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February 3, 2011

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: **Definition of Fiduciary Proposed Rule**

Ladies and Gentlemen:

T. Rowe Price Group, Inc. (**"T. Rowe Price"**)[1] appreciates this opportunity to comment on the Employee Benefits Security Administration's (**"EBSA"**) definition of fiduciary Proposed Rule (the **"Proposed Rule"**).[2] T. Rowe Price supports EBSA's goal of ensuring that its regulations issued under the Employee Retirement Income Security Act of 1974 (**"ERISA"**) are protective of retirement plans, participants and beneficiaries. However, we are concerned that the Proposed Rule will have significant unintended consequences and will significantly disrupt established service practices severely limiting the ability of plan sponsors and other designated fiduciaries[3] to obtain the information and support that they have come to expect from their service providers.[4] This letter includes a summary of our concerns regarding the Proposed Rule and suggests certain modifications.

Additionally, EBSA requested comments regarding distribution counseling services. T. Rowe Price believes that non-fiduciary distribution counseling services are essential for ensuring that plan participants understand the distribution options available to them when leaving an employer and should be preserved. Accordingly, this letter includes our views on that subject.

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[1] T. Rowe Price Group is a financial services holding company that, through its subsidiaries, provides investment advisory services to individual and institutional investors in the sponsored T. Rowe Price mutual funds and other investment portfolios. Through its subsidiary T. Rowe Price Retirement Plan Services, Inc. ("**RPS**"), it also provides recordkeeping and plan administrative services to over 1,091 retirement plans, with 1,771,445 plan participants (as of 12/31/2010).

[2] 75 Fed. Reg. 65263 (Oct. 22, 2010).

[3] For purposes of simplicity, references herein to "plan sponsor" and/or "designated fiduciary" include a plan committee acting on options. behalf of the plan, plan trustee or other plan fiduciary that is designated as being responsible for selecting a plan's investment

[4] In promulgating interpretations of ERISA, the U.S. Department of Labor is charged with protecting the interests of retirement plan and their participants and beneficiaries in a manner that ensures that "established business practices of financial institutions" in interacting with employee benefit plans were not disrupted. *See* ERISA Conference Report, P.L. 93-406, at 309.

I.
Introduction

The Proposed Rule expands the definition of a fiduciary under ERISA by redefining when a service provider renders "investment advice" for a fee within the meaning of Section 3(21)(A)(ii) of ERISA. Under the Proposed Rule, a service provider renders investment advice, and would be a plan fiduciary, when it "[m]akes recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property, or ... [p]rovides advice or makes recommendations as to the management of securities or other property"[5] and meets certain other requirements. Under the Proposed Rule, the service provider would be considered a fiduciary if it provides advice or recommendations regarding the matters described above--

> "pursuant to an agreement, arrangement or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant or beneficiary that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary."[6]

As noted above, we support EBSA's efforts to ensure that its regulations issued under ERISA are protective of retirement plans, participants and beneficiaries. However, we are concerned that the scope of the Proposed Rule is very broad and the availability and scope of the exceptions are unclear. As a result, the activities that trigger when a service provider will be considered a fiduciary would be contrary to the expectations of plan sponsors and other designated fiduciaries and, in many instances, significantly unclear. It is critical that service providers are able to structure their products and services with reasonable certainty about whether they are a fiduciary with respect to a retirement plan and its participants. Without such certainty, service providers can not reasonably avoid unintentionally and unwillingly becoming fiduciaries and engaging in prohibited transactions. Unintentional fiduciary status is a realistic possibility under the Proposed Rule in connection with advisory relationships, investment platform products and services, and in many other situations. Most importantly, we are concerned that the Proposed Rule's recharacterization of relationships into fiduciary activities will likely cause service providers to discontinue providing many services that plan sponsors, other designated fiduciaries and participants demand and will force such persons to obtain the information and data they need from fiduciary providers requiring that they pay substantially higher fees.

We urge EBSA to take a more measured and restrained approach in changing the definition of fiduciary so that the impact on access to markets, investment products and

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[5] 2510.3-21(c)(1)(i)(A)(2) & (3).

[6] 2510.3-21(c)(1)(ii)(D).

service providers will be less consequential. We urge EBSA to consider the following recommendations that can form the basis for a reproposal of the Proposed Rule.

