

LEGG MASON
GLOBAL ASSET MANAGEMENT

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Office of Regulations and Interpretations,
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefit Security Administration
Attn: D-11712 and D-11713

U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: Proposed Definition of the Term “Fiduciary” (RIN 1210-AB32);
Related Proposed Best Interest Exemption (RIN: 1210-ZA25)

Dear Ladies and Gentlemen:

Legg Mason, Inc. appreciates the opportunity to submit this comment letter concerning the Department of Labor’s (the “Department”): (i) proposed regulation defining who is a “fiduciary” of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (“ERISA”) or an individual retirement account (“IRA”) under Section 4975 of the Internal Revenue Code of 1986 (the “Code”) as a result of giving investment advice to a plan or its participants or beneficiaries or to an IRA or IRA owner (the “Proposed Fiduciary Rule”), and (ii) the proposed “Best Interest Contract Exemption” (the “BIC Exemption”) published in connection with the Proposed Fiduciary Rule.

Legg Mason is headquartered in Baltimore, Maryland. The firm is a leading global investment company committed to helping retail and institutional clients reach their financial goals through long-term, actively managed investment strategies. Legg Mason operates under a distinctive “multi-manager” business model under which seven independent investment managers provide clients with a broad spectrum of investment solutions across asset classes, geographies and channels. As of August 31, 2015, Legg Mason had approximately \$682 billion in assets under management. Legg Mason maintains a retail distribution platform that markets and distributes its products and services, including Legg Mason mutual funds that are sub-advised by Legg

Mason's investment manager affiliates, through relationships with a wide range of financial intermediaries, including broker-dealers, banks, insurance companies, and independent investment advisors. As an intermediary-sold fund complex, Legg Mason recognizes and values the important role played by financial intermediaries in helping clients invest their retirement savings.

Legg Mason has participated in several working groups, including those of the Investment Company Institute, the Investment Advisers Association and the Money Management Institute, that have prepared and submitted comment letters on the Proposed Fiduciary Rule and the BIC Exemption to the Department. Legg Mason believes that those letters do a very effective job of conveying both high level concerns as well as specific issues with the terms of the Proposed Fiduciary Rule and the BIC Exemption that have been identified by financial services firms that are active in serving retail and institutional retirement plan clients. Accordingly, Legg Mason would like to emphasize the "big picture" issues and concerns with the Proposed Rule and BIC Exemption that are set forth below.

I. Proposed Rule and BIC Exemption may have the unintended consequence of leading to reduction or elimination of services provided to retirement plan investors

Based on discussions we have had with many of the financial intermediaries that sell our products and services, Legg Mason is very concerned that the Proposed Fiduciary Rule and BIC Exemption may have the unintended consequence of causing financial intermediaries to cut back significantly on the level of service they are willing to provide to retirement plan investors, particularly IRAs and smaller corporate retirement plan sponsors and participants, or to drop out of the retirement market altogether. Many financial intermediaries have indicated that the compliance burdens and costs and legal risks presented by the new definition of "investment advice" under the Proposed Fiduciary Rule and by the conditions of the BIC exemption are leading them to re-evaluate the level of service that they would be able to provide to retirement plan investors, particularly those with smaller account balances, and their ability to effectively participate in the retirement plan market at all. This would be a most unfortunate result that would negatively impact the very persons that the Proposed Fiduciary Rule and BIC Exemption are trying to protect by limiting access to the services and support that investors need to effectively manage their retirement savings.

Specific concerns that have been raised by financial intermediaries with the Proposed Fiduciary Rule and with the BIC Exemption include the following:

- The proposed new definition of investment advice is overly broad and arguably would pick up sales and marketing activities that were never intended to be viewed as fiduciary in nature. If the definition is not appropriately narrowed, for example by requiring that

advice be tailored to the individual needs of the recipient as under current rules, financial firms may decide to cut back on the level of interaction and types of discussions concerning plan investments that their representatives are permitted to have with retirement plan clients.

- As currently constructed, the BIC Exemption's numerous requirements and conditions make it overly complicated and burdensome, leading to significant compliance uncertainty and attendant legal risks for financial firms seeking to rely upon it. Specifically, there appears to be concern among financial intermediaries with the sweeping nature of the required contractual warranties, the specificity of the annual compensation disclosure requirements, and the uncertainty around what is required with respect to the identification, prevention and mitigation of conflicts of interest. There appears to be considerable confusion among financial intermediaries concerning the types of circumstances, if any, under which financial intermediaries and their employees may receive "differential compensation" with respect to recommended investment products. Failure to comply with the conditions of the BIC Exemption could result in prohibited transactions, the remedies for which could include forfeiture of compensation, excise taxes and potential rescission of related investment transactions. Financial intermediaries understandably need certainty around BIC Exemption compliance, and that certainty is lacking given how the exemption is currently constructed. If the BIC Exemption is to be a viable alternative for financial intermediaries, its conditions need to be simplified, streamlined and clarified. In addition, the Department should give serious consideration to inclusion of specific relief for inadvertent violations of the BIC Exemption's conditions where the financial intermediary can establish that it has acted in good faith and with reasonable diligence in seeking to comply with the BIC Exemption.
- Financial advisers play a particularly important role in the small retirement plan market, but the "seller's carveout" in the Proposed Fiduciary Rule, as well as the BIC Exemption itself, do not apply to plan investment discussions with the sponsors of small retirement plans (fewer than 100 participants). The financial services industry is assuming that this gap was unintended, but it clearly needs to be addressed or it will lead to a vacuum in terms of the services that will be available to this important segment of the retirement market.

