EMPOWER
RETIREMENT™

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Submitted electronically: e-ORI@dol.gov
e-OED@dol.gov

Employee Benefits Security Administration
Attn: Conflict of Interest Rule and Prohibited Transaction Exemptions
Room N-5655, U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1210-AB32 Conflict of Interest Rule
ZRIN 1210-ZA25 Proposed Prohibited Transactions Exemptions

Dear Sir or Madam:

As the second-largest retirement services provider in the U.S., with more than 7.5 million individuals in the plans we serve, and recordkeeping and administration responsibility for over $440 billion of customer assets, Empower Retirement appreciates the opportunity to share our comments and concerns regarding the Department of Labor, Employee Benefits Security Administration's (the Department) recent re-proposal of regulations governing the Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Advice; and related proposed Prohibited Transaction Exemptions.

As written, we are concerned that the implementation of the rules will have unforeseen consequences on the American retirement system. Specifically, we believe that certain provisions will limit choices for plan sponsors, particularly small-business owners, and will eliminate many tools that retirement plans have available to them to help ensure retirement preparedness.

The value of advice and guidance

American workers face a major challenge in accumulating sufficient retirement savings to supplement Social Security and reliably replace their working life income in retirement. There are a number of tools and services that can help plan participants and other individuals saving for retirement meet this challenge. These tools and services include plan design elements that encourage participation and educational programs that help participants understand the amount of retirement savings they will need to meet their savings goal, as well as education and counseling discussing products and spend-down methods that efficiently ensure that the income that they receive in retirement remains stable and is adequate through their lifetime. Another key element in helping retirement savers succeed is access to professional advice and guidance while saving for retirement and through their retirement years. Our experience and data show that access to advice makes a decisive — and positive — difference in retirement savers' outcomes.

Every year, the Empower Institute[1] works with Brightwork Partners to prepare a Lifetime Income Score (LIS) survey that estimates the percentage of work-life income that American households are on track to replace in retirement. The LIS survey is comprehensive; it includes a wide range of assets, including Social Security, workplace and personal savings, home equity, and even the value of businesses that people own. **The survey clearly shows that access to a professional advisor is a significant contributor to a higher LIS.** People who work with a paid advisor have a nearly 30 percentage-point advantage in LIS compared with those not currently receiving professional advice.[2]

A recent study by Oliver Wyman[3] indicates that individuals with access to professional guidance exhibit the behaviors commonly associated with long-term investment success. Specifically, the report found that when compared with individuals without access to professional guidance, those with access:

- Own more diversified investment portfolios.
- Stay invested in the market by holding less cash and cash equivalents.
- Take fewer premature cash distributions.
- Rebalance their portfolios with greater frequency to stay in line with their investment objectives and risk tolerances.

The benefit of professional guidance is not only important during the accumulation phase, but it is also important when an individual saving for retirement is given the opportunity to take a distribution of his or her savings. In 2014, Quantria Strategies studied the impact that access to call centers had on discouraging cash-outs and leakage of retirement savings. The study finds that retirement savings balances were 33% higher for individuals with access to financial assistance. The study also estimates that limiting access to financial assistance for terminating employees could increase annual cash-outs by $20 billion to $32 billion, and the impact would be primarily felt by individuals with low account balances.[4]

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1 Empower Institute is the research and education arm of Empower Retirement's parent company, Great-West Lifeco U.S., Inc.

2 Empower Institute, Lifetime Income Score V, March 2015

3 Oliver Wyman, "The role of financial advisors in the US retirement market," July 10, 2015

4 Quantria Strategies, LLC, "Access to Call Centers and Broker Dealers and Their Effects on Retirement Savings," April 2014

In the preamble to the proposed rule, the Department attempts to quantify the cost of "conflicted advice" and estimates that the savings to investors would result in gains of between $40 billion and $44 billion over a 10-year period and between $88 billion and $100 billion over a 20-year period.[5] This estimated savings is then compared with the cost of compliance as justification for implementing the proposed rule. Even if the estimated savings and implementation costs are accurate, and question can be raised on both counts, the Department's analysis fails to take into consideration the increased investment returns experienced by individuals with access to guidance and the reduction in leakage, a combination that would appear to more than offset any estimated gains. The analysis, in short, is limited to estimating costs while making no attempt to quantify benefits received for those costs. The potential increase in leakage for one year alone would amount to 50-75% of the total of the Department's estimated savings over a 10-year period. Data from Empower's experience also shows, for example, an 18% decrease in participants who cash out their distribution when given the opportunity to speak with a call center representative.

