U.S. CHAMBER OF COMMERCE

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

Submitted Electronically – *e-ORI@dol.gov and e-OED@dol.gov*

Re: Definition of the Term "Fiduciary" (RIN 1210-AB32); Best Interest Contract Exemption (ZRIN 1210-ZA25)

To Whom it May Concern:

Thank you for the opportunity to testify at the recent administrative hearings on the proposed regulation (the "Proposal") redefining the term "fiduciary" with respect to the provision of investment advice under ERISA §3(21)(A)(ii),[1] and the proposed prohibited transaction class exemptions, including the "Best Interest Contract Exemption" ("BICE").[2] While the U.S. Chamber of Commerce ("Chamber") shares the U.S. Department of Labor's (the "Department" or "DOL") goal of ensuring ERISA plans, ERISA plan participants and beneficiaries, and Individual Retirement Account ("IRA") owners receive quality financial advice, we unfortunately continue to have serious concerns that the Department has chosen an approach that is unduly complicated and wrought with serious defects. As such, we are writing to submit additional comments on issues raised during the hearings.

The Chamber believes that the extensive written comments and hearing testimony highlight the Proposal's complexity and flaws, and these cannot be corrected without reproposal and additional comments from the regulated

[1] 80 Fed. Reg. 21,928 (Apr. 20, 2015)

[2] Id at 21,960.

community. The purpose of a reproposal is to ensure that any changes to the Proposal have been adequately addressed by the Department in a way that does not create new problems. Given the complexity of these issues and the significant retirement savings at risk, it is important for the Department to get this "right," and allowing interested parties an opportunity to see the rule again before it becomes final is essential to that outcome. We emphasize that our goal is not to delay that final rule but rather to ensure that the final product released by the Department is workable and serves the needs to all plan participants, plan sponsors, and IRA owners. Such a reproposal can be accomplished without a significant delay in the rule.

Our additional comments include the following concerns:

- The proposal presents a significantly increased risk of class action litigation that will not serve participants' or IRA owners' best interests.

- Governmental as well as private entities expressed serious concerns about the proposal's impact on small businesses and individuals.

- "Best Interest" is not a synonym for the ERISA fiduciary standard and the associated prohibited transaction rules, which can act against your best interest.

- A broad Sellers' Carve-Out is necessary for all plans and IRAs.

- A Seller's Carve-Out is necessary for proprietary products due to the prohibited transaction rules.

- Transition rules for ongoing arrangements and BICE need to be clarified and implemented.

- IB 96-1's language on asset allocation models and representative investment options should be retained.

- BICE should not limit assets available for investments in IRAs.
- BICE remedy and conduct requirements exceed the Department's regulatory authority.
- Clarification is needed for rollovers and platform carve-outs.
- Disclosure requirements must be modified.

This letter is in addition to all of our previous comments and testimony submitted to the Department—our previous positions remain, and we ask that the Department respond to all of our comments. Our concerns are explained in more detail below.

The Extensive Written Comments and Hearing Testimony Highlight the Proposal's Complexity and Flaws—These Cannot Be Corrected Without Reproposal and Additional Comments from the Regulated Community

The testimony presented at the hearings highlighted the considerable confusion and real-world problems presented by the Proposal, BICE, and the other exemptions in the regulatory package. We urge the Department to respond to the serious objections raised by the Chamber and many other witnesses at the hearings by reproposing a revised rule.

Reproposal is Essential to a Workable Final Rule:

Given the scope of the needed changes, and given the significant harm that will result to our members and their employees through the increased cost and reduced availability of advice if any final rule is not substantially altered, we respectfully request that the Department issue a reproposed rule and solicit additional public comments before it proceeds to a final regulation. Reproposal is necessary because the solutions to the complex issues discussed in the hearing testimony and written comments are not simple and clear cut, but rather require careful attention to dozens of technical issues. The Department's understanding of the effect of its decisions must be informed by the realities facing plans, participants, IRA owners and advice providers who must comply with any final rule. This cannot be done properly in a regulatory vacuum.

