BMO Financial Group

July 21, 2015

Via Electronic Mail

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

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712

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

Re: RIN 1210–AB32 – Definition of the Term "Fiduciary" — Conflict of Interest Rule —Retirement Investment Advice; ZRIN: 1210-ZA25 – Proposed Best Interest Contract Exemption

Dear Sir/Madam:

BMO Financial Group ("BMO") is a highly diversified financial services provider based in North America. BMO appreciates the opportunity to provide comments on the U.S. Department of Labor's (the "Department") re-proposed regulation regarding the definition of "fiduciary" under the U.S. Employee Retirement Income Security Act of 1974 ("ERISA") and the Department's proposed Best Interest Contract Exemption (collectively, the "Proposal"). In this letter, we provide commentary on the Proposal and its potential effects on the marketplace for retirement plan services.

With total assets of $633 billion and more than 47,000 employees, BMO provides a broad range of retail banking, wealth management and investment banking products and services to more than 12 million customers. In the United States, BMO serves customers through BMO Harris Bank, an integrated financial services organization based in the Midwest, and BMO Private Bank, with wealth management offices across the United States. BMO provides comprehensive financial services, including investment advisory, investment management, financial planning, retirement planning, and trust and estate settlement services to high net worth, ultra-high net worth and affluent customers.

BMO supports the Department's desire to revisit the 1975 regulatory definition of "fiduciary" in light of today's financial marketplace. Changes over the last 40 years have given plan participants, beneficiaries and IRA holders with direct responsibility for having the necessary resources to make critical decisions, such as whether to participate in an employer-sponsored retirement plan, whether and how much to contribute to an IRA, and how to invest assets for a secure retirement. BMO encourages the Department to ensure that a final rule adopts a definition of fiduciary investment advice that strikes an appropriate balance between regulating conduct intended by Congress as fiduciary investment advice, and clearly permitting non-fiduciary education and information to be provided to plans, fiduciaries, participants, beneficiaries, and IRA owners in order to allow them to make informed decisions.

In Part I of this letter, we discuss the scope of the Proposal's definition of "investment advice" and elaborate on our specific concerns regarding the Seller's Carve-Out, the Appraisal/Valuation Carve-Out and the Education Carve-Out. Part II outlines our suggestions on how the Department could strengthen the usefulness of the Best Interest Contract ("BIC") Exemption. In Part III, we conclude our remarks.

I. The Proposed Fiduciary Definition and Carve-Outs

The Proposal treats as fiduciary "investment advice" virtually every communication a provider would make about its services or products. For example, "requests for proposals" ("RFPs") have long been a customary way to match those in need of retirement related services to the providers of those services. Providers' responses to the RFPs are their opportunity to promote their own service offerings to the issuer of the RFP. These responses are intended to promote the requisite product or service, and the market has long understood them as sales pitches. Moreover, RFP responses enable the issuer of the RFP (a plan administrator, for example) to understand and examine, in accordance with its duty of care, the different offerings available in the market. Outside of the RFP context, there are numerous instances in which sales discussions take place. For example, a banker may learn from a branch customer that he or she is trying to understand college or retirement savings options and may take that opportunity to introduce the branch customer to other services that the bank can provide. These are clearly sales conversations that are not expected by the banker or the bank customer to be fiduciary in nature. In this context, the banker is already required to disclose to the branch customer that any affiliated broker to whom the client is introduced does not work for the bank. Other disclosures regarding the respective roles of the bank and the broker, and any compensation that may be received by either if a sale is made, are already required under applicable federal securities and banking rules. BMO urges the Department to clarify in a final rule that introductions or referrals, including actual or implied endorsements in the context of seeking to be hired as a service provider, are *not* fiduciary acts.[1]

BMO further asks the Department to clarify the relationship between the fiduciary definition and the carve-outs that are included in the final rule. Specifically, the Department should state that the existence of a carve-out should not be read to imply that activities covered by the carve-out would meet the definition of fiduciary investment advice, but are excluded from the definition only by reason of a carve-out. For instance, information about plan features and general investment principles presented to a group of plan participants at an enrollment meeting would most likely not meet the definition of fiduciary investment advice under the Proposal. Yet, without clear guidance from the Department as part of the final rule, the existence of a carve-out covering this activity could imply that the Department would consider such activity to constitute fiduciary investment advice *but for* the existence of the education carve-out. Below, we provide specific comments on certain of the "carve-outs" included in the Proposal.

