Early Reactions to the US Department of Labor's Fiduciary Re-Proposal

The US Department of Labor's long-anticipated proposed amendment to regulations defining "investment advice" for the purpose of determining who is a fiduciary (the "DOL Fiduciary Re-Proposal")[1] has been met with significant opposition. This legal update focuses on the issues that the DOL Fiduciary Re-Proposal raises for institutional asset management firms and the preliminary industry response.

Background

The DOL Fiduciary Re-Proposal was the culmination of more than five years of comments and debate from industry and other interested parties following an initial effort by the Department of Labor to expand the definition in 2010. In the preamble to the DOL Fiduciary Re-Proposal, as well as in public statements announcing the release of the re-proposal, the Department of Labor explained that the re-proposal is intended to address an urgent need to ensure that brokers, financial advisors and others on whom 401(k) plan participants and IRA[2] owners rely for important decisions regarding their retirement savings are providing such advice in a manner that is (i) consistent with the high standards of care imposed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), on plan fiduciaries and (ii) free from conflicts of interest. To address these concerns, the DOL Fiduciary Re-Proposal would expand the scope of fiduciary status to sweep in such advice providers. However, the more expansive definition of fiduciary is not limited to persons who assist IRA owners and 401(k) plan participants. Accordingly, if enacted, the DOL Fiduciary Re-Proposal could have broad ramifications for all persons who provide services to, or engage in transactions with, plans covered by ERISA or other plans that are subject to Section 4975 of the Internal Revenue Code of 1986, as amended (the "Code"). Under the DOL Fiduciary Re-Proposal, for example, nearly every sales pitch to such a plan could be considered an "investment recommendation," potentially resulting in fiduciary status to the recommending party. The fate of the DOL Fiduciary Re-Proposal remains uncertain due to strong opposition from many US lawmakers and industry groups.

Although the formal comment period remains open until July 21, 2015, preliminary reactions to the DOL Fiduciary Re-Proposal have already been published by the Securities Industry and Financial Markets Association ("SIFMA"), as well as a number of key industry players invited to testify at a June 17, 2015, hearing of the Subcommittee on Health, Employment, Labor and Pensions of the House Education and Workforce Committee. These early reactions to the DOL Fiduciary Re-Proposal are summarized in the second part of this legal update.

EXISTING REGULATION DEFINING INVESTMENT ADVICE

Current regulations defining the fiduciary landscape for plan advisors have been in place since 1975.[3] Under the existing regulation, a person providing investment advice to a plan subject to ERISA or Section 4975 of the Code, such as an IRA (collectively, "Benefit Plans"), for a fee or other compensation would not become a fiduciary unless the advice satisfies five elements under the regulation:

1. The advice must relate to the advisability of investing in, purchasing or selling securities or other property,
2. The advice must be rendered on a regular basis,
3. The advice must be provided pursuant to a mutual agreement, arrangement or understanding that
4. The advice will serve as the primary basis for investment decisions with respect to plan assets, and that
5. The advice will be individualized based on the particular needs of the Benefit Plan.

All five elements must be present in order for an advisor to be deemed to be a fiduciary. For example, advice with respect to general investment matters, such as asset allocation, selection of investment managers, plan distributions (including IRA rollovers), proxy voting, etc., would not trigger fiduciary status under the current regulations. Furthermore, investment advice regarding the purchase or sale of securities or other assets that is rendered only one time, or sporadically, would not rise to the level of ERISA fiduciary investment advice.

NEW PROPOSAL

In lieu of modifying the current definition of "investment advice," the DOL Fiduciary Re-Proposal abandons the definition entirely in favor of an approach that broadly sweeps into fiduciary status all advice, recommendations[4] and suggestions with respect to investment in, management or valuation of, Benefit Plan assets, and then offers six limited carve outs from fiduciary status. For a private fund sponsor or manager, communications with (i) Benefit Plans with fewer than 100 participants, (ii) any plan fiduciary or plan asset manager responsible for less than $100 million of Benefit Plan assets under management and (iii) any plan participant or IRA (regardless of whether dealing directly with the IRA owner or an investment professional retained by the IRA owner, and regardless of the size of the IRA) (collectively, "Protected Persons"), regarding investing in a private fund would be excluded from many of the fiduciary carve outs, and therefore, would trigger fiduciary status.