It is clear that the Department did not coordinate closely enough with other financial regulators like the Securities and Exchange Commission (the "SEC") and the Financial Industry Regulatory Authority ("FINRA") in developing the Proposal given the outright conflicts with securities law and regulation that compliance with the Proposal could cause for some advisors. This is not a minor concern, but a major problem for the entire regulated community. While the effect of the Proposal might be to "supersede" the current standards imposed by the SEC, FINRA, and other Federal and State regulators, the reality is that the Proposal would simultaneously apply with the already extensive regulation of financial advisors and product sellers of various types. Advisors and others would be responsible both for compliance with the full scope of their current standards and with the Proposal's additional requirements. The regulated community is whipsawed in the middle when these requirements conflict (as they would under the Proposal), or require onerous, but different, compliance regimes (as they would under the Proposal). We are especially concerned by the detailed comments submitted by FINRA identifying a large number of conflicts and errors in the Proposal. Accordingly, we request that the Department seek additional public input from the SEC, and publicly address each of the concerns raised by FINRA prior to any final rule.

The different interpretations of the Proposal's language by several entities in their testimonies and comments clearly demonstrate that what may seem like straightforward regulatory text to the Department is anything but for those who must comply. A consistent theme among the hearing witnesses was uncertainty regarding the Department's intentions and the meaning of ambiguous regulatory text. Many witnesses representing a broad spectrum of interests specifically discussed concerns about such ambiguities, including representatives of plan sponsors, the financial services industry and consumer advocacy groups. In fact, proponents of the rule also acknowledged these concerns in their testimony. For example, Ms. Barbara Roper, Direct of Investor Protection for the Consumer Federation of America agreed with Mr. David Blass, general counsel of the Investment Company Institute, that "...the definition of investment advice needs to be revisited for the "directed to" element and [for] some ambiguous terms, including the "understanding" element."[3]

The response from Department officials during the hearings at times suggested that they perceived no ambiguities, or that they were dismissive of the underlying concerns regarding those ambiguities. This disconnect between the regulated and the regulator is exactly why reproposal is necessary, and why a second round of comments is essential.

The Proposal is one of the most complex regulations the Department has attempted since ERISA's passage. As the comments and testimony so starkly highlighted, the Department's nearly four years of effort behind closed doors did not result in a "workable" rule. In fact, portions of the Proposal even exceed the Department's legal authority. Specifically, the Department has no regulatory authority to create alternative legal remedies to ERISA's exclusive remedies for participants, or to impose an ERISA fiduciary standard on advice to IRA owners, though it attempts to do both through BICE. The Department itself has conceded that changes must be made, and appeared to be exploring at least some of those changes through the hearings. However, we do not believe it is possible for the Department to fix the many policy and technical problems without additional input from the regulated community. Going directly to a final rule via another closed-door process in which the Department considers comments without additional input will simply result in more errors and mistakes. We do not make this request for the sake of delay—we make it for the sake of a final rule that will actually serve, rather than harm, the interests of our members and their employees.

[3] Raw transcript of testimony presented on August 10, 2015, at 155, accessed on September 17, 2015 at http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript1.pdf.

Prejudging "Legitimate" Concerns:

While the Department says its intent is to have an open regulatory process based on the free exchange of ideas, we are concerned by comments made by Department officials during the hearing that some of the objections to the ambiguities and restrictions of the proposal were "legitimate" while others were merely "talking points" against the rule. One such example was an exchange between Bradford Campbell, outside ERISA counsel to the U.S. Chamber, and Deputy Assistant Secretary Timothy Hauser, the highest-ranking career civil servant at the Employee Benefits Security Administration:

Campbell: "...[W]e have to adhere to these regulations by the letter. So where there is ambiguity, that's potential legal liability. It's a potential inability to know what the actual compliance obligation is."

Hauser: "And, you know, obviously there are both ambiguities that I think are legitimately identified that need to be clarified. There are ambiguities, to be completely blunt about it, that are talking points to be used in advocacy efforts to defeat the rule."[4]

Later, in discussing the effect of the Proposal on participant education with Lynn Dudley, Senior Vice President, Global Retirement and Compensation Policy for the American Benefits Council, Deputy Assistant Secretary Hauser suggested that employer concerns about the Proposal were being swayed by "talking points:"

Dudley: You need to rephrase or reframe some of what you're doing around education...when I go around and I really have talked to lots of plan sponsors...they have the sense that you're telling them to pull back.

[4] Raw transcript of testimony presented on August 11, 2015, at 628, accessed on September 17, 2015 at http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript2.pdf.

Hauser: Well, do you think they might be influenced at all by those talking points that say casual conversations are treated as fiduciary? Because I think they might be.

