

April 13, 2017

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue NW, Room N-5665  
Washington, DC 20210  
Attn: Fiduciary Rule Examination, RIN 1210-AB79

Submitted via email to: [EBSA.FiduciaryRuleExamination@dol.gov](mailto:EBSA.FiduciaryRuleExamination@dol.gov); RIN 1210-AB79

**Re: Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24, and 86-128.**

BlackRock, Inc. (together with its affiliates “BlackRock”) respectfully responds to the Department of Labor’s (“DoL”) request for comments with respect to delay and reconsideration of its Conflict of Interest Rule (29 C.F.R. 2510.3-21) (the “Fiduciary Rule”); Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01) (“BIC”); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 84-24, and 86-128.

In the current environment, it is more important than ever to (a) make it easier for employers, in particular small employers, and individuals to establish a plan or individual retirement account (“IRA”); (b) encourage and facilitate continuing and increasing levels of retirement savings, starting at an early age; and (c) support well-designed investment programs for individuals planning to retire and those in retirement. In our view, each of the following is necessary to facilitate these goals:

1. **Uniform Fiduciary Standard**: There should be a uniform fiduciary standard, adopted by the Securities and Exchange Commission (“SEC”) that applies to all types of accounts, regardless of whether they are plans or IRAs or non-qualified investment accounts. Only the SEC can oversee all investment accounts, promoting efficiencies and reducing confusion and unnecessary complexity. The President has set as a core principle for regulation of our financial system that regulations be efficient, effective and appropriately tailored.<sup>1</sup> In order to meet this core principle, the DoL should work to ensure that its standards are consistent with other regulatory regimes, and in particular with those of the SEC, the primary regulator of broker-dealers and investment advisors.

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<sup>1</sup> Presidential Executive Order on Core Principles for Regulating the United States Financial System (Feb. 3, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states> (“Executive Order”).

2. **Appropriately Tailored Definition of Investment Advice**: The definition of investment advice in the rule should be narrowed and tailored to address perceived abuses. Concerns about the current broad definition may cause financial institutions to limit providing valuable information, investment education and services because of fear that fiduciary status may inadvertently attach.
3. **Clear and Simple Sophisticated Independent Fiduciary Exception**: Sophisticated investment professionals should be able to engage in sales activities and other arms' length transactions with each other, such as the provision of models and useful investment tools, without the risk of fiduciary status inadvertently attaching or burdensome paperwork requirements to ensure compliance.
4. **Simple and Streamlined BIC with No Threat of Class Action**: The burdensome requirements of the BIC coupled with the threat of class action lawsuits will have a material impact on how financial intermediaries design and will, in many cases, reduce or eliminate products and services available for retirement investors, which is contrary to President Trump's stated priority of empowering Americans to make their own financial decisions.<sup>2</sup> In our view, the BIC should be simpler and streamlined and should be enforced consistent with FINRA rules and procedures.

We appreciate the DoL's adoption of a 60 day delay of the applicability date of the Fiduciary Rule and related exemptions. We also appreciate limiting the requirements of the BIC (and other exemptions) to compliance with the Impartial Conduct Standards until January 1, 2018<sup>3</sup> to afford time to fully consider the issues in President Trump's February 3, 2017 Memorandum and to revisit its prior analysis. However, as discussed more fully below, we believe that the DoL should also grant a further extension of the Fiduciary Rule's applicability date for at least an additional 60 days, so that it has time to examine, as directed by the President's Memorandum, the adverse and unintended consequences of its broad definition of investment advice. It is more important than ever to create an environment that permits individuals to get the advice they need to build a nest egg for a secure retirement. The DoL should take the time required to complete the thorough analysis, review and revisions that will facilitate our shared goals of improving retirement outcomes for all Americans.

#### 1. **Adverse Market Impacts Resulting from the Fiduciary Rule and Related Exemptions**

While it is inherently difficult to isolate the effects of the Fiduciary Rule, in response to the DoL's request for comment on market impact, we believe that the following changes, in particular, are directly attributable to the Fiduciary Rule and work to the detriment of IRA and plan investors:

- The overly broad definition of fiduciary conduct, limited exceptions and burdensome and complicated exemption requirements have created an environment of heightened liability concerns leading to extreme risk aversion. In order to avoid fiduciary status from attaching inadvertently asset management firms may need to unnecessarily restrict existing practices and, as discussed below, adopt costly, time consuming and restrictive processes to ensure compliance with exceptions.