At Empower, we are fully committed to always acting in the best interests of those we have the privilege of serving. We firmly believe in the full disclosure of costs in a clear and plain English manner that recipients can easily understand. We believe this can be accomplished in a manner that minimizes administrative burdens, encourages innovation, and allows all segments of the retirement market to receive the guidance that meets their needs and means.

As further discussed below, we have grave concerns that the current regulatory proposal will have the unintended consequence of limiting access for those individuals most in need of guidance. The structure of both the rule and the Best Interest Contract Exemption (BICE) appear to display a bias toward a fee-for-service compensation arrangement. This will be particularly burdensome for investors with low account balances. Most of these investors rely on broker-dealers and call centers for guidance.[6] While the intent of the BICE is to allow alternative compensation structures, the requirements make it difficult to implement and may result in a contraction of services to this market segment.

The remainder of this comment letter will focus on the proposed rule and the BICE.

Background

We agree with many of the goals that were presented in the preamble to the proposed rule, including:

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5 80 Fed. Reg., Page 21,930 (April 20, 2015)

6 Quantria Strategies, LLC, "Access to Call Centers and Broker Dealers and Their Effects on Retirement Savings," April 2014

- The preservation of beneficial business models for the delivery of investment advice, which enables advisors and their firms to give advice that is in the best interest of their customers without disrupting common compensation arrangements.[7]
- Drawing appropriate distinctions between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.[8]
- Avoiding reliance on technical and legal documents that participants do not read or understand.[9]

We also agree that regulatory guidance adopted almost 40 years ago warrants fresh review and consideration to ensure that it meets the evolving needs of the marketplace. But any revision to existing rules should also avoid disrupting proven guidance offerings that have provided much-needed assistance to those saving for retirement. The unintended consequence of a new regulation should not be to limit access to guidance.

New proposed definition

1. Recommended changes to avoid limiting access to essential guidance and support

Empower supports the Department's stated goal of drawing appropriate distinctions between advice relationships that should be treated as fiduciary in nature and those that should not. We are, however, gravely concerned that the proposal will inhibit routine communications with plan fiduciaries and plan participants that are essential for achieving retirement income success.

The core of the new definition is the concept of making a *recommendation*. The proposal borrows the definition of the term used by the Financial Industry Regulatory Authority (FINRA) and thus includes any suggestion that a person either takes or refrains from taking a particular course of action. FINRA's regulatory purpose and the activities that it regulates are very different — and much narrower — than the people and activities that would be affected by the definition under ERISA. The consequences of unintentionally making a recommendation under ERISA would also be significantly more damaging than the consequences under FINRA regulations.

Some examples of communications that could create fiduciary status under the proposal include the following:

Required notices – For example, a QDIA notice may be viewed as a recommendation to invest in the QDIA, or a 402(f) notice may be viewed as a rollover recommendation.

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7 80 Fed. Reg., Page 21,929 (April 20, 2015)
8 Ibid, Page 21,934
9 Ibid

Routine call center communications –

- A call center representative provides information that is consistent with FINRA Notice 13-45 to a participant eligible for a distribution. In responding to participant questions, the representative simply discusses the relative benefits of avoiding unnecessary tax penalties by keeping money in the plan or rolling over money into an IRA. Under the current definition of recommendation, this conversation may be considered a fiduciary act.

- A participant calls and expresses frustration with the responsibility of making investment decisions. The call center representative outlines various alternatives that could simplify the process, such as investing in a target date fund or using the managed account service that his or her plan offers. If any revenue is generated for the company from the target date fund or the managed account service, this conversation would be considered a fiduciary act.

We recognize that the Department has attempted to address some of these concerns through the carve-out for education, and we support the Department's inclusion of information relating to distributions and retirement income planning as educational in nature. However, because any discussion with a plan participant or IRA holder *related to* an investment or distribution decision may cross the line from educational to fiduciary if it includes a recommendation, we believe it will essentially be impossible to manage the hundreds of call center interactions to remain within the education carve-out and still provide participants with information they need — and information they are unlikely to get anywhere else. Even if the Department makes changes to the education carve-out as suggested later in this letter, absent a change to the core definition, there will still be many educational conversations that occur today that will not be able to occur in the future unless recordkeepers make all their call center representatives fiduciaries and comply with the BICE for each participant they serve (which, in our case, would involve entering into 7 million individual contracts).

This will particularly harm lower-income employees who do not have the financial resources to hire help outside the plan to assist them with decisions, and it will increase the likelihood of leakage of retirement assets due to missing information.