Dudley: Well, I don't actually have talking points out on this because I really haven't done that, but I don't think that they're influenced. They're not a membership that lets me tell them. They're a clear membership that tells me, and I am very aware of my role as the recipient of information.[5]

Specifically, we are concerned that these exchanges suggest the Department may have prejudged the outcome of the comments and the hearing, having already determined which concerns are not "legitimate"—those with which the Department disagrees.

The point of the notice and comment process is to provide the Department with information and understanding of how its Proposal would work, or not work, in the real world. For example, concerns about litigation risk resulting from unclear drafting of regulatory requirements are not "talking points" but a real risk facing plans and advisors in complying with new legal obligations and conditions. A quick glance at the comments shows that a wide array of concerns has been expressed by a wide range of parties, with many noting similar problems. These common concerns should be a warning to the Department that the scope and impact of the proposed rule is broader than it may realize, and will have significant, far-reaching effects beyond the first tier compliance issues we have identified in the few months we have had to review the Proposal. Reproposing a revised rule for additional comment will ensure the Department has not continued to overlook, misunderstand or dismiss the concerns of the regulated community and bring us closer to a rule that may work in practice.

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[5] Raw transcript of testimony presented on August 13, 2015, at 1146-1147, accessed on September 17, 2015 at http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript4.pdf.

The Proposal Presents a Significantly Increased Risk of Class Action Litigation that Will Not Serve Participants' or IRA Owners' Best Interests

As we testified, we believe the BICE provisions creating a state law cause of action for breach of contract as an alternative to ERISA's exclusive remedies are beyond the Department's authority. What's more, we believe the requirement that class action litigation be available under the contract will result in a great deal of new litigation, as the representations and warranties required by BICE are subjective standards that permit different compliance interpretations. These subjective standards permit the plaintiff's bar to litigate the advisor's reasonable and good faith interpretation of multiple points, creating a significant legal liability risk for advisors and their affiliated financial institutions.

As we explain more fully in our July 20th, 2015 comment letter from the U.S. Chamber of Commerce and the U.S. Chamber's Institute for Legal Reform, we do not believe the Department has the authority under Federal law to ban a binding arbitration provision in a BICE contract. The Federal policy favoring arbitration under the Federal Arbitration Act (the "FAA") is so strong that a "clear congressional command" is necessary to displace the FAA "even when the claims at issue are federal statutory claims."[6] When federal law is "silent" as to whether Congress intended to override the FAA for a particular type of claim, "the FAA requires the arbitration agreement to be enforced according to its terms," regardless of whether the source of the claim is federal or state law.[7] Nothing in ERISA or the Internal Revenue Code supplies the necessary clear command – indeed, nothing in either statute indicates any intent whatsoever to limit the availability of arbitration. The FAA therefore applies with full force.[8] Because "[i]t is a fundamental precept of administrative law that an

[6] *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

[7] *Id.* at 673.

[8] Indeed, a number of federal courts have held that Congress did not intend in ERISA to preclude arbitration of fiduciary breach claims. *See, e.g., Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 119-20 (2d Cir. 1991); *Pritzker v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993); *Kramer v. Smith Barney*, 80 F.3d 1080 (5th Cir. 1996); *Simon v. Pfizer, Inc.*, 398 F.3d 765, 774 (6th Cir. 2005); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds*, 847 F.2d

agency action, rule, or regulation 'cannot overcome the plain text enacted by Congress,'"[9] the Department cannot, without express statutory authority, prohibit what the FAA protects.

Further, class action litigation is not an effective or efficient means to protect the interests of the participants and IRA owners. Arbitration is at least as likely, and often more likely, than litigation in court to result in positive outcomes for consumers, as empirical studies repeatedly have shown. In addition, arbitration agreements offer fair and simplified procedures for consumers—something that is ensured by the protections of generally applicable state unconscionability law as well as the due process safeguards of the nation's leading arbitration providers.

From those arguing against arbitration, the Department has received comments suggesting that class action litigation concerns are overblown. The truth is quite the opposite—the litigation concerns presented by BICE are very real, and a significant barrier to its use unless materially changed. As Justice Ruth Bader Ginsburg noted in a class action case a few years ago, "A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims."[10] Empirical analysis of recent class action litigation shows that the members of the class—here the participants and IRA owners—typically receive little or no benefit from settlements while the lawyers pursing their cases earn millions of dollars. The combination of the class action and the contingent fee, in which lawyers may reap 40% or more of the total settlement, incents litigation over tiny disputes. The BICE contract would be fertile ground for those with such incentives, as the subjective nature of the BICE contract warranties and representations would make good faith compliance determinations subject to legal second-guessing.