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<sup>2</sup> Presidential Memorandum on Fiduciary Duty Rule (Feb. 3, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule>.

<sup>3</sup> 82 Fed. Reg., No. 66, 16902 (2017).

- Some firms have indicated that they will no longer offer IRA brokerage platforms or may limit their IRA brokerage offerings because of the complexities associated with BIC compliance and the risk of class action litigation included in the BIC. This negatively impacts choice for retail investors and may lead to worse, not better, outcomes for many clients. In particular, moving from a commission-based account to an advisory account may not be in the best interests of a client who trades infrequently. And, if the client does not move to an advisory platform, he or she may be left with no support at all. In revisiting its analysis, the DoL needs to examine the impact on smaller accounts that may be left with self-directed platforms or call centers that do not provide any information or responses to questions that may come even close to advice.
- Likewise, a number of firms have explored, among other options, the idea of creating a special mutual fund share class that enables technical compliance with the BIC for mutual fund offerings. To fully levelize compensation and eliminate potential conflicts, this new share class (often referred to as Transaction or T-shares) would have a standardized cost structure and would come without some of the privileges shareholders currently enjoy. In particular, shareholders would not be able to exchange funds to a different investment strategy within a fund family without paying an additional load and shareholders would not retain the benefits of paying a reduced load based on the cumulative amount of assets invested across the fund family. These are valuable privileges yet they raise conflicts under the BIC. The DoL seems to recognize the issues raised by T-shares by pointing out that in January 2017, the SEC provided guidance on use of share classes without any front-end load, deferred sales charge, or other asset-based fee for sales or distribution (referred to as “clean shares”) under Section 22(d) of the Investment Company Act of 1940.<sup>4</sup> However, many of our partners have indicated to us that there are interpretive issues with the SEC guidance and it would be almost impossible to have the systems in place that can manage these clean shares in brokerage accounts by June 9<sup>th</sup>, 2017.
- As firms modify their programs, they are increasingly focused on costs and compensation structure. Because the Fiduciary Rule targets conflicts of interest, many firms may focus on choosing products for plan and IRA platforms based on whether the product facilitates compensation neutrality within and across fund families and, thus, BIC compliance, rather than whether the product will deliver the client’s desired investment outcome. The overly heavy emphasis on cost and compensation structure, to the exclusion of other factors, threatens to work against the best interests of individual clients and could result in less assets available for retirement. Any fiduciary standard should encourage and facilitate solutions that focus on ensuring that individuals have the options that will best help them achieve their retirement goals.

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The DoL has also asked for comments illuminating “particular provisions of the Fiduciary Rule that could be amended to reduce compliance burdens and minimize undue disruptions while still accomplishing the regulatory objective of establishing an enforceable best interest conduct standard for retirement investment advice and empowering Americans to make their own financial decisions, save for retirement and build individual wealth.”<sup>5</sup> Set forth below are

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<sup>4</sup> SEC letter, Investment Company Act of 1940 – Section 22(d), Capital Group (Jan. 11, 2017).

<sup>5</sup> 81 Fed. Reg. No 68 at 12324.

BlackRock's specific comments on the critical changes that should be made to improve the Fiduciary Rule's "workability" and consistency with other regulatory regimes. In each case, these improvements protect investors, while at the same time preserving choice and facilitating individuals achieving their goal of having sufficient savings for a secure retirement.

## A. Definition of Fiduciary

The definition of fiduciary conduct should be narrowed and tailored to address any perceived abuses. If the current broad definition goes into effect on June 9<sup>th</sup>, 2017, before the DoL completes the analysis mandated by President Trump, this may cause financial services firms, including asset managers, to limit or discontinue providing valuable information and services to clients because of the risk that fiduciary status will attach. Once processes and restrictions are in place, they will be difficult, confusing or costly to reverse.

### 1. Narrow the Definition of Investment Advice

Section (a)(2) of the Fiduciary Rule provides that a "recommendation" will be investment advice if either the person renders the advice "pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient" **or** the person "[d]irects the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA."<sup>6</sup> Under this broad definition, financial services firms are concerned that fiduciary status will attach to any information or communications that is made available or delivered to groups of retirement investors and could be considered advisory in nature even though it is not based on any particular individual's needs or directed to a specific person (such as explaining (a) the benefits of investing in more fixed income products when someone gets closer to retirement and providing information on a variety of fixed income investment alternatives or (b) how a target date fund works and then providing information on target date funds available for investment). To address this overbreadth, we suggest that the DoL combine and revise sections (a)(2)(ii) and (iii) to provide that for a person to be a fiduciary: (a) the recommendation must be specifically directed to an advice recipient, (b) based on the advice recipient's individualized needs and (c) made pursuant to a mutual written agreement or arrangement that the recommendation is intended as investment advice.