As a recordkeeper, we are primarily concerned with the impact of the definition on the customer service support we provide, but we are aware that the broad definition impacts many other communications for which there is currently no expectation of a fiduciary relationship. Therefore, we believe that the solution is to change the definition. We propose the following alternative definition:

Recommendation means a communication that, based on its content, context and presentation, is reasonably viewed as advocacy to either take or refrain from taking a particular action.

In addition, Section 2510.3-21(b)(6)(i) of the proposed rule provides a listing of various plan provisions and distribution options and allows discussion of associated advantages and disadvantages.[10] It would be helpful if the Department would clarify that this is not meant to be an all-inclusive list. For example, participants may have questions regarding the ability to roll over balances from prior plans or inactive IRAs into their current plan or IRA, an option that is not specifically identified in the carve-out. We would hope that conversations regarding the advantage and disadvantages of roll-ins would fall under the education carve-out.

Another core concern we have with the definition is the change in the functional test from covering not only communications "individualized to" but also those "specifically directed to" the advice recipient. The Department's stated purpose in making this change is to prevent an advisor from denying responsibility for investment advice specifically directed to a recipient on the basis that the advisor did not consider the recipient's individual needs when providing the advice. The effect of this change, however, is much broader and would cause any communication with a participant sent via mail or email or triggered by a click on the Web to potentially be a fiduciary communication.

It has been our mission for many years to improve participant outcomes in retirement, and creating targeted communications is one of the core strategies in which we've invested to accomplish this mission. For example, within the same plan, a participant who is 90% invested in employer stock may receive a flier detailing the benefits of diversification and the risks associated with individual securities, while another participant who has reached retirement age may receive a flier detailing distribution strategies. Similarly, participants using our website are prompted with the identification of a *Next Best Step* to help them reach their retirement income goals — which may include a suggestion to change their asset allocation. There is clearly no expectation of a fiduciary relationship in these communications, but, under the proposal, sending these materials would potentially create fiduciary status.

As a recordkeeper, we find this problematic with our day-to-day interaction with plans and their fiduciaries.

Our recommendation is to amend Section 2510.3-21(a)(2)(ii) as follows:

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10 Ibid, Page 21,958

Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA and where, based on the content, context and presentation of the communication, there is a reasonable expectation that the advice is intended to be impartial advice offered in the best interest of the advice recipient.

2. Recommended changes to avoid limiting access to fiduciary services

One of the more troubling aspects of the proposal is the inclusion of any recommendation to hire anyone else offering fiduciary services as a fiduciary act. At Empower, we offer access to a variety of fiduciary services, including a managed account service that provides participants with fiduciary advice in selecting investments for their account and fiduciary-level help to plan sponsors in selecting and monitoring investment lineups for their plans or designing custom target date funds. In some cases, the entity acting as a fiduciary is an affiliate of Empower, and, in other cases, it is an independent third party. It should also be clarified that if a customer service representative provides contact information to a participant for a consultant who has been selected by a plan sponsor fiduciary, the mere passing on of that information should not be considered a fiduciary act. In all cases, however, the person selling or making a plan sponsor fiduciary aware of these services would not be, or want to be, a fiduciary with respect to those services. Merely making a plan sponsor or other fiduciary aware of services and providers available to them, whether or not of a fiduciary nature, should not be a fiduciary act in itself. The proposal creates an impossible situation whereby fiduciary services can't be sold or referred unless the seller of the fiduciary service is also the provider of the service. Applying this standard will significantly reduce access to many fiduciary services that are available today and that foster the success of both plans and participants.

We believe that adding this extra layer of fiduciary protection is not necessary because the advice recipient will receive the benefit of ERISA fiduciary protection if and when he or she elects to use the fiduciary service being recommended, and we recommend the deletion of the proposed 2510.3(a)(iv).

Carve-outs

1. Recommended changes to encourage establishment of small plans

The Department's 2010 proposal contained a seller's exception, available to plans of all sizes, that was conditioned primarily on use of a disclaimer to ensure that the plan fiduciary understood that the advice offered was not intended to be impartial. The 2015 proposal does not offer any carve-out for selling to plans with fewer than 100 participants or less than $100 million in assets. The proposal lumps these plans in with individual retail investors and concludes that these investors are unable to identify conflicts or assess the quality of advice they receive. The Department further concludes in the preamble to the proposal that disclaimers are ineffective in addressing these risks. Treating small-plan fiduciaries the same as individuals ignores the critical distinction that plan fiduciaries, regardless of plan size, are held to ERISA fiduciary standards of care, including the duty to educate themselves when making fiduciary decisions. Individual investors are not held to this standard.