A. Seller's Carve-Out

The preamble to the Proposal indicates that the "overall purpose" of the Seller's Carve-Out is "to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but

[1] This approach is consistent with the Department's regulations under Section 408(b)(2) of ERISA (*see, e.g.*, 29 C.F.R. 2550.408b-2(c)(3)(f) Examples 1 and 4).

that the seller is making representations about the value and benefits of proposed deals."[2] While BMO applauds the Department's objective, we think the Carve-Out should be revised in a number of respects to fulfill this purpose.

Accordingly, BMO asks the Department to consider the following.

- **The Seller's Carve-Out should expressly cover a broad array of customary sales practices, including responses to RFPs.** As discussed above, BMO asks the Department to amend the fiduciary definition within the Proposal to exclude from its scope responses to RFPs and other communications widely understood to be mere sales pitches. The Department should also clarify that the Seller's Carve-Out encompasses these customary sales practices.

- **The Seller's Carve-Out should expressly cover sales of services.** BMO notes that such clarification would be consistent with the existing Section 408(b)(2) regulations.

- **The Seller's Carve-Out should expressly cover customary sales practices of *all* fiduciaries, regardless of whether such fiduciaries have discretionary authority over plan assets.** Because we see no reason to exclude the sale of services from this Carve-Out, and considering that many services are offered to section 3(21) "advice fiduciaries," we think eliminating the requirement that the independent plan fiduciary exercise authority or control over plan assets is the logical next step.

- **Small Plans and IRAs should be included under the Seller's Carve-Out.** BMO notes that this proposed change is especially important for small employers since there is no small employer defined contribution plan relief under the BIC Exemption. However, to the extent the Department is reluctant to include all ERISA plans and IRAs under the Seller's Carve-Out, then we would propose that the Department adopt the "accredited investor" standard under the securities laws, a standard with which the financial markets are already quite familiar. As the Department is aware, securities generally may not be offered or sold unless registered with the U.S. Securities and Exchange Commission ("SEC") or exempted from registration. Certain securities offerings that are exempt from registration may only be offered to investors who are "accredited investors." The accredited investor standard is designed to protect potential investors from risk by identifying those investors that have sufficient financial sophistication and resources to understand and bear the risks associated with more complex or risky investments. Alternatively, the Department may consider adopting the threshold for an investor to be considered an "eligible contract participant" (as set forth in Section 1(a)(18)(A) of the U.S. Commodity Exchange Act). We do not see a reason why the *same* investor should be treated by the SEC or the U.S. Commodity Futures Trading Commission as sufficiently sophisticated, yet not be sophisticated enough to be covered under the Seller's Carve-Out.

- **The Department should either eliminate or significantly scale back the Carve-Out's threshold for assets under management.** As previously discussed, BMO proposes that the Department expand the Seller's Carve-Out to include customary sales practices for services, and

[2] 80 Fed. Reg. 21928, 21941 (Apr. 20, 2015).

that, should the Department adopt such suggestion, then sales pitches to non-discretionary investment advisers should similarly be covered under the Seller's Carve-Out. If the Department makes these important improvements, then the $100 million assets under management requirement is no longer relevant.

- **The Carve-Out's required representations should trigger before the contract for services or transaction is executed, rather than prior to the time a recommendation is made.** BMO notes that this alternative approach is consistent with Financial Industry Regulatory Authority and SEC guidance, and aligns with the way in which clients prefer to conduct business. Moreover, some investment transactions take place over a period of time. To simplify the Carve-Out, any required representations relating to the number of participants and assets under management should be met prior to, or contemporaneous with, the initial transactions, and should *not* be continuous in nature.