Broad Application

Pursuant to the DOL Fiduciary Re-Proposal, if adopted, a person would be a fiduciary by virtue of rendering "investment advice" with respect to moneys or other property of a Benefit Plan if such person provides such advice directly to (i) a plan, (ii) a plan fiduciary, (iii) a plan participant or beneficiary, (iv) an IRA or (v) an IRA owner in exchange for a fee or other compensation (direct or indirect)[5] and such person (directly or indirectly) either represents, or acknowledges, its status as a fiduciary, or provides advice under an agreement, arrangement or understanding that the advice is individualized to, or specifically directed to, the recipient for consideration in making investment or management decisions with respect to securities or other property of the Benefit Plan. The types of advice or recommendations that could trigger fiduciary status include:

- **Investment Advice/Recommendations:** investment recommendations, such as a recommendation as to the advisability of acquiring, holding, disposing of or exchanging securities or other property, including a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from a Benefit Plan;[6]

- **Plan Distributions and Rollovers:** a recommendation to take a distribution of benefits from a plan or to roll over a plan account to an IRA;
- **Investment Management Recommendations:** investment management recommendations, including with respect to asset allocation, investment guidelines, proxy voting or other exercises of rights relating to the ownership of securities;
- **Appraisals and Fairness Opinions:** an appraisal, fairness opinion or similar statement (whether verbal or written) concerning the value of securities or other property if provided in connection with a specific acquisition, disposition, or exchange of such securities or other property by the Benefit Plan; or
- **Recommendations of Investment Providers:** recommendations regarding the selection of investment managers or advisors for a plan.

Significant changes made to the existing regulations include deleting the requirements that there be a "mutual" understanding that the advice will be used as the "primary basis" for investment decisions and that the advice be rendered on a "regular" basis. The deletion of "mutual" understanding, for example, means that neither the Benefit Plan nor the communicating party may intend the communication, such as a sales pitch, to result in fiduciary status; but, under the DOL Fiduciary Re-Proposal, if the communication is interpreted as a recommendation, the communicating party would be an ERISA fiduciary to the Benefit Plan.

In addition, the DOL Fiduciary Re-Proposal eliminates the functional approach to defining "fiduciary" found in the existing regulations. Under the existing regulations, the type of service provided determines whether or not a party is a fiduciary to a Benefit Plan. Accordingly, many service providers to Benefit Plans enter into contracts that acknowledge ERISA fiduciary status to the extent the services provided cause the service provider to fall within the definition of an ERISA fiduciary. In contrast, under the DOL Fiduciary Re-Proposal, any such agreement or acknowledgment of fiduciary status will, in itself, cause the service provider to fall within the definition of an ERISA fiduciary regardless of the services actually provided.

Carve Outs

As noted above, the Department of Labor proposed six carve outs from fiduciary status that would be available if there has been no affirmative representation or acknowledgement of fiduciary status under ERISA. In the past, many agreements with Benefit Plans included an acknowledgement from the counterparties to the effect that the counterparty is an ERISA fiduciary to the extent it is acting as a fiduciary pursuant to the regulations promulgated under ERISA. Such an acknowledgement would likely result in the carve outs being unavailable.

For private fund managers, the fiduciary carve outs include carve outs for (i) a person who acts as a counterparty or representative of a counterparty in connection with a purchase, sale or other transaction with a large plan with financial expertise (the "Counterparty Carve Out"), (ii) the provision of an appraisal, fairness opinion or statement of value to a commingled investment fund that is deemed to hold plan assets (the "Appraisal Carve Out") and (iii) the delivery of statements of value to a plan fiduciary or participant or IRA or IRA owner to comply with reporting or disclosure requirements under ERISA or the Code. The other fiduciary carve outs would apply to recommendations to plan fiduciaries made by employees of an employer or labor union that sponsors a plan; providers of platforms of investment alternatives for 401(k) plans, as well as persons who assist the plan fiduciary with identifying 401(k) investment alternatives that meet criteria specified by the plan fiduciary; and the provision of general investment education (as long as no specific investment alternatives are referenced) to plan fiduciaries, plan participants, IRAs and IRA owners.

