T. ROWE PRICE ASSOCIATES, INC.

WWW.TROWEPRICE.COM

MARGARET H. RAYMOND
Vice President
Managing Counsel

4515 Painters Mill Road
Owings Mills, Maryland
21117-4903

Phone 410-345-5724
Fax 410-345-6575
margaret_raymond@troweprice.com

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By Federal eRulemaking Portal

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

Attention: Conflict of Interest Rule

Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice
RIN 1210-AB32
Proposed Best Interest Contract Exemption
ZRIN 1210-ZA25, Docket No. 2014-0016
Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1
ZRIN 1210-ZA25, Docket No. 2014-0016

Dear Sir or Madam:

This letter responds on behalf of T. Rowe Price Associates, Inc. ("TRPA") and its affiliates T. Rowe Price Investment Services, Inc. and T. Rowe Price Retirement Plan Services, Inc. (collectively, "T. Rowe Price") to the Department's Notice of Proposed Rulemaking related to the definition of the term fiduciary in the context of investment advice (the "Proposal") and related exemptions. The Proposal establishes the criteria by which conduct will be deemed to constitute investment advice for purposes of determining fiduciary status under ERISA § 3(21)(A)(ii). The new proposed Best Interest Contract Exemption ("BICE") and other exemptions for which amendments are proposed establish circumstances under which those who are deemed to be providing investment advice for a fee can avoid violations and tax penalties for transactions otherwise prohibited by ERISA § 406 or Internal Revenue Code § 4975. We appreciate the opportunity to provide comments.

T. Rowe Price Background

TRPA serves as investment adviser to the T. Rowe Price family of mutual funds ("Price Mutual Funds") and collective trusts maintained by its affiliate, T. Rowe Price Trust Company. Price Mutual Funds, which are distributed by T. Rowe Price Investment Services, Inc. ("TRPIS"), a registered broker-dealer, are known for consistent investment process and strong investment performance at moderate cost.[1] Through mutual funds and commingled trusts, as well as its sub-advisory and separate account management services, T. Rowe Price serves institutions—including both large and small business retirement plans—and individuals. T. Rowe Price assets under management ("AUM") total almost $747 billion as of December 31, 2014, of which some 40% are held in ERISA governed retirement plans and an additional 28% in other retirement-related accounts, including IRAs.

Price Mutual Funds and collective trusts managed by T. Rowe Price are made available to the investing public in three ways:

- Institutional investors (and the individual accounts underlying them) can obtain Price-managed funds and trusts through unaffiliated financial intermediaries, including recordkeepers, registered investment advisers and broker-dealers.

- Individual investors can purchase Price Mutual Funds directly in T. Rowe Price taxable accounts, individual retirement accounts and certain small business retirement plans (such as non-ERISA governed individual 401(k) plans, SEPs and SIMPLEs). Today, T. Rowe services over 1.4 million retail direct individuals, a substantial majority of whom maintain retirement-based accounts with us as retail investors.

- Finally, plan participants may obtain Price Mutual Funds and commingled trusts, as well as other non-proprietary investment options, through employer-sponsored retirement plans for which T. Rowe Price Retirement Plan Services, Inc. ("TRP RPS") provides recordkeeping and administrative services. TRP RPS provides services to more than 3,400 plans with 1.8 million participants as of December 31, 2014. TRP RPS supports a large number of non-proprietary options for its plan clients, but a solid majority of assets are held in Price Mutual Funds or other Price-managed assets.

As the third-largest provider of target date funds,[2] we are particularly proud of the role that our target date suite of investment products has played in helping retirement savers achieve appropriate diversification at reasonable cost.[3] In fact, target date funds and other asset allocation investments have been one of the great success stories; a collaboration between plan sponsors, investment managers, and the government[4] to bring modern portfolio theory to participants and other retirement investors in an easy-to-understand package.

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[1] As of June 30, 2015, over 85% of Price Mutual Funds outperformed their 10-year Lipper average, and over 75% of all share classes of Price Mutual Funds (excluding funds used in insurance products) outperformed their Lipper average for the 1- , 3-, 5- and 10-year periods on a cumulative total return basis. As of June 30, 2015 over 90% of the Price Mutual Funds for individual investors have expense ratios below their Lipper category median.

[2] Morningstar, Inc. ("Morningstar") 12/31/2014. As of December 31, 2014, T. Rowe Price target date funds and trusts held assets of approximately $149 billion.

[3] Price-managed target date mutual funds have experienced solid investment performance while maintaining reasonable fees. As of June 30, 2015, 100% of T. Rowe Price Retirement Date Funds had outperformed their comparable Lipper average on a 3-, 5- and 10-year cumulative total return basis, and 94% had outperformed on a 1-year total return basis. According to Morningstar, T. Rowe Price target date mutual funds are ranked in the second quartile of expenses compared to other funds in their category (where lowest quartile is cheapest).

[4] *See* 29 C.F.R. § 2550.404c-5.

We count among our clients retirement plans of all sizes, from some of the largest in America to small business retirement plans with only a handful of individuals. We believe that retirement plan clients serviced by T. Rowe Price have found benefit in T. Rowe Price's quality investment management, promotion of effective plan design, and dedication to assisting individual retirement savers.

Central to the value we provide for retirement investors is savings and investment guidance designed to drive better outcomes. Through the years, we have focused on making retirement saving easier by providing investor education about savings goals, likely retirement income needs, and investment principles. One example of this work is our Retire with Confidence® program for participants in plans recordkept by TRP RPS. Through a participant engagement model that includes employee meetings, targeted mailings and one-on-one consultations, we provide information appropriate to the retirement saver's life stage—from savings goals and asset allocation principles for beginning savers to approaches to retirement income for those beginning to draw down benefits. All discussions, including one-on-one consultations, are conducted by salaried (non-commissioned) associates. Another example of helpful guidance is an on-line tool on our public website that helps investors with their choices in drawing Social Security benefits at retirement. T. Rowe Price focuses on this type of help because this is what retirement savers want and need.[5]

Overview of T. Rowe Price Perspective on Fiduciary Advice Proposal

We appreciate the importance of positioning retirement savers for success in meeting the responsibility that our private retirement savings system imposes on them. Our country's retirement system depends in large part on a solid foundation of employer-sponsored plans and private savings, and we share the Department's dedication to making sure that retirement savers, as well as retirement plan fiduciaries, have access to quality investment guidance and advice. The standard the Department seeks to promote—one which requires putting clients' interests first—is entirely consistent with T. Rowe Price's longstanding core values; we believe it is both right for retirement savers and fundamental to T. Rowe Price's mission in assisting them.

