

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

Sept. 24, 2015

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

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ is pleased to provide supplementary comments regarding the Department of Labor’s (“Department”) definition of fiduciary regulatory package. The industry appreciates the Department’s engagement during the hearing, as well as its thoughtful questions.

At the hearing, Mr. Hauser asked me to address for the record whether, if the FINRA definition of the term “recommendation” were adopted, there would be a need for a seller’s exception. We believe the seller’s exception is critical to the rule, regardless of the definition of recommendation, and in fact, believe the two issues to be distinct and separate. The rule is so overbroad that it simply cannot be fixed with a precise definition of recommendation. Certain activities are not fiduciary in nature. Institutional traders, brokers, counterparties and clearing firms need certainty that regardless of their commentary, plans and their fiduciaries can agree that with adequate disclosure, one does not become a fiduciary inadvertently by providing one’s views about the market or about particular investments. The BIC Exemption will not become workable for broker-dealers merely because the definition of recommendation is clarified.

There was significant discussion at the hearings on mandatory arbitration. SIFMA firmly believes that unless mandatory arbitration continues to be permitted under the BIC exemption, the costs projected for the exemption will be even more significantly understated and the ability of broker-dealers to provide fiduciary services using the BIC exemption will be even more severely limited or the costs of such services increased dramatically to account for litigation risk.

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. 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 www.sifma.org.

We also do not believe that the Department has the authority to preclude arbitration, and note that mandatory arbitration was such a fundamental part of the proposal that its elimination would require reproposal.

There was significant comment on rollovers and distribution advice at the hearing and overall, we believe that there is a clear need to clarify the rollover rule to exclude information regarding required distributions, either because of the attainment of age 70 ½ or due to beneficiary distribution rules in inherited IRAs. We simply do not believe that this very necessary information should ever be deemed to be investment advice. In addition, we believe that there is a consensus among witnesses that the Department's proposal to permit no examples of specific funds will be a mistake for participants, and we urge the Department to work with consumer advocates and the industry to find a middle ground. Finally, we urge the Department to use FINRA Notice 13-45 as a safe harbor in this area.

We urge the Department to use the FINRA best interest standard, which requires that one put one's client's interests ahead of one's own. The Department's formulation instead – and in our view, mistakenly -- requires that one give advice “without regard” to one's interest, which, in our view, is merely a trap to permit a plaintiff's lawyer an avenue to argue that every time an investment could have paid the advisor “less”, its recommendation was not made “without regard” to the advisor's interest.

In addition, we reiterate that the Department's choice to make prudence and best interest a requirement of an exemption is duplicative, unnecessary and contrary to the clear statutory language of ERISA with respect to plans covered under ERISA, which are already subject to section 404 of ERISA with recourse to federal court for violations of that standard. With respect to IRAs, we understand the Department's interest in “finding a place” in the Code for a best interest standard for IRAs, but we believe that the remedies for violations of the prohibited transaction rules – reversal of the trade, disgorgement of fees, and payment of an annual 15% excise tax on the amount involved, regardless of a loss on the trade -- are flatly inconsistent with imposing ERISA remedies for the same violation.

Finally, if the Department chooses to proceed to a final rule, it must work with the industry on reasonable transition rules and effective dates. The systems that every broker-dealer will need to create, back test, and put into use will take years, not months to build. Both the point of sale and annual disclosure rules under the BIC exemption will require the creation of systems that accrue internal mutual fund fees daily to convert those fees to dollars amounts for the precise number of days that fund shares are held. It will also require the allocation of flat dollar revenue sharing to each share of every mutual fund sponsored by the fund company across all the firm clients holding such shares on a daily basis, a system that no broker dealer currently is required to do for any purpose. The planning and programming for these systems cannot even begin until the rules are finalized. In addition, every broker's compensation, every incentive and bonus program, every performance evaluation will need to be revised or renegotiated under the new rules. The

overwhelming majority of accounts will need new advisory agreements, with new fees and client signatures.² In the IRA world alone, that equates to the redocumentation of more than 50 million accounts. Finally, as we have said, numerous small accounts will have to be terminated. These accounts are likely the smallest and least sophisticated of our accounts, and the disruption and confusion inherent in this change should not be underestimated, in terms of negative client experience and the time necessary to make these transitions.