Recognizing the sweeping scope of its investment advice definition, the DoL provided guidance intended to address some of the "common sense" concerns. However, the DoL's claim that its definition allows a person to market himself and have a "hire me" conversation is wholly unrealistic.<sup>7</sup> It is difficult to imagine any meaningful conversation between an adviser and a potential client without some discussion of strategies or products that the adviser would use in the portfolio. Once products or services are mentioned, there is a material risk that fiduciary status will attach. Likewise, the DoL's attempt to limit the breadth of the definition through carve-outs for platform providers, general communications, education and transactions with independent fiduciaries falls short. These exceptions do not go far enough in addressing concerns that fiduciary status will inadvertently attach. In the end, there remains concern that a financial services firm could be subject to liability based on a retirement investor's view that the firm is acting like a fiduciary, even where the financial services firm is clear that it does not intend fiduciary status to attach. As a result, asset managers and other financial services firms

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<sup>6</sup> See 81 Fed. Reg., No. 68, at 20997.

<sup>7</sup> See 81 Fed. Reg., No. 68, at 20968.

will necessarily limit the services and resources they make available to IRAs, plans and their participants and beneficiaries.

## 2. Simplify and Clarify the Sophisticated Independent Fiduciary Exception

Section (c)(1) of the Fiduciary Rule provides an exception to fiduciary status for transactions with independent fiduciaries with financial expertise. The core purpose of this exception is to avoid imposing fiduciary obligations on statements or other communications that could be construed as “advice” made in connection with sales pitches or other arms’ length transactions between sophisticated investment professionals. As the DoL noted, in these relationships, the parties do not have a legitimate expectation that they are in a trusted relationship where one can fairly rely on the other for impartial advice. While helpful, this exception is subject to specific conditions. In addition, in the preamble to the Fiduciary Rule, the DoL made clear that a person seeking to avoid fiduciary status under this exception has the burden of demonstrating compliance with all the applicable requirements of the limitation.<sup>8</sup>

Since the DoL issued the Fiduciary Rule, financial services firms have struggled with the scope and interpretation of this exception and how best to comply. Based on that experience, we note and suggest the following:

### a. Eliminate Unnecessary Documentation Requirements

Section (c)(1) of the Fiduciary Rule includes repeated references to representations that a person can obtain from a plan or independent fiduciary to ensure that he has satisfied the requirements of the exception. And, as provided in the Preamble, the person using the exception has the burden of proving that it applies. This has led to asset management industry organizations, asset management firms and other financial services organizations developing rather lengthy forms of letters, notices and representations, some requiring affirmative consent, for use in demonstrating compliance with the exception. One example of unnecessary compliance burden is the “independence” condition. In response to industry questions and comments, FAQ 28<sup>9</sup> provided complicated ambiguous guidance as to whether parties were “independent” for purposes of the exception. This language could be interpreted to make the availability of the exception contingent on an intermediary’s compliance with the BIC or other exemption, over which an asset manager does not, and should not, have any control. We do not believe this is the DoL’s intent, and given the burden placed on asset managers, any test of independence should be readily determinable by the asset manager, such as common ownership or control. Furthermore, if the Fiduciary Rule goes into effect on June 9<sup>th</sup> without modification, it will be an enormous and costly undertaking for financial services firms, including BlackRock, to send letters or other communications and to answer the inevitable questions from recipients. Recipients of letters and other communications will likewise need to wade through the different variations they receive from their business partners to ensure accuracy and consistency and to raise any concerns. Since different firms provide different services, there is no one document that fits all, which increases the burden for the senders and the recipients of these communications. All of this paper and effort is essentially to make clear that two sophisticated parties dealing with each other on an arms’ length basis acknowledge and agree that one is not acting as a fiduciary to the other – although in the course of their interactions one

<sup>8</sup> See 81 Fed. Reg. No 68, at 20984.