While we agree with the Department's basic philosophy, we are concerned about many aspects of the Proposal and accompanying proposed exemptions. At the outset, we share concerns of other commentators about the basis for the Proposal and the procedure implemented in vetting it. We are troubled both by substantial shortcomings in the economic analysis that purports to justify this radical expansion of fiduciary status and the Proposal's failure to account for the

[5] *See, e.g.,* Participant Attitude Toward Investing Databank 2015, Cerulli Associates, in which 26% of surveyed retirement plan participants reported making their own investment decisions but seeking reassurance that they were on the right path, and another 18% viewing themselves as making their own decisions although not qualified to do so. *See also* Employee Benefit Research Institute and Matthew Greenwald & Associates 2002-2015 Retirement Confidence Surveys, which report that as of 2015, over 64% of the surveyed population reported themselves as either a little or a lot behind schedule in planning and saving for retirement, and that 27% reported themselves as unsure of how much they need to save.

resulting disruption to services upon which retirement savers and plan fiduciaries rely.[6] We share concerns of others about the Department's failure to appreciate the significant extent to which legal and regulatory frameworks outside of ERISA already constrain the conduct of financial services firms in this area today.[7] We agree that the Proposal will have practical impacts on accounts outside the Department's jurisdiction, an outcome that was not factored into the Proposal's economic impact analysis.[8] Finally, we concur with those who doubt that all of the unintended consequences of such a momentous proposed change will be identified during the relatively modest public comment period.[9]

We focus our comments here, however, on our substantive concerns:

- The proposed definition of fiduciary advice fails to distinguish fairly between circumstances in which individuals and fiduciaries have a reasonable expectation of fiduciary service and those interactions where there can be no such reasonable expectation.

- By casting too wide a net, the Proposal threatens to eliminate or reduce information and perspectives from firms like T. Rowe Price that are helpful to participants, IRA holders and plan fiduciaries, and may require individuals and small plan fiduciaries to spend more (or more out of pocket) to obtain needed help.

- With its overly broad cut at what constitutes investment advice, the Proposal seems to require firms like T. Rowe Price that offer primarily proprietary investment products to forego explaining to retirement investors how T. Rowe Price products and services may meet their needs.

If implemented, the Proposal would confer fiduciary status on firms like T. Rowe Price in many circumstances that do not create expectations of undivided loyalty, are permissible today without complex conditions, and are helpful to retirement investors, such as:

- Encouraging a participant to participate in an employer-sponsored plan, or discouraging a participant from taking a loan;

- Helping an IRA holder understand which target date fund is designed for someone of his/her age;

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[6] *See* Written Testimony of Brian Reid, ICI Chief Economist, United States House of Representatives, Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor and Pensions, June 17, 2015, *available at* https://www.ici.org/govaffairs/testimony/15_house_advice.pdf.

[7] *See* Comment Letter of the U.S. Chamber of Commerce. We concur with the Chamber's view that this area is best addressed by traditional regulators of investment products and services, such as the U.S. Securities and Exchange Commission ("SEC"), whose jurisdiction is not limited to the subset of those limited account types the Department regulates.

[8] *Ibid.*

[9] *Ibid.*

- Providing daily account values to a participant initiating a plan loan;

- Providing a web-based screening tool that allows an IRA investor to sort available funds by Morningstar "star" ratings.

- Mailing or e-mailing a brochure about a specific Price Mutual Fund to an IRA holder whose investments are concentrated in money market funds;

- Suggesting to an adviser working with a small participant-directed plan that the plan consider a T. Rowe Price target date fund; and

- Including a sample fund-lineup in a recordkeeping Request for Proposal ("RFP") response.

In so doing, the Proposal risks depriving retirement investors of these and similar services, or making them more expensive.

The challenges presented by an overly broad fiduciary definition cannot be remedied through prohibited transaction exemptions. To be sure, conflicts of interest present prohibited transaction concerns, but they also pose a challenge in meeting basic ERISA § 404 duties, especially the duty to act for the exclusive benefit of participants and beneficiaries. Intentional fiduciaries can address this through careful delineation of duties. Unintentional fiduciaries—such as those created by the Proposal—or sellers cannot. Exemptions alone, no matter how well-crafted, cannot solve this basic tension.

Even if the Proposal were to draw the line between fiduciary and non-fiduciary conduct appropriately, the proposed exemption is not workable. The BICE's requirement of a pre-advice contract, its voluminous fee reporting and disclosure requirements, and its overwhelming data creation and retention requirements, not to mention the substantial risk of unwarranted litigation, all threaten the usefulness of the exemption. Further, the BICE's suggestion that the Department might craft a product-specific dispensation from these onerous requirements (the "high quality low cost" exemption) is both premature and troubling in its assumption that a durable, universal definition of investment quality can or should be determined by a federal agency.

If the Department continues to believe that there are abuses that cannot be addressed by existing legal and regulatory constraints, we propose instead the following steps:

- Redraw the basic definition of advice to reflect reasonable expectations of fiduciary status.

- Remove provisions that constrain conduct that has no identifiable harm, or as to which other protections are available.

- Expand or revise carve-outs to avoid unintended consequences.

- Substitute a streamlined "best interest exemption" for the overly complicated BICE.

Our specific comments and suggestions for modification follow.