1. Plan service providers and their customers should be able to reach a mutual understanding as to a service provider's role and whether a fiduciary relationship is expected. Service providers should not be subject to significant risk that an agreement with a plan or plan participants to provide non-fiduciary products and services is treated, after the fact, as a fiduciary services arrangement.

2. ERISA fiduciary status should not apply to activities engaged in by investment advisers and their affiliates outside of the relationship for which the adviser has undertaken to provide investment advisory services for compensation.

3. Requiring a seller of an investment product or service to state that its interests are "adverse" to those of the buyer only serves to create confusion. An awareness of the financial interests the seller may have regarding the purchase decision would be more relevant and, therefore, useful to a prospective buyer.

4. Service providers should be able to provide information and data on investment options to plan sponsors both during the sales process and on an ongoing basis if the service provider expressly discloses that it is providing such in a non-fiduciary capacity as a seller and that it has a financial interest regarding any decisions that the potential customer may make in connection with the plan and plan assets. [7]

5. Ministerial custodial valuations and pricing services should not be considered fiduciary activities.

T. Rowe Price believes that modifications to the Proposed Rule based on the above concepts will accomplish EBSA's goals, continue to protect plans, plan sponsors, plan participants and beneficiaries and allow sponsors and participants to continue to receive non-fiduciary products and services they need at a reasonable fee. Our concerns and additional recommendations regarding specific aspects of the Proposed Rule are summarized below.

II.
Specific Concerns

A. Unintentional Fiduciary Status of Certain Investment Adviser Affiliates. The Proposed Rule provides that a person renders investment advice if such person makes recommendations as to the advisability of investing in, purchasing, holding or selling plan investments, and such person meets at least one other requirement.[8] In this respect,

[7] The service provider should disclose in any such agreement and consistent with the regulations under Section 408(b)(2) of ERISA, the financial interests it may have regarding any decisions that the plan, plan sponsor, plan participant or beneficiary may make in connection with the plan and plan assets.

[8] 2510.3-21(c)(1)(i)(A)(2), and 2510.3-21(c)(1)(ii).

such person would also have to either (1) directly or indirectly, including through or together with affiliates, be an investment adviser under the Investment Advisers Act (**"Advisers Act"**),[9] or (2) provide advice or make recommendations regarding plan investments pursuant to an agreement, arrangement or understanding, written or otherwise, with the plan, a plan fiduciary, or a plan participant or beneficiary that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary.[10]

1. Impact on normal activities of investment advisers - We are concerned that the Proposed Rule treats a person as acting as an ERISA fiduciary for all purposes where a particular status exists, even if this status is unrelated to the engagement establishing the relationship between the person and the plan sponsor or other designated fiduciary. In determining whether someone interacting with a plan or participant is giving advice under ERISA, the relevant inquiry should be the context of the interaction itself and not rest solely on the status of the person as an adviser under the Advisers Act or an ERISA fiduciary for some other reason.

T. Rowe Price serves as investment adviser to numerous ERISA plans and in such capacity acknowledges its status as an ERISA fiduciary and registered adviser under the Advisers Act. In performing advisory services under such relationships, T. Rowe Price understands and takes with the utmost seriousness its obligation to satisfy fiduciary responsibilities both under ERISA and the Advisers Act with respect to the assets that it manages. As an established adviser, however, T. Rowe Price also often provides general investment – related information or commentary on matters beyond the scope of its existing relationship on an impromptu basis, through educational newsletters or client conferences, or during discussions regarding potential future services. Typically, such information and commentary is offered to all clients regardless of their status as a retirement plan or relationship to a retirement plan.[11]

As discussed above, under the Proposed Rule, an investment adviser that makes a recommendation as to the advisability of investing in, purchasing, holding, or selling securities or other property to a plan or participant would be acting as an ERISA fiduciary. The recommendation need not be individualized to the needs of the plan or participant and need not even be aimed at a particular plan or participant. Any investment newsletter or expression of opinion reported in a newspaper or financial publication, including those making general statements about classes of investments would be encompassed by the proposal's two-part test, even if the commentary is intended for the adviser's total client base or the general public without reference or individualized to a particular retirement plan or participant.

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[9] 2510.3-21(c)(1)(ii)(C).

[10] 2510.3-21(c)(1)(ii)(D).

[11] While T. Rowe Price uses appropriate care and the utmost good faith in providing investment and market commentary, it is, of course, not intending to provide individualized guidance customized to the unique circumstance of a specific client when doing so.