II. Active vs Passive: Need to Preserve Investor Choice

Certain statements made in the Department's releases that accompanied issuance of the Proposed Fiduciary Rule and BIC Exemption, as well as the Department's indication in the BIC Exemption release that it is considering the issuance of a "low fee" exemption with far fewer conditions than the BIC exemption, have been interpreted by certain industry participants as an implicit endorsement by the Department of passively managed investment products over actively

managed investment products or of lower fee investment products over higher fee investment products. Legg Mason believes that retirement plan investors are significantly benefitted by being able to choose from a wide range of investment options with a variety of characteristics, including investment styles and fee structures, and that the Department should be careful to avoid any regulatory action that could have the unintended consequence of constraining the range of investment options that are offered or made available to retirement plan investors by financial intermediaries.

- Legg Mason believes that the Department should be very careful to avoid any explicit or implicit endorsement of particular types of investment products or styles. Investor choice should be paramount, including the choice between active and passive.
- Given that certain industry participants are drawing inferences that the Department has a preference for low cost, passive investment products, Legg Mason believes that it would be helpful and appropriate for the Department to confirm that while fees and expenses are an important factor to consider in making investment decisions, there are many other important factors to consider as well, including diversification and the full range of services that are covered by a product's fee structure.

III. **Rollover Discussions Should Not be Unduly Inhibited**

Legg Mason is concerned that the Department's Proposed Fiduciary Rule and BIC Exemption, as currently written, may have the unintended consequence of severely limiting discussions that financial advisers may have with retirement plan investors concerning the very important decision as to whether to rollover assets from a corporate retirement plan to an IRA or to leave the assets in the plan. Such a result would be to the detriment of retirement plan investors.

- The definition of "investment advice" in the Proposed Fiduciary Rule would include a recommendation to take a distribution from a retirement plan and to rollover the distributed assets to an IRA. The BIC Exemption would cover advice on how to invest assets once they are rolled over, but it is unclear whether the BIC Exemption would cover discussions concerning the decision to rollover or not rollover.
- The decision to rollover assets to an IRA or to leave them in a corporate retirement plan is a very important decision that can impact an individual's long term retirement savings. There are a variety of factors that need to be carefully considered and weighed in making a rollover decision (taxes, fees, availability of advice, range of investment options, etc.). Each individual's situation is different, and there is no "one size fits all" answer to the question. Legg Mason believes that a knowledgeable financial adviser can provide important information and guidance on this important topic.

- Legg Mason believes that it would be beneficial for the Department to encourage the ability and willingness of financial advisers to engage in rollover discussions by clarifying that the BIC Exemption is available to cover the full range of rollover-related discussions, including discussions concerning the decision to rollover assets to an IRA.

IV. Product Sponsor's Materials and Wholesaling Activities Should Not be Considered Fiduciary in Nature

As a provider of intermediary-sold fund products, Legg Mason routinely provides informational materials to financial firms for their use in helping their clients understand our products and routinely engages in conversations with financial firm representatives to help them understand Legg Mason products as part of our firm's normal wholesaling activities. Concerns have been raised (see Investment Company Institute comment letter) that ambiguous language in the Proposed Fiduciary Rule could be construed in a manner such that a product sponsor that makes such informational materials available to a financial intermediary that acts as a fiduciary with respect to its clients (a "Fiduciary Intermediary"), or engages in normal wholesaling activities with respect to a Fiduciary Intermediary, will itself be deemed a fiduciary with respect to the Fiduciary Intermediary's clients even though the product sponsor has no relationship or interactions of any kind with such clients. Legg Mason believes that it is important for the Department to confirm that it is not intended that the Proposed Fiduciary Rule be construed in a manner that would treat a product provider that distributes informational materials or provides wholesaler services to a Fiduciary Intermediary as a fiduciary by virtue of engaging in such activities.

Thank you for your consideration of our comments.

Very truly yours,

*Leonard P. Larrabee III **

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** On behalf of Mr. Larrabee, Ms. Cashman
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