475 (8th Cir. 1988); *Williams v. Imhoff*, 203 F.3d 758 (10th Cir. 2000); *but see Amaro v. Continental Can*, 724 F.2d 747 (9th Cir. 1988).

[9] *Sierra Club, Inc. v. Sandy Creek Energy Associates, L.P.*, 627 F.3d 134, 141 (5th Cir. 2010).

[10] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

A recent empirical study by Mayer Brown LLP of 148 class action cases brought in 2009 and tracked through September 2013 (by which time 127 were resolved) found that:

- "The vast majority of cases produced no benefits to most members of the putative class—even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process,"

- 35% were dismissed voluntarily by the plaintiffs, with most resulting in an undisclosed settlement for the lead plaintiff and attorneys, but nothing for the class members.

- "For those cases that do settle, there is often little or no benefit for class members, [and] few class members ever even see those paltry benefits—particularly in consumer class actions...Of six cases in our data set for which settlement distribution data was public, five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%. Those results are consistent with other available information about settlement distribution in consumer class."[11]

The Department should eliminate the class action requirement in BICE not only to reduce meritless litigation, but to actually protect the interests of the participants and IRA owners who are better served by arbitration.

Governmental as well as Private Entities Expressed Serious Concerns About the Proposal's Impact on Small Businesses and Individuals

[11] "Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions" by Mayer Brown LLP, December 2013, accessed on September 17, 2015 at https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf

As we testified, the Chamber is the world's largest business organization, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, the overwhelming majority of which are small businesses. As plan sponsors and plan fiduciaries, our members are the recipients of investment advice, and they and their employees are the people this rule is intended to help. Their view is that the Proposal would not help them, but would hurt them. The Chamber and other groups representing businesses are not alone in criticizing the Proposal's effects in reducing choices and increasing costs.

Specifically, we direct the Department's attention to the concerns of the Small Business Administration's ("SBA") Office of Advocacy. This fellow Federal agency filed a comment letter with the Department expressing serious criticism of the Department's deficient economic analysis, particularly the projected impact on small business. The SBA focused in part on the difference in treatment between small and large plans under the large plan carve-out, questioning whether the Department fully appreciates the impact on small businesses.

The SBA Office of Advocacy wrote that it had conducted its own focus groups discussing the Proposal with small businesses, and the results of those focus groups showed that their position was the same as the Chamber members—these small businesses believed the proposal would make advice more expensive and less available.[12]

Similarly, the majority of the Senate Finance Committee Democrats wrote the Department about the importance of providing a broad seller's carve-out covering small plans, writing, "The reality is that retirement plans for small businesses are sold, not bought—and it is important that any final rule take this factor into account."[13]

[12] *See*, Comment letter from the Small Business Administration's Office of Advocacy, July 17, 2015, at 5-6. (SBA's multiple roundtable discussions and ongoing communications with small business stakeholders revealed that "the proposed rule would likely increase the [advisers'] costs and burdens associated with serving smaller plans...[and] could limit financial advisers' ability to offer savings and investment advice to clients...ultimately lead[ing] advisors to stop providing retirement services to small businesses.")

[13] *See*, Comment letter from Senate Finance Committee members Sens. Wyden, Stabenow, Menendez, Carper, Cardin, Bennet, Casey, and Warner; August 7, 2015 at 3.

"Best Interest" is Not a Synonym for the ERISA Fiduciary Standard and the Associated Prohibited Transaction Rules…Which Can Act Against Your Best Interest.

One of the major issues coming from the hearings and comments is that acting in a person's "best interest" is not the same thing as the Proposal's imposition of the ERISA fiduciary standard and its associated prohibited transaction restrictions. The Chamber supports financial advisors acting in the best interest of their clients—our members *are* their clients. What we don't support is relabeling the ERISA fiduciary standard along with all of the prohibited transactions rules as "best interest" when the simple fact is that the ERISA fiduciary standard and the prohibited transaction rules in fact can prevent our members' advisors from acting in our members' best interest. Thus, while the Department uses the term "best interest" to describe what the Proposal requires, the actual requirements of the Proposal are not about best interest, but about the application of the prohibited transaction rules. The prohibited transaction rules apply without regard to the "best interest" of the recipient of advice, as they are based on the relationships between the advisor and the investments, not on the content of the advice. A small business or an IRA owner could seek and receive what is without any doubt the best possible advice that is entirely in his or her best interest, and yet the Proposal could—and would—still declare that advice to be prohibited. The Proposal itself illustrates this point through the large plan carve-out.