As the Department is well aware, one of the greatest challenges facing our industry is how to provide access to a retirement plan for employees of smaller employers. Indeed, closing the access gap and finding ways to extend workplace savings coverage to all working Americans has been a professed goal of this Administration — and one that Empower's leadership shares and has repeatedly spoken out on. Regrettably, though, the proposed rule could make that goal more difficult. The fact is that small employers generally need to be proactively educated and sold a plan — they do not usually go looking for plan services. In the small-business market, the plan fiduciary is typically the company owner who is experienced in both buying and selling services and is not so naive that he or she can't tell the difference between a sales conversation and investment or fiduciary advice. We agree with the Department that these plan fiduciaries may be less familiar with compensation arrangements than fiduciaries to large plans, but we believe the appropriate solution is to address this lack of familiarity with a third tier to the counterparty or seller's exception as follows:

- A section would be added to 2510-3-21(b)(1), creating a carve-out for the rendering of advice to a plan fiduciary of a plan of any size.
- The carve-out would require conformance with 2510-3(b)(1)(A) and (B).
- Additional requirements for the carve-out as applied to plans with fewer than 100 participants would be a *cigarette-style* warning that alerts the plan fiduciary of the potential for conflicts of interest in plan fee arrangements and the need for them to review 408(b)(2) disclosures and otherwise fully educate themselves regarding the fee and service arrangement being offered.

The Department specifically asked whether the proposed seller's carve-out should be available for "advice given directly to plan participants, beneficiaries and IRA owners." We answer in the affirmative. As currently structured, the proposed rule does not appear to allow even advising a participant or potential IRA customer of the existence of rollover services without becoming a fiduciary.

2. Recommended changes to avoid unnecessarily complicating participant choices

We applaud the Department's expansion of topics considered educational and not fiduciary, as well as its decision to bring this guidance into the regulation. We are perplexed, however, at the change prohibiting identification of individual investments in asset allocation models or in interactive materials unless specified by the participant. The investments identified in these situations are almost always designated investment alternatives (DIA) that a plan fiduciary independent of the platform provider has selected and is monitoring.

The proposal does not identify any harm that has allegedly arisen from helping participants draw the connection between an asset allocation model with a 40% large-cap fund allocation and the list of DIAs available in their plan that are large-cap funds. There is nothing subjective or harmful in helping participants use the information provided to them in an asset allocation model and pairing it with the specific investments selected by a plan fiduciary. It seems pointless and negligent to send participants off looking for another way to connect the dots. We recommend that the prohibition against identifying individual funds in models or interactive materials be removed.

We also believe the education carve-out should be expanded to clarify that any communication with a terminating participant consistent with FINRA Notice 13-45, as well as any response to a participant's request for a list of products and services that includes multiple options, be included in the carve-out. We understand the Department's concern with potential conflicts of interest, but we believe a far greater concern, if the carve-out is not expanded, would be the inability for participants to make decisions and act in ways that enhance their future retirement income security due to lack of information.

Advising participants who are eligible to receive a distribution of the availability of rollover services without providing any specific advice regarding investments should not rise to the level of fiduciary advice and should be included in the investment education carve-out. This should also extend to informing terminated participants of the various rollover options and vehicles that may be available to them (e.g., mutual fund accounts, managed account offerings, brokerage accounts, etc.) and the advantages and disadvantages inherent in these options. Making a participant better informed and aware of his or her choices is clearly educational.

3. Recommended changes to avoid impairing the ability of plan sponsors to fulfill their fiduciary responsibilities

As a platform provider, we offer a variety of services designed to help plan sponsors with selecting DIAs from a large array of options and with monitoring their choices. We appreciate the carve-outs for platform providers and for selection and monitoring assistance offered by platform providers, but we believe additional clarification is needed regarding these carve-outs.

We believe the proposal should clarify that the act of creating products in which a limited number of investment options are made available is not a fiduciary act. For example, we and other large platform providers have thousands of investment offerings that we could make available to plan sponsors, but we narrow that universe based on a variety of factors specific to a market or a group of plans as the number would otherwise be overwhelming. Decisions about what investments to offer in which a given situation is not individualized to any plan should not be considered fiduciary decisions.

This packaging of investment options is a matter of convenience and efficiency on a given platform to meet general plan archetypes. If a plan fiduciary is uncomfortable with the platform's offerings, platform providers believe a plan fiduciary is always free to purchase service offerings through either a different platform offering or one of the many other service providers and is not held captive to a single platform provider.