For example, a typical client newsletter might include a question and answer segment with a mutual fund manager that offers the manager's perspective on general market influences that could be relevant to the fund's future performance or risks. A plan sponsor who has a small portion of its defined contribution plan assets in a separate account managed by T. Rowe Price could decide to invest a portion of the plan's assets (that is not managed by T. Rowe Price) in the mutual fund based in part on what the fund manager had to say in the newsletter. Such a scenario, which would be impossible to monitor and protect against, could be deemed to meet both parts of the two-part test. In this respect, it includes an opinion on market influences relevant to an investment and is made by someone who is an investment adviser under the Advisers Act. Because the mutual fund at issue is a proprietary product of the adviser, it would also result in a prohibited transaction under ERISA's prohibited transaction rules for which we are aware of no available exemption.

Beyond ensuring that inadvertent prohibited transactions don't result from any expression of opinion made in investment newsletters or reported in the press, investment advisers need to know who is relying on such opinions as fiduciary advice for another important reason – to ensure that such opinion is fully vetted against the unique circumstances of the client plan. Thus, the plan sponsor in the above illustration may have found upon further discussion with its investment professionals that the mutual fund that they selected for the plan is inappropriate for the plan's needs in light of the fund's limited market segment, redemption policies or other factors not fully considered by the plan sponsor. It is untenable and contrary to public policy to impose ERISA fiduciary status on investment advisers who are not in a position to know who is relying on commentary offered as general guidance but not individualized to the plan or other customer. We urge EBSA to eliminate the "status" test from the definition. Since this test is largely duplicative of the Proposed Rule's fundamental test, dealing with making recommendations that are individualized to the needs of the plan, an alternative test focused solely on the status of the service provider is simply not necessary and only results in significant unintended consequences.

2. Impact on investment adviser affiliates - We are also concerned that the language in aforementioned sections of the Proposed Rule either is intended to or can be misinterpreted to mean that a non-fiduciary service provider that makes recommendations to a plan about plan investments, but does not otherwise meet the substantive requirements under the second clause of the rule, could still be deemed to have provided investment advice if it is affiliated with an Investment Adviser. The Proposed Rule appears to cause the non-fiduciary service provider to be deemed a fiduciary even though the affiliated investment adviser is not involved in providing the recommendation made by the service provider with the direct relationship to the plan.

We are concerned that the Proposed Rule treats service providers who are merely affiliated with an investment adviser to become unintentional plan fiduciaries. As discussed in the sections that follow in this letter, this status oriented standard will force

such providers to stop providing many services to their plan customers and prospects in order to avoid becoming an unwilling fiduciary and engaging in unintentional prohibited transactions. This will put providers who are affiliated with investment advisers at a competitive disadvantage relative to other service providers and significantly disrupt the existing price competitive nature of the retirement plan industry.

In order to resolve this issue, we urge EBSA to modify the language in the Proposed Rule to clarify that merely being affiliated with an investment adviser will not cause a service provider to be treated as having rendered investment advice, and that such service provider will only be treated as having rendered investment advice if it meets one of the other requirements under Section (c)(1)(ii)(D).

B. Seller's Exception. Under the Proposed Rule, generally, a service provider will not become a fiduciary with respect to--

> "the provision of advice or recommendations if ... such person can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice."[12] (Emphasis added.)

EBSA presumably recognized that service providers must be able to sell their products and services and, therefore, provided an exception for certain sales activities. Although we commend EBSA for recognizing the need for a sales exception in the Proposed Rule, we are concerned about potential limitations on the scope and usefulness of the exception because issues and discussions on certain investment related topics do not present themselves as pre- and post-sale activities. We are also concerned that the conditions of the exception would require that all sales activities be cast in a negative light as being "adverse" to the interests of plan sponsors and participants.