B. Appraisals/Valuations

BMO acts as a directed trustee and custodian for numerous plan clients and plan asset vehicles. BMO custody clients include defined benefit, defined contribution and IRA assets, as well as assets of plan asset vehicles, such as bank collective investment funds and limited partnerships. BMO provides valuation information in connection with securities lending programs, and is responsible for collecting information necessary to strike a net asset value for a plan or fund. Valuation information provided by BMO to its custody clients may be used for multiple purposes, including on-going fiduciary monitoring of investment performance, providing distributions to plan participants and meeting reporting and disclosure obligations or requests. In its role as valuation provider, BMO does not exercise discretion or act as an advisor to its plan clients. To arrive at the requested valuations, BMO typically utilizes market-based information from a number of sources, including well established daily pricing firms, the prior custodian, account owner, investment source (as in hard-to-value assets), or a third-party valuation/appraisal firm. Plan clients contracting with BMO as a custodian understand that BMO's role in providing valuation information is not evaluative or subjective, but rather involves a process of collecting and consolidating information. Based on the reality of the valuation process, BMO is concerned that the scope of the application of the Proposal to the valuation process is unclear and suggests certain changes.

The Department should clarify that a plan service provider, including a trustee or custodian providing valuations based on information available in the market or through another fiduciary, should not be deemed a fiduciary, even if the valuation may be used for some purpose related to a transaction. In BMO's view, the language of the regulation included in the Proposal, which includes as fiduciary advice "a statement . . . concerning the value of securities or other property *if provided in connection with a specific transaction*,"[5] is confusing and overly broad. Correct, updated values are required for retirement plans and IRAs for a number of reasons, many of which could be viewed as "in connection with" a specific transaction, yet the role of the valuation provider is not to advice with respect to whether or not to engage in the transaction. The following examples should serve to illustrate this point.

- A custodian may provide valuation information for purposes of calculating required minimum distributions.

[5] 80 Fed Red at 21957 (emphasis added).

- A custodian may provide pricing information to calculate a market value to enable clients to provide updated information to participants for purposes of plan administration, such as qualified domestic relations order administration.
- Custodians also typically report to clients on the value of securities held out on loan. These values are typically used to set collateral levels with plan counterparties.
- In its capacity as a custodian, BMO provides various on-line tools that calculate and show a daily net asset value. These tools may provide updated information to participants or IRA owners, who may (or may not) use the information for the purpose of evaluating a specific transaction, but who do not view the custodian calculating the values as an advisor with respect to the transaction.

BMO is concerned that these valuation services could be viewed as "in connection with a specific transaction," yet we do not believe that the Department (or Congress) intended that a custodian be viewed as a fiduciary in these circumstances. BMO requests that the Department consider changing the language in the final rule such that a valuation statement must be provided primarily for the purpose of advising the recipient in evaluating a specific transaction.

BMO is also concerned that the valuation carve-out included in the Proposal is too limited. Specifically, subsection (iii) of the carve-out only applies where valuation information is provided "solely" for reporting and disclosure purposes. As discussed above, valuation information may be used for numerous purposes, and the custodian may not know (even the recipient may not know when it first receives the information) how the information will be used. Therefore, BMO suggests striking "solely" from subsection (iii) of the valuation carve-out.

C. Education Carve-Out

BMO applauds the Department for recognizing the importance of investment education by creating a specific advice carve-out that is largely based on existing Interpretive Bulletin 96-1. The Department is no doubt aware that investment education plays a vital role in helping Americans prepare for retirement, particularly as individuals are increasingly responsible for managing their own retirement savings.

Accordingly, BMO asks the Department to consider the following.

- **The Carve-Out should apply to IRA platforms.** The Department should confirm that the structuring and offering of a platform, including an IRA platform, should not constitute fiduciary advice. At the least, the Department needs to distinguish a general offering of a platform and services from recommendations or sales that are tailored to a particular plan, participant, or IRA owner.

- **The Carve-Out should be amended to reflect the fact that identifying specific investment options available under a plan or to an IRA is part and parcel of providing practical investment education.** The Carve-Out is drafted so narrowly that it would limit investors' ability to understand available investment options. Many individual investors understand investment alternatives more clearly when presented with information on sample asset allocations. The ability to see illustrations of actual investments helps customers understand investment strategies.

The Carve-Out's inapplicability to the identification of specific investment options under a plan or IRA, even when asked by the investor and in combination with general financial and investment concepts, hinders any possible progress in arming investors with information that they can use to construct diversified portfolios. Above all, investment education must be *practical*. A discussion of asset classes in the abstract would do little in assisting the average investor in making investment decisions unless it is permissible to identify examples of available and applicable products or services.