Part 1. Fiduciary Advice Proposal

A. The basic definition of advice—recommendations to buy, sell or hold

The functional definition of a fiduciary should be crafted with recognition of the important duties imposed on ERISA fiduciaries—most importantly the requirement to act with "an eye single" to the interests of the participants and beneficiaries of the plan.[10] Where circumstances, viewed objectively, create expectations that the person providing an investment recommendation will act in accordance with that high standard, it is appropriate to include those circumstances in the functions that will give rise to ERISA fiduciary status. Unfortunately, the Proposal goes too far and encompasses circumstances where there is no reasonable expectation of fiduciary trust and confidence.[11]

The Proposal defines as investment advice any investment recommendation as to which the putative advice provider acknowledges fiduciary status in connection with the recommendation or as to which there is an agreement or understanding that the recommendation is individualized or specifically directed to the recipient for consideration in making investment decisions. There is no question that a recommendation as to which the provider acknowledges fiduciary status creates the kind of expectation of fiduciary-level trust and confidence that warrants creation of an ERISA fiduciary relationship.

We do not agree, however, that any investment recommendation (defined by the Proposal as a suggestion) that is understood, perhaps unilaterally, to be individualized or specifically directed to a participant, IRA holder or plan fiduciary creates a similar expectation of fiduciary trust and confidence. An investment suggestion for consideration, even if individualized, may be helpful, but is far from a prescription of a particular investment course of conduct.[12] The "specifically directed" recommendation concept is so broad as to bring into the fiduciary definition something as innocuous as the practice of mailing or emailing standard investment sales literature to an individual. Further, the failure to require mutuality of understanding means that someone with an objectively unreasonable unilateral "understanding" can confer fiduciary status on the provider of the investment suggestion. Finally, the fact that the understanding is connected to whether the suggestion is individualized or specifically directed is misguided—the question is not whether the information is individualized, but rather whether there is a meeting of the minds

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[10] *See Pegram v. Herdrich*, 530 U.S. 211, 235 (2000) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982)).

[11] The Department acknowledges that its basic definition is too broad, 80 Fed. Reg. 21,929 (April 20, 2015).

[12] Secretary Perez defended the Fiduciary Advice Proposal during a congressional hearing by stating that investment advisers should be held to the same standards as doctors. *See* Testimony of Thomas E. Perez, Secretary U.S. Department of Labor, United States House of Representatives, Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor and Pensions, June 17, 2015, *available at*, http://www.dol.gov/_sec/media/congress/20150617_Perez.htm. But a "suggestion" – even if individualized – is a far cry from the courses of treatment or prescribed medications that flow from a doctor-patient relationship.

or other objectively reasonable expectation that the information is entitled to a fiduciary level of reliance.

Establishing the correct baseline definition of fiduciary advice is important. An overly broad definition risks chilling or eliminating information that is needed by retirement savers in order to maintain a successful private retirement system. For example, if a suggestion to take a distribution, without more, is investment advice, then a suggestion to participate in a plan would similarly be considered investment advice. This ramification of the overly broad definition is particularly troubling. T. Rowe Price often suggests that individuals with access to a plan participate and contribute at least to the level of any employer matching contributions. The fact that such a suggestion is presented in a one-on-one conversation does not create a reasonable expectation of a fiduciary relationship. If it were a fiduciary interaction, we might have to steer clear of such suggestions if we had not conducted a fiduciary-level analysis of the relative merits of the specific plan investments offered in comparison to the broad range of investments available in IRAs from T. Rowe Price or others. Such a constraint is particularly inappropriate for non-fiduciary recordkeepers like TRP RPS, as plan sponsors frequently include enrollment communications as part of the basic participant communication services expected of a recordkeeper, and yet such a service may be promoted through this Proposal to fiduciary investment advice.[13]

We also take issue with incorporating wholesale into the definition of ERISA investment advice principles developed by the Financial Industry Regulatory Authority ("FINRA").[14] FINRA's threshold for a "recommendation" was intended to delineate those sales practices requiring governance and supervision, not fiduciary services.[15] But selling does not create an objectively reasonable expectation of fiduciary-level trust and confidence. Salesmanship is a cultural norm understood by individuals as well as plan fiduciaries, no matter their level of financial literacy or investment sophistication. Few in America would expect to enter a Chevrolet dealership and hear about anything other than Chevrolets. Those who sell products, especially firms who sell proprietary products and services, should not be held to a fiduciary standard that might require them to either remain mum or sell a competitor's product.[16]

We recognize that the Department included a carve-out for certain counterparties, intending to legitimize a subset of sales activities. The carve-out is inadequate. First, it does not cover

[13] Recordkeepers like TRP RPS often enter into contracts that are carefully drawn (and priced) to exclude fiduciary activities. If the Proposal were to become final, TRP RPS would need time to renegotiate its contracts to either re-price in light of expanded duties or eliminate services newly elevated to fiduciary status. The time proposed for the effective date and applicability date would not give sufficient time to conclude that negotiation.

[14] Certainly FINRA as an organization should not be charged with ongoing responsibility for defining what constitutes ERISA fiduciary advice, as FINRA's goals are different and it has no particular expertise in understanding retirement principles or tax penalties under the prohibited transaction regime.

[15] Even though we do not believe FINRA principles should inform the definition of "recommendation" (a term used in the longstanding guidance, but not previously defined), FINRA precedent as to what is NOT considered a recommendation should establish what cannot reasonably be viewed as fiduciary-level advice.

[16] If the final rule continues to define fiduciary advice so as to cover sales activity, then the Department will need to include formal guidance interpreting ERISA's principles of undivided loyalty in a manner that does not impede standard sales activities (including those limited to proprietary investments).

individuals or plans with less than 100 participants, no matter how sophisticated. The decision to treat small plan fiduciaries differently than other plan fiduciaries is especially puzzling, given the duties of prudence and loyalty imposed on all plan fiduciaries equally, regardless of size. This imposes additional burdens and costs on small plan fiduciaries that large plan fiduciaries are not required to absorb. Such a result seems counterproductive to the Department's goal of promoting retirement savings. Nor does the carve-out acknowledge the increasingly common business practice for plans of retaining professionals to assist with investment selection and monitoring, including firms that accept express ERISA fiduciary responsibility (and sometimes ERISA § 3(38) investment discretion). Second, the conditions imposed by the counterparty carve-out (such as the requirement of an affirmative acknowledgment from plans with less than $100 million in assets, but more than 100 participants) are unnecessary burdens on commercial activity that simply is not a fiduciary interaction.[17]

