

July 21, 2015

VIA ELECTRONIC MAIL to e-ORI@dol.gov and e-OED@dol.gov

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule (RIN 1210-AB32) and Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Ladies and Gentlemen:

This letter responds to the request by the Department of Labor (“Department”) for comments on the Department’s proposed regulations on the definition of the term “fiduciary,” Conflict of Interest Rule--Retirement Investment Advice (the “Proposed Rule”),¹ the Proposed Best Interest Contract Exemption (the “BIC Exemption”),² the proposed exemption for principal transactions (“Principal Transaction Exemption”),³ and the related amendments to existing prohibited transaction exemptions⁴ (collectively, the “Proposal”). We appreciate the opportunity to comment on the Proposal and related questions raised by the Department.

I. Introduction

First Trust Portfolios L.P. (“FTP”) and First Trust Advisors L.P. (“FTA”) (collectively, “First Trust”) are privately-held companies that provide a variety of investment products and services. FTP is a registered broker-dealer and a member of the Financial Industry Regulatory Authority (“FINRA”), and FTA is a registered investment adviser with the Securities and Exchange Commission (“SEC”).

First Trust has been in the investment management business since 1991 and currently employs over 580 employees. First Trust offers a range of investment product sponsorship and investment advisory services, with collective assets under management or supervision of approximately \$118 billion, as of June 30, 2015. First Trust serves as sponsor, distributor,

¹ 80 Fed. Reg. 21928 (Apr. 20, 2015).

² 80 Fed. Reg. 21960 (Apr. 20, 2015).

³ 80 Fed. Reg. 21989 (Apr. 20, 2015).

⁴ 80 Fed. Reg. 22004 (Apr. 20, 2015); 80 Fed. Reg. 22010 (Apr. 20, 2015); 80 Fed. Reg. 22021 (Apr. 20, 2015); 80 Fed. Reg. 22035 (Apr. 20, 2015).

administrator, and/or investment adviser to 5 mutual fund portfolios, 9 exchange-traded funds consisting of 95 series, 15 closed-end funds, and over 1,680 unit investment trusts ("UITs"). Each First Trust fund is registered with the SEC as an investment company under the Investment Company Act of 1940 ("Investment Company Act").

First Trust offers a broad range of UITs designed to provide a cost-effective way to own a professionally selected and diversified portfolio. Since 1991, more than \$280 billion in gross assets have been deposited in First Trust UITs. First Trust markets the UITs to financial institutions which, in turn, offer the UITs to their retail clients; these retail clients may hold investments in UITs in employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and plans subject to the Internal Revenue Code of 1986, as amended ("Code"), including individual retirement accounts ("IRAs") (collectively, "Plans").⁵

First Trust appreciates the Department's desire to protect Plan participants and IRA owners from conflicts of interest by Plan fiduciaries. However, as discussed further below, we are concerned about certain technical issues in the Proposal that have the, likely unintended, impact of excluding advice regarding UITs from coverage under the BIC Exemption. We also request clarification that the scope of the Proposal is not such that it would extend fiduciary status to an entity that markets its own products, or that markets or recommends investment products to financial institutions that serve as intermediaries with Plans in cases where the entity marketing the product has no direct interaction with the Plan.

II. UITs Should be Included in the BIC Exemption on the Same Basis as Other Registered Investment Companies.

Like open-end mutual funds and closed-end funds, UITs are registered under, and governed by, the Investment Company Act, and the rules and regulations promulgated thereunder.⁶ UITs are professionally selected pooled investment vehicles in which a portfolio of securities is selected by the sponsor and deposited into the trust for a specified period of time, usually ranging from 12 months to as many as 25 years. Generally, UITs follow a "buy and hold" strategy. A UIT typically will make a "public offering" for a specific time period. Investors purchase units of the trust, which represent an undivided ownership interest in the assets held in the UIT. Units of a UIT are sold through a network of underwriters and dealers and generally trade on a principal basis at a price based on net asset value of the underlying securities plus an applicable sales charge. Although units of a UIT are purchased from the UIT

⁵ Although First Trust generally does not sell directly to retail clients, it may be available in some cases to answer questions or provide additional information directly to a retail client regarding certain investments, in a marketing capacity.