For the investment selection process, it would be helpful to clarify that while the plan sponsor fiduciary must select filtering criteria, the platform provider can supply a list of possible filters from which the fiduciary can choose. As a matter of convenience, these filters provide assistance to many plan sponsors, particularly in the small-plan market, that may not have access to more sophisticated modeling tools available to large plans or that are not aware of possible filters that may be relevant to them, so supplying them with a list helps to trigger their thinking.

We also offer sample fund lineups for consideration by plan sponsor fiduciaries or their advisors in the pricing evaluation. We use a small set of samples for most plans within a platform product, and they are not intended to serve as the actual final list of DIAs. Rather, they are intended to be examples of how various investment platform offerings can be utilized within a plan that could meet some plan design best practices while meeting the necessary requirements of a given platform, including costs for the recordkeeping of the plan. They are typically the starting point for a discussion about how to choose an investment lineup and cover plan fees and expenses. Plan sponsor fiduciaries find such examples to be very useful. We recommend that the proposal be amended to permit the use of these generic samples.

Likewise, the rule has been expanded to cover IRAs, and the platform carve-out should allow providers to supply a possible list of filters to IRA investors to assist with fund selection.

We also offer support to plan fiduciaries in terms of monitoring their investments. Using criteria identified in the Investment Policy Statement for the plan, we track performance and provide ratings, including a "fail" rating based on consistent criteria disclosed to the plan sponsor. This selection and monitoring process consists of rating systems that might otherwise be considered a recommendation. However, we recommend that, as long as the rating criteria are objective and are approved by the plan sponsor fiduciary, this should be covered under the selection and monitoring carve-out. This information is available to plan sponsors at all times on the Web and is communicated to them proactively on a quarterly basis. In our most packaged product that is designed for use in the small-plan market, we replace funds in the product in accordance with the process that the Department approved of in Adv. Op. 97-16A. This data provides a repeatable process that many plan sponsors, particularly small-plan fiduciaries, find helpful in ensuring that the funds available to participants remain sound choices over time.

Similar to the discussion above regarding assisting plan sponsors with developing filters in selecting a fund lineup, it should be made clear that the selection and monitoring carve-out will allow identification of funds that have similar characteristics to assist in identifying a process for replacement of an existing investment option. If providers such as Empower are not able to make this information available, plan sponsors and the plans themselves will incur additional costs with the increased need to develop and/or expand toolsets historically maintained by platform providers.

4. Recommendations to ensure participants continue to receive appropriate education associated with plan offerings

Most service providers make available a set of tools that assist participants in making decisions related to their retirement account. Proposed regulation would make many of these tools the act of a fiduciary to the plan. We recommend expanding the education carve-out to cover many of these tools made available.

In recent years, there has been much discussion and research surrounding this topic and its impact on the retirement investor, especially in the area of behavioral finance. In fact, works by researchers, including Shlomo Bernartzi, Richard Thaler and others, encourage these tools and processes as a method to obtain retirement savings

For example, during the enrollment process and in everyday interactions, it is commonplace for Web usage and call center interaction to illustrate possible next steps for plan participants. These steps may include discussion around the selection of investments, additional services offered by the service provider and appropriate level of contributions to the plan. We believe that without the ability to offer these tools, service providers will be dramatically hampered in our ability to help plan participants meet their optimal retirement income goals. We recommend an expansion of the education carve-out to:

- Stipulate that providing calculators and modeling tools is not a fiduciary activity and that the selection of these tools does not make the service provider a fiduciary.

- Clarify that providing helpful information for participants to act upon that would enhance their retirement readiness is not a fiduciary activity.
- Validate that providing illustrations of alternate scenarios for participants to view as a means to encourage retirement savings is not a fiduciary act. This includes tools such as a lifetime income score or tools that compare participants with others in their peer group

The Best Interest Contract Exemption

Under the proposed rule, it appears that the sole vehicle for providing any type of guidance that could possibly fall under the new definition of advice to individuals considering taking a distribution of their retirement savings and rolling the distribution over is the BICE. A number of questions have been raised about how the BICE is structured and how this would affect current rollover practices.

1. The scope of the BICE should be expanded

The scope of the BICE is limited to the purchase, sale or holding of an asset. An asset is further defined to only include a narrow list of investments that the Department deems to be commonly held products. Under this very narrow scope, services do not appear covered, including any assistance in helping a participant decide whether to take a distribution and whether that distribution should be rolled over. The decision to purchase assets within an IRA is only one of the decisions a participant must make during the rollover process. The proposed rule makes clear that any recommendation to take a distribution or roll over a distribution is fiduciary advice. The Department needs to clarify that assisting a participant with the entire rollover process is covered by the BICE.