The Proposal would permit a large plan with more than 100 participants or $100 million in assets the choice to continue to receive advice not subject to the new fiduciary definition. This choice is denied to small plans, participants and IRA owners. The practical effect of this is that large plans may determine for themselves when the new rules act against their best interest by limiting the information they can receive, and they may access that information from advisors who are not allowed to provide it to small plans or individuals. Allowing large plans, without prohibition, access to advice that is denied to small plans and IRA owners not only implicitly acknowledges that this advice must serve large plans' "best interest" (for if it did not, the Department would have prohibited it for large plans also) but proves the point that a small business or IRA owner's "best interest" is not determined by ERISA's arguably arbitrary prohibited transaction rules, and may actually be harmed by them.

That is why we believe that the large plan carve out should be modified into a sellers' carve out available to interactions with all plans and all IRA owners, not just to large plans. This is what the Department originally proposed in 2010. With clear disclosure of the type contemplated by the Proposal for large plans to ensure there is no confusion of advice for sales activity, small plans and IRA owners will benefit from choice and availability of advice, just as large plans will. Department officials asked a number of questions about this distinction between advice and sales over the course of the hearings, which we address in more detail below.

A broad seller's exemption is one important change needed to address the problems resulting from conflating "best interest" with the ERISA fiduciary standard and associated prohibited transaction rules, but other changes would also be necessary to fully address this problem. For example, BICE does not clearly permit traditional compensation methods for insurance and annuity contracts—the "conflict" results from the application of the prohibited transaction rules to issues like the timing of the commission payments or the agent's representation of a proprietary product, not from whether the recommendation is actually in the client's best interest. There are many other examples we have identified in our comment letters and testimony, all of which are practical problems directly resulting from the Department's decision to use the prohibited transaction rules in ERISA and the Code as a proxy for the "best interest" of plans, participants and IRA owners.

Additional Comments on Specific Issues Raised During the Hearings

In our comments and testimony, we expressed many concerns and made a number of specific recommendations to add or remove language to address these issues. Some of these were discussed during the hearings by Department officials, and we wish to follow up on these issues to more clearly express our views.

A Broad Sellers' Carve-Out for all Plans and IRAs:

As discussed above and in our comment letter and testimony, the Department should retain the broad sellers' carve-out it originally proposed in 2010. During the hearings, Department officials asked a number of witnesses why such a carve-out is necessary, appearing to suggest that sales activity could or should be compatible with the ERISA fiduciary standard and the associated prohibited transaction rules. The Department officials asking these questions appeared to believe that objecting to the Proposal's requirements was tantamount to a rejection of acting in the best interest of the client. Nothing could be farther from the truth.

There are a number of ways a regulation could define best interest. Unfortunately, as these questions from Department officials show, the Department seems to believe that acting in the "best interest" of the advice recipient can only mean complying with the ERISA fiduciary standard and the prohibited transaction rules. We disagree, as the two standards simply are not the same—the prohibited transaction rules go far beyond best interest, and can actually act against the best interest of the advice recipient. As discussed above, an advisor can make a recommendation that is in your best interest, but nonetheless be prohibited from doing so under the Proposal. That is why sales discussions are not compatible with the ERISA fiduciary standard and prohibited transaction rules, and require a broad sellers' carve out.

Seller's Carve-Out is Necessary for Proprietary Products Due to Prohibited Transaction Rules:

Another illustration of this conflict between what is actually in the best interest of a client and what the Proposal would require is the treatment of proprietary products. An insurance agent, for example, may be prohibited from discussing proprietary products even when doing so is in the recipient's best interest. As the Chamber testified during the hearings, a broad seller's carve-out is necessary for a variety of reasons, such as ensuring that small plans and individuals are not discriminated against by depriving them of options available to large plans. In addition, with respect to proprietary products, the sellers' carve-out is necessary because the ERISA prohibited transaction rules do not permit advice, no matter how much such advice is in the best interest of the recipient, where there is a structural connection with the investments. This is a significant concern for the sellers of proprietary products. If the seller represents a specific provider of investment products, the Proposal deems that advice to be conflicted. As a result, an exemption from the prohibited transaction rules is necessary to permit the sales conversation, which the Proposal has redefined as "fiduciary advice." BICE does not clearly cover such transactions as it requires advice to be provided "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party."[14] This is a nearly impossible standard to meet when the agent can only discuss investments or products offered by affiliated entities.

