote? It would be very harmful to the markets if dealers are not assured that they can give price quotes without coming within this prong.
- With respect to a single plan investment pool for which participants are provided a daily NAV, would this function be considered fiduciary advice?

There is no statutory authority to deem private equity funds, other pooled funds, prime brokers, securities lending agents, custodians or fund administrators ERISA fiduciaries in the course of valuing securities, loans, portfolio companies, or collateral. Nor does it make sense at all that a quote from a bond dealer regarding the price at which it would buy or sell a bond from or to an IRA or a plan maintained by a small business suddenly would be considered "investment advice". All of the effort that went into making sure that the bond markets would not be affected by the fiduciary rules of ERISA is simply discarded in this proposal. This effect on bond dealers has broad implications for the bond market and how investors behave when seeking to purchase or sell a bond. Few bonds are shown with firm bids/offers. Most are subject to revision or are indicative bids.[15] In the bond market, investors compare the quoted prices to a comparable yield curve to see if they are getting a good price. These market comparisons, whether through an automated tool or through a financial professional, may be covered by the definition of investment advice and may not be carved out by reason of the valuation or counterparty carve-outs.

If the Department believes that it has identified a problem with respect to valuation of privately held stock for an ESOP, it should bring those cases, as it repeatedly has. Making factual appraisal functions into fiduciary functions will merely cause appraisal firms to turn down assignments for plans, dealers to refuse to quote values for plans, and custodians to refuse to price any asset not valued by a third party public source. The Department has failed to consider the costs of this change to plans and participants. The comments raising precisely these points in 2010 have been ignored by the Department; only ESOPs have been eliminated from the regulation but the flaw in the Department's approach remains.

The proposal will turn routine and required valuations and market quotes into fiduciary acts in a manner that will surely affect normal market practice. SIFMA urges the Department to reserve the valuation prong of the definition of advice. When the Department determines that it is appropriate to tackle the issue of valuations, it should do so in a coordinated manner, and not

[15] Whether bond dealers will provide the bids required in the proposed exemption for principal transactions is questionable, especially if providing the quote could make them a fiduciary, if they know that the request for a quote is for a plan or IRA.

focus first on an area where there has been no abuse, leaving aside the area where it has determined the problem is the most urgent.[16]

3. The prong dealing with advice on managers

The fourth prong defines advice as 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 preamble suggests that the fourth prong of the advice definition was intended to capture individualized recommendations and advice as to the selection of investment managers and advisers. However, the prong appears to apply to all recommendations or referrals without limitation. We are concerned that this broad definition, especially when coupled with "the specifically directed to" language discussed below, will preclude information and access that is beneficial to retirement investors. [17]

SIFMA suggests that this prong be rewritten to provide as follows:

> (iii) A recommendation as to the advisability of engaging a person who is also going to receive a fee or other compensation for providing any of the types of advice described in ERISA Section 3(21)(A) (i) or (ii).

Such a revision would indicate that fiduciary status extends to those persons that offer advice as to the advisability of an adviser or discretionary asset manager based on the needs of the plan or investor, but not to referrals of such advisers or managers where no recommendation or advice is given as to the advisability of engaging a particular advisor or manager.

[16] For the reasons described more fully below, the valuation carve-out addresses virtually none of the concerns described here.
[17] In addition, the BIC exemption specifically needs to provide relief for the recommendation of discretionary management programs.

Rollovers as Part of the Advice Definition

1. Sales conversations

As stated above, SIFMA believes that the Department's 2005 legal interpretation regarding rollovers is correct and that there is not a basis for the Department to depart from it. Even supposing some extension to rollovers were appropriate, SIFMA members have concerns with respect to the drafting of the rollover language in paragraphs (i) and (ii). The rule should not capture sales pitches that are no more than a "hire us to provide services to your retirement assets" appeal. There is no carve-out for a plan participant to merely listen to and participate in a sales conversation about an IRA rollover. There is no carve-out for a call center conversation, initiated by a participant or eligible employee, to discuss distribution options[18]. Sales conversations need to be clearly carved out of the rule, and that includes sales conversations about rollovers.

2. Education

While the Department's intent to include rollovers in the scope of the rule is quite clear, we strongly believe that there needs to be a clear line: factual education about distribution and rollover options and processes should not be fiduciary advice. This kind of education should not be subject to fiduciary liability. On the other hand, mutually agreed upon, individualized investment advice about distribution investments should be fiduciary advice, if that is what the participant chooses to contract for.[19] Without clear lines, distinctions blur, information becomes unavailable and participants suffer.

[18] We note that the education bulletin in general should provide for education to eligible employees because it is that education that may encourage the employee to participate in the plan.

[19] Indeed, the education carve-out, described in more detail below, is internally inconsistent and confusing about rollover education, which will surely chill all such discussions for fear of falling outside the carve-out, even as the

SIFMA fundamentally disagrees that every conversation regarding rollovers should be treated as fiduciary advice. SIFMA simply does not agree that participants cannot distinguish a sales call from trusted advice.[20] SIFMA does not agree that it is in the best interest of plan participants to discourage all conversations regarding distributions. Rollover education starts with a conversation urging participants to keep the assets in a retirement account and not liquidate these retirement assets. We agree that premature liquidation could subject participants not only to a less secure financial future but potentially to current tax penalties as well. The fact that financial firms urge participants and IRA owners to keep their assets in retirement accounts and not dissipate them on boats or vacations or other discretionary spending is one of the greatest strengths of the financial professional system. If a policy goal is to avoid “leakage” out of the retirement system so that Americans save sufficiently for retirement, an effective strategy to pursue that goal would be to encourage one- on- one educational conversations with investment professionals about the pitfalls of taking distributions (as opposed to a strategy that relies on the hope that now, than to hope participants will stumble happen across the right information for their needs before they switch jobs and cash out of their former employer’s retirement plan). Although current financial needs are far more real and acute for many people than are financial needs after retirement, real, but often financial professionals often can help participants

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Department acknowledges that "[i]n most instances participants will be better off if they preserve all or most of the their account balance in a tax-preferred vehicle, be it a plan or an IRA."[19] As described in more detail below, FINRA Regulatory Notice 13-45 provides a useful example of how to operationalize a conversation about rollovers without veering into investment advice. We urge the Department to consider its use as a safe harbor. As a public policy matter, we should not stifle call centers, which are the last place where a neutral and fact based conversation can take place to inform participants of their options, prevent leakage and provide information on options when leaving assets in the employer’s plan is not possible.

[20] Recent research suggests consumers can distinguish between a sales call and fiduciary advice. People don’t trust sales calls or other unsolicited advice. *See, e.g.*, “Trust and Financial Advice,” J. Burke and A. Hung, RAND Labor and Population Working Paper, WR-1075 (Jan. 2015), at 1. (“...we find that financial trust is correlated with advice usage and likelihood of seeking advisory services. Analysis of the experiment shows that trust is an important predictor of who chooses to receive advice, even after controlling for demographic characteristics and financial literacy. However, providing unsolicited advice has little impact on behavior, even for individuals with high levels of trust.” This finding underscores SIFMA’s view that unsolicited advice – sales conversations – should not be deemed fiduciary advice.

understand the importance of saving early and often for retirement and why they should consider exhausting all other resources before cashing out of the retirement system. If every sales conversation or every educational conversation is fiduciary advice, all participants suffer. SIFMA urges the Department not to drive all discussion of the benefits of retaining some form of tax-favored account into the realm of fiduciary advice.

3. The consequences of an overbroad rule

Leakage from retirement plans is at an epidemic high. In 2010, one in four American workers with a 401(k) or other defined contribution plan tapped their retirement account for current expenses. This "leakage" reached $70 billion in 2010, equal to nearly a quarter of all contributions that year. As Alicia Munnell and Anthony Webb found in a study released earlier this year:

> "The ability of our model to match the SIPP public use data corroborates our leakage estimates; leakages reduce wealth by 22 percent. They are more significant than fees (14 percent) but less significant than the effects of non-participation among eligible employees and the immaturity of the system (30 percent and 27 percent). In total, all these factors reduce retirement wealth by two thirds."[21]

Yet the Department's focus on fees to the exclusion of coverage and leakage is unfortunate. We urge the Department to reconsider its narrow limited carve-out for educational rollover conversations and no carve-out at all for sales. The Department's approach likely will make the problem of retirement security worse, not better.[22] SIFMA believes that the Department has not

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[21] "The Impact of Leakages from 401(k)s and IRAs", Alicia Munnell and Anthony Webb, February, 2015, page 17.
[22] In 2005, the Department determined that it is not fiduciary advice when a person makes a recommendation regarding whether to take a distribution from a plan, whether that distribution should be in cash or in kind, and whether it should be rolled over to a plan or an IRA or invested in a non-tax favored account. Just five years later, in the 2010 Proposal, the Department decided that its 2005 determination was a mistake. With this 2015 iteration, the Department has decided that any recommendations about distributions, regardless of how general in nature, should be actionable fiduciary advice, regardless whether that advice relates to the securities involved in the

carefully considered alternatives here.[23] The Department has not provided any analysis as to why the flat, intentionally prohibitive approach is protective of participants or in their interest. Nor has it provided a basis for believing that the new rules will have a positive effect on reducing leakage.[24]

The Department's rule appears to assume that all plan sponsors want their terminated vested participants to remain in the plan. We think this assumption may be incorrect, especially in light of the cost and complexity of administering the accounts of participants who are no longer employees.[25] Some employees have such small balances that they are automatically cashed out. They need options or the tendency to simply take a distribution and spend it will overwhelm the best employer intentions. Moreover, the Department ignores participants' real concerns about their former employers and the chance that their retirement account may not be accessible when they need it. The Department minimizes the very real issue for participants who change jobs frequently, on average more than 11 times over their careers.[26] Leaving small account balances in a dozen or more plans creates a huge amount of work for participants. They need to keep up with menu changes in many plans, keep many plan sponsors apprised of address changes, name changes and beneficiary changes. It will likely be easier for a participant to have all of his or her

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distribution. These provisions should be reconsidered in light of the very serious adverse effect they will have on savings.

[23] FINRA Regulatory Notice 13-45, Rollovers to Individual Retirement Accounts, December 2013.

[24] We note that a recommendation to stay in the plan by a plan sponsor who may benefit from that decision will also be fiduciary advice and a prohibited transaction.