⁶ Section 4 of the Investment Company Act categorizes investment companies into three basic types: face amount certificates, unit investment trusts, and management companies which include open-end mutual funds and closed-end funds. Although most exchange traded funds ("ETFs") are registered as open-end mutual funds, there are also popular ETFs that are actually registered as UITs with SEC. These UITs include SPDR S&P 500 ETF Trust (ticker symbol, "SPY"), SPDR S&P MidCap 400 Trust (ticker symbol, "MDY") and PowerShares QQQ Trust (ticker symbol, "QQQ" and formerly known the "NASDAQ 100 Index Tracking Stock"). In addition, variable annuity and variable life insurance separate accounts are typically also registered as UITs with the SEC.

sponsor on a principal basis, these principal transactions are typically “riskless principal”⁷ transactions to fill orders placed by investors.⁸ As further discussed below, these purchases by investors are subject to strict rules to assure uniform prices are paid by all investors.⁹ Units are redeemable every day at net asset value.

We understand that the Department intends to limit the BIC Exemption to provide relief for otherwise prohibited compensation generated by investments only if such investments are of certain types commonly purchased by Plans. In this connection, the Department defined the “Assets” that can be sold under the exemption to include only such commonly purchased investments, including shares or interests in registered investment companies. However, Section I(c)(2) of the BIC Exemption excludes principal transactions from coverage under the BIC Exemption.¹⁰ In a footnote in the preamble to the BIC Exemption, the Department indicates that it “does not view a riskless principal transaction involving mutual fund shares as an excluded principal transaction.”¹¹ However, it is not completely clear whether this statement covers all types of registered investment companies, including UITs. Further, the exception for riskless principal transactions is not explicitly included in the BIC Exemption provisions. Therefore, although UITs, as registered investment companies, would be included within the definition of “Asset” under the BIC Exemption, we are concerned that fiduciaries seeking relief under the BIC Exemption may be precluded from obtaining that relief for the distribution of UITs.

UITs do not raise the same types of issues, such as those related to mark-ups and mark-downs of debt securities that trade on a principal basis, that the Department is concerned would not be addressed by the safeguards under the BIC Exemption. Fees charged to investors for the purchase of units in a UIT primarily include a sales charge. Because of the fixed character of a UIT portfolio, ongoing trustee and sponsor fees are minimal, and there is no ongoing investment advisory fee. UITs are subject to the same pricing requirements and restrictions under Section 22 of the Investment Company Act as open-end mutual funds. Section 22(d) of the Investment

⁷ FINRA defines “riskless principal” as a trade in which a member, after having received an order to buy (sell) a security, buys (sells) the security at the same price, as principal, in order to satisfy the order to buy (sell). In order to qualify for riskless principal trade reporting, the rule requires that the trades be executed at the “same price” (exclusive of a markup or markdown, commission equivalent, or other fee).

⁸ In certain cases, a broker may hold units of a UIT in its inventory for later distribution to investors. In such cases, the broker may assume some risk with respect to the principal transaction. Regardless of whether the transaction is a “riskless principal” transaction or not, all investors purchasing such units pay the net asset value of the underlying securities at the time of purchase plus any applicable sales charges as disclosed in the prospectus.

⁹ Many UIT sponsors, however, will maintain a secondary market, which allows unitholders to sell them back to the sponsors and allows other investors to buy UIT units from the sponsors.

¹⁰ Although the Department has simultaneously proposed an exemption for principal transactions, the Principal Transaction Exemption would apply only with respect to certain debt securities and would be inapplicable to principal transactions in UITs. 80 Fed. Reg. 21989 (Apr. 20, 2015). In addition, the relief proposed under the proposed amendments to Prohibited Transaction Exemption 86-128 for so-called “riskless principal” transactions involving open-end investment companies may not be available for UITs and, regardless, would not be available for a non-discretionary “investment advice” fiduciary. 80 Fed. Reg. 22021 (Apr. 20, 2015).

¹¹ 80 Fed. Reg. at 21968.

Company Act prohibits the sale of open-end mutual fund shares and UIT units at any price other than the current public offering price described in the prospectus (“Retail Price Maintenance”). Rules promulgated by the SEC under Section 22(d) permit variations in sales loads for particular classes of investors or transactions. Most UITs waive or decrease the sales load for certain defined groups of investors. These Retail Price Maintenance rules require the UIT, its principal underwriter, and its dealers to apply the reduced sales load to all purchasers of units in the specified class or transactions, which would include, for example, quantity discounts and sales charge discounts for investors purchasing multiple products. Rules adopted by FINRA also require adherence to the same Retail Price Maintenance concepts, thus eliminating any issues related to undisclosed mark-ups and mark-downs that are present with respect to debt securities traded on a principal basis. All investors purchasing units pay the net asset value of the underlying assets in the UIT plus the applicable sales charges notwithstanding any principal transactions along the distribution chain that occurred prior to the investor’s order being filled.¹²

