

September 24, 2015

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

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

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

Ladies and Gentlemen:

As a follow up to its comment letter of July 21, 2015, its testimony on August 13, 2015 at the hearing held by the Department of Labor (the “Department”) and meetings with the Department, the IPA respectfully submits these additional comments. The IPA appreciates the Department’s willingness to engage in a dialogue with IPA regarding the inclusion of Public Products within the Best Interest Contract Exemption’s Asset list or through a separate prohibited transaction exemption, thereby potentially allowing IRA investors to continue investing in Public Products.

EXECUTIVE SUMMARY

The IPA respectfully reiterates its belief that the promulgation of a list of approved Assets in connection with the availability of the BIC Exemption is not in the best interest of retirement investors. Such a list will deprive retirement investors of choice among many beneficial existing products which contribute to a broadly diversified portfolio and improved risk-adjusted returns. Such a list also will stifle innovation of new products to address the evolving needs of retirement investors and changing financial market conditions

Nevertheless, if the Department determines to proceed with such an Asset list, the IPA proposes herein an expanded set of Policies and Procedures applicable solely to retirement plan investment in Public Products (publicly registered, non-exchange listed REITs, publicly registered, non-exchange listed Business Development Companies, and Other Direct Participation Programs). These additional Policies and Procedures go beyond the existing requirements of federal and state securities law and industry practices regarding investor suitability and, IPA submits, are sufficient to justify either the inclusion of Public Products on any such Asset List or the formulation of a separate Prohibited Transaction Exemption for Public Products.

These proposed enhanced Policies and Procedures would provide significant additional protections to retirement plan investors in that they would:

- reduce or eliminate the conflicts created by high up-front commissions to financial professionals and limit overall sales compensation to that charged by fiduciaries for similar investment products currently proposed for the Asset list;
- enhance the visibility of sales compensation to investors by requiring a straightforward disclosure of the amount and timing of such sales compensation separate from the disclosures contained in lengthy and complex offering documents;
- require the financial professional to conclude and document in writing the appropriateness for the specific qualified account of the attributes of the Public Product being recommended, including: the issuer's objectives; the degree of financial leverage; the primary form of financial return (income distributions vs. capital appreciation); and the anticipated holding period of the investment;
- require the financial professional to conclude and document in writing that the attributes of the investor support the appropriateness of the investment for the qualified account, including the investor's existing and resulting portfolio diversification; the investor's net worth and liquid net worth; the amount of investment being recommended; and the age of the investor;
- require as a condition for investment in a Public Product by an IRA or qualified account that the investor's qualified accounts have a minimum required value at the time of the investment, such minimum intended to exclude from the pool of potential investors in Public Products retirement investors with relatively small holdings and who represent a substantial portion of the universe of retirement account holders;
- require a qualified third-party independent of the investor's financial professional, broker-dealer, the investment sponsor and the external manager of the issuer to perform product due diligence and conclude in writing in its report that the attributes of the investment are appropriate for IRA and other qualified account

investors, including: the degree of anticipated leverage; the anticipated diversification of the investment's assets; the magnitude, timing of payment, subordinations and hurdle rates of return and alignment of interests of any incentive compensation payable to the issuer's investment manager; and confirmation of the investment product's inclusion of provisions requiring (a) annual valuations conducted or confirmed by independent third-party valuation experts; and (b) availability of limited liquidity no less frequently than quarterly at a redemption price equal to the net asset value (to the extent such redemptions would not impair capital or adversely affect the anticipated investment returns or tax considerations for non-redeeming investors).

The IPA respectfully submits that these enhanced Policies and Procedures provide significantly more retirement investor protections than any other product on the Asset list. When considered in light of the existing extremely rigorous federal and state regulatory regimes and the transparency provided via public filing requirements applicable to Public Products, the IPA submits that these enhanced Policies and Procedures for qualified accounts more than justify either the inclusion of Public Products on any BIC Exemption Asset list or a separate PTE for Public Products.

BIC Exemption & the "Legal List" of Assets

The IPA restates its conviction that the principles-based fiduciary obligations which result from application of the proposed BIC Exemption without the construct of a list of approved Assets is sufficient to achieve the Department's objectives for retirement investors. As the IPA observed in its comment letter dated July 21, 2015, the incorporation of a list of Assets in the BIC Exemption will deprive retirement investors of choice among many beneficial existing products and will stifle innovation of new products to address the evolving needs of retirement investors and changing financial market conditions. Further, the IPA respectfully submits that upon thorough review and understanding by the Department of the extraordinarily rigorous federal and state regulatory regimens and disclosure requirements which apply to Public Products, including extensive requirements to confirm the suitability of each Public Product investment for an individual retail investor, the appropriateness of including Public Products on any such list of Assets with no additional restrictions beyond those embodied in the fiduciary principles of the BIC Exemption is appropriate. Finally, the IPA notes that as a result of FINRA RN 15-02, the market for Public Products is moving rapidly toward products with significantly reduced front-end commissions and additional

valuation transparency. For example, new share classes for public non-listed REITs have front-end loads which have been significantly reduced. It is also noteworthy that through the first eight months of 2015 compared with the same period in 2014, the fundraising of full up-front load Public Products has declined by 43% whereas the fundraising of no and low load Public Products has increased 66%.