[25] Plan sponsors heavily depend on call centers to discuss distribution options with participants, and these call centers are an important source of one on one educational conversations when participants can describe their circumstances, their goals, and their concerns. But even a single balanced, factual conversation on distributions to individual participants could become fiduciary advice if it were deemed to be a recommendation directed to the participant who called. SIFMA believes that its members, plans and participants are ill-served by call center conversations that must end after the participant asks what specific alternatives exist for his or her plan account balance or IRA. Education is critical in this area, and the proposed rule should accommodate education about rollovers, and about other distribution issues that are confusing to participants, such as inherited IRAs, and required minimum distributions. Plan sponsors depend on call centers to communicate these issues to participants and it is in no one's interest to impede these conversations.

[26] See footnote 26, infra.

retirement assets in one place, allowing the participant to focus on one platform. It may allow the participant to have professional management, generally not available in a 401(k) plan, or a wider array of investment options. Indeed, the Department appears to believe plans should have available fewer investment choices, not more.[27] Participants may be legitimately worried about the stability of their employer, and the future of the plan. The Department concedes that the number of abandoned plans is significant and growing. It cannot be disputed that participants have had real difficulty obtaining their benefits when their former employer abandons the plan.

The effect of the proposal would likely make rollovers very difficult, if not impossible, to discuss with individuals. As currently drafted, discussions with participants regarding distributions and rollovers would be limited in scope. SIFMA urges the Department to adopt the sensible approach taken by FINRA under Regulatory Notice 13-45 to create a safe harbor for financial professionals so that participants can discuss rollovers in a balanced, educational way. We provide further detail on Notice 13-45 below in the context of our discussion of the education carve-out, and note that this FINRA guidance is expressly aimed at addressing the very conflicts with which the Department is concerned. There can be little doubt that the major societal issue that needs to be addressed here is the adequacy and preservation of retirement savings. It will do little good if the result of this proposed rule is that plan participants will be more confused, more concerned about the security of their assets being controlled by an entity with which they no longer are connected, more cut-off from sources of information and education that is readily accessible and more cut off from sources of financial literacy, especially during volatile economic cycles. The ultimate goal should be to create policy that encourages and simplifies the ability of individuals to retain savings in tax favored retirement accounts, regardless of whether they are plans or IRAs.

[27] See the comments of the Joint Trades to Assistant Secretary Borzi regarding Field Assistance Bulletin 2012-02, objecting to the Department's arbitrary requirement that a plan have no more than 25 investment alternatives.

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The Department does not appear to have considered or analyzed the benefit to participants and their families of having all retirement assets in one place, where they can discuss their investment needs more holistically with a single person with respect to all of their savings. The Department also has not analyzed the behavioral impact on a young participant with a very low account balance when faced with the choice of electing to take (or being forced to take) a distribution or continuing to save for retirement. Participants in today's mobile workforce change jobs on average more than 11 times before they reach retirement age.[28] Fifty years ago, those job changes were far less frequent. For individuals who are now in their 20s and 30s, those numbers will surely rise. Employees often had little or no account balance in a retirement plan when they left the employer after a couple of years. Now, with automatic payroll deduction, immediate participation, automatic deferral rate increases and mandatory employer matches, participants will have a least a few hundred or a few thousand dollars when they change jobs after a year or two. The Department spends little time looking at how a young participant views that account balance, or the effort it takes to educate that participant effectively enough to cause that participant to continue to save that account balance rather than use it for immediate spending. But in the current employment environment of multiple employers over short periods, participants may be less likely to entrust even their small account balances in the plan to a former

[28] A BLS news release published in March 2015 examined the number of jobs that people born in the years 1957 to 1964 held from age 18 to age 48. The title of the report is "Number of Jobs Held, Labor Market Activity, and Earnings Growth among the Youngest Baby Boomers: Results from a Longitudinal Survey." The report is available on the BLS web site at: www.bls.gov/news.release/pdf/nlsoy.pdf. These younger baby boomers held an average of 11.7 jobs from ages 18 to 48. (In this report, a job is defined as an uninterrupted period of work with a particular employer.) On average, men held 11.8 jobs and women held 11.5 jobs. From ages 18 to 48, some of these younger baby boomers held more jobs than average and others held fewer jobs. Twenty-seven percent held 15 jobs or more, while 10 percent held zero to four jobs. For additional statistics on the number of jobs held, see the tables at: www.bls.gov/nls/nlsy79r25jobsbyedu.xlsx. See also Forbes Magazine, August 14, 2012: "The average worker today stays at each of his or her jobs for 4.4 years, according to the most recent available data from the Bureau of Labor Statistics, but the expected tenure of the workforce's youngest employees is about half that.
Ninety-one percent of Millennials (born between 1977-1997) expect to stay in a job for less than three years, according to the Future Workplace "Multiple Generations @ Work" survey of 1,189 employees and 150 managers. That means they would have 15 – 20 jobs over the course of their working lives!"

employer, or tolerate receiving account statements from a dozen different employer plans accumulated over the first 10-15 years of their working lives.[29]

SIFMA's suggestions for changes to the education carve-out are discussed below.

Who is a Fiduciary?

1. Persons Who Acknowledge Fiduciary Status

The proposal defines investment advice fiduciaries in two subparagraphs. The first apparently is intended to deal with the financial professional who claims to be a fiduciary with respect to particular advice in a particular account and then later recants; however, it is written far more broadly. SIFMA supports the intent of this provision but urges the Department to clarify it, especially where it is used to create an absolute bar on the use of a carve-out.

Section (a)(2)(i) of the proposal provides:

> (2) Such person, either directly or indirectly (*e.g.*, through or together with any affiliate),-
>
> (i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to the advice described in paragraph (a)(1) of this section;

This provision needs to be narrowed in two important ways. First, the language "directly or indirectly (*e.g.* through or together with an affiliate)" is too broad. A representation that a person is a fiduciary should be explicit and express and not just an inference. That statement should be made by that person. It is too important a concept, with too much potential liability, to infer such

[29] The Department has also not analyzed the effect on the nonbank custodian rules if all IRAs are treated as nonpassive and the net worth requirement s applicable to all nonbank custodians are significantly increased.

status through loose language or comments made by an affiliate. Nor do we understand what it means to say “through an affiliate”. The definition of fiduciary is a functional test and one becomes a fiduciary because of one’s recommendations, not because one’s affiliate has made a recommendation. See Advisory Opinion 97-16:

> “You have assumed that ALIC, an affiliate under common control with ALIAC, is a fiduciary with respect to the Plans by virtue of exercising authority or control over Plan assets invested in separate accounts maintained by ALIC. There is nothing, however, in your submission to indicate that ALIAC is in a position to (or in fact does) exercise any authority or control over those assets. Accordingly it does not appear that ALIAC would be considered a fiduciary merely as a result of its affiliation with ALIC.”

In addition, SIFMA believes the language should be clarified to say “with respect to a particular account and a particular recommendation or series of recommendations”. Unless that clarification is made, a representation that one is acting as a fiduciary with respect to particular advice given with respect to one account could automatically render the financial professional a fiduciary with respect to *all* accounts in a self-directed plan, regardless of whether individualized advice is given to more than one participant, or with respect to other plans of the same advice recipient plan sponsor, or several accounts of one individual, such as a person’s individual account, his IRA, and his business accounts. The Department makes clear in the preamble to the BIC exemption that one can agree with a client on the scope of its fiduciary obligations – that is, fiduciary status can be transaction based, account based, or limited to a period of time, limited to the recommendation to buy, without any obligation to provide advice regarding how long an asset should be held or when it should be sold and does not require additional contract execution prior to each transaction recommended for an account.[30] This expansive definition should be narrowed in the same fashion.

[30] Dept. of Labor, Proposed Best Interest Contract Exemption, 80 FR 21960, at 21969.

The expansive language in Section (a)(2)(i) of the proposal definition should be narrowed to reflect the Department's intent reflected in the BIC exemption that a fiduciary and a client can agree on the exact contours of the fiduciary's responsibilities.in the same fashion. Accordingly, we ask the Department to revise this language so that the provision reads:

> "(2) Such person –
> (i) Expressly states that it is acting as a fiduciary within the meaning of the Act with respect to advice described in paragraph (a)(1) of this section that is or will be provided with respect to a particular account in connection with a particular recommendation of an investment transaction or a series of recommendations regarding such a transaction or series of transactions, provided that the express acknowledgement of fiduciary status with respect to a particular transaction, account or recommendation will not, by itself, cause the person to become a fiduciary with respect to any other transaction, account or recommendation."

2. Mutual Understanding

The proposal changes current law with respect to whether the parties must have a common understanding of the services being provided. The Department also errs in supposing that a fiduciary relationship within the meaning of ERISA or the Code can be formed by a single transaction, particularly a transaction of a nature customarily performed by broker-dealers. That is inconsistent with the on-going relationship of heightened trust and confidence historically associated with fiduciary status, and with the long-standing recognition—expressly embodied in the Advisors' Act—that a broker-dealer whose advice is merely incidental to a sale is not a fiduciary. The proposal provides:

> (ii) Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

These changes will cause confusion and costly litigation. The second prong of this definition of "investment advice" should relate to situations where the parties *agree* that the recommendations will play a significant role in the participant's decision-making. The Department's proposal, however, abandons the requirement that there be a mutual understanding, agreement or arrangement between the financial professional and the advice recipient about anything at all. Indeed, the preamble specifically notes that no meeting of the minds is required.[31] While we would have thought eliminating the notion that the parties should reach an understanding regarding whether the intent is that the financial professional be an investment advice fiduciary was merely a drafting issue rather than a substantive one, the preamble specifically notes that no meeting of the minds is required. By eliminating any notion that the parties should have a meeting of the minds regarding the financial professional's role, the Department opens the door to nearly indefensible claims by any person who in hindsight is upset with an investment decision, whether or not the person relied at all on the financial professional's related recommendations. SIFMA believes that the Department's elimination of the concept of a meeting of the minds opens the door to potentially false but nearly indefensible claims. This standard would allow a person who has not received fiduciary advice to later claim that he "understood" that it was investment advice, or that the financial professional "understood" that the information was targeted to the person, leaving the financial firm with an impossible task of proving that the claimant could not have so understood the statement. The standard also would place courts and arbitrators in the simple, but utterly one-sided, position of assuming that any arguable "recommendation" by a broker makes the broker a fiduciary with no room to consider the facts and circumstances of the situation. The nature of the advisory relationship should be demonstrably intentional for both parties. Whether one is a fiduciary governs bonding decisions, liability and risk decisions, training and systems management. It governs what the client should

[31] "The parties need not have a meeting of the minds on the extent to which the advice recipient will actually rely on the advice, but they must agree or understand that the advice is individualized or specifically directed to the particular advice recipient for consideration in making investment decisions." 80 CFR at 21940.

be charged, and what the financial professional and his financial institution can receive under the Department's proposed prohibited transaction exemptions. It should be a reasoned decision, by a plan, plan participant or IRA, to seek and agree to pay for investment advice, and both parties should understand the arrangement, the fees and the conflicts. Setting up a legal regime that allows or encourages individuals, with investment hindsight, to recast arrangements as fiduciary in nature and allow a unilateral, after the fact "understandings" regarding the nature of recommendations rather than requiring or encouraging the parties to reach an understanding up front regarding the nature of a financial professional's role and responsibilities simply is unreasonable.