Transition Rules, Ongoing Arrangements and the Seller's Carve-Out:

In our comment letter, we illustrated the difficulties presented by the Proposal's very limited transition rule in several ways. There is no general transition rule, resulting in disruption of existing arrangements. BICE permits preexisting arrangements to continue only to the extent that the account assets are on the approved list, and only if no additional advice is provided. Among other concerns, we noted that in the case of an up-front fee paid for additional investment information in the future, the lack of a transition rule would deny that investor the benefit of the arrangement he or she had negotiated.

During the hearings, Department officials inquired about such up-front payment for future services, specifically asking if this arrangement would be covered by the sellers' carve-out. If this information is advice, the Department asked, should it be covered by an exemption for sales? As discussed above, the question conflates acting in the "best interest" with ERISA fiduciary status and compliance with the prohibited transaction rules. Sales activity, including ongoing sales activity, generally cannot comply with the ERISA fiduciary standard—the prohibited transaction rules do not permit the structural relationship between the seller and its proprietary

[14] 80 Fed. Reg. 21,986 (Apr. 20, 2015)

products, whether the sales discussion occurs only at the beginning of the relationship or over multiple interactions during the life of the arrangement.

Further, the sales activity associated with the investment may not begin and end with the initial agreement in many types of products—there is ongoing sales activity that must be covered by the sellers' carve-out. Ongoing sales activity cannot be recast as prohibited advice because it is provided after the point of the initial sale. To do so would simply not work in practice. For example, defining sales activity to occur only at the initial point of contact would mean than an insurance agent could be prohibited from answering a client's future questions about the product she sold, such as the effect of exercising a right or feature under the policy that could be construed as a recommendation. Under this odd result, the agent would not be a fiduciary for the initial sale of the product, but would become a fiduciary, and therefore be prohibited from helping the client, after the initial paperwork was signed. This outcome would not be in the best interest of the participant or IRA owner, who would effectively be deprived of future interaction with the agent with whom her or she chose to work.

Therefore, we request that the Department make clear that the sellers' exemption is not limited to the initiation of an arrangement, but covers sales activity provided at any point in the relationship.

Retaining IB 96-1's language on Asset Allocation Models and Representative Investment Options:

In our comment letter and in our testimony, we objected to the limitations in the Proposal's education carve-out that redesignated asset allocation models identifying available investments as fiduciary advice. In our view, along with that of many other commenters, removing this important feature of the current Interpretive Bulletin 96-1 ("IB 96-1") undermines the purpose of education. Participants and IRA owners will find little utility in an asset allocation model that does not help them understand which investments belong to which asset classes. For nearly 20 years such models and accompanying investment option information have been an essential part of participant education efforts, and the Department cited no evidence of abuse or other material concerns to justify such a drastic change.

During the course of the hearings, Department officials asked a number of witnesses for their views on a variation of IB 96-1 in which the model asset allocations could be provided along with available investments so long as all of the available investments in each asset class were listed. As we testified, such a limitation on education could work in the narrow circumstances of a plan with a fairly small number of available investments.

However, this alternative does not realistically address the very real need for education on an IRA platform, where the number of investment options could be quite large. It is not feasible to provide a list of the hundreds of mutual funds or other investments within each asset class that are likely to be available to an IRA owner. Indeed, even if such a list were required, it is unlikely that most IRA owners would look beyond the first few options listed. IRA owners need access to education, including model asset allocations, just as much as plan participants with a limited investment menu, and the provisions of IB 96-1 are well-designed to help them get this needed education.

IB 96-1 allows a number of representative investments in each asset class to be provided, along with notice that additional investments are available. This is a superior solution, as it is practical in scenarios with many investment options, and has proven to work well in current plans. Accordingly, we request that the current language of IB 96-1 be included in the education carve-out in any final rule, and that this language apply to IRA owners as well as to plan participants.