UITs are an important investment option for Plan investors. A “buy and hold” strategy helps eliminate emotional investing, reduce costs associated with churning investments and provide transparency to investors. UITs provide a simple method for Plan investors to own a diverse basket of securities, professionally researched and screened, with a single purchase. UITs are designed to fill a variety of investment needs and risk tolerance levels. The fixed nature of a UIT portfolio gives investors security that they know exactly what they own. In addition, UITs are liquid investments, redeemable on a daily basis at net asset value. UITs are commonly purchased by Plans, and Plan investors make up a significant proportion of UIT investors.

We respectfully request the Department revise the BIC Exemption to provide relief for compensation generated by recommendations related to Assets that consist of registered investment companies, such as UITs, that distribute units on a principal basis.

III. The Department Should Make Clear that the Proposed Rule does not Extend Fiduciary Status to an Entity that Recommends Products to a Financial Intermediary.

As drafted, the Proposed Rule would extend fiduciary status to persons that provide investment recommendations or appraisals (with certain exceptions) to an employee benefit plan, *a plan fiduciary*, plan participant or beneficiary, IRA, or IRA owner in exchange for a fee or other compensation. Because the Proposed Rule may extend fiduciary status to persons that were not previously considered plan fiduciaries, such as many broker-dealers or other financial intermediaries, unless the Proposed Rule is clarified, it could be read to extend fiduciary status to an entity that itself recommends or markets products to such financial intermediary, even if such entity has no direct relationship with a Plan.

We respectfully request that the Department clarify that the Proposed Rule does not extend fiduciary status in such a manner and that recommendations to a financial intermediary,

¹² We note that the same legal protections under Section 22 of the Investment Company Act apply regardless of whether the principal transaction is a “riskless principal” transaction. For this reason, we believe it would be reasonable and appropriate for the BIC Exemption to cover all principal transactions in units or shares of registered investment companies governed by Section 22 of the Investment Company Act.

even if that financial intermediary is a Plan fiduciary by reason of providing investment advice, should not be considered investment advice to a Plan.

IV. The Department Should Make Clear that the Proposed Rule does not Extend Fiduciary Status to an Entity that Markets its Own Products.

The Proposed Rule extends fiduciary status to any person making a recommendation about acquiring an investment to an employee benefit plan, a plan fiduciary, plan participant or beneficiary, IRA, or IRA owner in exchange for a fee or other compensation. Read literally, this could apply fiduciary status to a person marketing his or her own products and cause all sales activity to be treated as fiduciary activity. This reading of the Proposed Rule is inconsistent with the longstanding position of the Department and the courts that marketing one's own products or services is not a fiduciary activity.¹³

We believe that the Department did not intend such a broad reading, but intended only to capture those service providers that provide third-party recommendations of products or services and that receive a fee specifically for providing those recommendations. We respectfully request that the Department clarify that a recommendation triggering fiduciary status includes only a recommendation of another's product or services for compensation, and not the marketing of one's own.

V. Conclusion

In light of the foregoing, First Trust respectfully urges the Department to both clarify the scope of the Proposal as requested and revise the BIC Exemption to explicitly provide relief for compensation generated by recommendations related to Assets that consist of registered investment companies, such as UITs, that distribute units on a principal basis.

¹³ See, e.g., *American Fed'n of Unions, Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc.*, 841 F.2d 658, 664-65 (5th Cir. 1988) (simply urging the purchase of its own products does not make an insurance company an ERISA fiduciary). Consistent with that approach, in its discussion regarding transactions with fiduciaries in the Department's regulation on the general statutory exemption for services or office space, the Department states that an investment adviser retained by a plan that proposes to a plan sponsor to perform additional portfolio evaluation services for the plan for additional fees is not engaging in prohibited self-dealing because the investment adviser is not using its fiduciary authority, control, or responsibility to cause the plan to select and pay for the portfolio evaluation services. 29 CFR § 2550.408b-2(f), example (1).

If there is any additional information or assistance that First Trust can provide to the Department in connection with the Department's consideration of the comments and issues raised in this letter, please let us know.

Sincerely,

A handwritten signature in cursive script, appearing to read "W Scott Paul". The signature is written in dark ink on a white background.