<sup>9</sup> See Conflict of Interest FAQs, Part II – Rule, U.S. Department of Labor, Employee Benefits Security Administration (Jan. 2017), available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf> (“Conflict of Interest FAQs Part II”) at FAQ 28.

may make suggestions that are advisory in nature. The presumption for communications between an asset manager and an intermediary institution should be that neither party has an expectation of reliance on the other's recommendations. As such, fiduciary status should only attach to transactions between sophisticated parties where the parties mutually agree, in writing, that the recommendation is intended to be fiduciary investment advice. Plans and IRAs are sufficiently protected because the intermediary institution will act as a fiduciary when it provides investment advice under the Fiduciary Rule. Moreover, the significant additional, and in our view, unnecessary paperwork, is inconsistent with President Trump's mandate to streamline and make regulations more efficient.<sup>10</sup> The cost of this paperwork may cause asset managers to stop providing some services, and in any event, the material costs will likely eventually be passed through to end clients.

b. Clarify that the Sophisticated Independent Fiduciary Exception Applies to Model Portfolios and Other Investment Tools Provided by Asset Managers to Financial Intermediaries

As we noted in our July 21, 2015 comment letter, asset managers, including BlackRock, often make model portfolios and/or investment tools available to financial intermediaries. Financial intermediaries are generally broker-dealers or other investment advisers and asset managers, who have direct relationships with plans, particularly smaller plans and IRAs. By using models and investment tools, financial intermediaries are better able to work with their clients to develop portfolios that improve their client's ability to achieve their investment goals in a cost effective manner.

Model portfolios are collections of possible investment portfolios comprising a wide range of strategies (e.g., growth, low volatility, inflation protection, income), product types (e.g., exchange traded funds, mutual funds) and risk. The models are rebalanced or updated by the model provider on a periodic basis, but the model provider does not generally purchase and sell the securities contained in the model on behalf of any investor. The models are developed based on what an asset manager believes would be an appropriate or attractive strategy for some sub-set of investors, but without targeting any particular investor. Thus, the model provider is not "recommending" any model to a plan or IRA. It is making the model portfolios available as a product and/or service to a financial intermediary, who in turn may evaluate and recommend the models for specific Plans or clients.

In addition, as technology improves, asset managers are increasingly offering financial intermediaries sophisticated investment tools to assist them in analyzing their client's financial needs and objectives, along with strategies to achieve those objectives that may include the use of the asset manager's products and models. The financial intermediary obtains information regarding a client's investment objective, risk profile, time horizon, total savings, etc. and uses that information with the tool to generate an "optimal" portfolio based on that information. The tools and technology are accompanied by detailed financial information on the investment funds or other securities included in a model or strategy and risks. The financial advisor generally shares with his client a streamlined version of the "output" generated by use of the tool, including information regarding the proposed model portfolio and actual portfolio once an investment is made. The "output" will generally include investment funds (e.g., exchange traded funds or mutual funds) managed by the model/tool provider and is likely to identify the asset manager that provides the model and/or tool.

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<sup>10</sup> Executive Order.

Model portfolios and investment tools are a portfolio management or investment service provided by an asset manager to a financial intermediary. Asset managers do not have a contract with a client and are unlikely to know the identity of the client, including whether the client is a plan or IRA. A financial intermediary, and not the asset manager, is responsible for determining whether a client would benefit from an investment program based on models, determining the appropriate model provider (which may be BlackRock or another asset manager), selecting a particular model or investment tool and determining what recommendations to make to his client. The financial intermediary, and not the asset manager, will have responsibility for execution of securities purchase and sale instructions, including rebalancing. The model and any “output” from an investment tool provided by the asset manager and used by the financial intermediary cannot and should not be characterized as a recommendation by the asset manager to the end client, even where the financial intermediary identifies the asset manager and presents the client with a particular asset manager’s model portfolio or output from its investment tools.