We have attached a marked version of the rule, suggesting language changes that we believe will clarify it. We have not attempted to provide markups for the exemptions but we would be happy to continue to discuss necessary changes to these exemptions.

We also reiterate our view that in light of the number of substantive comments received, the many changes that even supporters have suggested, and the many changes that are needed to make the rule work, the Department should re-propose the rule and prohibited transaction exemptions before adopting them in final form.

Please do not hesitate to reach out to Lisa Bleier at 202-962-7329 if you have further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ken Bentsen", with a long horizontal line extending to the right.

Kenneth Bentsen

² We understand that the Department believes that one can agree to be an investment advice fiduciary without a written bilateral agreement and delivery of an ADV. The vast majority of securities lawyers who advise our industry disagree, and have advised our members that they will need to convert brokerage account agreements to advisory agreements.

Mark-Up of Department's Proposal

SUBCHAPTER A--GENERAL

PART 2509--INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order 1-2011, 77 FR 1088 (Jan. 9, 2012). Sections 2509.75-10 and 2509.75-2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75-5 also issued under 29 U.S.C. 1002. Sec. 2509.95-1 also issued under sec. 625, Pub. L. 109-280, 120 Stat. 780.

Sec. 2509.96-1 [Removed]

2. Remove Sec. 2509.96-1.

SUBCHAPTER B--DEFINITIONS AND COVERAGE UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2510--DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

3. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order 1-2011, 77 FR 1088; Secs. 2510.3-21, 2510.3-101 and 2510.3-102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237. Section 2510.3-38 also issued under Pub. L. 105-72, Sec. 1(b), 111 Stat. 1457 (1997).

4. Revise Sec. 2510.3-21 to read as follows:

Sec. 2510.3-21 Definition of "Fiduciary."

(a) Investment advice. For purposes of section 3(21)(A)(ii) of the

Employee Retirement Income Security Act of 1974 (Act) and section 4975(e)(3)(B) of the Internal Revenue Code (Code), except as provided in paragraph (b) of this section, a person renders investment advice with respect to moneys or other property of a plan or IRA described in paragraph (f)(2) of this section if--

(1) Such person provides, directly to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner the

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following types of advice in exchange for a fee or other compensation, whether direct or indirect:

(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 ~~exercise of rights appurtenant to management of~~ securities or other property, including recommendations as to the ~~exercise of such rightsmanagement of securities~~ ~~or with respect to securities or~~ other property to be rolled over or otherwise distributed from the plan or IRA;

(iii) ~~Valuation: reserved. 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); and

~~(2) Such person, either directly or indirectly (e.g., through or together with any affiliate),—~~

~~(i) “(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.”~~

~~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~~

~~(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.”~~

~~“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.”

~~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.~~

(b) Carve-outs--investment advice. “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.”

~~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 section.~~

(1) Counterparties to the plan—(i) 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).~~Counterparty transaction~~

~~plan fiduciary with financial expertise. (A) In such person's capacity as a counterparty (or representative of a counterparty) to an employee benefit plan (as described in section 3(3) of the Act, 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 sale, purchase, loan or bilateral contract between the plan and the~~

counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral contract, if, prior to providing any recommendation with respect to the transaction, such person satisfies the requirements of either paragraph (b)(1)(i)(B) or (C) of this section.

