



OppenheimerFunds®

The Right Way
to Invest

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Submitted Electronically and via Overnight Mail

Mr. Timothy D. Hauser
Deputy Assistant Secretary for Program Operations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5677
Washington, DC 20210

**Re: Definition of the Term “Fiduciary”; Conflict of Interest Rule –
Retirement Investment Advice
RIN 1210-AB32**

Dear Mr. Hauser:

Thank you for meeting with OppenheimerFunds¹ on September 15, 2015 to discuss our comments and issues of concern under the U.S. Department of Labor’s (“DOL” or the “Department”) proposed rule addressing the Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 75 Fed. Reg. 21928 (Apr. 20, 2015) (“Proposed Rule”). We are writing to provide further explanation and recommendations regarding two key issues that we discussed during our conference with you.

1. Making recommendations to a trained financial professional should not itself be fiduciary activity and should be addressed as a carve-out from fiduciary status.

As we discussed, OppenheimerFunds manufactures and markets a full range of actively managed investment funds as well as a range of retirement plan products and services for self-employed individuals and small businesses, including 401(k), profit-sharing and other types of plans and an IRA product. Almost exclusively, OppenheimerFunds sells these funds and products to and

¹ OFI Global Asset Management, Inc., a direct, wholly owned subsidiary of OppenheimerFunds, Inc. (“OFI”), is a registered investment adviser, providing investment management and transfer agent services to nearly 100 registered investment companies. OFI has been in the investment advisory business since 1960, and with its subsidiaries, has more than \$235 billion in assets under management.

through sophisticated financial intermediaries, who in turn market products and services from multiple providers to ERISA plans and IRAs. We do not sell our products directly to ERISA plans or IRAs.

In most cases, OppenheimerFunds markets to a financial professional who is a non-fiduciary to ERISA plans or IRAs, or who would be a fiduciary adviser under the new rule. However, in some cases the financial professional may be serving as a discretionary fiduciary for a plan as an ERISA section 3(38) investment manager or under a delegation of fiduciary responsibility from the plan's named fiduciary.

We believe that recommendations made to trained financial professionals should not be subject to ERISA fiduciary requirements, regardless of that professional's status with respect to any ERISA plan (adviser or discretionary fiduciary). Financial professionals are well aware that OppenheimerFunds is a wholesaler engaged in selling activity, and not providing unbiased investment advice. These financial professionals are fully capable of, and know they are responsible for, making their own independent expert investment judgment. Accordingly, we ask DOL to adopt the following carve-out language in the final rule:

(b)(7) Advice to financial professional acting as plan fiduciary. The person provides advice to a plan fiduciary that is any one of the following entities: (1) a registered investment adviser under the Investment Advisers Act of 1940 or under the laws of a State in which it maintains its principal office and place of business, (2) a person registered as a broker or dealer under the Securities Exchange Act of 1934, or (3) an employee, agent, or registered representative of such a person who satisfies the requirements of applicable securities laws. For this purpose, a "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (substituting the entity for the investment adviser referred to in such section).²

2. The platform carve-out should be extended to cover platform providers in the IRA and owner-only retirement plan space.

You asked during our meeting whether OppenheimerFunds, as a provider of IRA and "owner-only" small business retirement products, would continue to request an extension of the Proposed Rule's 401(k) platform carve-out to IRA and small business plan platforms if the Department were to exclude marketing to financial professionals from the definition of fiduciary advice.³ We believe that platform relief is still necessary for business models such as ours even if the Department grants a final carve-out for advice provided to financial professionals because (a)

² This definition is taken from the definition of "financial adviser" under the ERISA section 408(g) regulation. See 29 C.F.R. § 2550.408g-1(c)(2)(i).

³ OppenheimerFunds offers an IRA product that accounts for a substantial portion of the firm's retirement assets under management. In its line of small business retirement products, OppenheimerFunds also offers a qualified 401(k) product that is specifically designed for "owner-only" small businesses, called the OppenheimerFunds "Single K" product. The vast majority of plans established through this product are technically not covered by ERISA because they cover only a business owner and his or her immediate family, and no additional employees. See 29 C.F.R. § 2520.3-3(b). The IRA and Single K products offer investors access to the full range of Oppenheimer mutual funds as investment alternatives.

participants and accountholders may invest in OppenheimerFunds products through a platform without the intervention of a financial professional; and (b) the 401(k) platform carve-out creates the inference, by negative implication, that the provision of non-401(k) platforms may constitute fiduciary advice.