In response to our and other financial services firms’ comments, the DoL helpfully included in the sophisticated independent fiduciary exception a specific reference to asset allocation models and other financial analysis tools as services that will not be deemed fiduciary advice. However, the exception contains a condition that the model or tool provider does not receive a fee or other compensation *directly* from the plan fiduciary or IRA for the provision of investment advice (as opposed to other services). Particularly with respect to more sophisticated investment models and tools, the asset manager charges the financial intermediary – who would be a fiduciary to a plan or IRA – a fee for the service. That fee is generally calculated based upon the financial advisor’s clients’ assets that are invested based on the model. Following publication of the final Fiduciary Rule, asset managers, including BlackRock, raised a concern that this language could inadvertently preclude the use of the exception for investment models and tools.<sup>11</sup>

In FAQ 29,<sup>12</sup> the DoL attempted to address this concern by stating that it “would not treat a fee paid between financial intermediaries as a direct fee for investment advice for purposes of the exception unless the fee is directly paid by the plan or IRA or with plan or IRA assets.” While helpful, this language created further ambiguity and uncertainty by continuing that “[a] fee paid by the plan or IRA or with plan or IRA assets would include a situation in which the investment adviser pays the fee out of its own general assets but then is separately reimbursed by the plan, plan participant or IRA (e.g., the investment adviser’s invoice to the plan, participant or IRA includes a separate line item for model portfolio service fee).”<sup>13</sup> Although fees for models and tools are generally paid by the financial intermediary out of its own assets, these fees are often calculated by reference to a client’s assets invested based on a model or investment tool. Further, the disclosure documents or invoice for the financial intermediaries’ investment program will often specify the portion of the client’s fee that is paid to the model or tool provider. This transparent disclosure is helpful to the client and should not affect whether the exception is available. However, in view of the language in FAQ 29, the applicability of the exception to models and investment tools provided by asset managers to independent fiduciaries remains uncertain.

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<sup>11</sup> See email from Patricia Kuhn to Luisa Grillo-Chope, Re: Conflict of Interest Rule – Question Regarding Asset Manager Compensation for Model Portfolios and Tools (May 16, 2016, 5:26pm).

<sup>12</sup> Conflict of Interest FAQs Part II at FAQ 29.

<sup>13</sup> *Id.*

In our view, the treatment of models and tools has become overly complicated, remains ambiguous and does not reflect market practices regarding these helpful services. If the DoL moves forward with a fiduciary rule, it should adopt a simple construct which provides that the delivery of model portfolios and investment tools by an asset manager to a financial intermediary will not trigger fiduciary status for the model/tool provider if (a) the model/tool is provided to a financial intermediary, (b) the model/tool provider does not contract with the end client, (c) the model/tool provider does not execute trades in the portfolio and (d) the model/tool provider does not otherwise agree with the financial intermediary to assume fiduciary status. This streamlined approach would help facilitate financial intermediaries offering diversified portfolios at a lower cost to a broader segment of retirement investors, in particular, investors with lower balances, who could otherwise lose access to affordable advice.

c. The Sophisticated Independent Fiduciary Exception Should Not Be Limited to Large Plans and Sophisticated Fiduciaries

BlackRock does not believe that the carve-out for arms' length transactions should be limited to transactions among sophisticated financial services companies. In our view, there should be a broad "seller's exemption" for sales of products and services to all retail investors. Small employers and individuals are the groups that are in the greatest need of establishing plans or IRAs, increasing savings and wiser investing. Rather than discouraging marketing activities targeted to these groups by requiring use of a complicated exemption, the DoL should be encouraging and facilitating increased marketing, education and outreach to these groups. We understand that the DoL may be concerned about broker-dealers disclaiming fiduciary responsibility, but the solution is not to subject marketing and sales activity to fiduciary status and require compliance with the BIC for retail investors. To provide additional protection for small plans, including IRAs, the exception could require a very clear disclosure (not in fine print or buried at the end of television advertising) that materials are "sales" and "marketing materials" that do not purport to be fiduciary advice, are not individualized and may not be appropriate for a particular individual. The materials could also include a suggestion that the person could contact a broker-dealer or investment adviser to obtain advice regarding whether the service or product would be appropriate for a person's circumstances.

3. Clarify the Dividing Line Between Advice and General Communications

The Fiduciary Rule should provide clearer distinctions between advice and general communications and significantly expand the definition of what qualifies as a general communication. In our view, all broadly disseminated marketing materials and other communications, even if they are targeting retirement investors generally should be viewed as general communications. Similarly, statements regarding investment products at a widely attended conference should not be considered investment advice simply because the majority of the participants in the conference are IRA or other plan investors.<sup>14</sup> For any broad communications, reasonable individuals understand that the information provided to the group is not specifically directed to them or individualized to their specific needs and a clear statement or disclosure that the communication is not intended to be advice would resolve any lingering uncertainty. Absent a significantly broader and clear definition of what constitutes a general communication, the risk of fiduciary status inadvertently attaching will have a chilling effect on disseminating useful investment education to the public.