Counterparty Carve Out. The Counterparty Carve Out is available to a person who has not, either directly or indirectly, represented or acknowledged fiduciary status, and who, acting merely as a counterparty or representative of a counterparty, makes a recommendation to an independent employee benefit plan fiduciary with authority and control over the plan's assets and the requisite expertise with respect to an arm's-length purchase, sale, loan or other bilateral contract with the plan.[7] As noted earlier, the Counterparty Carve Out is not available for counterparty dealings with Protected Persons.

In order to be eligible for the Counterparty Carve Out, before providing any recommendation to a plan fiduciary, the counterparty must (i) provide the plan fiduciary with disclosure that fairly informs the plan fiduciary of the counterparty's financial interests in the transaction and (ii) either obtain a written representation from the plan fiduciary confirming that the plan has 100 or more participants, or must know or reasonably believe that the plan fiduciary has responsibility for managing at least $100 million of employee benefit plan assets.[8] In addition, the counterparty may not receive any fee or other compensation directly from the plan or plan fiduciary for the provision of investment advice in connection with the transaction (although this condition would not preclude the counterparty from receiving compensation as a result of the transaction or investment involved, such as receiving a management fee based on committed capital in a private fund).

Should the DOL Fiduciary Re-Proposal be adopted in its proposed form, it would be advisable for marketing personnel of private fund managers and their placement agents to adopt procedures to enable them to satisfy the Counterparty Carve Out in connection with marketing a fund, separately managed account or other service or product to Benefit Plans that are not Protected Persons. The procedures should include confirming that the individual with whom the counterparty is communicating is the plan fiduciary with authority and control over the Benefit Plan's assets invested (or to be invested) in the private fund. If the counterparty is communicating with a staff member or employee of the Benefit Plan that is not the plan fiduciary with authority and control over such assets, the Counterparty Carve Out would not apply and fiduciary status would result once any fee or compensation is received by the counterparty (directly or indirectly).

The confirmation that the individual is the appropriate plan fiduciary will likely need to be in the form of an affirmative representation. Merely referring to the Benefit Plan's Form 5500 filing would not be sufficient as the plan administrator identified in such form may not be the fiduciary with investment discretion. The concern for the counterparty as to whether it is communicating with the appropriate Benefit Plan fiduciary is relevant at the time of the initial investment, as well as at the time of any additional investment or any continuation, renewal or retention decisions by the Benefit Plan.

In addition, since the Counterparty Carve Out is not available for dealings with Protected Persons, marketing personnel of private fund managers and their placement agents would need to take care to avoid marketing to such Protected Persons or, if available, to comply with the Best Interest Contract Exemption, described below. Similar procedures should be established with respect to any ongoing communications by relationship or marketing personnel with a Protected Person that is already a client or fund investor.

Appraisal Carve Out. The Appraisal Carve Out would enable a person who provides an appraisal, fairness opinion or statement of value to a commingled plan asset fund to avoid ERISA fiduciary status with respect to the fund and its

Benefit Plan investors. The commingled plan asset fund must hold the plan assets of more than one unaffiliated Benefit Plan for this carve out to apply. The Appraisal Carve Out would not be available, for example, to such services provided to a fund of one or separate account client.

The Appraisal Carve Out does not extend to statements of value delivered by a manager to investors or clients and does not apply if the provider of the valuation represents or acknowledges that it is acting as a fiduciary with respect to such advice. Financial statements delivered in the ordinary course may not trigger fiduciary status under the broadened fiduciary definition since it extends only to statements of value that are delivered in connection with a specific transaction or transactions involving a Benefit Plan. Furthermore, such deliveries may be covered by the carve out for deliveries required by ERISA or the Code.