BICE Limitations on Listed Assets:

As we testified and commented, the BICE restriction of a defined list of assets is both wrong as a matter of policy, and impractical in execution. The list of assets offers no additional protection against "conflicts"—instead it merely prevents advisors that need the exemption under BICE from advising on non-listed assets, no matter how much doing so would be in the best interest of the recipient.

During the hearing, a Department official asked about our objection to the asset list, and why we believe it "prevented" advisors from advising on assets not on the list. The official's view was that BICE did not prevent the advice—it simply did not provide an exemption for it.[15] As we testified, that is essentially the same result. If an advisor needs to use BICE, as we believe many will for rollovers and other activities, then he or she cannot discuss investments not on the list, no matter how beneficial they may be for the advice recipient.

An example of this concern is managed accounts. Managed accounts, or other forms of discretionary management, are not eligible for BICE. In a situation where BICE is needed—for example, a rollover—the advisor cannot discuss managed account options in connection with the rollover because BICE does not apply. Thus, a participant wanting a professionally managed account (for example, a participant who used such an account in his or her 401(k) and would like to do so in an IRA as well) would be unable to receive any assistance from his or her advisor. Similarly, a participant seeking advice from a "BICE" advisor regarding current plan investment options would be unable to get advice regarding the plan's discretionary management investment option, despite this being a designated investment option selected by the plan fiduciary for use by plan participants. These outcomes do not make sense, but they are the logical result of BICE as proposed.

BICE Remedy and Conduct Requirements Exceed the Department's Regulatory Authority:

As we testified, we believe the Department has attempted to impose conditions in BICE that it lacks the authority to require. Specifically, the Department has no regulatory authority to create alternative legal remedies to ERISA's exclusive remedies for participants. Yet this is exactly what BICE attempts to do by creating new, state

[15] Raw transcript of testimony presented on August 11, 2015, at 638, accessed on September 17, 2015 at http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript2.pdf.

law-based class action lawsuits for participants claiming breach of contract. Similarly, the Department has no legal authority to mandate compliance with ERISA's fiduciary provisions on advisors to IRAs—Congress expressly excluded IRAs from ERISA's fiduciary requirements. Yet again, this is exactly what BICE attempts to do by requiring an advisor to an IRA owner to contractually agree to adhere to an "Impartial Conduct" standard that is essentially just a slightly reworded version of the ERISA Sec. 404(a) fiduciary standard.

We do not believe the Department can require exemptive conditions it lacks the authority to impose directly—this is beyond the scope of the authority granted by Sec. 408(a) of ERISA. Accordingly, we request that the Department remove the new private right of action created in BICE entirely.

Concerns Regarding Rollovers:

One of the most significant changes in the Proposal is making a recommendation regarding the advisability of a rollover or other distribution fiduciary advice. This has created significant ambiguities that the Department has not addressed. First and foremost, the Department has not indicated under what circumstances advice to take a distribution or rollover would be a prohibited transaction. This is a crucial issue, as it goes both to the scope of the fiduciary duty regarding the rollover recommendation and the relationships between the parties that give rise to a prohibited transaction. Second, BICE is not written in a manner that clearly covers rollover advice. While it may have been intended to do so, the regulatory text is not explicit. Both of these issues must be clarified in any final rule if the Department is to avoid disrupting important rollover activity. We also ask that the Department expressly clarify that discussing rollover and distribution options, unless accompanied by a recommendation, is education, and not fiduciary advice. While this seems a clear inference to draw, it would be preferable to have it expressly stated in the regulatory text or in the Preamble to the Proposal. As most plans do not offer individual investment advice (due in part to the prohibited transactions rules the Department proposed to apply even more broadly in the Proposal—a result the Department calculated in 2011 cost participants more than $100 billion per year in preventable investment errors),[16] rollovers are one of the few ways participants can access products and services needed to plan the "spending" phase of their retirements.

Concerns Regarding the Platform Provider Carve-Out:

Though we briefly alluded in our testimony to efforts by platform providers to offer services designed to meet the needs of different kinds of plans, such as those plans that might not be able to find an advisor due to the Proposal's increased costs and legal liabilities, the limited time available during the hearing did not allow us to discuss this in detail. The platform provider carve-out in the Proposal is an important concept, but it needs to be modified and more clearly written.

First, it needs to be clear that the platform provider carve out applies to IRA and annuity platforms. Second, it needs to be clear that platform providers can offer plans pre-bundled packages of services with limited investment menus and other features without becoming fiduciaries.