1. Scope of seller's exception – The sellers exception has reportedly been described by EBSA representatives as being intended solely as an exception to fiduciary status for pre-sale activities and is not intended to apply once a service provider relationship is created. However, many of the conversations and issues related to a plan's investments may begin during the sales process without a plan sponsor making any final decisions (*e.g.*, selecting the exact investment options, or whether and what fund to use as a default option). As discussed in greater detail below in connection with the platform exception, a service

[12] 2510.3-21(c)(2)(i).

provider may provide various forms of assistance during the sales process (*e.g.*, providing a list of comparable funds as investment options) that, absent an exception, could be treated as investment advice under the Proposed Rule. This may happen in response to an RFP or in conversations and interviews as a plan sponsor narrows down its choices among providers. Plan sponsors and other designated fiduciaries generally make final decisions about their investment options after signing the service agreement with the provider. This allows them more time to consider their investment choices and to focus on the specifics of those decisions separately from administration, record keeping and general services decisions. It would also be unreasonable and overly burdensome for a plan sponsor to be required to obtain all of the assistance it needs relative to the fund selection process before the service provider has been hired.

We are also concerned that the activities covered under the sales exception will be based on the parties, particularly the service provider, being able to identify and demonstrate when the sales process ends. As illustrated by the examples discussed below, there is no clear beginning and end date for discussing potential plan investment options. Although certain decisions in connection with the selection of a plan lineup may be resolved before or shortly after an agreement is signed, a plan sponsor will expect the assistance and conversations on plan investments to be a continuous process throughout the relationship which can last twenty or more years. For example, after a service provider relationship is established, EBSA may issue guidance relevant to the investment selection of a plan option, *e.g.*, the selection of default options, that will cause a plan sponsor or other designated fiduciary to ask questions of the service provider relevant to available investments. The exception in the Proposed Rule does not appear to extend its coverage in this situation. As a result, plan sponsors and service providers will be in an awkward and difficult position with each other. The plan sponsor will expect follow-through and resolution of investment related issues, but the service provider will be forced to stop providing help unless it has agreed to serve as a plan fiduciary. In cases where the service provider makes available proprietary products or products for which it receives shareholder servicing or 12b-1 fees, it may be precluded altogether by ERISA's prohibited transaction rules from having any discussion of such products.

In order to resolve these concerns, we urge EBSA to clarify that the seller's exception is intended to cover the advice and recommendations of the seller at any time during a relationship when a decision is being considered with respect to an unresolved matter,[13] even if an agreement has been signed or decisions have been made by the recipient with respect to other matters. By adopting the foregoing recommendation in combination with several others in this letter, *e.g.*, those relating to the platform exception, service providers will be better able to provide information that plan sponsors and/or designated fiduciaries need and be responsive to their questions during the course of the relationship.

[13] Subject of course to the condition that the service provider specify that it is not intending to be acting as a fiduciary and provides the disclosures required under 408(b)(2).

2. Seller's activities as adverse – As noted above, we commend EBSA for recognizing the need for an exception under the Proposed Rule for the advice or recommendations that a service provider may provide during the selling process. The language in the Proposed Rule characterizes every seller and prospective customer relationship as adverse. We appreciate that the term "adverse" is intended to be used in a technical and legal sense. However, while it is understood that sellers have a financial interest in the decisions made by customers, the vast majority of service providers and clients would not characterize their relationship as adverse in the plain English meaning of the word. Purchasers of investment products and services, of course, understand and accept that the provider of the products and services has a financial interest in completing a sale. However, we are concerned that the Proposed Rule could be interpreted as requiring the term "adverse" to be used prominently and repeatedly in discussions of products and services which will cause needless concern for plan sponsors and participants leading to a general mistrust of service providers.

In order to address our concerns, we urge EBSA to delete the reference to "adverse" from the exception's disclosure requirements. T. Rowe Price believes that such a modified disclosure, combined with the disclosures that a prospect turned customer will receive from a service provider as required under 408(b)(2) of ERISA, will provide substantial information and protection for retirement plans, plan sponsors and participants.

C. Investment Platform Exception. The Proposed Rule includes an exception for investment platform providers that states that a service provider will not be treated as rendering investment advice as a result of—

> "[m]arketing or making available (*e.g.*, through a platform or similar mechanism), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property from which a plan fiduciary may designate 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 making available such investments discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice."[14]

The Proposed Rule also specifies that—

> "the provision of certain information and data to assist a plan fiduciary's selection or monitoring of such plan investment alternatives will not be treated as rendering investment advice if the person providing such information or data discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice."[15]

[14] 2510.3-21(c)(2)(ii)(B).

[15] *Id.*

T. Rowe Price commends EBSA for recognizing the valuable role that investment platform providers play in making information and data available to retirement plans and their fiduciaries by including the investment platform exception. As noted above, however, we are concerned that the Proposed Rule establishes a broad and very low threshold for when a service provider becomes a fiduciary and that the exception does not provide clear and sufficient protection that is needed by investment platform providers to be able to continue to offer broad investment choices and critical services to plans and designated fiduciaries.