BEST INTEREST CONTRACT EXEMPTION ("BICE")

As mentioned above, under the DOL Fiduciary Re-Proposal, dealings with Protected Persons as counterparties in potential investments and transactions would not be covered by the Counterparty Carve Out. The Department of Labor believes that this segment of the plan market always requires the heightened protections afforded by imposing fiduciary status on persons who recommend investments and transactions involving plan assets, even when such persons are acting merely as salespersons or other counterparties. However, in response to industry comments, the Department of Labor acknowledged that if such persons were deemed to be fiduciaries, they would often have prohibited conflicts as a result of receiving compensation from the investments and products offered or recommended to Protected Persons. To address this, the Department of Labor proposed BICE to cover such potentially conflicted dealings. It is important to note that BICE does not provide relief from the prohibitions on party in interest transactions. Accordingly, the parties will need to rely on a different prohibited transaction exemption for the services being provided, such as Section 408(b)(2) of ERISA.

BICE only applies to advice that is given to (i) a participant or beneficiary of an ERISA Benefit Plan, (ii) the beneficial owner of an IRA or (iii) an in-house fiduciary with authority to make investment decisions on behalf of a non-participant directed ERISA Benefit Plan with fewer than 100 participants (collectively, "Retirement Investors").

BICE is not applicable to dealings with a participant-directed Benefit Plan, other than with the participant or beneficiary. Furthermore, BICE would be available only if the party dealing with the Retirement Investor is a bank, an insurance company, an investment adviser registered with the US Securities and Exchange Commission ("SEC") or a federally registered broker-dealer (each, a "Financial Institution"), or is an individual who is an employee, independent contractor or registered representative of such a Financial Institution and who is properly qualified and licensed with respect to the covered transaction. Finally, the exemption would only apply to plan purchases, sales or holdings of certain types of assets, including interests in bank collective investment trusts, insurance company separate accounts, registered investment companies, exchange traded funds and exchange-traded REITs. Transactions involving other types of investment funds are not covered, making BICE of limited use for managers of private funds.

The conditions of BICE would be very onerous. First, the individual advisor and the Financial Institution that employs the advisor must enter into a written contract with the Retirement Investor agreeing to be a fiduciary to the Retirement Investor under ERISA or the Code, as applicable. The exemption specifies a number of provisions that must be included in the written contract, including representations and warranties that the advisor and Financial Institution will (i) adhere to a prudence standard of care, taking into account the specific needs of the Retirement Investor, without regard to the financial or other interests of the Financial Institution or any other party, (ii) receive no more than reasonable compensation, (iii) make no misleading statements, (iv) comply with applicable law and (v) adopt written policies and procedures reasonably designed to identify and mitigate material conflicts so that they do not result in violations of the advisor's and Financial Institution's agreed upon standards of care. The Financial Institution must also represent and warrant that it does not employ any policies or compensation arrangements that would tend to encourage individual advisors to make recommendations that are not in the best interests of the Retirement Investor.

By requiring a written contract with the foregoing provisions, the Department of Labor intends to allow a Retirement Investor that is not subject to Title I of ERISA, such as an IRA, to bring a breach of contract claim under state law to the extent any of the representations or warranties are breached by the Financial Institution. BICE prohibits the contract from including any exculpation of the Financial Institution or advisor or waiver of the Retirement Investor's right to sue or participate in a class action suit against the advisor or Financial Institution. This exemption also requires extensive initial and annual disclosures, including of all direct or indirect fees payable to the advisor for each asset recommended, as well as posting of the disclosed information on a web site available to the general public. The range of investment alternatives offered by the Financial Institution, and which are available for recommendation by the advisor to the Retirement Investor, must be broad enough to enable the advisor to make recommendations with respect to all of the asset classes reasonably necessary to serve the best interests of the Retirement Investor. Finally, the advisor and Financial Institution must notify the Department of Labor of their intent to rely on the exemption and maintain records demonstrating compliance and data of all transactions effected pursuant to the exemption that must be made available to the Department of Labor upon request.