Investors access the IRA and Single K products by entering an agreement directly between the IRA holder/business owner and OppenheimerFunds. Although the agreement runs directly between the IRA holder/business owner and OppenheimerFunds, OppenheimerFunds does not provide any recommendations of either the product or investments in connection with these products. Instead, just as in the mutual fund context, OppenheimerFunds relies on a network of third-party financial intermediaries to market its IRA and Single K products to potential investors.

We believe the activities of OppenheimerFunds related to the assembly and offering of the IRA and Single K products would not rise to the level of fiduciary “investment advice” under DOL’s Proposed Rule. In this regard, subsection (a)(1) of the Proposed Rule requires a person to provide one of three types of specific “recommendations,” or a statement of value concerning specific securities or property, in order for fiduciary status to be triggered. *See* DOL Prop. Reg. 2510.3-21(a)(1)(i)-(iv).

You advised us that the platform carve-out under subsection (b)(3) was intended to provide certainty to 401(k) plan providers and was not intended to suggest that platform activity necessarily fit within the basic definition of fiduciary advice, leaving open the possibility that platform providers’ specific activities may not rise to the level of fiduciary advice under the threshold tests set forth in the rule even without reference to the 401(k) platform carve-out. However, our concern is that the current text of the carve-out creates a significant negative inference for platform providers such as OppenheimerFunds, and could be interpreted as triggering fiduciary status regardless of the results of a technical application of subsection (a). This is because the introductory text of the carve-out section of the regulation provides:

(b) *Carve-outs—investment advice.* Except for persons described in paragraph (a)(2)(i) of this section [describing persons who explicitly acknowledge ERISA fiduciary status], the rendering of advice or other communications in conformance with a carve-out set forth in paragraph (b)(1) through (6) of this section shall not cause *the person who renders the advice to be treated as a fiduciary under paragraph (a) of this section.*

See DOL Prop. Reg. 2510.3-21(b) (emphasis added). This language suggests that the carve-outs apply to persons that are otherwise providing fiduciary advice under the broad definition set forth in paragraph (a)(1). The preamble echoes this framework, making clear that if the terms of a carve-out are not met, the activity could be included within the scope of the general definitional rules of subsection (a). *See* 75 Fed. Reg. 21928, 21941 (Apr. 20, 2015) (“Accordingly, paragraph (b) contains a number of specific carve-outs from the scope of the general definition.”).

Our concern arises because OppenheimerFunds can be said to assemble a “platform” of investment choices that are made available to investors through these products by its act of limiting the available investments to Oppenheimer mutual funds. But, the so-called “platform” carve-out provided in the Proposed Rule is expressly limited to persons who make securities or

other property available to benefit plans *as described in ERISA section 3(3)* through a platform or other mechanism. *See* DOL Prop. Reg. 2510.3-21(b)(3). Under its express terms, the carve-out is not available to persons who perform the same activities with respect to non-ERISA plans, including IRAs and owner-only plans. Thus, given the articulation of the current platform carve-out it would be reasonable to infer that platform assembly and sponsorship activities in-and-of-themselves for non-ERISA plans would be considered fiduciary activities under the initial test set forth in subsection (a).

For these reasons, we ask that DOL extend the platform carve-out so that it applies in the case of any “plan” within the meaning of ERISA section 3(3) and section 4975(e)(1) of the Internal Revenue Code. This would make clear that the carve-out extends to IRAs and owner-only qualified plans. While extending the platform carve-out, we also think it would be helpful for DOL to clarify that it is providing the carve-out to create certainty for providers, but further acknowledge that activities related to the offering and assembly of a “platform” of investment options from which a plan fiduciary, IRA or other investor may select may not involve the provision of a “recommendation” as to the advisability of acquiring, holding, disposing or exchanging a security such that the investment advice definition is triggered.

We greatly appreciate the opportunity to provide these comments and work with you as the Department develops and finalizes the Proposed Rule. If you have any questions, please feel free to contact me at agabinet@ofiglobal.com or 212.323.5062.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ari Gabinet".

Ari Gabinet
Executive Vice President
and General Counsel
OFI Global Asset Management, Inc.

cc: Judy Mares, Deputy Assistant Secretary
Employee Benefits Security Administration

Karen E. Lloyd, Division of Class Exemptions
Employee Benefits Security Administration