The overbreadth of the proposed rule and the inadequacy of the carve-outs would constrain current standard, non-abusive sales practices, and other common interactions that do not create an expectation of fiduciary-level interaction. Two examples illustrate the concern:

- *Fund Line-ups.* In its capacity as recordkeeper, TRP RPS frequently provides responses to RFPs that contain sample plan line-ups. These sample line-ups can be important to the pricing of recordkeeping services, as plan fiduciaries seek to estimate the specific indirect compensation that may be generated by certain investments. Sample line-ups provide important ideas and comparators that the fiduciary will use in arriving at their ultimate decision, and are often required as a condition of a response to an RFP.[18] Treating such an interaction in the context of a sales presentation (or even in the context of a discussion of fund substitution ideas) as fiduciary-level advice does not comport with industry expectations. Were such interactions to be deemed advice, service providers might hesitate to provide line-ups, making the process of understanding recordkeeping pricing even more cumbersome.

- *Ad-Hoc Investment Idea Exchange.* Plan fiduciaries often turn to trusted advisers for additional insight into markets or investment approaches not covered by the manager's current investment mandate. For example, plan fiduciaries seek input from TRPA concerning our views on what sub-asset classes might be appropriate for a new fixed income mandate for their plan, or the types of investments we might use to implement a particular investment objective. These conversations do not relate to a proposed engagement of TRPA (and thus do not appear to be covered by the counterparty carve-out), but serve a useful purpose for plan fiduciaries seeking new ideas or perspectives for

[17] Particularly troubling is the carve-out requirement that "medium" plan fiduciaries acknowledge that they cannot rely upon the advice provider to act in the best interests of the plan. Such, an acknowledgement would be inapposite for T. Rowe Price clients under our view of "best interest." *See* Part 2, *infra*.

[18] RFP responses are often required to be electronic, so the notion of an acknowledgment in advance is particularly difficult. Further, RFPs are sometimes done on a "blind" basis, in which case it would be impossible to obtain the acknowledgement or make the evaluation of sophistication that is suggested.

their plan investment program. Adopting a more practical definition of fiduciary investment advice would allow these types of useful conversations to continue.

B. The basic definition of advice—distributions

For the first time, the Proposal changes the Department's longstanding position with respect to distribution activity by including in the definition a "recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed…" Such an expansive rule will have a chilling effect on useful suggestions related to distributions (discouraging loans, encouraging minimum required distributions, suggesting consolidation into a current plan) that today are provided without specific fiduciary-level inquiry. The Department should recognize the essential difference between recommendations as to the form of retirement savings (including the suggestion of a taxable account as opposed to a tax deferred account) on the one hand, and the investment of the savings on the other hand. Only where the recommendation as to the form of account is paired specifically with a recommendation as to the specific investment of the account or its proceeds should the interaction fall into the ambit of potential fiduciary investment advice.

C. The basic definition of advice —valuations

The Proposal includes as advice "appraisals, fairness opinions or similar statements…concerning the value of securities or other property…if provided in connection with a specific [investment] transaction…" By its terms, the proposal appears to cover ordinary daily valuations provided by recordkeepers and custodians, because these valuations are used every day for specific transactions, such as minimum required distributions or plan loans. The Proposal does not distinguish between the entities that create the valuations and those who receive and use valuations (such as recordkeepers and custodians), nor does it exclude values provided through specific mechanisms governed by other legal or regulatory regimes, such as mutual fund or common trust net asset values. The proposed carve-out is inadequate to rectify the overly inclusive definition; in the case of a daily value recordkeeping system or daily valued mutual funds held in IRAs, values are provided and can be used for specific transactions daily, far in excess of any legal requirements for reporting or disclosure.

It is difficult to understand the particular valuation abuse that the Department seeks to curb here (inasmuch as ESOPs, the prior area of Department concern, were excluded). No aspect of the Department of Labor's discussion quantifies the harm from non-ESOP valuations.[19] This provision should be removed.

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[19] The Department's discussion of abuses appears to center on non-publicly traded securities. At a minimum, the Department should clarify that the valuation provisions do not apply to reporting of values for publicly traded securities, and do not apply to recordkeepers, custodians or trustees in reporting the value of assets.

D. The definition of advice—recommendation as to an advice provider

The Proposal includes as investment advice a recommendation provided to a participant, IRA holder or plan fiduciary as to an advice provider (as newly defined). Advice as to which vendor to retain is too far removed from an actual recommendation concerning a securities transaction to constitute investment advice. Moreover, such a rule is unnecessary. If a person has been retained to provide a recommendation as to an advice provider with respect to participants and plan fiduciaries, the recommending firm will be a covered service provider required to report compensation under ERISA § 408(b)(2) regulations, thereby providing fee transparency. Even with respect to IRA holders, the provision is unnecessary, as the recommended advice provider itself will undertake fiduciary responsibilities under the Proposal.

Despite the absence of noted abuses, the Proposal does a great deal of harm:

- *Selling*. This section of the Proposal prevents those willing to provide fiduciary-level investment advice from selling their own services. If the act of marketing proprietary investment management products or services is fiduciary, then no investment manager or fund firm will be able to sell its own goods or services. This runs counter to decades old ERISA case law holding that fiduciaries do not have fiduciary responsibilities with respect to the terms of their own engagement,[20] a precedent that was acknowledged and embraced by the Department in its explanations of § 408(b)(2).[21]

- *Casual referrals*. Making recommendations to an advice provider a fiduciary act is likely to prevent plan fiduciaries and individuals from receiving casual referrals (without separate charge) to one or more advice providers from a lawyer, tax professional or service provider.

- *Marketing third-party advice services*. Finally, this aspect of the Proposal prohibits recordkeepers like TRP RPS from marketing third party advice services to which its recordkeeping system can provide daily feeds. As plan sponsors have sought to provide investment advice and management services to participants, it has become common for recordkeepers to make arrangements with third party advice providers to facilitate such services. Owing to technical challenges with secure transmission of sensitive data, it is rare to have complete "open architecture." There will often be only a few third party firms that a recordkeeper can accommodate, and there may be an extra charge collected by the recordkeeper in recognition of the added costs. In these cases, the recordkeeper will market the third party service(s) as value-added capabilities. All compensation that is received by either the recordkeeper or the third party advice provider is reflected in the respective ERISA § 408(b)(2) fee disclosures and Form 5500 Schedule C reporting.