Compliance with BICE would not be required if an advisor's compensation is structured to avoid conflicts of interest. For example, an advisor who receives a fixed fee or a fee that is set as a percentage of assets under management, and who does not receive (or have any affiliates who receive) compensation from investments or products recommended by the advisor, would not have a prohibited compensation-related conflict. Compliance with BICE would also not be required if another exemption were available. For example, Section 408(b)(14) of ERISA is another exemption which allows a fiduciary giving investment advice to a participant or beneficiary of a self-directed individual account plan to receive compensation from investment vehicles that such fiduciary recommended, if certain conditions are satisfied. The conditions designed to minimize the conflicts of interest relating to such compensation arrangements include the requirements that (i) either the selection among investment options not impact the compensation received by the advisor or the investment advice program use a computer model that is independently certified, (ii) a separate fiduciary authorize the arrangement and (iii) an independent auditor annually audit the arrangement for compliance with the conditions of the exemption.

COMMENT PERIOD

Originally, the Department of Labor set a comment period deadline of 75 days for the DOL Fiduciary Re-Proposal. The first comments submitted to the Department of Labor requested an extension to the comment period. The Department of Labor subsequently extended the period for comments until July 21, 2015.

The Department of Labor intends to hold an administrative hearing on August 10–12 and, if needed, August 13. The Department of Labor indicated that, after the hearings, it intends to provide for an additional comment period with respect to the DOL Fiduciary Re-Proposal.

EFFECTIVE DATE

The DOL Fiduciary Re-Proposal would become effective 60 days after publication in the Federal Register, and the requirements of the DOL Fiduciary Re-Proposal generally would become applicable eight months after such publication.

Preliminary Response

PROPOSED LEGISLATION TO BLOCK THE DOL FIDUCIARY RE-PROPOSAL

Many representatives in the US Congress have expressed objections to the DOL Fiduciary Re-Proposal. Both the House of Representatives and the Senate have proposed spending bills that would withhold funding for the implementation of the DOL Fiduciary Re-Proposal. If such a spending bill were to be enacted, the lack of funding would effectively block the implementation of the DOL Fiduciary Re-Proposal.

INDUSTRY RESPONSE

SIFMA's Proposal

After the Department of Labor released its DOL Fiduciary Re-Proposal, SIFMA proposed, as an alternative, a "best interests of the customer" standard for broker-dealers. In its release of the proposal, SIFMA explained that it has long supported efforts by the SEC to create a uniform standard for broker-dealers and investment advisors who provide personalized advice to retail customers. SIFMA noted in its release that the DOL Fiduciary Re-Proposal and exemption package, which would only apply to advice rendered to Benefit Plans, would likely increase investor confusion. Furthermore, the Department of Labor's proposal, if adopted, would result in duplication of efforts of government regulators and inefficiency.

In SIFMA's view, the "best interests of the customer" standard for broker-dealers should be uniform for retail customers in all brokerage accounts and be consistent with the SEC's fiduciary standard to be established under Dodd-Frank. As a starting point to promote discussion, SIFMA revised FINRA's existing rule establishing a suitability standard for broker-dealers[9] to be a best interests of the customer standard. This proposed best interest standard includes a "prudent person" standard of care, with disclosure requirements for all investment-related fees and duties to manage material conflicts of interest. With respect to conflicts of interest, even if a retail customer consents to a transaction involving a material conflict, the SIFMA proposal would still require that the recommended transaction or investment strategy be in the best interests of the customer. Finally, SIFMA's proposal would require initial, annual and website disclosures regarding fees and services provided.

Testimony Before the US House of Representatives

On June 17, 2015, the Subcommittee on Health, Employment, Labor and Pensions of the House Education and Workforce Committee held hearings to discuss the DOL Fiduciary Re-Proposal and BICE. Consistent with SIFMA's proposal, the individuals from the financial services industry who testified at the hearings expressed support for the adoption of a best interest standard.[10] In addition, like SIFMA, a majority of those testifying from the financial services industry urged that the best interest standard be established either through legislation or SEC action so that the standard would apply uniformly to all investors.[11] During testimony, each commenter expressed significant concerns with respect to the DOL Fiduciary Re-Proposal and BICE.