Similarly, it is unclear how the BICE would apply to any recommendations of managed account services. Under the proposed rule, a recommendation of a party that will receive compensation for the management of plan or IRA assets is fiduciary advice. The BICE's narrow scope does not appear to provide prohibited transaction relief for this transaction. As discussed above, we believe that recommendation of a managed account provider, particularly one that is acknowledging fiduciary status, should not rise to the level of fiduciary advice. But, as it stands under the proposed rule and the BICE, there is no mechanism available to provide this type of service if the potential for differential compensation exists.

As noted above, neither the seller's carve-out nor the BICE includes small participant-directed plans. The Department requested input on whether the BICE should be expanded to cover advice to plan sponsors of participant-directed plans with fewer than 100 participants. We do not believe that the BICE is the appropriate place to address guidance to these plans. This should be addressed through the seller's carve-out as recommended above.

2. Recommendations to improve the contract requirements in the BICE

Under the BICE, prior to making any recommendations to an individual, there must be a written contract. If an individual were to contact several different potential rollover providers, each would need to enter into a written contract with the potential customer. This places a burden not only on the rollover providers but also on the individual seeking information regarding the options available to him or her. Individuals will be confused as to why they must enter into a contract with a party prior to deciding whether they wish to utilize the services being offered. The appropriate time and place for such an agreement should be at the point of sale.

We urge the Department to modify the proposal to allow service providers to work with individuals, but not require a contract until an actual business relationship exists. We understand the Department's goal of having an enforceable agreement between the advisor and the recipient, but it makes little sense to require such an agreement when an advisor-advisee relationship is merely being contemplated. Disclosures of the rights and obligations of the parties once an agreement has been reached could be provided to potential advice recipients with some form of electronic acknowledgement of receipt.

The contract would also require adherence to certain impartial conduct standards. We agree that any guidance given must be in the best interest of the recipient. For this very reason, all call center personnel and all representatives who speak with individual participants or potential IRA holders are registered representatives in accordance with the rules and subject to oversight of FINRA. Empower's broker-dealer affiliate is subject to periodic audits and examination by FINRA.

In public comments at the FINRA annual conference May 27, 2015, FINRA Chairman and CEO Richard Ketchum expressed concern that the proposed rule and BICE would shift enforcement responsibility for alleged misconduct away from FINRA and place that burden on individual IRA holders. Concerns were also raised of imposing dual contract requirements on individuals seeking investment assistance and guidance for both retirement and nonretirement savings.

In addition to creating confusion on applicable standards between the BICE and FINRA, the impartial conduct standards create confusion between ERISA §404 and the BICE. We have concerns with Section II(c)(1) of the BICE, which not only applies ERISA's standards of prudence and loyalty but also requires specific information about the advice recipient to be taken into account before a recommendation can be given and requires advice to be provided "without regard" to the financial interests of the advisor or any affiliate. We recommend that this section of the BICE incorporates ERISA §404 rather than creating a new standard. Certainly, there will be many situations in which gathering the identified data will be necessary to satisfy the prudence standard, but that will not always be true and, to the extent it is, applying standards of prudence will provide adequate protection to the investor. The "without regard" language is also problematic as it suggests the advisor can't be paid for his or her services and is not needed if the duty of loyalty, which requires the advisor to put the interests of the advice recipient before his or her own interest, is part of the contractual obligation.

3. Recommendations to make the BICE's disclosures more meaningful and build on prior disclosure guidance

At the point of sale of an asset to an IRA holder, the BICE requires a chart listing the total costs associated with each recommended asset. The chart would require projecting the future cost in a dollar amount for the next one-, five- and 10-year periods and assume reasonable assumptions regarding investment performance. Beyond the question of whether publishing projections of future earnings for specific investments might constitute a violation of securities law, how would the Department define reasonable assumptions? It seems likely that these assumptions could vary from provider to provider, inserting another layer of complexity and uncertainty in the decision-making process individuals are faced with when deciding how to manage their retirement savings.

An annual disclosure would be required 45 days after end of the "applicable year," identifying each asset purchased or sold during the year, as well as the total *dollar* amount of all fees paid by the account holder and the total dollar amount of any direct or indirect fees received by the advisor. But no definition is provided regarding what constitutes an applicable year. Does it mean the 365-day period beginning on the date the account was opened? Does it mean a calendar year?