— (B) Such person—

— (1) Obtains a written representation from the independent plan fiduciary that the independent fiduciary exercises authority or control with respect to the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act), that the employee benefit plan has 100 or more participants covered under the plan, and that the independent fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity;

— (2) Fairly informs the independent plan fiduciary of the existence and nature of the person's financial interests in the transaction;

— (3) Does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction; and

— (4) Knows or reasonably believes that the independent plan fiduciary has sufficient expertise to evaluate the transaction and to determine whether the transaction is prudent and in the best interest of the plan participants (the person may rely on written representations from the plan or the plan fiduciary to satisfy this subsection (b)(1)(i)(B)(4)).

— (C) Such person—

— (1) Knows or reasonably believes that the independent plan fiduciary has responsibility for managing at least \$100 million in employee benefit plan assets (for purposes of this paragraph (b)(1)(i)(C), when dealing with an individual employee benefit plan, a person may rely on the information on the most recent Form 5500 Annual Return/Report filed for the plan to determine the value and, in the case of an independent fiduciary acting as an asset manager for multiple employee benefit plans, a person may rely on representations from the independent plan fiduciary regarding the value of employee benefit plan assets under management);

— (2) Fairly informs the independent plan fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity; and

— (3) Does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction.

(ii) 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.~~ Swap and security-based swap transactions. The person is a counterparty to an employee benefit plan (as described in section 3(3) of the Act) in connection with a swap or security-based swap, as defined in section 1(a) of the Commodity Exchange Act (7 U.S.C. 1(a) and section 3(a) of the Securities Exchange Act (15 U.S.C. 78c(a)), if—

- ~~—(A) The plan is represented by a fiduciary independent of the person;~~
- ~~—(B) The person is a swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant;~~
- ~~—(C) The person (if a swap dealer or security-based swap dealer), is not acting as an advisor to the plan (within the meaning of section 4s(h) of the Commodity Exchange Act or section 15F(h) of the Securities Exchange Act of 1934) in connection with the transaction; and~~
- ~~—(D) In advance of providing any recommendations with respect to the transaction, the person obtains a written representation from the independent plan fiduciary, that the fiduciary will not rely on recommendations provided by the person.~~

(2) Employees. In his or her capacity as an employee of any employer or employee organization sponsoring the employee benefit plan (as described in section 3(3) of the Act) or an affiliate thereof, the person provides the advice directly or indirectly to a plan fiduciary, and he or she receives no fee or other compensation, direct or indirect, in connection with the advice beyond the employee's normal compensation for work performed for the employer or employee organization.

(3) Platform providers. The person merely markets and makes available to an employee benefit plan (as described in section 3(3) of the Act) or to IRAs, without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, if the person discloses in writing to the plan or IRA fiduciary that the person is not undertaking to provide

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impartial investment advice or to give advice in a fiduciary capacity.

(4) Selection and monitoring assistance. In connection with the activities described in paragraph (b)(3) of this section with respect to an employee benefit plan (as described in section 3(3) of the Act), the person--

- (i) Merely identifies investment alternatives that meet objective

criteria specified by the plan fiduciary (e.g., stated parameters concerning expense ratios, size of fund, type of asset, credit quality); or

(ii) Merely provides objective financial data and comparisons with independent benchmarks to the plan fiduciary.

(5) Financial reports and valuations. The person provides an appraisal, fairness opinion, or statement of value to--

(i) An employee stock ownership plan (as defined in section 407(d)(6) of the Act) regarding employer securities (as defined section 407(d)(5) of the Act);

(ii) An investment fund, such as a collective investment fund or pooled separate account, in which more than one unaffiliated plan has an investment, or which holds plan assets of more than one unaffiliated plan under 29 CFR 2510.3-101; or

(iii) A plan, a plan fiduciary, a plan participant or beneficiary, an IRA or IRA owner ~~solely~~ for purposes of periodic statements, market quotes, annual reporting, compliance with the reporting and disclosure provisions under the Act, the Code, and the regulations, forms and schedules issued thereunder, or any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization rule or regulation.

(6) Investment education. SEE SEPARATE COMPARE VERSION ATTACHED HERETO.

(7) 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.