Problems with BICE's Tri-Party Contract Condition. As noted above, one of the conditions of BICE is that the individual advisor and the Financial Institution that employs the advisor enter into a written contract with the Retirement Investor prior to any recommendation being made. Much of the testimony focused on practical problems with this condition. An individual, for example, may want to interview different advisors before selecting one.[12] During the interviews, the individual would likely ask questions regarding the services the advisor offers and the products the advisor may recommend. Under the expansive definition of "fiduciary" in the DOL Fiduciary Re-Proposal, such interviews would cause the advisors to fall within the definition of an ERISA fiduciary. To rely on BICE, the advisor and his or her Financial Institution would be required to enter into a contract with the individual before the individual even engages them for services. After the individual selects an advisor, it is possible that the advisor could be on vacation or on leave at a time when the individual seeks additional investment advice. Under BICE, a new advisor and the Financial Institution would be forced to enter into a new contract with this individual before making any additional recommendations.[13]

- **Call Centers.** Many Financial Institutions use call centers to supply information to prospective investors and existing clients. As noted above, to rely on BICE, before asking a question or receiving any information from a call center employee, a Retirement Investor would be required to enter into a contract with the call center employee and the Financial Institution.[14] If, for some reason, the original call center employee needed to refer the Retirement Investor to a colleague, the Retirement Investor would need to enter into a new contract to satisfy the written contract condition of BICE.[15]
- **Existing Clients.** Many Financial Institutions have thousands of existing clients who would be considered Protected Persons under the DOL Fiduciary Re-Proposal. In order to obtain prohibited transaction relief provided by BICE, such a Financial Institution would need to enter into a tri-party contract with each such client and such client's individual advisor. The Financial Institution, however, has no leverage to compel existing clients to enter into such a contract.[16] If the DOL Fiduciary Re-Proposal becomes effective, the Financial Institution will be forced to terminate any existing client that does not respond to its requests to enter into the required contract.[17]

Problems with BICE's Disclosure Requirements. As noted earlier, BICE requires extensive initial and annual disclosures. These include disclosure of all direct or indirect fees payable to the advisor for each asset recommended, as well as posting of the disclosed information on a web site available to the general public. According to testimony, the disclosures regarding the total cost of an investment in an asset over one-, five- and 10-year periods would be impossible to provide due to uncertainty in the future performance of any investment.[18] Furthermore, according to the commenter, making performance projections may cause the advisor to violate SEC and FINRA rules that prohibit performance projections and may create unrealistic expectations by the Retirement Investors.[19] During testimony, it was noted that the condition to maintain the extensive disclosure information on a web site and updating it at least quarterly will be time consuming and costly given the wide variety of investment products available to advisors to offer to their clients.[20]

No Assistance to Small Employers/Small Plans Permitted Under BICE. In BICE, the defined term "Retirement Investor" does not include a plan sponsor of a participant-directed Benefit Plan. Accordingly, BICE would not apply to recommendations made to small businesses in connection with the establishment of a 401(k) plan, for example.[21] Under the DOL Fiduciary Re-Proposal, if a Financial Institution were to provide examples of investment options available in 401(k) plans of similar businesses or different options for different risk profiles, such information would cause the Financial Institution to fall within the definition of a "fiduciary" under ERISA.[22] As the fees likely vary between the different investment options, the Financial Institution would need to rely on a prohibited transaction exemption to avoid a prohibited transaction in connection with its assistance to the plan sponsor. As noted above, BICE would be unavailable. Accordingly, the plan sponsor would be forced to select the investment options without assistance or pay an independent third party to make such decisions.[23]

Insufficient Transition Period. If the DOL Fiduciary Re-Proposal is adopted, affected persons would need to be in compliance within eight months after the proposal's publication in the *Federal Register*. As noted above, some Financial Institutions have thousands of clients with whom the Financial Institution would need to enter into a contract in order to rely on BICE. Such a process would likely take longer than eight months, if it can be accomplished at all.[24]

PUBLIC COMMENTS

We anticipate that many of the comments that will be submitted to the Department of Labor will focus on the issues raised during the congressional hearings. As noted above, the deadline for submitting comments to the Department of Labor is July 21, 2015.