There were scores of comments making this point in 2011 but these comments seem to have been ignored by the Department in this iteration. In causing the most casual recommendations to be deemed fiduciary advice, the Department seems to want to permit advice recipients to look backward and claim an understanding or agreement that did not exist at the time.[32] SIFMA's 2011 comment described the 2010 proposal as follows:

> "The Department's alternative test for defining "fiduciary" eliminates the regular basis test, the mutual understanding requirement, and the test that requires the advice to be a primary basis on which the client will make his or her investment decision. The elimination of these tests will result in a service provider becoming an unwitting fiduciary. No longer must the parties agree that the relationship is a fiduciary relationship. If the client "understands," long after information is provided by a service provider, that the relationship is, in retrospect, a fiduciary relationship, even if the service provider specifically disclaims that status, the client's one sided, opportunistic "understanding" carries the day. This is true, despite the fact that the client's one-sided understanding can be manufactured after the fact when any trade turns out less successfully than he anticipated. The formulation cannot work nor can it be validated. Allowing a plan fiduciary or participant to claim, after the fact, that he "understood" that a broker was offering

[32] The Department's defense of this position essentially acknowledges this point, stating that the new definition "would simplify the determination of fiduciary status *by eliminating difficult factual questions* relating to what constitutes a 'regular basis,' a 'mutual agreement,' a 'primary basis,' or 'individualized' advice." Dept. of Labor, Fiduciary Investment Advice Regulatory Impact Analysis, (Apr. 14, 2015), at 155 (emphasis added).

> tailored fiduciary advice puts too great of a burden on the fiduciary, unless the Department allows brokers and others to have written agreements disclaiming fiduciary status and the Department recognizes that disclaimer. The elimination of the term "mutual" from the current regulation is particularly troubling. Agreements, arrangements and understandings are by definition mutual, suggesting that there are two people party to the agreement or arrangement. The most inchoate and subjective of the three terms - understanding - is made even more subjective and elusive by dropping the modifier "mutual." Thus, a regulation which should be (and currently is) a bellwether to guide standards of conduct instead becomes subjective, where no service provider will have a clear understanding of the expectations of its client. The deletion of the word "mutual" will cause significant disruption in the markets, changes in trading patterns for asset classes that currently trade on a principal basis and increases in costs to plans and IRAs, just as the Department feared in its economic analysis of the regulatory alternatives it rejected. See 75 FR 65275. Brokers will not take the risk that they will be later deemed to be fiduciaries, and in violation of the prohibited transaction provisions of ERISA and the Code. We urge the Department to retain the requirement that any agreement, arrangement or understanding be mutual to avoid permitting a much more subjective reading of the regulation. Any change in the regulation will be unworkable unless it is based on service provider and client agreement."

That comment is equally true with respect to the 2015 proposal, despite the Department's view that it listened to the criticisms and have proposed something that is "nothing like the earlier proposal". In connection with the 2010 Proposal, the Department staff said in many forums that the term "mutual" was superfluous and its deletion was merely editorial. Nevertheless, this time around, the preamble is more straightforward; it notes that both the primary basis test and the mutual understanding test were deleted to preclude a financial professional from "defeating" fiduciary status.

> "Under the five-part test, fiduciary status can also be defeated by arguing that the parties did not have a mutual agreement, arrangement, or understanding that the advice would serve as a primary basis for investment decisions. Investment professionals in today's marketplace frequently market retirement investment services in ways that clearly suggest the provision of tailored or individualized advice, while at the same time disclaiming in fine print the requisite "mutual"

> understanding that the advice will be used as a primary basis for investment decisions."

SIFMA members believe that a claim that a relationship is a fiduciary relationship *should* be "defeated" if the parties do not mutually understand that they both intended a fiduciary relationship, with the additional liability on the part of the financial professional and the additional cost on the plan, participant or IRA owner. SIFMA does not agree with the Department's view that striking the essential component of "mutual" agreement is justified by the stated goal of easing the burden on Department investigators and "more effective enforcement".[33] Indeed, the Department's formulation requires only that if the financial professional understands that he is "specifically directing" his sales pitch to a person who has not agreed to be his client – and to whom he may never have spoken before – he becomes a fiduciary, even where the person on the other end of the phone neither sees the financial professional as a "trusted adviser" nor evidences any mutual understanding, reliance or trust of any kind.

3. A Reliance Standard

Under current law, a recommendation must be a primary basis on which the advice recipient makes up his or her mind on a course of action. That test is deleted entirely from this new proposal. The Department apparently believes that "a primary basis" is too high a standard. SIFMA disagrees. Nonetheless, we continue to be willing to discuss other standards. But the total elimination of any notion of reliance, or even a standard of importance to the recipient, is simply too one-sided. While the Department's formulation may make it easy for the Department to prove fiduciary status, it makes little sense in trying to define when a conversation legitimately

[33] *Id.*

should be considered "investment advice." In 2010, the Department's formulation was "advice which may be considered". The revised proposal is no better. In 2010, SIFMA noted:

> Similarly, the "may be considered" test is too vague and credits even the most casual conversation as fiduciary advice. Whenever someone talks, the listener "may consider" the speaker's words. The "may be considered" test is really an "I hear you" test. We urge the Department to consider a test which both parties to a conversation understand to be fiduciary advice, such as material reliance, substantial reliance, or a significant part of the plan's decision making process. The "may be considered" test is inconsistent with the level of reliance described by the Department in the preamble to the regulation. We note that this test may well capture every lawyer, accountant, actuary or other consultant that works on an investment policy, reviews asset allocations for purposes of an actuarial valuation, or looks at values for purposes of an audit. The Department's preamble specifically excludes these service providers from the first prong of the regulation's four prong test; it should exclude these service providers from all four prongs. See 75 FR 65266.

Interestingly, the preamble to the 2010 proposal states that the then proposed regulation "is intended to capture persons that significantly influence the decisions of plan fiduciaries and have a considerable impact on plan investment." 75 FR 65265. SIFMA soundly agrees with that formulation. This time around, the Department goes beyond the 2010 formulation and doesn't pretend to require that it is intended to "capture persons that significantly influence the decisions of plan fiduciaries and have a considerable impact on plan investment". SIFMA urges the Department to codify its explanation from its first proposal here in paragraph 2(a)(ii):

> "Renders the advice pursuant to a written or oral agreement, *mutual* arrangement or *mutual* understanding that the advice is individualized to the advice recipient *to significantly influence* investment or management decisions with respect to securities or other property of the plan or IRA."

As SIFMA has repeatedly stated, it concurs with a best interest standard, and concurs with financial professionals being subject to fiduciary liability when they are acting as fiduciaries at the client's request. If the standard now becomes "any consideration, regardless of how insignificant", then the proposal is even less practical and appropriate in its current form than the 2010 proposal.

4. Recommendations that are "Specifically Directed To" a Person

The third area with respect to which SIFMA urges the Department to modify its proposal is in connection with its newly created "specifically directed to" test in section 2(a)(ii). This test extremely troublesome and is inappropriate as a means of determining whether information properly should be considered fiduciary "investment advice, and accordingly should be eliminated. Moreover, the test is so overbroad and ambiguous that it makes the 2015 proposal as unworkable as the 2010 proposal. A test for fiduciary status that arguably identifies advertisements, group meetings, research reports, marketing materials and other clearly non-fiduciary communications as "investment advice" needs to be scrapped.

References to this language in the preamble underscore the Department's apparent intention to make every financial professional a fiduciary if his or her employer advertises on the radio, on television or in the newspaper, or suggests in any marketing material – whether or not that material is intended for plan participants or IRAs – that financial professionals give one-on-one advice. While SIFMA agrees that advice may be fiduciary in nature if it is specifically individualized to a participant pursuant to a mutual agreement to provide advice that will significantly influence investment decisions and is not merely selling, SIFMA believes that the Department is actually trying to capture non-individualized information – and the mere selling of one-on-one services -- with this change, including through broadly disseminated television and newspaper advertisements.[34]

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[34] The Department concedes this point by calling out, as the problem it is trying to address, marketing materials rather than the agreement between the parties. Apparently in the Department's view is that where there may be a conflict between a public advertising campaign and an agreement entered into with a client, the advertising campaign, and not the agreement, should characterize the client relationship: "Thus, at the same time that

The Department notes in the preamble to the proposed rule that it "avoids burdening activities that do not implicate relationships of trust and expectations of impartiality".[35] SIFMA agrees with that aim but unfortunately, we do not believe that the text of the proposal accomplishes this objective. Research reports sent to thousands of clients don't implicate relationships of trust. Newspaper and television advertisements to the general public do not implicate relationships of trust. Sales calls, responses to requests for proposals, and product brochures do not implicate relationships of trust.

The preamble notes that this language "addresses concerns that the general circulation of newsletters, television talk show commentary, or remarks in speeches and presentations at financial industry conferences would result in the person being treated as a fiduciary." However, the preamble then draws a direct line between the "specifically directed to" language and *advertising*, stating that advisers could not "continue the practice of advertising advice or counseling that is one-on-one or that a reasonable person would believe would be tailored to their individual needs and then disclaim that the recommendations are fiduciary investment advice in boilerplate language in the advertisement or in the paperwork provided to the client." The rule, as proposed, could be read to capture virtually all general marketing materials that mention specific products and similarly could transform advertising and all selling of advice services into actionable fiduciary advice before there is individualized contact, let alone a mutual agreement, based on the Department's "specifically directed to" formulation.

The language also risks capturing research and market commentaries, even if sent to all or a large group of clients, and even if not geared at all to individualized trading recommendations.

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marketing materials may characterize the financial adviser's relationship with the customer as one-on-one [sic], personalized, and based on the client's best interest, footnotes and legal boilerplate disclaim the requisite mutual agreement, arrangement, or understanding that the advice is individualized or should serve as a primary basis for investment decisions.

[35] 80 FR 21938.

Classifying such materials as fiduciary advice will curtail the availability of key educational and informative resources that help investors in making informed investment decisions.