Most concerning is the requirement that total dollar amounts be shown for all investments and all indirect compensation in both the point of sale and annual disclosure. Current statement accounting and participant recordkeeping systems do not track investment management fees at this level. Fund NAVs are reported net of any expense ratios, and calculating this at the IRA level would impose significant and costly burdens on the account service providers. And, to be clear, this burden would fall solely on the account service provider, not the fund company. This is not information currently provided by fund companies and is not required for nonretirement accounts.

Calculating these amounts will be complicated by the fact that the IRA holder may make investment changes throughout the course of the year, necessitating the calculation of a dollar amount for an asset that may have been held for a single day. Fund expense ratios also vary over time, but audited expense ratios are reported on only an annual basis. These changes are outside of the control of the service provider and further complicate the calculation process.

The BICE would also require the maintenance of a publicly accessible Web page listing all direct and indirect compensation received by the advisor, financial institution and any affiliate over the preceding 365 days (updated at least quarterly). This covers any assets that may be acquired by a participant, plan or IRA holder. For an IRA account service provider, this could require listing tens of thousands of funds. This raises an important question: What use would any of this be to an individual investor? This level of information is not required for nonretirement investment accounts and, given the many other requirements the Department is proposing, is irrelevant to an individual's decision-making process.

4. Alternative approaches

The various BICE provisions noted above have the net effect of making it unworkable, particularly in the small-investor market. The increased expenses associated with trying to comply with these new and onerous burdens will end up limiting the amount of guidance available to small investors. As noted, not only is this level of information not required for nonretirement investments, but it's also not required for large plan sponsors that have fiduciary oversight responsibilities for plans with thousands of participants and millions in assets.

We do agree that individuals should understand the fees associated with their accounts and any potential conflicts of interest. This information should be communicated in a manner that promotes understanding. As the Department duly noted in the preamble to the proposed rule, individuals become confused and do not read long, technical legal documents. When it comes to fees, the individual investor is concerned about:

- The fees he or she is paying.
- How these fees translate to a dollar amount.

We believe that the goal and intent of both the point-of-sale disclosure under Section III(a)(1) and the annual disclosure under Section III(b) could be satisfied by providing individual investors with a clear and succinct disclosure prior to any purchase of assets and as part of their annual statement. It would include:

- Total expense ratios for the assets being purchased, sold or held at any time during the year.
- Providing an example translating these expense ratios to a dollar amount on a $1,000 investment held for one year.
- Disclosing the existence of any indirect compensation received by the advisor, financial institution or affiliate, and also providing an example translating this into a dollar amount on a $1,000 investment held for one year.

- An explanation that a fund's value and any investment performance information are net of the fees.

The recommended disclosures are modeled after disclosures to plan participants required under Section 404(a) of ERISA and could be accompanied by the cigarette-style warning proposed by the Department in the preamble to the BICE.[11] We suggest that the same language accompany the annual disclosure.

One caveat is that fees paid are only a single element in determining what investment might best meet an individual's needs and be in his or her best interest. Other factors include overall net of fee performance and the individual's unique circumstances, age, investment timeline, risk tolerance and other assets he or she may own. Focusing solely on fees runs the risk of giving too much weight to a single element of the investment decision-making process.

Similarly, we have concerns regarding the Department's request for input on whether a streamlined prohibited transaction exemption should be provided for high-quality, low-fee investment products. Providing a streamlined exemption seems to suggest a bias toward such products and is effectively promoting the sale and distribution of these offerings over other options — regardless of what might be in the individual investor's best interest. We also request that any potential prohibited transaction exemption related to such funds be first issued as a proposal to allow opportunity for public comment.

The need for clarity regarding reliance on prior guidance

With the exception of the various existing class exemptions that the Department has proposed to modify, and the references to the advice exemption set out in ERISA Section 408(b)(14)/(g) and its code counterpart (e.g., in connection with so-called robo-advice), the Department has provided little guidance on the ability to continue relying on existing exemptions or arrangements designed to avoid prohibited transactions, including but not limited to the SunAmerica advisory opinion[12], and fee leveling, including the Frost[13] and Aetna[14] advisory opinions.

Many products and services used by plans and participants today rely on this authority in terms of how they are structured, and we recommend that the Department clarify the ability to continue this reliance. In order for this reliance to have any relevance, the Department must also address the need for a broader seller's carve-out because, for

11 80 Fed. Reg. 21,794 (April 20, 2015)
12 ERISA Advisory Opinion 2001-09A (December 14, 2001)
13 ERISA Advisory Opinion 97-15A (May 22, 1997)
14 ERISA Advisory Opinion 97-16A (May 22, 1997)

example, the act of selling a service for which fee offsetting is used would be a separate fiduciary act.