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

Herbert W. Krueger
+1 312 701 7194
hkrueger@mayerbrown.com

Lennine Occhino
+1 312 701 7966
locchino@mayerbrown.com

Maureen Gorman
+1 650 331 2015
mgorman@mayerbrown.com

Erika Gosker
+1 312 701 8634
egosker@mayerbrown.com

Elizabeth Dyer
+1 312 701 8581
edyer@mayerbrown.com

Endnotes

1 80 Fed. Reg. 21927 (Apr. 20, 2015).

2 The DOL Fiduciary Re-Proposal and the proposed exemptions and amendments to exemptions discussed herein define IRAs as any trust, account or annuity described in Section 4975(e)(1)(B)-(F) of the Code (as defined below). Health savings accounts, for example, would be included in the definition of IRA.

3 29 C.F.R. § 2510.3-21(c).

4 The DOL Fiduciary Re-Proposal defines "recommendation" as a "communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."

5 The DOL Fiduciary Re-Proposal defines "fee or other compensation (direct or indirect)" to mean any fee or compensation for the advice received by the advice provider (or by an affiliate of the advice provider) from any source and any fee or compensation incident to the transaction in which the advice was rendered or will be rendered.

6 The Department of Labor states in the preamble to the DOL Fiduciary Re-Proposal that the DOL Fiduciary Re-Proposal would supersede Advisory Opinion 2005-23A (Dec. 7, 2005), and render a person who provides an individualized recommendation relating a distribution and IRA rollover for a fee (direct or indirect) a fiduciary.

7 Swap transactions would be eligible for the Counterparty Carve Out, but would be subject to a special conditions and requirements.

8 Please note that this is significantly different than the assets under management requirement in the prohibited transaction class exemption for qualified professional asset managers (the "QPAM Exemption"). The QPAM Exemption defines what it means to be a qualified professional asset manager ("QPAM"). One of the conditions for a registered investment adviser to qualify as a QPAM is that the adviser have at least $85 million of total client assets under its management and control as of the last day of its most recent fiscal year. That $85 million threshold is not restricted to assets of employee benefit plans. For the Counterparty Carve Out, the assets under management test is based only on assets under management of employee benefit plans.

9 Financial Industry Regulatory Authority Manual Section 2111. Any one may petition FINRA, requesting that FINRA raise an issue with the SEC. Ultimately, it is FINRA's decision as to whether it wishes to raise the issue with the SEC. Then, the SEC would need to formally propose the revisions and allow comments to be submitted and addressed.

10 *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families, 2015: Hearings Before the Subcomm. on Health, Employment Labor and Pensions of the House Comm. on Educ. and the Workforce*, 114th Cong. (2015) (testimony of Kent A. Mason of Davis & Harman LLP ("Mason"), at 3); (statement of the Investment Company Institute, Brian Reid ("Reid"), at 10); (testimony of Dean Harman, Founder and Managing Director Harman Wealth Management, Inc. and Member, Board of Directors of the Financial Services Institute ("Harman"), at 6); and (testimony of John F. "Jack" Haley, Jr., Executive Vice President, Fidelity Investments ("Haley"), at 3).

11 *See* Mason at 13, calling for legislation; Reid at 10 urging a joint effort by the Department of Labor and the SEC; and Harman at 6 supporting a uniform standard of care.

12 *See* Mason at 10; Harman at 15.

13 *See* Mason at 10.

14 *See* Reid at 9; Haley at 8.

15 *See* Reid at 9.

16 *See* Mason at 11.

17 *See* Haley at 8.

18 *See* Mason at 10; Reid at 10.

19 *See* Harman at 17; Haley at 8.

20 *See* Mason at 10; Harman at 18.

21 *See* Mason at 10; Haley at 6.

22 *See* Mason at 5.

23 *See* Mason at 6.

24 *See* Mason at 10-11.