As EBSA knows, many plan service providers allow plan sponsors to choose their plan's investment options from a list of funds that could include thousands of choices. At various times in the relationship between a plan and a service provider, plan representatives, including designated plan fiduciaries or other professionals hired by a plan, may ask the service provider to provide information, tools, education or other guidance to help narrow down the choice of funds available to the plan. Under the existing regulatory structure, platform providers and other service providers are able to respond to these requests and provide plan sponsors and their designated representatives with valuable assistance in a capacity that is understood by both parties to be non-fiduciary in nature. While the Proposed Rule allows for the "provision of certain information and data to assist a plan fiduciary's selection or monitoring of [sic] plan investment alternatives," it does not specify permissible ways of using such "information and data." T. Rowe Price believes that, without clear guidance identifying specific approaches for assisting plan fiduciaries in selecting plan investment options that will <u>not</u> be considered investment advice under the final rule, investment platform providers and other service providers will not be able to continue to provide the type of information and data on investments available on their platforms that plan fiduciaries have come to expect.

The following is a summary of some of the approaches and tools that have been developed by investment platform providers in response to plan fiduciaries' request for help.

1. <u>Platform narrowing using third-party criteria</u> – Plan sponsors and designated plan fiduciaries seek information and guidance necessary to assist them in meeting their fiduciary responsibilities in many ways. Sometimes they seek the advice of investment managers and consultants under the understanding that such investment manager or consultant is intended to serve in a fiduciary capacity to the plan. In many other cases, however, plan sponsors and other designated fiduciaries are only seeking information and data necessary to help them meet their fiduciary responsibilities to the plan. This is especially true of plan sponsors and/or designated fiduciaries looking for information and data to assist them in putting together an investment lineup or replacing a nonperforming option with one that they believe will perform better. Included among the many sources from which plan sponsors often seek such information and data are their investment platform providers. As noted above, given that platform providers like T. Rowe Price

generally offer thousands of mutual funds to select from on their platforms, a plan sponsor or designated plan fiduciary often expects the platform provider to provide information and assistance in narrowing the list of available funds.

To assist designated plan fiduciaries in narrowing platform choices, one or more objective third-party criterion is often used as a tool in which to distinguish investment options meeting specified criteria from the larger list. For example, a designated plan fiduciary might ask the platform provider to identify those funds in a specific asset class that are rated by Morningstar "4 stars" or higher.[17] Similarly, a service provider might assist a designated plan fiduciary by identifying funds which have beaten their Lipper ratings for the past 3, 5 and 10 year periods.[18] Such narrowing is also performed to identify various factors that might be of particular importance to the designated fiduciary beyond performance, such as cost, the existence of sales charges, manager tenure, the availability of institutional classes, etc. The narrowing criterion used is widely accepted in the retirement plan investment field and its use is not intended by either party to be fiduciary in nature. It simply is an attempt to use accepted criteria to assist the plan sponsor and/or designated fiduciaries in narrowing potential options or in reviewing how existing options are performing.

We are concerned that, absent a clarification of, or modification to, the final rule, platform providers and other service providers will be forced to take very conservative and restrictive approaches in order to avoid being unintentionally and unwillingly treated as fiduciaries and potentially engaging in unintended prohibited transactions. Platform providers and other service providers will simply have no choice but to stop providing the assistance and information that plan sponsors and designated fiduciaries need and often demand.

2. Platform narrowing using third-party expert – In an effort to assist plan fiduciaries in narrowing the list of potential investment options from a platform with thousands of available funds, it is becoming common for platform providers to engage independent third parties to construct a narrowed list of funds available on the service provider's platform based again on accepted investment evaluation criteria chosen by the third party. Such a list is intended to be used by plan sponsors as a potential starting point from which to compare and contrast potential investment alternatives. It is provided solely as a service to the plan sponsors and is not intended to be focused on the individualized needs of the plan. The platform provider is expressly excluded under the engagement from having any input into the criteria used by the third-party expert who is under no obligation to include proprietary investments of the platform provider or its

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

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

affiliates in the selected list of funds. Under such circumstances, no public policy interest is served by imposing fiduciary status of either the platform provider or the independent third party. Doing so will only result in such useful information being unavailable except at a substantial fee.