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[20] *See Renfro v. Unisys Corp*., 671 F.3d 314, 324 (3d Cir. 2011) (citing *Hecker v. Deere*, 556 F.3d 575, 583 (7th Cir. 2009) (a party "does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms.").

[21] *See* Comment Letter submitted by Society of Professional Administrators and Recordkeepers ("SPARK").

There is simply no reason to impose fiduciary duties on firms who market third party advisory services in these circumstances.

E. Carve-outs

The use of carve-outs to cure an overly broad definition of fiduciary advice is itself troubling. The Department acknowledges that carve-outs are necessary because the basic definition is overly broad.[22] The resort to highly technical and specific carve-outs is problematic in these circumstances. As this letter and other commentators note,[23] the Department's proposed carve-outs fall far short. It is difficult to imagine that all unintended consequences of the overly broad rule will be identified in the relatively brief period for public comment. We list the most troubling carve-out implications we have identified below:

1. Platform Providers

The carve-out related to platform providers is insufficient to address ordinary sales activities of recordkeepers. For example, TRP RPS' platforms offer thousands of investment options (including different share or unit classes of specific options). A simple list with thousands of entries is insufficient to help fiduciaries navigate through the choices. To assist prospective plan clients and their advisers, TRP RPS offers curated lists using disclosed, objective criteria (often sourced by TRP RPS from third parties under license). The use of these lists is not covered by either the platform provider carve-out or the selection and monitoring assistance carve-out (which is limited to criteria specified by the fiduciary). If this were to be a fiduciary-level task, we would likely reevaluate this service.

The platform carve-out is also insufficient because it is limited to plan fiduciaries. Read literally, it does not allow the transfer agent for the Price Mutual Funds to provide a comprehensive list of those funds available for investment by IRA clients, or to denote which of those funds remains open for new investors, without accepting fiduciary status. At a minimum, the Department should clarify that the Proposal does not elevate to a fiduciary act the listing of funds available for investment by IRA clients.

2. Selection and Monitoring Assistance

The selection and monitoring assistance carve-out is also too narrow. The carve-out does not allow the criteria used to be specified by the provider of the assistance. Often, however, firms like T. Rowe Price develop special technology and license specific data in order to support robust, objective screening tools, and cannot readily support full customization of screening criteria. The carve-out should be expanded to allow provider-specified criteria.

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[22] *See* 80 Fed. Reg. 21929.
[23] *See, e.g.*, SPARK Comment Letter; U.S. Chamber Comment Letter; Investment Company Institute Comment Letter on Proposed Definition of Fiduciary Advice.

In addition, the carve-out limits the assistance to plan fiduciaries. Firms would now have to remove on-line screening tools from their websites for individual retirement investors that allow users to narrow funds by specific criteria (such as asset class or Morningstar star rating or expense level).

This carve-out illustrates another shortcoming with the rule. Individuals do not consider their financial circumstances by legal character of account; those who seek to save for the long-term may save in a number of investment accounts—retirement plans, IRAs and taxable accounts.[24] The overly broad rules here, paired with uncertain abilities to limit the scope of fiduciary responsibilities, may cause firms to remove these tools altogether as it will be difficult to restrict on-line tools to those with taxable accounts only, or to prohibit individuals with multiple account types from using the information in connection with their IRAs.[25]

3. Investment Education

Perhaps the most serious defect in the carve-outs is the contraction of the definition of investment education first promulgated in 1996.[26] Without any specific attribution of harm arising from the decades-old definition, the Proposal would eliminate the ability to identify specific funds in connection with asset allocation models or interactive tools designed to help participants understand and model the impact of different asset allocation choices on their likely ability to support certain income levels in retirement. While we laud the expansion of investment education to new topics and recipients, we believe that the Proposal would substantially erode retirement security by reducing assistance that is provided today using the well-established investment education principles.

T. Rowe Price believes that meaningful asset allocation education has helped improve the retirement prospects for many retirement investors. Interactions with investors that both explain asset allocation principles and put them in context by referencing available investments have helped retirement savers become retirement investors. One important example of this is educational material used to explain target date funds. Target date funds represent an important innovation in the investment product space that has markedly improved asset allocation among retirement savers across the industry. The effectiveness of this education is evident in research that shows younger retirement savers are gravitating towards target date funds.[27] Forcing firms into a fiduciary status for this type of helpful information is highly likely to reduce access to these types of helpful materials.

Absent specific abuses that have occurred as a result of the investment education principles

[24] Of those individual investors serviced by T. Rowe Price who use our interactive tool for retirement planning, about one-third report having assets earmarked for retirement in non-retirement accounts.
[25] Many T. Rowe Price investors hold both taxable and retirement accounts at T. Rowe Price. It will be confusing to these investors if they can receive assistance with their taxable account, but not their retirement plan account or IRA.
[26] Interpretive Bulletin ("IB") 96-1, codified at 29 C.F.R. § 2509.96-1.
[27] *See* the combined report from the Investment Company Institute and the Employee Benefits Research Institute at https://www.ici.org/pdf/per20-10.pdf.

articulated by the Department in 1996, there is no regulatory basis or justification for reducing access to help by changing an interpretation that has functioned well for almost 20 years.[28]

Part 2. Best Interest Contract Exemption

The Department intends BICE to be a flexible exemption to ERISA's prohibited transaction rules that preserves a wide range of business practices. We laud the Department's support for a "best interest" standard which protects retirement investors while accommodating the business objectives of firms providing investment advice.[29] As proposed, however, the exemption is flawed in concept and unworkable in practice. If the Department seeks to implement a standards-based exemption, it should eliminate the many conditions and instead articulate a broad "best interest" principle.