For all of the foregoing reasons, SIFMA urges the Department to delete “specifically directed to” from the regulation. At best, it is highly confusing. At worst, it makes general research, a sales call, or a television or newspaper advertisement proof of a fiduciary relationship.

The Carve-outs

There are seven specific carve-outs from the proposed rule’s “investment advice” definition. SIFMA believes that they need to be broadened. Our concerns are as follows.

1. The Exclusion From Use of the Carve-outs

First, the carve-outs do not appear to be available at all to any service provider who has affirmatively represented or acknowledged that he or she is a plan fiduciary SIFMA agrees that a person should not be able to agree to act as a fiduciary and then seek to avoid the fiduciary status to which he or she agreed,. But, the language in the proposed regulation makes the carve-outs unavailable is a far broader set of circumstances. We urge the Department to clarify the language in the carve-outs to reflect the very basic concept under ERISA’s fiduciary rules: that a person is a fiduciary with respect to particular recommendations made with respect to particular assets of a particular account, and not a fiduciary “in general” of an entire plan. The way the Department has written this section, a none of the carve-outs would be available to a directed trustee because the directed trustee will acknowledge in its trust agreement, that it acts as a fiduciary in safekeeping assets.

A client may have several accounts, or several IRAs, and only in certain of these accounts, and perhaps only with respect to certain assets, has he engaged the financial professional to provide investment advice. The exclusion is overbroad and assumes that once a person is a fiduciary for any set of assets in any manner, no matter how limited, you are a fiduciary for all accounts, all assets, all relationships, and all communications. That is simply not the law.

The definition of fiduciary in the statute is quite clear: a person is a fiduciary "to the extent" that the statutory tests are met. This same, statutorily mandated qualification needs to be reflected in the carve-outs..

Section (a)(2)(i) of the proposal provides:

> (2) Such person, either directly or indirectly (*e.g.*, through or together with any affiliate),--
> (i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to the advice described in paragraph (a)(1) of this section; or . . . .

As noted above, SIFMA requests that it be revised to provide:

> "(2) Such person –
> (i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to advice described in paragraph (a)(1) of this section that is or will be provided with respect to a particular account in connection with a particular recommendation of an investment transaction or a series of recommendations regarding such a transaction or series of transactions."

The carve-out section describes this definition as applying to persons in general, not persons in connection with particular recommendations with respect to particular assets of a particular plan. The proposal provides:

> (b) Carve-outs--investment advice. Except for persons described in paragraph (a)(2)(i) of this section, the rendering of advice or other communications in conformance with a carve-out set forth in paragraph (b)(1) through (6) of this section shall not cause the person who renders the advice to be treated as a fiduciary under paragraph (a) of this

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section.

Thus, this language should be revised to read as follows:

> "Except for advice described in paragraph (a)(1) of this section with respect to which the person has represented or acknowledged that it is acting as a fiduciary as described in paragraph (a)(2)(i) of this section with respect to a particular account (or particular assets in an account) and a particular transaction, the rendering of advice or other communications in conformance with a carve-out set forth in paragraph (b)(1) through (6) of this section shall not cause the person who renders the advice to be treated as a fiduciary under paragraph (a) of this section."

2. IRAs and Other Retail Accounts

Only two of the six exceptions – the education and financial reports exceptions – cover communications with participants, beneficiaries, and IRA owners. SIFMA members think this limitation is a mistake that has no analytical basis and goes beyond the Department's authority. Incidental advice as part of selling is a concept Congress adopted in 1940 with the Investment Advisors Act. Congress presumably would have noted such a striking difference when it passed ERISA since it was considering securities law amendments at the same time.[36] Selling is selling, regardless of the setting or recipient. If a financial professional makes clear he is selling, then it is inconsistent with that reality to suggest that selling is a fiduciary activity when the target is a retail account. There simply is no legal difference. When the fee for executing a trade is the same whether one gives "advice" incidental to the sale or not, there is no fee for the advice. Similarly, objectively monitoring data or platform information is just that: factual and objective. It doesn't become less so because it is given to an IRA or a plan participant. SIFMA members

[36] The Conferees intend that this legislation with respect to individual retirement accounts is not to limit in any way the application of the Federal securities laws to individual retirement accounts or the application of them of the laws relating to common trusts or investment funds maintained by an institution. As a result, the Securities and Exchange Commission will have the authority to act on the issues arising with respect to individual retirement accounts independently of this legislation. [CITE}

do not agree with the Department that there is no warning, no cautionary language, no disclosure, that would suffice to warn an individual that the financial professional is selling a service, or that the factual information provided is just that: data. Not every conversation will be misconstrued as a recommendation. SIFMA urges the Department to make all of the carve-outs eligible for retail accounts, including plan participants and IRAs and to create a clear carve-out for sales pitches and other sales activities.

3. Mere Selling

We think the regulation needs to clarify that a person or entity seeking to be hired – as a broker, a custodian, a fiduciary, an advisor, a trustee – initially, for a longer engagement, or a new mandate or new account, and in a one-on-one conversation, a response to an RFP or in a newspaper advertisement, is not a fiduciary regardless of what kind of investment suggestions are contained in that sales context. While selling could be covered by a carve-out, it needs to cover selling to all potential clients, and not just plans with 100 or more participants or asset managers with $100 million in employee benefit plan assets. The clearest expression would be a provision in the rule itself, after the definition of the four kinds of advice in section (a), which would read as follows:

> "Provided however, that no person shall be deemed to be providing investment advice by reason of recommending, urging, responding to requests for proposals regarding or otherwise promoting, its own hiring."

Alternatively, there should be a clear carve-out for selling one's own services.

4. The Counterparty Carve-out

SIFMA seeks several clarifications with respect to this carve-out. The first, as noted above, would make this exception applicable to all retirement accounts, and to all intermediaries who sell products to or act on behalf of those accounts. The lack of opportunity for accounts of any size to decide for themselves whether or not they want to work with a fiduciary advisor is a serious shortcoming. Subject to clear warnings that the financial professional is not providing impartial advice and has no duty to do so, we strongly believe that the Department should not decide for every American that he or she cannot have a non-advisory brokerage account where they nevertheless can speak with a financial professional. Some individuals might not choose to select an advisory account to meet their needs.

The second clarification is that this carve-out should 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 where the service provider is acting as agent or representative of the plan. As written, the exception is explicitly available only with respect to a sale, purchase, loan or bilateral contract, and not with respect to services provided to accounts. Thus, any incidental advice from a service provider could be deemed to be fiduciary advice if it is specifically directed to the plan, despite the fact that Congress clearly meant incidental advice which bears no additional fee over and above the fee for execution is not fiduciary advice. Such incidental advice could include:

- information provided by a futures commission merchant executing a futures trade for the biggest, most sophisticated plan client,
- information provided by the institutional agency desk at a broker-dealer, again dealing with the most sophisticated institutions,
- any such information from a plan's prime broker,
- all marketing materials or pitches from trustees, brokers, custodians, investment managers, commodities trading advisers,
- generally available research,

- corporate finance recommendations made to a company's corporate financial staff which may later be communicated to plan fiduciaries,
- any sales pitches by collective trust trustees, brokers, or third party administrators to plan fiduciaries.

For virtually all of these service provider communications, the counterparty exception appears to be inapplicable. Similarly, the current language seems to omit communications from exchanges, alternative trading systems and electronic communication networks used in trading.[37]

While the Department has informally indicated in its meetings with the industry that it will fix this carve-out to include services and that the omission was not intended, the lack of coverage of services, including selling one's own services, by this carve-out is worrisome, especially since in the 2010 proposal, the carve-out also failed to cover services and the Department received scores of comments highlighting this point. The Department has said in every setting from the initial proposal forward that the clarification we seek – the coverage of services and selling -- is what it intends. SIFMA hopes the Department will clarify coverage of service providers and selling one's own services in the carve-out. We also hope that the Department will reconsider its current position regarding the ability of American investors to decide for them what kind of relationship they want to have with their financial professionals and will modify the carve-out to cover transactions with IRAs, participants and small plans. Accordingly, SIFMA respectfully requests that the Department circulate revised language on this point for comment prior to finalizing the proposal because of its importance.

Third, the carve-out should apply to referral programs. Many financial institutions have programs that provide compensation to professionals (*e.g.*, lawyers or accountants) for referrals

[37] SIFMA, and several other commenters, made this very same point in response to the 2010 proposal. See page 15 of SIFMA's February 3, 2011 comment.

(as regulated by SEC Rule 206(4)-3). Under these programs, an estate planning lawyer might refer their client to a financial institution for investment services or advice relating to their IRA and other non-retirement assets. Under the proposal, such referrals would likely be considered fiduciary advice because they could be construed to be a recommendation of an investment adviser or manager. Yet the referral would not be subject to the counterparty carve-out because IRAs are not included. These referral programs are beneficial to consumers. Furthermore, these programs are already regulated by the SEC, which requires extensive conflict disclosures to the consumer, but would not be covered by the counterparty carve-out, as currently contemplated.

Fourth, the carve-out should clearly apply to pooled funds. We assume that this was an inadvertent omission and the carve-out applies to asset managers and trustees who manage pooled funds and to the funds they manage, regardless of whether it is managing the assets of a single plan or a pooled fund. Nonetheless, clarity on that point would be helpful.

Fifth, the $100 million asset test should be based on all assets under management, and not merely employee benefit plan assets. Our members know of no managers who keep track of assets under management based on client type, and no other exemptions where the Department has looked at only employee benefit plan assets to qualify a manager. See, *e.g.*, PTE 84-14, and numerous individual exemptions. This test should be satisfied either by the reasonable belief of the service provider or counterparty or by a representation by the plan sponsor. In addition, the $100 million threshold should be revised to use a standard that is commonly understood in the market place. SIFMA urges the Department not to create new definitions for commonly understood market terms for a sophisticated investor when accepted definitions exist that are well understood by brokers and advisors and counterparties. We suggest in our revision below that the asset level be at $50 million. The condition regarding the level of sophistication at $50 million is taken from the INHAM Exemption (PTE 96-23) and from FINRA Rule 4512(c)(3), which defines aninstitutional account as follows:

(c) For purposes of this Rule, the term "institutional account" shall mean the account of:
(1) a bank, savings and loan association, insurance company or registered investment company;
(2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or
(3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million.