3. Platform narrowing in response to plan parameters – When searching for a new service provider for a plan or during the conversion process, plan sponsors and/or their designated representatives will ask significant detailed questions about the investment options offered by prospective providers. They also typically ask service providers to provide a sample fund lineup for the plan or to identify specific funds from the platform that are comparable to those that the plan currently uses. The plan fiduciary may provide parameters for the service provider to consider in making those recommendations, such as using the plan's existing funds as a guide or may provide other criteria such as information from a plan's investment policy statement. Additionally, the designated plan fiduciary might inquire about the possibility of liquidating all of the plan assets and transferring or "mapping" them into a single fund or series of funds (*e.g.*, target date funds) pending reinvestment in the investment options that will be used under the new provider's platform. Prospective providers that do not respond to these requests are generally eliminated from consideration by the designated plan fiduciary. When responding to such requests, service providers use available third-party data such as Morningstar "fund fact sheets" to compare and contrast the plan's existing lineup and specified parameters to those investment options available on its platform. A chart is typically provided to the designated plan fiduciary showing side-by-side the comparative fund descriptions. The parties understand that the service provider is matching potential alternative funds based solely on the parameters specified by the designated fiduciary and comparing the features of potential alternative funds based solely on third-party data. In all cases, platform providers inform the plan sponsor that the information and assistance it provides is not intended to be investment advice and that the plan sponsor must make its own decisions based on its particular facts and circumstances.

The conversations between plan sponsors and their service providers that necessarily take place during the RFP and conversion process can not avoid discussions about investment options. While these issues may initially be raised in the RFP and sales process, they continue in conversations after the plan selects the service provider. Platform and other service providers are concerned that under the Proposed Rule they will not be able to provide the assistance and information that plan sponsors need and demand, without becoming a plan fiduciary. The sales exception does not appear to provide adequate protection because many of these issues are discussed and resolved after the plan and service provider have established a formal relationship.

4. Narrowing by proprietary products– EBSA has recognized that inclusion by plans of the proprietary investment products of the plan's service provider or its affiliates in the investment menu of a retirement plan can sometimes impact the pricing of recordkeeping

services offered to the plan.[19] Additionally, in some cases the platform provider or its affiliate is recognized in the marketplace as having specific products that are particularly highly rated or widely touted by consultants and other investment professionals. For example, a certain fund or family of funds might be identified in the industry press as a suitable default option. For this reason, it is not uncommon for plan sponsors or their designated fiduciaries to request the platform provider to identify potential proprietary products for their consideration in constructing a plan lineup or in replacing a low performing option. We are concerned that platform providers who have affiliated funds on their platforms will not be able to structure their products and services as needed to respond to such requests under the Proposed Rule. Additionally, we note that these same issues and concerns arise when a plan replaces an investment option. The sales exception discussed above would presumably not provide protection from fiduciary status in that situation either.

5. Investment review services - Many platform providers provide periodic reviews to their plan sponsor clients that are designed to assist plan sponsors in monitoring and evaluating their plan investment lineups. These reviews can be in person or in writing and may be provided directly to plan sponsors or may be used by other third-party professionals (*e.g.*, consultants and advisors) who have been engaged to assist the plan sponsor in the performance of the plan sponsor's fiduciary duties to the plan. These review sessions often use investment summaries as a tool to assist the plan sponsor in performing investment monitoring and often include criteria that could be used to evaluate funds (*e.g.*, bench marking, historical performance, and fee data). For example, an investment summary might compare the performance of each of the investment options available in the plan against their Lipper averages or other criteria that the plan sponsor or its representative requests or is identified by the service provider. The approaches used vary but are all based on generally aceepted evaluation criteria. Unless the service provider intends to, and agrees to, become a fiduciary by providing investment advice for a plan, the investment summaries and related materials disclose that they are for educational purposes only and that the service provider is not providing investment advice and is not a fiduciary. We are concerned that because of the broad expansion of the fiduciary definition and the potential limited scope of the platform exception under the Proposed Rule, such investment summaries could not be offered by service providers without substantially increasing the risk that they can become involuntary and unintentional fiduciaries. Consequently, absent clarification of, or a modification to, the Proposed Rule, service providers may be forced to discontinue making available investment monitoring and evaluation tools to plan sponsors.