A. Contract Requirement and Timing

The requirement of a contract is unnecessary for ERISA-governed relationships. There is ample opportunity under ERISA for advice recipients to pursue violations without a contract. Adding contract liability appears to contravene the principles of ERISA preemption, and may in fact exceed the authority of the Department.[30]

Even with respect to non-ERISA IRA relationships, it is not clear that a contract creating additional liabilities and causes of action is required. As noted earlier, the Department of Labor's preamble discounts the efficacy of remedies available outside of ERISA for the conduct it seeks to address.[31] Yet, most of the individuals and firms providing investment advice to investors, including IRA holders, are subject to extensive oversight and enforcement by one or more of the SEC, FINRA, and state securities and/or insurance regulators. In discounting these other regulatory schemes, the Department has failed to demonstrate the necessity for a contract as a condition of a prohibited transaction exemption.[32]

The timing requirement of the contract is both inconsistent with the legal framework and unworkable. Prohibited transactions arise only if the investment advice is followed precisely and

[28] The preamble to IB 96-1 explains that the Department first developed that guidance after a review of actual investment materials. It then circulated a draft of the proposed guidance to both plan sponsors and service providers and released IB 96-1 because "[b]oth plan sponsors and service provider representatives unequivocally agreed that the guidance as drafted would strengthen participant investment education."

[29] In this regard, we believe the Department should clarify that putting the clients' interests first satisfies the requirement to act "without regard" to an adviser's or firm's compensation. Such a change would avoid any potential confusion as to the ability of a for-profit firm to meet the standard.

[30] *See* U.S. Chamber Comment Letter.

[31] *See* 80 Fed. Reg. 21,933, 21,947. The Department notes the absence of a remedy *under ERISA* but does not acknowledge remedies available under a number of other regulatory regimes, such as FINRA arbitration, SEC administrative complaints, or state insurance regulators.

[32] The Department also ignores another key deterrent—the imposition of punitive prohibited transaction penalties. If the Department is concerned about IRA holders, it could implement a standards-based prohibited transaction exemption—imposing a best interest standard without a contract—paired with a DOL-administered referral program whereby IRA holder complaints are referred to the Internal Revenue Service for consideration of tax penalties.

a transaction ensues, yet the contract is required to be formed even before the advice is given. Because advice is defined to include basic sales activities, the proposed exemption requires retirement investors to enter into a contract before they even understand the value of services or products to be offered, making the contract requirement inexplicable and even daunting for retirement investors.[33]

The BICE's contract requirement is especially problematic in the context of a call center. For example, a contract between an investor and a T. Rowe Price call center representative would be required to discuss large cap funds offered by T. Rowe Price as potential IRA investments. If a follow-up conversation on the same or a related investment topic occurred that same day with a second phone representative, a new contract would be required. Setting aside the logistical issues of contracting via telephone, such repeated contracting is both annoying for the investor and unwieldy for the advice provider and his or her firm.

B. Contract Substance—Reasonable Compensation

Exemption from prohibited transaction taxes under BICE requires the advice provider to receive no more than reasonable compensation. While a laudable goal, this requirement in the context of an exemption is troublesome for two reasons. First, this requirement appears to shift the burden for determining reasonableness of a firm's compensation onto the service provider,[34] even though it is the advice recipient who is best equipped to comparison shop among competitors. This is inconsistent with the Department's approach in regulations under ERISA § 408(b)(2) which imposed the burden for determining reasonableness appropriately on the plan fiduciary retaining the service provider.[35] Second, the concept of reasonableness is malleable, and has been taken by some (especially in the private plaintiffs' bar) to mean "lowest cost."[36] If the Department retains such a requirement, it should specify that reasonableness is a range, and does not require that the advice provider be the lowest cost provider relative to the value provided, or even among the lowest cost providers.

We are particularly concerned by the special BICE requirements for a firm that does not offer a "broad range" of products. The failure to define "broad range" creates uncertainty among putative advice providers. Certainly, firms like T. Rowe Price that focus on proprietary products

[33] The Department in its rulemaking resulting in participant fee disclosure rules, 29 C.F.R. § 2550.404a-5, emphasized the importance of avoiding information overload: "While a critical objective of this rulemaking is to ensure that all participants and beneficiaries in participant-directed individual account plans are furnished the information they need to make informed investment decisions, the Department remains sensitive to the possibility that too much information may only serve to overwhelm, rather than inform, participants and beneficiaries."

[34] *See Braden v. Wal-Mart Stores, Inc.*, 588 F. 3d 585, 601 (8th Cir. 2009) ("[T]he statutory exemptions [to prohibited transaction provisions] are defenses which must be proven by the [person claiming the exemption]").

[35] In light of disclosures under ERISA §408(b)(2), the "reasonableness" requirement is unnecessary when the advice provider has been retained by a plan fiduciary.

[36] *See Braden,* 588 F. 3d at 601 (holding that a complaint claiming that a lower cost funds were available in the asset classes represented in a 401(k) plan's line-up stated a claim for fiduciary breach).

and services should not have a greater burden under BICE.[37] Further, the standard that BICE imposes with respect to reasonableness of compensation in regard to the "specific services" provided to the advice recipient is unworkable. Mutual fund expenses are mutualized and are borne by all shareholders in the same share class on a pro rata basis; they are not based on "specific services" provided to any given shareholder. Accordingly, the standard in BICE with respect to compensation for those primarily focused on selling proprietary mutual funds is potentially inconsistent with how mutual funds operate. This requirement should be removed.

C. Contract Substance–Warranties

The BICE requires the advice provider to provide certain contractual commitments in the form of warranties. This unnecessarily duplicates liability for the advice provider, as breach of warranty may give rise to a separate tort claim with the potential for punitive damages.[38] Adding contract liability and tort liability, especially where there is already the potential for ERISA liability, is unnecessary and will dissuade many from using BICE.

The subject of the required warranties is also concerning.

- *Compensation warranty*. Advice providers are required to warrant that their compensation practices do not "tend to" encourage violation of the Best Interest standard. In selling its proprietary investment management services and products, T. Rowe Price maintains a core value of putting clients first. No T. Rowe Price employee receives commissions. We reward employees for putting clients first *and* for furthering the interests of the firm. While our compensation practices promote our clients' best interest as we understand it, they may be seen as violative of a best interest standard as interpreted by the Department.[39] At a minimum, the Department should clarify that it is permissible for a firm to base compensation on sales activity, so long as the firm and the individual employee have put the client's interests first.