Finally, as we testified in the hearing, the language in the carve-out that prevents the platform provider from taking into account the individualized needs of the plan must be removed. Plan sponsors need platform providers to provide individualized responses to their requests for proposal ("RFP") in order for our members to comply with their own fiduciary duty to prudently select and monitor service providers.

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[16] *See,* The Preamble to the final regulation implementing the Pension Protection Act investment advice provisions, 76 FR 66,151-66,153 (October 25, 2011) (...the retirement income security of America's workers increasingly depends on their investment decisions. Unfortunately, there is evidence that many participants of these retirement accounts often make costly investment errors due to flawed information or reasoning...Financial losses (including foregone earnings) from such mistakes likely amounted to more than $114 billion in 2010...Such mistakes and consequent losses historically can be attributed at least in part to provisions of the Employee Retirement Income Security Act of 1974 that effectively preclude a variety of arrangements whereby financial professionals might otherwise provide retirement plan participants with expert investment advice.) [Emphasis added].

Accordingly, we request that the Department make the changes discussed above in any final rule, as limiting the ability of platform providers to meet the needs of plans and IRAs will not be in the best interests of plan, participants, or IRA owners.

Disclosure Requirements Must Be Modified:

Two key considerations in any disclosure regime should be whether disclosures are effective and efficient. The BICE disclosure requirements fail on both counts. Compared to generalized disclosures, the very specific, individualized, prospective and retrospective disclosures required by BICE would be extremely expensive to prepare (a cost ultimately borne by the participant or IRA owner), and offer very little, if any, additional utility to plans, participants and IRA owners justifying the much higher fees. The same information facilitating an understanding of the effect of fees could be conveyed with greater simplicity, greater efficacy, and at much less expense using general rather than individualized disclosures.

For example, an illustration of the effect of fees over time would be easier to understand and cheaper to provide than an individualized 1, 5 and 10 year speculative projection of the future costs of a particular investment, especially where making the projection might itself conflict securities laws.

<u>Comments Related to Other Testimony:</u>

In addition to the issues addressed above, the Chamber would like to address certain issues related to testimony presented by other witnesses.

For example, Mr. Stephen Hall, the witness representing Better Markets, testified that the Department's Proposal was "not stretching boundaries" but was simply doing "what Congress actually said and always intended."[17] This directly misstates the law with respect to IRAs.

Congress never intended the ERISA fiduciary standard to apply to advice provided to IRA owners. In passing ERISA and creating IRAs, Congress established the ERISA fiduciary standard for employee benefit plans subject to Title IV of ERISA, but expressly excluded IRAs from that fiduciary standard. As we commented and testified, we do not believe DOL has the legal authority to circumvent this Congressional decision by imposing an ERISA fiduciary standard as a condition of an exemption, when it could not do so directly.

We also note that a number of witnesses who spoke in support of a fiduciary standard in general terms did not fully explain how that general standard differs from the Proposal. For example, witnesses representing Certified Financial Planners ("CFP") suggested that as they already adhere to a CFP fiduciary s2tandard, compliance burdens under the Proposal would be minimal because the CFP requirements are "similar" to the BICE requirements.[18] While elements like a written contract are similar, it is worth noting that the CFP fiduciary standards permit the disclosure of conflicts, but do not require levelized compensation for broker-dealers, registered representatives or insurance agents. They do, however, require the advisor to act in the best interest of the client. This is exactly the issue we address above—a best interest standard, such as that espoused by the CFP Board standards, is not the same as compliance with the ERISA fiduciary requirements and the associated prohibited transaction rules.

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[17] Raw transcript of testimony presented on August 11, 2015, at 595 and 596, accessed on September 17, 2015 at http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript2.pdf.

[18] Raw transcript of testimony presented on August 10, 2015, at 29, accessed on September 17, 2015 at http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript1.pdf.

Conclusion:

We look forward to working with the Department to discuss these and other issues regarding the Proposal. We want to ensure that financial advice is in the best interests of our members and their employees, but the Proposal needs significant modification in order to meet that standard. We ask that these modifications be achieved through reproposal and additional public comments. This request is not about delaying the regulation, but about ensuring that a final regulation benefits the plans, participants and IRA owners who have the most to lose from a rule that unnecessarily limits access and choice in retirement savings advice.

Sincerely,

David Hirschmann

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