In order to ensure that plan sponsors continue to get the help they need in narrowing potential investment choices, we urge EBSA to clarify or modify the Proposed Rule. In this respect, the final rule should allow service providers to provide information and data to a plan sponsor or its designated fiduciaries about plan investment options that is intended to narrow the options available provided that any such assistance is based on

[19] A0 2003-09A (June 25, 2003)

"objective third-party criteria" including criteria identified by the service provider, provided that the service provider discloses that the assistance is not intended to be advice, that the service provider is not acting in a fiduciary capacity, that the service provider may have a financial interest regarding the decisions that are made (if applicable), and that the recipient is ultimately responsible for making the final decision. "Objective third-party criteria" should be broadly defined to include criteria identified by the service provider, information from a plan's investment policy or other information provided to the service provider by the plan sponsor, and the identity and characteristics of a plan's current investment options. Examples of the type of permissible criteria would be publically available information and data on asset classes, historical performance, manager tenure, expense ratios and bench marking, among other things.[20]

These suggested changes will avoid forcing plan sponsors and their designated fiduciaries from having to hire a fiduciary for the information and data they need and paying higher fees for it. It will also allow service providers to provide assistance to their customers and prospects without substantial risk that they will unwillingly and inadvertently become plan fiduciaries and engage in prohibited transactions.

D. <u>Financial Information and Reporting Exception</u>. Under the Proposed Rule, a service provider renders investment advice, and would be a plan fiduciary, when it "[p]rovides advice or an appraisal or faimess opinion, concerning the value of securities or other property."[21] EBSA recognized that, absent an exception, the noted change would limit service providers' ability to provide needed financial information to plan sponsors and participants and limit service providers' ability to help plan sponsors meet certain reporting requirements, including providing participant statements. Accordingly, EBSA included an exception in the Proposed Rule that states that "advice, or appraisal or fairness opinion" does not include the --

> "preparation of a general report or statement that merely reflects the value of an investment of a plan or a participant or beneficiary, provided for purposes of compliance with the reporting and disclosure requirements of the Act, the Internal Revenue Code, and the regulations, forms and schedules issued thereunder, <u>unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries</u>."[22] (Emphasis added.)

We commend EBSA for recognizing the need for an exception under the Proposed Rule. However, we are concerned that the proposed exception does not provide clear and

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[20] We note that many of the services and assistance described above are comparable to the non-fiduciary participant education services defined by EBSA in Interpretive Bulletin 96-1 ("IB 96-1").

[21] 2510.3-21(c)(1)(i)(A)(1).

[22] 2510.3-21(c)(2)(iii).

sufficient protection that is needed by service providers to be able to continue to provide information necessary for plan sponsors to meet their reporting obligations to participants and in response to reporting requirements. In this respect, the limitation under the exception for reports on assets that do not have a generally recognized market value is likely to create significant problems for plan sponsors and service providers. T. Rowe Price believes that many of the activities that would be treated as fiduciary services under the proposed definition are purely "ministerial" services and should not be considered investment advice that results in a service provider to be treated as a plan fiduciary.[23]

For example, record keepers provide benefit statements, maintain call centers and provide web sites for participants to access information about their plan accounts. The account information that is provided is also used for purposes of making distributions. However, the asset values are generally not determined or established by the service provider that provides the information through the channels noted above. Rather, they are derived from third-party sources. For example, some investment options, such as bank collective funds, separately managed accounts and other non-registered options may not have a generally recognized market value because they are not publicly traded but their underlying investments generally are. In some instances, a record keeper may, as an accommodation to the plan, provide record keeping and administrative services, including those noted above, for an asset that does not have a generally recognized market value. In such instances, the asset may be valued by the investment provider or another party and supplied to the recordkeeper to display and use as needed. Similarly, if a plan holds a group annuity contract or other insurance company investment products, the product provider would have to provide a value to the plan sponsor and record keeper for informational and distribution purposes including for calculating a required minimum distribution.

Additionally, an investment option may be valued based on the prices of publicly traded securities owned by or held in the investment option (*e.g.*, a "fund of funds" that holds multiple publicly traded mutual funds, or an employer stock fund that holds a cash component and employer stock). The fund may be maintained for the plan by a record keeper on a "unitized" basis. The record keeper or some other service provider may calculate the value of the units on a daily basis. While these unitized funds do not have their own generally recognized market value, their value is based solely on the value of publicly traded securities.