- *Compliance warranty*. Further, the requirement that advice providers warrant to compliance with "all applicable state and federal laws" relative to the advice and asset at issue appears to create private rights of action for particular violations where Congress and perhaps state legislatures have failed to do so.[40] This provision should be removed.

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[37] TRPIS offers self-directed brokerage accounts as a convenience for T. Rowe Price customers. Clearing services for these accounts are provided by an unaffiliated third party. TRPIS does not provide investment guidance or advice with respect to brokerage accounts.

[38] Restatement (Second) of Torts, § 522 (1977).

[39] *See, e.g.*, Testimony of the Honorable Thomas E. Perez before U.S. House of Representatives Education and the Workforce Committee, hearing on "restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees," June 17, 2015, in which he stated that the Proposal is "grounded in a basic principle—that investment advisers should act in their clients' best interest, *not their own*." (Emphasis added).

[40] We question whether the Department has the authority to augment the enforcement schemes of federal statutes other than ERISA, *see, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)("[P]rivate rights of action to enforce federal law must be created by Congress."). Similar questions exist about the Department's authority to address violations of state statutes and regulations.

D. Contract Substance—Conflicts Disclosure

The requirement to list so-called "material" conflicts of interest creates the potential for excessive and duplicative disclosures. First, those subject to the Investment Advisers Act must already disclose material conflicts,[41] and the Department has made no attempt to harmonize those requirements. Second, the definition of "material" in BICE in effect nullifies the materiality premise by requiring disclosure of *any* interest that "*could affect*" a fiduciary's judgment. The requirement to list interests that could affect an advice provider's judgment in any respect, absent any materiality threshold, is likely to overwhelm the recipient with substantial quantities of unnecessary information. At a minimum, BICE should be revised to acknowledge that compliance with Investment Advisers Act of 1940 principles with respect to timing and content of conflict disclosures should meet BICE for registered investment advisers, and the definition of "material conflict of interest" should be re-written to incorporate a true materiality threshold.

E. Fee and Performance Disclosure and Data Creation

The numerous disclosure conditions within the proposed exemption are duplicative of the information provided in existing disclosures and are unnecessary to ensure that best interest standards are met.

For plan fiduciaries and plan participants, there are already disclosure requirements that address fees. See 29 C.F.R. § 2550.404a-5 (participant disclosure) and 29 C.F.R. § 2550.408b-2 (governing disclosure to fiduciaries with authority to retain service providers, including other fiduciary service providers). These rules were developed recently after extensive public comment and agency deliberation, and weighed carefully the amount of detail (especially the detail appropriate and helpful for individual investors) against the need for transparency. The Department has failed to explain why additional disclosures at different times are necessary for plan fiduciaries and participants in this context.

The disclosure requirements are also problematic to the extent that they require projections. FINRA imposes significant constraints on investment projections, and it is unclear whether member firms could discharge the obligation to provide specific projections without violating FINRA rules.

For firms like T. Rowe Price that focus on proprietary mutual funds, the BICE's requirement of additional disclosure is unnecessary. IRA retirement investors contemplating mutual fund purchases or sales already receive ample fee disclosure. Mutual fund rules require extensive fee and performance disclosure to investors in the form of prospectuses, summary prospectuses, annual reports, semi-annual reports, and statements of additional information, and govern both style of presentation and timing of delivery. These disclosures contain detailed information about the fund, with a particular emphasis on fees and costs. In both the summary and statutory prospectus, clients are provided information about sales charges (i.e., loads), redemptions fees,

[41] *See* SEC Form ADV and related instructions.

account fees, management fees, distribution and service fees (i.e., 12b-1 fees), as well as other expenses. Those materials also provide an example of the hypothetical projected costs of holding the investment 1-, 3-, 5- and 10-year time horizons using the rate of return assumption (5%) mandated by the SEC.

The charts below give samples of disclosures taken from the Summary Prospectus of the T. Rowe Price Blue Chip Growth Fund dated May 1, 2015.

Fees and Expenses of the Fund

Shareholder fees (fees paid directly from your investment)	
Maximum sales charge (load) imposed on purchases	NONE
Maximum deferred sales charge (load)	NONE
Redemption fee	NONE
Maximum account fee	$20[a]
Annual fund operating expenses (expenses that you pay each year as a percentage of the value of your investment)	
Management fees	0.57%
Distribution and service (12b-1) fees	0.00%
Other expenses	0.15%
Total annual fund operating expenses	**0.72%**

[a] Subject to certain exceptions, accounts with a balance of less than $10,000 are charged an annual $20 fee.

Example This example is intended to help you compare the cost of investing in the fund with the cost of investing in other mutual funds. The example assumes that you invest $10,000 in the fund for the time periods indicated and then redeem all of your shares at the end of those periods. The example also assumes that your investment has a 5% return each year and that the fund's operating expenses remain the same. Although your actual costs may be higher or lower, based on these assumptions your costs would be:

1 year	*3 years*	*5 years*	*10 years*
$74	$230	$401	$894

Requiring additional, somewhat similar disclosures tailored for the amount of the particular investment is unnecessary in light of the extensive disclosure already required, and is unlikely to provide substantially greater clarity to the retirement investor when the advice prescribes investment in mutual funds.

The costs to build point-of-sale and annual disclosure systems as well as the costs to create data repositories for the information that might be requested by the Department are substantial, and well in excess of those estimated in the economic impact section of the Preamble.[42] In relation to the disclosures required by 29 C.F. R. §§ 2550.404a-5 and 2550.408b-2, the complexity of creating the infrastructure to support the BICE disclosures would consume more resources and

[42] *See*, *e.g.*, 80 Fed. Reg. 21,982-83 (describing costs of recordkeeping requirements as "de minimus additional burden").

require greater lead time. The window for implementing the substantial §408(b)(2) disclosures was 2 years. Allowing only 8 months to implement the exponentially larger BICE disclosures is unrealistic.