Sixth, as noted above, this carve-out should apply to all accounts with additional disclosure for retail accounts, and a more frequent reminder to retail accounts that any information or suggestions are not impartial investment advice. If the Department is unwilling to take that suggestion, SIFMA members believe that the 100 participant test is a mistake.[38] It is operationally difficult from a compliance perspective. How often would the financial professional need to check on the number of participants in the plan? It would not be possible to check on the current number of participants as of the date of every transaction or every recommendation. If the test is intended to reflect less sophisticated plan sponsors, we think the Department should use an asset-based test that aggregates the assets of all plans sponsored by the same employer and its affiliates. Many large and sophisticated employers sponsor many plans, and some of those plans may be quite small. It does not seem reasonable to suggest that the plan sponsor is not sophisticated, when other plans it sponsors have thousands of participants, and the plans contain billions of dollars in assets. SIFMA urges the Department to use a test that focuses on the value of the assets in all employee benefit plans sponsored by the employer and its affiliates so that this carve-out can apply to large, sophisticated employers, regardless of the size of their plans. Again, this test should be satisfied either by the reasonable belief of the service

[38] We note that the 100 person test is very unwieldy since it does not specify the date as of which this determination is made, or the consequence of fluctuations in this number.

provider or counterparty or by a representation by the plan sponsor.

Seventh, the representations need clarification. The timing of the representations is not specified; they should be provided prior to the first transaction and, as noted above, only for retail accounts should they be repeated periodically. Under no circumstances should the representations be provided on a trade by trade basis. The representations that operationally may be required to make this carve-out work will slow all investment transactions and make plans second class citizens in the market place. As written, it is unclear if they need to be given for each transaction or at the beginning of the relationship. Systems will need to be built to reflect whether a current necessary representation is on file. This kind of infinite prescriptive requirement is unnecessary.[39]

SIFMA is also concerned about the 8 month transition rule in this context. Even if this carve-out only applies to those plans that are covered by the proposal, the task of obtaining mutual representations will likely take a minimum of 24 months, if the recent Dodd-Frank experience is any guide. We urge the Department to be realistic, especially here where the carve-out specifically requires representations from the plan fiduciary.

For retail accounts, the following representations should be sufficient.

- The plan fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial advice or to give fiduciary advice and that the plan fiduciary has sufficient expertise to evaluate the merits of the transaction.
- The financial professional discloses that it has its own financial interests in the arrangement or transaction, or may receive a fee as a result of the transaction.

In sum, SIFMA believes that the carve-out should read as follows:

[39] 17 CFR 23.434.

COUNTERPARTIES AND SERVICE PROVIDERS. In such person's capacity as a counterparty, service provider, including exchanges and other similar trading platforms, to a plan or IRA, or representative of either the plan, the IRA or the counterparty or service provider, the person provides advice to a plan or IRA fiduciary who is independent of such person, with respect to an arm's length service arrangement, sale, purchase, loan or bilateral contract between the plan or IRA and person (or with respect to a proposal to enter into such an arrangement, sale, purchase, loan or bilateral contract), each a "transaction" for purposes of this subclause if, prior to or in connection with entering into a transaction, (A) the plan fiduciary represents that it has the requisite sophistication and experience in investment matters, and such person discloses to the fiduciary, participant or beneficiary, as the case may be, that the person has a financial interest in the matter, and that the person is not undertaking to provide impartial financial advice; provided such person has not acknowledged in writing that it is acting as a fiduciary (within the meaning of the Act) with respect to the transaction and the person does not receive a specific separate advisory fee for such recommendation or (B) such person knows or reasonably believes that the plan fiduciary (1) has responsibility for managing at least $50 million in assets (for purposes of this paragraph, when dealing with an individual employee benefit plan, a person may rely on representations from the independent plan fiduciary regarding the value of assets under management or (2) is a bank, savings and loan association, insurance company, an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state or foreign securities commission (or any agency or office performing like functions).

5. Swap Transactions

SIFMA seeks three clarifications with respect to this carve-out. The first, as noted above, would make this exception applicable to all accounts. There is no reason why a small plan or a very sophisticated IRA owner should not be able to engage in a swap under appropriate circumstances, assuming that the account owner is an eligible contract participant. The second is that it should cover the services inherent in swap transactions, such as, but not limited to, swap clearing arrangements. Third, the carve-out needs to cover pooled funds that hold plan assets, which is a significant omission. These latter two changes are critical to conform this carve-out to the relief the Department recently gave in Advisory Opinion 2013-01A. While the Department has indicated that it did not intend to cut back on that relief, the carve-out is clearly inadequate to cover swap clearing arrangements.

The carve-out should read as follows:

> **SWAP TRANSACTIONS** – The person is a counterparty, service provider or representative thereof or of the plan in connection with a swap or security-based swap if, the plan or plan asset vehicle is represented by a fiduciary independent of the person; the person is a swap clearing firm or other service provider in relation to a swap, swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant; the person (if a swap dealer, security-based swap dealer, clearing firm or other similar service provider), is not acting as an advisor to the plan or plan asset vehicle in connection with the transaction; and in advance of providing any recommendations with respect to a transaction or a series of potential transactions, the person obtains a written representation from the independent plan fiduciary, that the fiduciary will not rely on recommendations provided by the person.

6. Employees of the Plan Sponsor

Under the proposed rule, advice given to plan fiduciaries by the sponsor's employees will not be fiduciary investment advice, unless the employee receives compensation for it beyond the employee's regular pay. We think this is a sensible carve-out. However, it leaves out certain very normal situations that are not at all abusive: the employee providing the advice for the plan sponsor may be an employee of an affiliate of the plan sponsor and he or she may be providing the advice for the plan fiduciary but not directly to the plan fiduciary. The proposal should be clarified accordingly.

7. Platform Providers

SIFMA seeks three clarifications with respect to this carve-out. The first, as noted above, would make this exception applicable to all accounts, including plan participants and IRAs. It is a serious omission, and not at all in the interest of IRAs, to preclude a mutual fund complex or broker dealer or other financial institution from narrowing the offerings available to IRAs so as to make the choices more manageable for the investor, without recommending particular options from the remaining list of funds. There are more than eight thousand mutual funds and ETFs available in the market; it is unfair and burdensome to tell IRA owners that they are on their own.[40] The Department's sincere effort to protect IRAs may well be leading to their abandonment in the financial markets. In addition, if IRA and self-directed brokerage account platforms are not included in the carve-out, it could be impossible for financial institutions to avoid fiduciary status for IRAs and self-directed brokerage accounts even if they offer a non-fiduciary "self-directed/execution only" IRA accounts (i.e., if any limits are placed on the available universe of investment options, a platform may be created).

SIFMA members do not think that such a path is good policy or in the interest of American retirement investors.

Second, the carve-out should apply to the marketing and provision of brokerage window services and factual information provided to participants through such brokerage windows. Third, the carve-out should explicitly apply to call centers. So long as the information provided to plan participants and IRA owners does not vary from caller to caller, there is no reason why the Department would want to make call centers useless to participants and IRAs. SIFMA concurs with the Department's requirement that the platform provider "discloses in writing to the plan fiduciary, plan participant or IRA that [it] is not undertaking to provide impartial investment

[40] ICI, April 2015.

advice or to give advice in a fiduciary capacity." SIFMA believes that the required disclosure should be provided to all users, and should be prominently displayed on the website and in written materials. It may also be appropriate for the disclosure to be provided with account statements periodically but not more frequently than annually.

8. Objective Advice on the Selection and Monitoring of Investment Alternatives

SIFMA reiterates its comments above for this carve-out. It should apply to IRAs and plan participants. Moreover, it should not be restricted to platform providers. Many service providers and consultants provide objective data to help IRA owners, plan participants and plan sponsors monitor their investment alternatives. There is no reason why this carve-out should not apply to anyone who provides this information. The carve-out should cover situations where the provider merely "identifies investment alternatives that satisfy objective criteria specified by the plan fiduciary, participant or IRA" or "provides objective financial data and comparisons with independent benchmarks to the plan fiduciary, participant or IRA." It should surely cover lists of potential funds to consider, fund screeners or other internet tools that allow individuals to filter through thousands of investment options, especially when the list is being provided to all clients, and not individualized to particular IRA owners or plan participants.

SIFMA suggests that the carve-out require that the platform provider "discloses in writing to the plan fiduciary, plan participant or IRA that it is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity."

The Department has repeatedly cited studies that find that individuals need access to clearly presented factual information that is not overwhelming. Many studies have shown that participants who have one-on-one education and assistance can digest and understand this data better.[41] SIFMA believes that the Department understands the confusion engendered by a bewildering number of choices for IRAs. We are quite certain that the Department does not want to make investing one's retirement savings harder, or more confusing, or more time-consuming. The Department should rely on the safeguards described in this comment which would permit retail investors to navigate the markets without a paralysis imposed by a Department regulation.

9. Financial reports and valuations

As noted earlier in this comment, SIFMA strongly believes that the Department should reserve the valuation prong of the definition of fiduciary advice until it is prepared to adopt a complete cohesive definition and to justify its inclusion as a fiduciary act when the statute and the legislative history provide no support for that construction. SIFMA strongly believes that the Department should not deal with this area in a piecemeal fashion.

This is particularly true because of the flaws in the way the carve-out is drafted. The carve-out fails to cover bond prices given to a plan or participant, or any other values given to a plan before a trade in the public markets. The carve-out covers valuations of securities provided for regulatory purposes but fails to cover the monthly account statements sent by custodians, brokers and insurance agents every month, as well as online account information and other similar reports. The carve-out will make every fund administrator, third party vendor of pricing information and custodian a fiduciary by providing the pricing for buying shares or units or partnership interests. We do not believe that the Department has thought through the

[41] See Montmarquette, C., and Viennot-Briot, N. (2012). Econometric Models on the Value of Advice of a Financial Advisor. CIRANO. http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf, which concludes that advised households save at roughly twice the rate of non-advised households and advised investors exhibit behaviors that leave them better prepared for retirement.

ramifications of this section and the narrowness of the carve-out, all the while giving ESOP valuations, its real area of interest, a free pass. SIFMA again urges the Department to reserve the valuation section of the definition and reserve this carve-out.

10. Investment Education

This exception would replace 29 C.F.R. § 2509.96-1 (also known as "Interpretive Bulletin 96-1"), which excludes general financial, investment and retirement information from the scope of investment advice. While it does cover IRAs, SIFMA members are very concerned about its treatment of distribution advice. The preamble descriptions and the operative language are inconsistent and confusing. And there is no question that a safe harbor that is inconsistent and confusing will not be used, for fear of fiduciary liability. Under the proposed rule, in the context of plan information, an educator can discuss varying forms of distribution, including rollovers. However, when providing general information, it cannot discuss distribution options under the plan or specific alternatives or services offered outside the plan, but in that very same subsection, at paragraph (H), it can discuss "General methods and strategies for managing assets in retirement (*e.g.*, systematic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits), including those offered outside the plan or IRA." It seems very unclear to our members how the lead in language to subsection (ii) relates to paragraph (H) thereunder. Similarly, subsection (iv) seems to allow a discussion of distribution options: "questionnaires, worksheets, software and similar materials which allow a plan fiduciary, participant or beneficiary, or IRA owners to evaluate distribution options"; however, paragraph (E) thereunder provides that the interactive material *not* identify any distribution option. This language needs to be reworked.