II. The Best Interest Contract Exemption

BMO appreciates that the Department has issued the BIC Exemption as a means through which financial institutions and advisers can, if acting in the best interest of the client, continue to receive traditional forms of compensation. However, in its present form, BMO believes that the proposed BIC Exemption is unworkable from a practical standpoint in various respects. Accordingly, we ask the Department to consider the following.

A. "Assets" Definition

The BIC Exemption should *not* be limited to certain approved "Assets." Such a limitation needlessly restricts consumer investment choice and is unnecessary given the comprehensive consumer protections already embedded in the Exemption and ERISA. First, the Department should consider substituting its often-used phrase "securities or other property" for the term "Asset." This approach would allow the Exemption to evolve with the financial markets and incubate the flexibility fiduciaries need in honoring their duties to the plans and participants. Second, an investment advisory or management contract or arrangement should be expressly included under the Exemption. This is necessary for two reasons: (1) relief may be required for the marketing of these types of services; and (2) relief is required for non-discretionary advisers who, as part of their advice programs, recommend discretionary asset managers. For example, BMO offers investment advisory programs under which it will recommend, based on the customer's expressed risk profile, affiliated and unaffiliated mutual funds and/or discretionary investment managers for selection by the customer fiduciary or IRA owner. The Department should either confirm that such programs constitute "securities or other property" (if our suggestion above is adopted) or instead broaden the definition of "Asset" to include such programs.

B. Contract Timing Requirement

As proposed, the BIC Exemption requires that the contract be entered into prior to "recommending" that the investor purchase, sell or hold an asset. This requirement is untenable. Typically, an adviser would make a "recommendation" in the context of a sales presentation before an investor has had the opportunity to make a judgment about whether the recommendation is worthy of serious consideration.

It is unrealistic to expect that any investor would be willing enter into a contract with an adviser before they understand the nature of the recommendations that the adviser will make. Moreover, requiring a prospective investor to sign a detailed, tri-party contract before the adviser is permitted to give the client any of his recommendations will stop many sales presentations in their tracks. The BIC Exemption should *not* be conditioned on execution of the contract by all *or any* of the parties. Instead,

other reasonable means of establishing the requisite mutual agreement should be permitted, including a "negative consent" process, provided that the contract is presented by the adviser or financial institution in advance of, or contemporaneous with, the transaction.

Similarly, requiring the substitution of tri-party contracts for millions of *existing* contracts, within eight months or even twelve months, would require a substantial capital and time investment. Substituting tri-party contracts would require significant administrative and operational efforts without a corresponding increase in customer protection. Not all clients diligently sign and return paperwork (either electronically or through the mail), which means that only a fraction of retirement investors may enter into the contract envisioned by the Department in the proposed implementation timeframe. BMO, therefore, requests the Department to permit the amendment of existing contracts (to conform to the new BIC Exemption) via *notification* (*i.e.*, negative consent). We believe that these alternative methods of obtaining the required contract will be less intimidating to the investor while still achieving the objective of making the requisite information available.

C. Disclosure

Finally, BMO urges the Department to remove the various disclosure requirements from the BIC Exemption (*e.g.*, Compensation Disclosure – Point of Sale & Annual, Website Disclosure, etc.). Section 408(b)(2) of ERISA already requires the appropriate disclosures and service providers have already devoted significant financial and compliance resources to complying with the Department's 408(b)(2) disclosure scheme. As a result, the Department should require disclosures similar to those required under Section 408(b)(2). Moreover, BMO notes that the Department reserves the right to publicly disclose this information, presumably without the permission of the bank's primary regulator. This may force banks to choose between conflicting legal and regulatory obligations involving the requirements of the Proposal versus the obligation to refrain from providing information to sources other than the bank's primary regulator, particularly when such information is subject to public disclosure.

III. Conclusion

BMO appreciates this opportunity to provide comments to the Department on this important initiative. We would be pleased to make representatives available to the Department to further discuss any of our comments. We look forward to working closely with the Department to ensure that both proper protections and proper regulatory certainty are in place to best serve the retirement needs of American workers.

Sincerely,

Andrew T. Karp
Deputy General Counsel