Even if firms build the systems to satisfy the disclosure and reporting requirements, the data creation and retention requirements of BICE are unlikely to confer benefit on retirement investors, and will be very difficult, if not impossible, to meet.[43] Tracking the outcome of recommendations is only possible when investors implement the recommendations precisely and immediately, and implement the recommendation within an account that is maintained by the firm that has provided the advice.[44] The data creation and retention requirements to support potential Department inquiries should be removed.

Part 3. Existing Exemption Amendments

T. Rowe Price embraces the philosophy of putting clients' interests first, and we are supportive of the Department's goal of incorporating a best interest standard (defined as putting clients' interests first) into existing exemptions, provided our concerns about the inconsistency and excessive breadth of the Department's definition of materiality with respect to conflicts of interest is addressed. We see no reason, however, to change the burden of proof as to reasonableness of compensation for fiduciaries in those exemptions. This is inconsistent with both judicial precedent and earlier Department rule-making concerning fees.

With respect to Prohibited Transaction Exemption ("PTE") 77-4, we recommend that the Department clarify that the advice recipient not be required to provide affirmative consent to changes in fees. Particularly for those firms focused on advice with respect to mutual funds, changes in fees of the mutual fund are not individually negotiable, and are overseen by an independent mutual fund board. Requiring an affirmative disclosure to a change in mutual fund fees rather than disclosure and negative consent does not add materially to protection of the advice recipients, and has been waived by the Department in over 22 private exemptions patterned on PTE 77-4. Further, we recommend that commingled trusts or other investment vehicles managed by a fiduciary or its affiliates be included as permissible investments as to which a fiduciary can provide advice, as has occurred in 6 private exemptions also patterned on this exemption. The playing field should be leveled by allowing all who seek to take advantage of PTE 77-4 to benefit from rules that some have received through private exemptions.

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[43] The data creation requirements must be clarified in another important regard. T. Rowe Price mutual funds are distributed through intermediaries under contracts which may make them "agents" of various T. Rowe Price affiliates for purposes of accepting purchase or sale orders. We do not have visibility into the activities of these firms with respect to their investment advice activities, and we would be unable to track the outcome of their specific actions because we neither control their conduct nor maintain investor level accounts. The obligation to create data should be limited to firms that both provide advice to and maintain accounts for retirement investors.

[44] The impracticality of the data creation requirement is attributable in part to the substantial overbreadth of the proposed definition of advice that elevates mailings addressed by name to an individual to the level of fiduciary advice.

Part 4. Proposals for Revision

If the Department continues to believe, after review of the commentary and reexamination of the economic analysis, that some action is required to prevent abuses, then T. Rowe Price proposes the following:

A. Redraw the basic definition of advice to reflect reasonable expectations of fiduciary status.

The Department should define investment advice to mean an individualized recommendation as to the purchase, sale or holding of an investment in an ERISA plan or IRA account in circumstances where a) the person providing the recommendation acknowledges fiduciary status in connection with the recommendation; b) there is a mutual understanding that the recommendation is intended to serve as the primary basis for decision; or c) the circumstances surrounding the recommendation create an objectively reasonable expectation that the person providing the recommendation is acting for the exclusive benefit of the recipient with respect to the prescribed action.

Recommendations should be defined to mean something more purposeful than a suggestion. While some commentators have proposed different formulations to address this same concept,[45] we favor using the Secretary of Labor's analogy to doctors by defining recommendation as a communication that, based on its content, context and presentation would reasonably be viewed as a prescription that the recipient engage in or refrain from a particular course of action.

The definition should not incorporate FINRA standards (which purposefully bring into scope sales activities), although the Department should specify that anything that is not a recommendation under FINRA rules should not constitute a recommendation for ERISA purposes. Recommendations to contribute to a plan or to take a distribution or rollover should not be an investment recommendation unless paired specifically with a fiduciary-level recommendation as to the investment of the plan account, IRA, or proceeds distributed from such accounts.

B. Remove provisions that constrain conduct that has no identifiable harm, or as to which other protections are available.

References to valuation (especially valuations reported by recordkeepers and custodians) should be excluded from the definition of fiduciary advice. The act of providing suggestions or recommendations as to advice providers should be removed from the definition of investment advice. While expansion of the principles of Interpretive Bulletin 96-1 should be retained and the expanded audiences confirmed, provisions narrowing investment education should be eliminated. The ability to identify specific investment options as under current guidelines in Interpretive Bulletin 96-1 should be preserved.

[45] *See, e.g.*, the proposal from the American Benefits Council, incorporating the requirement that the recommendation represent the "considered judgment" of the provider.

C. Expand or revise carve-outs to avoid unintended consequences.

To the extent that the Department retains an overly broad definition of advice, carve-outs should be equally broad and unconditional to eliminate any suggestion that standard sales activity (including selling investment management products or services, or identifying available investment options, or a subset of them, for any advice recipient) is fiduciary in character. Similarly, any language in carve-outs suggesting that screening tools based on identified, objective criteria are fiduciary-level investment advice in any circumstance should be eliminated.

D. Substitute a broad standards-based Best Interest Exemption for BICE.

Instead of the problematic BICE, the Department should craft an exemption with a single requirement, namely that the adviser and firm act in the best interest of the advice recipient by putting the interests of the advice recipient first. This change would achieve greater consistency with the Department's approach to other exemptions, and is protective of retirement investors.

E. Eliminate burden switching as to fee reasonableness, and create a level playing field for all who seek to use 77-4.

Modifications to other exemptions that alter the burden of proof as to reasonableness of fees should be eliminated. The "best interest" standards should be defined as putting clients' interests first. PTE 77-4 should be improved (and the playing field leveled) for all firms seeking to use PTE 77-4 principles by allowing negative consent to fee changes, and by including circumstances where a fiduciary provides advice with respect to a collective trust or other investment vehicle managed by that fiduciary or its affiliate.

We appreciate the opportunity to provide our perspectives on the Proposal and the proposed new or amended prohibited transaction exemptions, and we welcome a chance to work with the Department to improve the fiduciary advice initiative for the benefit of all retirement investors.

Sincerely yours,

Marg H Raymond

Margaret H. Raymond
Vice President
Managing Counsel