This carve-out would require a financial professional providing holistic education to omit information which is both appropriate and arguably indispensable to a participant's understanding of his or her choices. The prohibition suggests that the Department, contrary to its clear support of actions that preserve individuals' retirement savings, would, by barring discussions of these options, fail to discourage a participant from liquidating and spending his savings. It would leave participants adrift on required minimum distributions, the complicated rules on inherited IRAs and the question of beneficiaries on their own IRA. The carve-out requires the material to be factual and objective. SIFMA members do not understand the Department's concern that these prescriptive requirements are not enough, and all conversations about distribution options needs to be eliminated. Because of the heightened emphasis in the definition of advice on distributions, this carve-out should specifically permit distribution education and rollover education. It is critical that participants in plans be provided information that supports the public policy objective of keeping retirement assets in retirement vehicles so that the assets will be available in the retirement phase of life. SIFMA strongly urges the Department not to limit discussion of distributions in education.

The education carve-out has another problem as well. Even though the current regulations require presentations to state that other investments with similar characteristics may be available, the DOL has decided that participants and IRA owners cannot understand that examples are not, *per se*, recommendations, no matter how strongly they are warned.

> "Thus, for example, we would not treat an asset allocation model as mere education if it called for a certain percentage of the investor's assets to be invested in large cap mutual funds, and accompanied that proposed allocation with the identity of a specific fund or provider."   See 80 FR 21945.

Virtually every study that the Department points to suggests that participants need assistance with financial decision-making. Giving asset classes without allowing examples will not help participants. They will be paralyzed by their choices, and unless they choose to pay for advice from a financial professional, their choices will be uninformed and haphazard, if not entirely incorrect, driven by confusion in the least volatile markets and panic in the most volatile markets. SIFMA believes there must be middle ground here, so that some examples can be given, under circumstances where the disclosure is clear and unambiguous. It is simply not reasonable to believe that participants will be able to grasp abstract descriptions of investment categories with no examples at all. Education that leaves participants lost, and forced to navigate the internet for additional information is a failure. SIFMA urges the Department to allow examples to be given, so long as at least three examples for each asset class are provided, unless there are fewer than three alternatives available in an asset class, in which event all options should be provided as examples.

SIFMA also urges the Department to make two changes to the proposal for rollovers. The first is to carve-out recommendations related to the selling of rollovers, unless there is a prior, explicit understanding that the recommendations are part of an agreement to render fiduciary advice. This carve-out should require, as a condition, that the call center or financial professional make clear that the conversation is a sales call or education, and is not intended as fiduciary or impartial advice. This second carve-out should make clear that so long as the factors contained in FINRA's 2013 rollover release (FINRA Regulatory Notice 13-45) are fairly presented, the conversation should not be deemed fiduciary advice.

In FINRA Regulatory Notice 13-45, FINRA explained that participants generally have four options when they separate from service: leave their account balance in their current plan, roll over their account balance to their new employer's plan, if permitted, roll over their account balance to an IRA, or simply take a distribution, pay the applicable taxes, and use the money for a non-retirement purpose. FINRA noted that the statistics on rollovers tell a graphic story: many participants are more comfortable with their assets in an IRA they control than in their former employer's plan.[42] SIFMA supports an interpretative bulletin or other rulemaking, or a change to the education carve-out in this rule, that makes clear that education on rollovers is not fiduciary advice. SIFMA respectfully suggests a new subsection to the education carve-out which would require the financial professional or call center representative to address each of the following factors taken directly from the FINRA Regulatory Notice in a non-biased fashion:[43]

> (b)(6)(v) Rollover Education. Oral or written information which does not include recommendations or advice but merely lays out the following considerations, each of which must be mentioned without biased emphasis:
>
> > **(A) Investment Options**—An IRA often enables an investor to select from a broader range of investment options than a plan. The importance of this factor will depend in part on how satisfied the investor is with the options available under the plan under consideration. For example, an investor who is satisfied by the low-cost institutional funds available in some plans may not regard an IRA's broader array of investments as an important factor.
> >
> > **(B) Fees and Expenses**—Both plans and IRAs typically involve (i) investment-related expenses and (ii) plan or account fees. Investment-related expenses may include sales loads, commissions, the expenses of any mutual funds in which assets are invested and investment advisory fees. Plan fees typically include plan administrative fees (*e.g.*, recordkeeping, compliance, trustee fees) and fees for services such as access to a customer service representative. In some cases, employers pay for some or all of the plan's administrative expenses. An IRA's account fees may include, for example, administrative, account set-up and custodial fees.

[42] IRAs account for about 28 percent of all U.S. retirement assets, which totaled $19.5 trillion at the end of 2012. Of this amount, IRA assets were $5.4 trillion, compared with $5.1 trillion in defined contribution plans and $9 trillion in other retirement plans. Approximately 98 percent of IRAs with $25,000 or less are brokerage accounts. Rollovers from employer-sponsored retirement plans are the largest source of contributions to IRAs. A June 2013 Employee Benefits Research Institute report states that in 2011, assets rolled over into IRAs were almost 13 times the amount of direct contributions. This is not a new trend; ICI data indicates that from 1996 to 2008 more than 90 percent of funds flowing into traditional IRAs came from rollovers, primarily from plans. In 2013, 49 percent of the traditional IRAs held by U.S. households included rollover funds.

[43] A revised carve-out for education is attached hereto as an appendix.

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(C) Services—An investor may wish to consider the different levels of service available under each option. Some plans, for example, provide access to investment advice, planning tools, telephone help lines, educational materials and workshops. Similarly, IRA providers offer different levels of service, which may include full brokerage service, investment advice, distribution planning and access to securities execution online.

(D) Penalty-Free Withdrawals—If an employee leaves her job between age 55 and 59½, she may be able to take penalty-free withdrawals from a plan. In contrast, penalty-free withdrawals generally may not be made from an IRA until age 59½.

(E) Protection from Creditors and Legal Judgments—Generally speaking, plan assets have unlimited protection from creditors under federal law, while IRA assets are protected in bankruptcy proceedings only. State laws vary in the protection of IRA assets in lawsuits.

(F) Required Minimum Distributions—Once an individual reaches age 70½, the rules for both plans and IRAs require the periodic withdrawal of certain minimum amounts, known as the required minimum distribution. If a person is still working at age 70½, however, he generally is not required to make required minimum distributions from his current employer's plan. This may be advantageous for the increasing population of Americans who plan to work into their 70s.

(G) Employer Stock—An investor who holds significantly appreciated employer stock in a plan should consider the negative tax consequences of rolling the stock to an IRA. If employer stock is transferred in-kind to an IRA, stock appreciation will be taxed as ordinary income upon distribution. The tax advantages of retaining employer stock in a non-qualified account should be balanced with the possibility that the investor may be excessively concentrated in employer stock. It can be risky to have too much employer stock in one's retirement account; for some investors, it may be advisable to liquidate the holdings and roll over the value to an IRA, even if it means losing long-term capital gains treatment on the stock's appreciation.

The Department may have other required content to suggest and SIFMA would look forward to engaging in a constructive conversation about how all perspectives on rollovers can be fairly presented to a participant without the provider of the information becoming a fiduciary. But we strongly disagree with the Department's current, highly restrictive approach and ask that the Department carefully consider the implications of and possible alternatives to its proposed framework.

The DOL has specifically declined to provide a separate carve-out for call centers. At the very least, this exception should make clear that call centers can use the education carve-out.

12. **Networking Arrangements and Institutional Referrals**

We understand the Department intends the fiduciary definition to capture individualized recommendations and advice as to the selection of investment managers and advisers. However, the Department's proposed language would apply to all recommendations or referrals without limitation. There is no carve-out for referrals to investment managers or other investment advice fiduciaries. This broad definition, especially when coupled with "the specifically directed to" language discussed above, will preclude information and access that is beneficial to retirement investors. The ability of non-fiduciary financial professionals and service providers to recognize and encourage potential opportunities for retirement savings is beneficial to investors and furthers the Department's goal of increasing the adequacy and preservation of retirement savings. For instance, retail bank employees that are not qualified to discuss investments often refer customers to an affiliated adviser within the bank or an affiliated broker-dealer in order to discuss the benefits of retirement savings. SIFMA members do not believe it is in the best interest of retirement investors to chill these referrals and networking arrangements, especially where such referrals would increase investors' access to, and consideration of, retirement savings and where the referred adviser will be acting in the best interest of the customer. Investors are able to distinguish referrals of affiliated services from trusted fiduciary advice. Fiduciary status should extend to those persons that offer advice as to the advisability of an adviser based on the needs of the plan or investor (assuming other requirements for fiduciary status are met), but not to referrals to such advisers where no recommendation or advice is given as to the advisability of engaging any particular adviser. In these circumstances, fiduciary status should be placed with the advice provider, not the introducer.

In addition, we do not believe fiduciary obligations should extend to arms-length referrals where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of a proposed service. SIFMA urges the Department to provide clarification that the counterparty exception or another exception from the fiduciary definition would be available for service providers when selling the services of an affiliate or third-party adviser, such as a networking arrangement under Regulation R or a solicitor arrangement under Rule 206(4)-3 of the Investment Advisers Act of 1940. The Department has not identified any risk of harm under these circumstances where the communications are non-individualized and fully transparent. This is especially true where a referral will satisfy all the conditions set forth in the counterparty exception or where a plan fiduciary has the expertise to evaluate the transaction and to determine whether the transaction is prudent and in the best interest of the plan participants.