The SunAmerica advisory opinion is often used by platform providers that may make available one or more independent financial experts as part of the platform offering. This reliance should be preserved by both clarifying its continued viability and making changes to the platform provider carve-out as recommended previously.

The Department must make it clear that any existing regulation, exemption, advisory opinion or other guidance not expressly modified by the proposal remains fully valid and may be relied upon notwithstanding any contrary implication in the proposed regulation.

Implementation timeline and associated costs

The proposed rule and BICE contemplate an effective date of 60 days after publication and an applicability date of eight months after publication. We believe that an eight-month period to comply with the final rule is unworkable. The proposal impacts complex financial institutions such as Empower in a myriad of ways. It affects how we communicate with and support the plans and the millions of participants we serve; the products and services we offer and how we are compensated for them; how we distribute our products and services; how we partner with other vendors to deliver products and services; our proprietary products; and virtually every facet of our business. It will take a significant amount of time to understand all the implications, to develop solutions that will enable us to continue to meet the service expectations of our clients, and to coordinate with current partners and/or develop new ones in order to meet those expectations. Eight months is simply too short to develop and implement these strategies and will likely result in the discontinuation of services that plans and participants rely on and value today.

In the BICE proposal, the Department estimates that the cost to comply with the required disclosures, contract requirements, record maintenance and Web page construction would require 100 hours of IT staff time and approximately eight hours of maintenance time in subsequent years (the Department's assumed total hours of commitment in subsequent years of 22,000 hours for 2,800 complying institutions, or approximately 7.86 hours per institution). Our review of the effort involved suggests that this seriously underestimates the effort required. In fact, in our estimation, more than 100 hours of IT effort would be required for a large provider to simply determine the scope of the project, identify impacted systems and procedures, develop an initial project plan, and test and install the required changes. It should also be noted that IT resources are allocated far in advance, and reallocation requires shifting resources from other projects, resulting in lost-opportunity costs.

In discussions with our information technology group, a more realistic estimate of the cost and time of implementation would be an initial implementation requirement of 5,400 hours and an annual maintenance effort of more than 500 hours. Note that this is only IT effort and does not include the training of staff on new procedures and developing the appropriate compliance oversight.

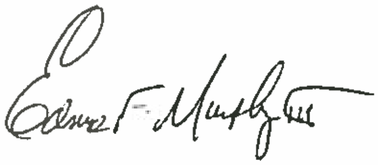
The time to implementation is also understated. We would note that when the Department finalized the plan fiduciary fee disclosure rules under Section 408(b)(2) of ERISA in July 2010, the rule initially provided for a one-year implementation period. This was later extended to April 1, 2012 — for a total final implementation period of just more than 20 months. Likewise, the participant fee disclosure rules under Section 404(a) of ERISA were finalized in October 2010, and the rule was effective for plan years beginning on or after November 1, 2011 — a period of more than 12 months. This time period was also extended to 60 days after the fiduciary disclosure effective date, or May 31, 2012, for a total final implementation period of more than 19 months. We suggest that a similar period of time is necessary to implement the proposed rule and recommend a minimum of 24 months — preferably 36 months.

The cost and time to implementation could be lessened if the more onerous compliance provisions were eliminated or modified. Time and cost to implementation could also be reduced if the Department would structure the disclosure process in a manner that would allow providers to leverage the systems and procedures already developed and implemented as part of the fee disclosure program under ERISA Section 404(a). The regulated community incurred significant expense to implement this rule. The disclosure alternatives we've suggested above were modeled after the participant-level disclosures.

Once again, we reiterate our commitment to providing all of customers — plan sponsors, participants and IRA holders — with services and guidance that are solely in their best interest. We fully share the Department's goal in this area. Our concern, however, is that the proposed rule, if implemented as drafted, could run counter to other policy goals that we strongly believe in, namely extending workplace savings access to all working Americans and enabling all retirement savers to have access to affordable financial guidance.

At Empower, we believe these goals must also be kept as high priorities when considering any changes to current fiduciary rules. Having expressed our concerns about ways the proposed rule might work against these goals, we would be pleased to work with the Department to ensure that this rule can be drafted in ways that could increase access to workplace savings and access to advice and guidance based on the best interests of working Americans. Along with our affiliated organizations, Great West

Financial® and Putnam Investments, we appreciate this opportunity to share our thoughts and comments and welcome further discussion.



Edmund F. Murphy, III | President
Empower Retirement

8515 E. Orchard Road, 3T2, Greenwood Village, CO 80111
Email: edmund.murphy@empower-retirement.com
www.empower-retirement.com