Additional Policies and Procedures for Placement of Public Products in IRA and Qualified Retirement Accounts

Notwithstanding these observations, the IPA proffers the following additional investor protection policies and procedures relating to the sale of Public Products to IRAs and other qualified accounts for consideration by the Department as sufficient additional investor safeguards to include Public Products among the BIC Exemption Assets or to fashion a separate Prohibited Transaction Exemption relating to Public Products.

The IPA respectfully proposes that a publicly registered, non-exchange listed REIT, publicly registered, non-exchange listed Business Development Company or Other Direct Participation Program (as defined in FINRA Rule 2310) shall be deemed an Asset for purposes of the BIC Exemption or shall be the subject of a separate Prohibited Transaction Exemption where:

- (i) the compensation received by the investor's financial professional shall be similar to the level of compensation deemed reasonable for the placement of other similar covered Assets held in fiduciary accounts, and the majority of such compensation is not paid at the time of investment but rather is paid over a multi-year period;
- (ii) the financial professional or broker-dealer shall provide to the qualified account investor prior to the date of sale of the investment a separate disclosure, distinct from the offering documents, which includes the following information for the specific investment being recommended:

Financial Professional Compensation Paid At Time of Investment (% of Investment)	Financial Professional Compensation Paid Over Time (% of Investment)

In addition, the financial professional shall confirm not only that the investor is qualified for such investment based on the existing suitability standards promulgated by the Securities and Exchange Commission, the Financial Industry Regulatory Association, and the requirements of the investor's state of domicile, but shall also provide the following additional investor protections for any investment made by an IRA or other qualified account:

- (iii) The financial professional shall conclude, and document such conclusion in writing, that based upon the disclosures in the public offering document the following attributes of the investment, taken as a whole, are appropriate given the personal and financial profile of the qualified account investor:
 - a. the investment objectives;
 - b. the anticipated use and degree of financial leverage;
 - c. the intended primary form of financial return (income distributions vs. capital appreciation); and
 - d. the intended holding period prior to liquidation of the issuer.
- (iv) The financial professional shall conclude, and document such conclusion in writing, that the following attributes of the investor at the time of the investment, taken as a whole, make the investment appropriate for the investor's IRA or qualified account:

- a. the investor's existing and resulting portfolio diversification;
 - b. the investor's net worth (excluding home and personal property);
 - c. the investor's liquid net worth;
 - d. the amount of investment being recommended; and
 - e. the age of the investor.
- (v) Investment in a Public Product by an IRA or qualified account shall only be permitted when the total value of the investor's qualified accounts exceeds \$50,000 at the time of the investment; and
- (vi) A qualified third-party independent of the investor's financial professional, broker-dealer, the investment sponsor and the external manager of the issuer performs product due diligence and concludes in its report in writing that the following attributes of the investment are appropriate for IRA and other qualified account investors:
- a. the degree of anticipated leverage;
 - b. the anticipated diversification of the investment's assets based on the amount of securities being offered;
 - c. the magnitude, timing of payment, subordinations and hurdle rates of return and alignment of interests of any incentive compensation payable to the issuer's investment manager; and
 - d. confirmation of the investment product's inclusion of the following provisions:
 - i. valuations of the investment shall be determined and disclosed to investors no less frequently than annually, and following the conclusion of the original offering such annual valuations shall be conducted or confirmed by independent third party valuation experts; and
 - ii. Except as limited by SEC rules and regulations, liquidity shall be offered to investors in exigent circumstances no less frequently than quarterly following the conclusion of the original offering period at a redemption price at that time equal to the net asset

value of the investment to the extent such redemptions would not impair capital or adversely affect the anticipated investment returns or tax considerations for non-redeeming investors.

Conclusion

The IPA also notes that the products covered by this request are not sold as principal transactions.

The IPA again thanks the Department for its attention to this issue. Should you have any questions, please contact Sara Pikofsky at 202 879 3781.

Respectfully submitted,



Kevin Shields
Chairman, Investment Program Association