A carve-out from the fiduciary definition should be created to provide as follows:

> **NETWORKING AGREEMENTS AND INSTITUTIONAL REFERRALS** – (A) In such person's capacity as a counterparty, service provider to a plan or IRA, representative or affiliate of the counterparty or service provider, or solicitor of the counterparty or service provider, the person provides a recommendation of a person who is going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (a)(1)(i) through (a)(1)(ii) or for asset management, provided such person has not acknowledged in writing that it is acting as a fiduciary (within the meaning of the Act) with

respect to the recommendation, the person only receives a nominal one-time cash payment from the recommended fiduciary in connection with such recommendation, and the person does not receive a specific separate advisory fee for such recommendation; (B) In such person's capacity as a counterparty, service provider to a plan or IRA, representative or affiliate of the counterparty or service provider, or solicitor of the counterparty or service provider, the person provides advice to a plan fiduciary who is independent of such person and who exercises authority or control with respect to the management or disposition of the plan's assets, with respect to an arm's length service arrangement, sale, purchase, loan or bilateral contract between the plan and a third-party adviser who is going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (a)(1)(i) through (a)(1)(ii) or for asset management, each a "transaction" for purposes of this subclause, if, prior to entering into a relationship that may lead to a transaction, the plan fiduciary represents that it has the requisite sophistication and experience in investment matters, and such person discloses to the fiduciary, participant or beneficiary, as the case may be, that the person has a financial interest in the matter, and that the person is not undertaking to provide impartial financial advice; provided such person has not acknowledged in writing that it is acting as a fiduciary (within the meaning of the Act) with respect to the transaction.

SIFMA reiterates its comments above that this carve-out should apply to IRAs and plan participants as well.

Subsection (d) of 29 CFR 2510.3-21

SIFMA urges the Department to modernize the safe harbor in 2510.3-21(d). The entire basis of the Department's new rule is that times have changed and the rule needs to take into consideration the effects of current plan and market conditions. That being said, the safe harbor should permit trade orders to be given to foreign broker dealers who are registered under broker-dealer laws in their countries. In addition, it should cover transactions in fixed income securities, options, and currency that are not executed on an agency basis. This regulation is not simply about participant directed plans: it covers plans of all sizes and types, and this subsection, which is intended to make sure that limited timing or trade venue decisions does not make one into a fiduciary, needs to cover any market broker or dealer, and not just those in the United States. Accordingly, we suggest the following clarification:

> (d) Execution of securities transactions. (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, *or a bank or broker dealer covered under the laws of a foreign jurisdiction*, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code, with respect to an employee benefit plan or IRA solely because such person executes transactions for the purchase or sale of securities *or currency on behalf of such plan or involving such plan* in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA, if:
>
> (i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and
>
> (ii) The instructions specify:
>
> (A) The security *or currency* to be purchased or sold;
>
> (B) A price range within which such security *or currency* is to be purchased or sold, *or that the security or currency is to be executed at the current market price,* or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, et seq.), a price which is determined in accordance with Rule 22c1 under the Investment Company Act of 1940 (17 CFR270.22c1);
>
> (C) A time span during which such security *or currency* may be purchased or sold (not to exceed five business days); and
>
> (D) The minimum or maximum quantity of such security *or currency* which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

Definitions

SIFMA has the following comments on certain of the definitions used in the proposed regulation.

(1) The term “Recommendation”

The proposed rule defines the term “recommendation” to mean “a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.” The preamble indicates that the DOL based this definition on FINRA Notice to Members 01-23, which sets forth guidelines for identifying communications that require compliance with the “suitability” rule for securities brokerage transactions (FINRA Rule 2111), and several other FINRA notices (RN 11-02, 12-25, and 12-55)[44]. A later FINRA notice, quoted with approval in the preamble to the proposal, states as follows: “An important factor in this regard is whether – given its content, context and manner of presentation – a particular communication from a firm or associated person to a customer reasonably would be viewed as a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy.”

The Department should fully adopt FINRA Notice to Members 01-23, which provides extremely valuable guidance for broker-dealers to distinguish between online tools that are educational and do not provide recommendations, and online tools that provided individualized recommendations. The former types of tools are prevalent and extremely valuable to self-directed investors to make informed investment decisions without paying a fee for advice. The industry has been following this guidance for fourteen years and, especially given that DOL has adopted FINRA’s definition of “recommendation” based on an interactive tools or other

[44] 80 FR 21938.

communication's content, context and presentation, DOL should remain consistent with this longstanding approach. Otherwise investors may lose access to such tools in their retirement accounts even though they will remain available to them in their taxable accounts.

SIFMA strongly supports the use of FINRA's guidance on what constitutes a "recommendation" to be used for purposes of the DOL proposal but it should also include the context in which that guidance is provided. Broker dealers that are FINRA members have many years of experience with this guidance and have incorporated it into their policies procedures, supervisory systems and controls, and training. This is a good example of the need to take a coordinated approach to the DOL proposed rule.

SIFMA agrees with the Department that the provision of information, investment ideas, alternatives and suggestions that fall far short of a "call to action" or a "specific endorsement" should not be fiduciary advice in the absence of an agreement or a mutual understanding or mutual arrangement. In addition, the definition needs to provide that the term does not include communications that merely suggest actions or courses of actions for consideration without a recommendation that is a call to action for the individual to engage in the action or course of action. However, as noted above, this definition needs to be read in connection with subsection (a)(2) and the changes suggested therein, to delete the term "specifically directed to" and to include the concept of mutual understanding and some level of reliance or importance as well as some level of qualitative recommendation and not a mere listing of possibilities to consider without such a recommendation. SIFMA strongly disagrees with the substitution of a standard which merely requires that the advice be targeted to an individual, and even where a person clearly warns the recipient that he is not providing individualized advice, an advertisement on television noting the availability of one-on-one to advice, may foil that clear warning.

We suggest that the definition read as follows:

> Recommendation means a communication that, based on its content, context, and presentation, would reasonably be viewed as a call to action or specific endorsement that the advice recipient engage in or refrain from taking a particular course of action. Recommendation does not include communications that merely suggest actions or course of actions for consideration with no call to action to engage in the action or course of action. A communication that would not be a recommendation within the meaning of applicable FINRA rules will not be deemed a recommendation under this section.

(2) The term "Compensation"

In addition, the proposed regulation defines "fee or other compensation, direct or indirect" to mean "any fee or compensation for the advice received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered." The term specifically includes brokerage fees, mutual funds and insurance sales commissions but sensibly leaves out revenue sharing, which is not shared with individual financial professionals and is generally paid without reference to particular transactions. This definition needs to make clear that revenue sharing that is paid regardless of whether the advice is taken by the participant or plan fiduciary is not compensation for purposes of the regulation.

We are also concerned with the forward looking part of the definition. As written, it covers "compensation incident to the transaction in which the investment advice has been rendered or will be rendered", leaving open whether the test could be met for compensation that is received regardless of whether the advice is taken, such as revenue sharing or training allowances and leaving open how far into the future compensation could be received. The future tense appears to be an attempt to codify the Department's position that a sales pitch, considered by the recipient in any way, that is followed by acceptance and a fee, can turn that sales pitch into fiduciary advice. SIFMA urges the Department to make clear that an advisor's recommendations under the rule which do not result in compensation for that advisor within a reasonable period of time is not compensation that meets the requirements of the definition.

(3) The term "IRA"

The proposed rule defines IRAs as "any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code." The definition is too broad. SIFMA members see no reason why the regulation should impose these fiduciary standards on savings accounts accumulated for very different reasons: fairly immediate health cost needs or education expenses. The kinds of issues that one considers in making the relatively short term investment decisions for these vehicles is so different from long term retirement savings that these sections should be reserved and dealt with separately.

Transitions

The preamble, but not the rule itself, provides that the final rule will be effective 60 days after publication of the final rule in the Federal Register. However, the requirements of the final rule would become applicable eight months after such publication. All exemptions would be effective on the applicability date as well. The Department seeks comment on whether certain provisions, such as the data collection requirements, should have a further delayed applicability date. We are not certain we understand the difference between an applicability date and an effective date. Neither term is defined in the proposed rule. Neither term is defined in the preamble. What does the effective date mean, if the rule and the exemptions are not effective on that date? Will courts agree that a rule's effective date is not really its effective date? If a person provides individualized advice after the effective date but before the applicability date, is he not a fiduciary? Is the applicability date the first date that liability attaches? If the individualized advice is given before the applicability date, and after the effective date, can the person receive differentiated compensation until the applicability date? Under what exemption? SIFMA would appreciate a clearer explanation of the Department's intentions with these terms.

Regardless of what these terms mean, they are simply inadequate. Sixty days or eight months is not nearly enough time to train all employees, build new systems, create compliance procedures, change compensation systems, block principal trades, block securities that do not meet the definition of "Asset" in the BIC exemption, revise confirmations, re-document all accounts, negotiate new fees, find and secure bonding policies and fiduciary insurance policies, talk to clients about assets they may no longer buy, and how to sell the investments they already have. Congress provided more than two years for the clearing requirements in Dodd-Frank which were far less sweeping than these changes. And when ERISA was enacted, Congress fully understood that financial professionals would need significant time to meet with their clients, review the required changes in their relationship, renegotiate fees, re-document the relationship, revise internal systems to contain required information and to block prohibited trades, create a website, determine how to create a system that provides liquidity and assesses credit risk, by CUSIP, on a daily basis to meet the requirements of the principal transaction exemption, design new confirms, new marketing materials, new educational materials, create supervisory procedures and compliance training, recode all accounts – the list is extraordinarily long and 8 months is very short. ERISA required far less in terms of systems development, new documentation, creation of charts, websites, and asset blocking systems. In 1974, Congress gave broker-dealers almost 10 years to phase in the prohibited transaction provisions relating to purchases and sales and almost three years to change services arrangements.[45] The Department's transition period is simply inadequate. Even if the final rule is published by January 1, 2016, financial professionals will have only 8 months to reach out to about 50 million accounts, have the important conversations with these plan fiduciaries and retirement investors about how their accounts, fees and client relationship will change, and how the rule will prevent those accounts from holding assets that

[45] See Section 413 of ERISA and ERISA Conference Report page 325, et. seq.

they currently hold or might want to hold in the future. Plans, participants and IRAs will be enormously pressured to review their arrangements or take their accounts to other institutions. Simply put, the transition period is too short. If the rule is to be effective within 8 months, at the very least the Department should propose a temporary exemption that permits all transactions permissible under current law to continue for 18 months, so long as clients receive clear and specific disclosure that the financial professional is required to put the client's interest before his own, and that he may have a conflict of interest with respect to the fees he receives in connection with his advice.

A Best Interest Standard

SIFMA believes there are less disruptive and more comprehensive ways to implement a best interest standard for additional protection for individual investors who maintain securities investments. Our members long ago endorsed a best interest or uniform fiduciary standard of care for all retail investors, including the retirement sector, when providing personalized investment advice about securities. SIFMA has encouraged the SEC, which has broad jurisdiction and authority in this space, to take action to establish a uniform fiduciary standard across all retail securities accounts receiving personalized investment advice.