These are just a few examples that illustrate legitimate concerns about the scope of the Proposed Rule and limitations of the reporting exception. In light of these concerns and the importance of the affected service to retirement plans, we urge EBSA to modify the exception at issue by deleting the following language from paragraph (c)(2)(iii): "unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and

[23] It is understood that a person who performs purely ministerial functions within a framework of "... rules, practices and procedures" is not a fiduciary. *See* 29 C.F.R. §2509.75-8, Q&A D-2.

beneficiaries." Additionally, we urge EBSA to modify the Proposed Rule to provide that a service provider shall not be considered a fiduciary as a result of reporting, providing statements, using, relying on or taking any other necessary action for a plan based on, or in connection with, the value of any plan assets, including assets that do not have a generally accepted market value, unless such provider independently establishes or determines the value of such asset. We also urge EBSA to provide that a service provider will not become a fiduciary as a result of calculating the value for an investment option that does not itself have a recognized market value, where the value is otherwise determined based on the prices of the investment options' underlying publicly traded securities.

III.
Distribution Counseling

In the preamble of the Proposed Rule, EBSA requested comments regarding whether the final regulations should define the provisions of investment advice to encompass recommendations related to taking plan distributions. T. Rowe Price supports EBSA's efforts to safeguard the interests of participants and beneficiaries in connection with plan distributions. Participants frequently need assistance and to be educated about the distribution options available to them (*e.g.*, leave the money in the plan, take a lump sum distribution, take advantage of certain lifetime income options, or rollover to another plan or IRA). T. Rowe Price urges EBSA to maintain its current position that distribution counseling services and recommendations that a person take a distribution are not investment advice under ERISA.[24]

As noted above, plan participants generally need and demand assistance when deciding whether or not to take a distribution from a retirement plan and, what type of distribution to take. These decisions are impacted by many factors, including the alternatives available under the plan, the circumstances giving rise to a possible distribution (*e.g.*, changing jobs, termination, retirement, among others), and personal circumstances (*e.g.*, age and other available assets). EBSA's position under AO 2005-23A allows a completely unrelated adviser, who is likely to have a financial interest in recommending that the participant take a distribution, to discuss these matters and even make specific recommendations. However, the rules make it harder for service providers with an established relationship with a plan, including those who are not fiduciaries, to provide comparable assistance.[25]

We recognize and support EBSA's view that a plan fiduciary should not be able to act in its own interest and should not be able to influence its own compensation, but the current regulatory scheme actually makes it harder for service providers who have been authorized by the plan sponsor or other designated fiduciary to provide distribution

[24] *See* DOL AO 2005-23A, Question 3 (Dec. 7, 2005).

[25] *Id.*

counseling to provide the needed assistance. The current regulatory environment gives unknown advisers who may be making "cold calls" to plan participants the ability to exercise greater influence over their decisions. If plan participants are unable to get the assistance that they need from plan sponsor representatives and their service providers, it is more likely that they can be influenced by unknown solicitors when they seek help. Additionally, we are concerned that a sudden reversal of EBSA's position, absent additional guidance, will likely be more harmful to participants who will not be able to get the assistance they need from plan service providers.

We also urge EBSA to refrain from revising its position on distribution counseling until the Securities and Exchange Commission ("SEC") has determined what new rules and regulations should be adopted and implemented in response to initiatives mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act"). A recent study submitted by the SEC to Congress in response to the Act recommends a uniform fiduciary standard of conduct for broker-dealers and investment advisors that is no less stringent than currently applied to investment advisers under the Advisers Act.[26] The study states that "retail customers should be protected uniformly when receiving personalized investment advice about securities regardless of whether they choose to work with an investment adviser or a broker-dealer." T. Rowe Price believes that this presents the SEC with an opportunity to develop a uniform fiduciary standard applicable to all retail investors, including participants seeking to implement a rollover distribution outside of a plan, and should be considered by EBSA in its analysis of whether additional protections are needed.

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We hope you find the foregoing comments helpful to your review of the Proposed Rule and its role in protecting the interests of plan sponsors, plan participants and beneficiaries. If you need additional information or you have questions regarding our comments, please feel free to contact me at the above number or David Abbey at (410) 345-5724.

Sincerely,

Cynthia Egan
President
T. Rowe Price Retirement Plan Services, Inc.

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[26] SEC Study of Investment Advisers and Broker-Dealers, As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (January 2011).