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, 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 participant or beneficiary or IRA owner, describe the terms or operation of the plan or IRA, inform a plan fiduciary, 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 address specific investment products, specific plan or IRA alternatives or distribution options available to the plan or IRA or to participants, beneficiaries and IRA owners, or specific alternatives or services offered outside the plan or IRA, and 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 include or identify any specific investment product or specific alternative available under the plan or IRA; and~~
 - ~~—(D) The asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual situations, 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, 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, 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~~

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~~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 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, beneficiary's or IRA owner's assessment of the different asset allocations or different income streams accompany the materials or are specified by the participant, beneficiary or IRA owner;~~
~~—(E) The materials do not include or identify any specific investment alternative available or distribution option available under the plan or IRA, 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, 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.~~

(c) Scope of fiduciary duty--investment advice. A person who is a fiduciary with respect to an employee benefit plan or IRA by reason of rendering investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, direct or indirect, with respect to any securities or other property of such plan, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which

such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (a)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(1) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(2) Exclude such person from the definition of the term "party in interest" (as set forth in section 3(14)(B) of the Act or "disqualified person" as set forth in section 4975(e)(2) of the Code) with respect to a plan.

(d) (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 CFR 270.22c1);

(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.

~~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, 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 on behalf of 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 to be purchased or sold;~~
 - ~~— (B) A price range within which such security is to be purchased or sold, 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 CFR 270.22c1);~~
 - ~~— (C) A time span during which such security may be purchased or sold (not to exceed five business days); and~~
 - ~~— (D) The minimum or maximum quantity of such security 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.~~

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to an employee benefit plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA, or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the provisions of paragraph (d)(1) of this section, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition of the term party in interest (as set forth in section 3(14)(B) of the Act) or disqualified person 4975(e)(2) of the Code with respect to any assets of the plan or IRA.

(e) Internal Revenue Code. Section 4975(e)(3) of the Code contains provisions parallel to section 3(21)(A) of the Act which define the term "fiduciary" for purposes of the prohibited transaction provisions in Code section 4975. Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237 transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. All references herein to section 3(21)(A) of the Act should be read to include reference to the parallel provisions of section 4975(e)(3) of the Code. Furthermore, the provisions of this section shall apply for purposes of the application of Code section 4975 with respect to any plan described in Code section 4975(e)(1).

(f) Definitions. For purposes of this section--

(1) 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.

~~"Recommendation" means 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.~~

(2)(i) "Plan" means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code, and

(ii) "IRA" means any trust, account or annuity described in Code section 4975(e)(1)(B) through ~~(DF), 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.~~

(3) "Plan participant" means for a plan described in section 3(3) of the Act, a person described in section 3(7) of the Act.

(4) "IRA owner" means with respect to an IRA either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) "Plan fiduciary" means a person described in section (3)(21) of the Act and 4975(e)(3) of the Code.

(6) "Fee or other compensation, direct or indirect" for purposes of this section and section 3(21)(A)(ii) of the Act, means 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 fee or other compensation includes, for example, brokerage fees, mutual fund and insurance sales commissions, provided, however that a-n advisor's recommendations which do not result in a transaction that includes compensation for that advisor within a reasonable period of time is not compensation that meets the requirements of this definition.

(7) "Affiliate" includes: Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such person; and any corporation or partnership of which such person is an officer, director or partner.

(8) "Control" for purposes of paragraph (f)(7) of this section means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Signed at Washington, DC, this 14th day of April, 2015.
Phyllis C. Borzi,
Assistant Secretary, Employee Benefits Security Administration,
Department of Labor.
[FR Doc. 2015-08831 Filed 4-15-15; 11:15 am]
BILLING CODE 4510-29-P

Comparison on the Investment Education Portion

(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 ~~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 ~~address~~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, ~~and~~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;

~~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.

~~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;

~~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 include or identify 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

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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 ~~include or identify~~ 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.

~~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.