The Dodd-Frank Act granted the SEC the authority to review and set the standard of care for broker-dealers with respect to retail investors through a Congressional mandate. While the SEC has not yet moved forward with a proposed rule, the rules and precedents governing broker-dealers' conduct with respect to retail investors, both in retirement and non-retirement accounts, have been migrating in recent years toward a best interests standard of care. For example, FINRA, under the supervision and oversight of the SEC, has been increasingly refining its definition of suitability under Rule 2111 and most recently through FINRA Notice 13-45, referenced earlier, to require brokers to put clients' best interests ahead of their own.

To further assist the SEC and FINRA and to maintain forward progress towards formalizing a best interest standard across all retail investor securities accounts, SIFMA, on June 3, 2015, proposed a “Best Interests of the Customer Standard for Broker-Dealers”,[46] which is designed to lay the groundwork for an investor-focused, comprehensive regulatory solution that works for investors and broker-dealers alike.

SIFMA believes that an optimal “best interests of the customer” legal standard for broker-dealers should do the following:

1. Apply across all investment recommendations made to individual retail customers in all brokerage accounts (not be limited to just IRA accounts);
2. Serve as a benchmark for, be consistent with, and integrate seamlessly into, the SEC uniform fiduciary standard that ultimately emerges under Dodd-Frank § 913;
3. Provide interim, strong, substantive, “best interests” protections for retail customers; and
4. Follow the traditional securities regulatory approach of establishing a rules-based heightened standard, including robust disclosure, coupled with robust examination, oversight, and enforcement by the SEC, FINRA and state securities regulators, as well as a private right of action for investors, as exists today.

SIFMA believes that our proposal outlines the broad contours of how a best interests standard for broker dealers might be developed as part of the path forward on this most important investor protection issue. Any approach by the DOL for retirement accounts must be entirely consistent with the views and rulings of the securities regulators, or the costs of compliance will increase unreasonably as institutions attempt to reconcile inconsistent interpretations of these requirements – how to define markups and markdowns, when disclosure must be provided,

[46] See http://www.sifma.org/newsroom/2015/sifma_proposes_best_interests_standard_for_broker-dealers.

required content on confirms, scope of required records --leading to confusion on the part of financial professionals, compliance professionals and clients. Investor confusion and market disruption are a certain result if the government does not get this right.

SIFMA and its members appreciate the opportunity to comment and look forward to meeting with the Department to discuss our concerns. For further discussion, please contact the undersigned at 202-962-7329.

Sincerely,

Lisa J. Bleier

Lisa J. Bleier
Managing Director, Federal Government Relations
and Associate General Counsel

Revisions of Investment Education Carve-out

(6) Investment education. The person furnishes or makes available any of the following categories of investment-related information and materials described in paragraphs (b)(6)(i) through (iv) of this section to a plan, plan fiduciary, participant or beneficiary, eligible employee, IRA or IRA owner irrespective of who provides or makes available the information and materials (*e.g.*, plan sponsor, fiduciary or service provider), the frequency with which the information and materials are provided, the form in which the information and materials are provided (*e.g.*, on an individual or group basis, in writing or orally, or via call center, video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of information and materials identified in paragraphs (b)(6)(i) through (iv), provided that the information and materials do not include (standing alone or in combination with other materials) recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations on investment, management, or value of a particular security or securities, or other property.

(i) Plan information. Information and materials that, without reference to the appropriateness of any individual investment alternative or any individual benefit distribution option for the plan or IRA, or a particular eligible employee, participant or beneficiary or IRA owner, describe the terms or operation of the plan or IRA, inform a plan fiduciary, eligible employee, participant, beneficiary, or IRA owner about the benefits of plan or IRA participation, the benefits of increasing plan or IRA contributions, the impact of preretirement withdrawals on retirement income, retirement income needs, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (*e.g.*, immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions, or describe investment objectives and philosophies, risk and return characteristics, historical return information or related prospectuses of investment alternatives under the plan or IRA.

(ii) General financial, investment and retirement information. Information and materials on financial, investment and retirement matters that do not recommend specific investment products, specific plan or IRA alternatives or distribution options available to the plan or IRA or to eligible employees, participants, beneficiaries and IRA owners, or specific alternatives or services offered outside the plan or IRA, unless at least three examples are provided but which inform the plan fiduciary, participant or beneficiary, or IRA owner about--

(A) General financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment;

(B) Historic differences in rates of return between different asset classes (*e.g.*, equities, bonds, or cash) based on standard market indices;

(C) Effects of inflation;

(D) Estimating future retirement income needs;

(E) Determining investment time horizons;

(F) Assessing risk tolerance;
(G) Retirement-related risks (*e.g.*, longevity risks, market/interest rates, inflation, health care and other expenses); and
(H) General methods and strategies for managing assets in retirement (*e.g.*, systematic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits), including those offered outside the plan or IRA.
(iii) Asset allocation models. Information and materials (*e.g.*, pie charts, graphs, or case studies) that provide a plan fiduciary, participant or beneficiary, or IRA owner with models of asset allocation portfolios of hypothetical individuals with different time horizons (which may extend beyond an individual's retirement date) and risk profiles, where--
(A) Such models are based on generally accepted investments theories that take into account the historic returns of different asset classes (*e.g.*, equities, bonds, or cash) over defined periods of time;
(B) All material facts and assumptions on which such models are based (*e.g.*, retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) accompany the models;
(C) Such models do not recommend any specific investment product or specific alternative available under the plan or IRA unless three examples are provided; and
(D) The asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual situations, eligible employees, participants, beneficiaries, or IRA owners should consider their other assets, income, and investments (*e.g.*, equity in a home, Social Security benefits, individual retirement plan investments, savings accounts and interests in other qualified and non-qualified plans) in addition to their interests in the plan or IRA, to the extent those items are not taken into account in the model or estimate.
(iv) Interactive investment materials. Questionnaires, worksheets, software, and similar materials which provide a plan fiduciary, eligible employee, participant or beneficiary, or IRA owners the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income; questionnaires, worksheets, software and similar materials which allow a plan fiduciary, eligible employee, participant or beneficiary, or IRA owners to evaluate distribution options, products or vehicles by providing information under paragraphs (b)(6)(i) and (ii) of this section; questionnaires, worksheets, software, and similar materials that provide a plan fiduciary, participant or beneficiary, or IRA owner the means to estimate a retirement income stream that could be generated by an actual or hypothetical account balance, where--
(A) Such materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (*e.g.*, equities, bonds, or cash) over defined periods of time;
(B) There is an objective correlation between the asset allocations generated by the materials and the information and data supplied by the participant, beneficiary or IRA owner;

(C) There is an objective correlation between the income stream generated by the materials and the information and data supplied by the eligible employee, participant, beneficiary or IRA owner;

(D) All material facts and assumptions (*e.g.*, retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, rates of return and other features and rates specific to income annuities or systematic withdrawal plan) that may affect a participant's, eligible employee's, beneficiary's or IRA owner's assessment of the different asset allocations or different income streams accompany the materials or are specified by the eligible employee, participant, beneficiary or IRA owner;

(E) The materials do not recommend any specific investment alternative available or distribution option available under the plan or IRA, unless at least three examples are provided or unless such alternative or option is specified by the participant, beneficiary or IRA owner; and

(F) The materials either take into account other assets, income and investments (*e.g.*, equity in a home, Social Security benefits, individual retirement account/annuity investments, savings accounts, and interests in other qualified and non-qualified plans) or are accompanied by a statement indicating that, in applying particular asset allocations to their individual situations, or in assessing the adequacy of an estimated income stream, eligible employees, participants, beneficiaries or IRA owners should consider their other assets, income, and investments in addition to their interests in the plan or IRA.

(v) The information and materials described in paragraphs (b)(6)(i) through (iv) of this section represent examples of the type of information and materials that may be furnished to participants, beneficiaries and IRA owners without such information and materials constituting investment advice. Determinations as to whether the provision of any information, materials or educational services not described herein constitutes the rendering of investment advice must be made by reference to the criteria set forth in paragraph (a) of this section.

(vi) Rollover Education. Oral or written information which does not include recommendations or advice but merely lays out the following considerations, each of which must be mentioned without biased emphasis:

> **(A) Investment Options**—An IRA often enables an investor to select from a broader range of investment options than a plan. The importance of this factor will depend in part on how satisfied the investor is with the options available under the plan under consideration. For example, an investor who is satisfied by the low-cost institutional funds available in some plans may not regard an IRA's broader array of investments as an important factor.
>
> **(B) Fees and Expenses**—Both plans and IRAs typically involve (i) investment-related expenses and (ii) plan or account fees. Investment-related expenses may include sales loads, commissions, the expenses of any mutual funds in which assets are invested and investment advisory fees. Plan fees typically include plan administrative fees (*e.g.*, recordkeeping, compliance, trustee fees) and fees for

services such as access to a customer service representative. In some cases, employers pay for some or all of the plan's administrative expenses. An IRA's account fees may include, for example, administrative, account set-up and custodial fees.

(C) Services—An investor may wish to consider the different levels of service available under each option. Some plans, for example, provide access to investment advice, planning tools, telephone help lines, educational materials and workshops. Similarly, IRA providers offer different levels of service, which may include full brokerage service, investment advice, distribution planning and access to securities execution online.

(D) Penalty-Free Withdrawals—If an employee leaves her job between age 55 and 59½, she may be able to take penalty-free withdrawals from a plan. In contrast, penalty-free withdrawals generally may not be made from an IRA until age 59½.

(E) Protection from Creditors and Legal Judgments—Generally speaking, plan assets have unlimited protection from creditors under federal law, while IRA assets are protected in bankruptcy proceedings only. State laws vary in the protection of IRA assets in lawsuits.

(F) Required Minimum Distributions—Once an individual reaches age 70½, the rules for both plans and IRAs require the periodic withdrawal of certain minimum amounts, known as the required minimum distribution. If a person is still working at age 70½, however, he generally is not required to make required minimum distributions from his current employer's plan. This may be advantageous for the increasing population of Americans who plan to work into their 70s.

(G) Employer Stock—An investor who holds significantly appreciated employer stock in a plan should consider the negative tax consequences of rolling the stock to an IRA. If employer stock is transferred in-kind to an IRA, stock appreciation will be taxed as ordinary income upon distribution. The tax advantages of retaining employer stock in a non-qualified account should be balanced with the possibility that the investor may be excessively concentrated in employer stock. It can be risky to have too much employer stock in one's retirement account; for some investors, it may be advisable to liquidate the holdings and roll over the value to an IRA, even if it means losing long-term capital gains treatment on the stock's appreciation.