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<sup>14</sup> Conflict of Interest FAQs Part II. See FAQ 16, where the DoL suggested that if a conference were widely attended by retirement investors, the description of a group annuity contract would be considered "advice".



In this regard, web-based tools and model portfolios available to the general public should not be considered investment advice. Asset managers, including BlackRock, often make model portfolios and investment tools available to the general public for free on their websites.<sup>15</sup> These tools are increasingly “interactive” and generate information, including possible asset allocations or investment portfolios based on an individual’s inputs (which may or may not reflect an individual’s actual financial situation). They are designed to provide investment education and to make the asset allocation process easier for investors, without regard to whether those investors are plans. These tools are simply calculators that assist potential investors sort through investments that may meet their needs, not an individualized solution. The model and tool provider likely has little to no information regarding the user or whether the user is even a plan. Where an individual uses and inputs data (complete or incomplete, true or false) into a free website, he should reasonably be aware that the output is not individualized investment advice. Like the case with respect to general communications, a clear statement or disclosure that the communication is not intended to be advice should resolve any remaining concerns. If information and output from web-based tools may be considered investment advice, these services will likely simply be discontinued or will be provided only to a significantly more limited extent or for a fee. This will harm all investors, including plans.

#### 4. Permit Education to Include Identification of Specific Investment Alternatives for All Plans, including IRAs

The Fiduciary Rule’s exception for investment education is too narrow and restrictive as written because it does not permit identification of specific possible investments unless the investment is a designated investment alternative within the meaning of 29 CFR 2550.404a-5(h)(4) under a defined contribution plan, or the alternative is specified by the plan participant, beneficiary or IRA owner. As BlackRock has previously emphasized, we believe that making it more difficult for individuals to connect information about asset allocation to actual products will harm their savings levels and returns on investment. As behavioral finance research shows, savers are more likely to save when saving is made easier. For instance, participation rates in 401(k) plans are much higher when participants are automatically enrolled.<sup>16</sup> While, to our knowledge, no study has specifically examined scenarios where savers only received asset allocation information and not information regarding particular investment options that fit into that allocation, we believe that a reasonable conclusion from existing research is that providing only non-specific asset allocation information will make saving more difficult for investors and thus negatively impact savings. Indeed, the Pension Protection Act of 2006, recognized the importance of making it easier to save and receive advice when it sought to increase 401(k) participation by creating statutory authority for automatic enrollment,<sup>17</sup> and sought to improve the available investment education by permitting fiduciary investment advisers to receive

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<sup>15</sup> Although the model or tool provider does not charge a fee for the service, there is the possibility of indirect compensation to the asset manager if the investor invests in any of the investment funds or other products that are referenced in the model or tool.

<sup>16</sup> See David Laibson, Lecture at the American Economic Association, “The Psychology and Economics Household Investment Decisions (Jan. 2010), available at [http://scholar.harvard.edu/files/laibson/files/the-psychology-and-economics-of-defaults\\_laibson-lecture3.pdf](http://scholar.harvard.edu/files/laibson/files/the-psychology-and-economics-of-defaults_laibson-lecture3.pdf) (“Automatic enrollment as the default dramatically increases 401(k) participation, and those hired under automatic enrollment tend to stay at the default levels.”); Gabriel D. Carroll, James J. Cho, David Laibson, et al., “Optimal Defaults and Active Decisions,” National Bureau of Economic Research (Jan. 2005), available at <http://www.nber.org/papers/w11074.pdf> (“The favorable results of automatic-plan features have been impressive—generally more than 90 percent of automatically enrolled participants remain in the retirement plan...Automatic-service plans have effectively made retirement-plan savers out of people who had not been previously motivated by financial incentives or education.”).

<sup>17</sup> Pension Protection Act, Pub. L. No. 109-280, §902, 120 Stat. 780, 1033-39.

compensation from recommended investment vehicles as long as it is based on a computer model or done on a level-fee basis.<sup>18</sup> We believe that the ability to include investment alternatives in educational materials is critical to making savings easier. Without the additional information, investing will be made significantly more time consuming and difficult. Many investors may be disincentivized from saving and investing for retirement because it is simply too hard.<sup>19</sup>

The exception for education to plans should be consistent with what is currently permitted under DoL Bulletin IB 96-1.<sup>20</sup> Under this bulletin, asset allocation models can provide examples of products that meet an allocation without constituting investment advice. These examples are accompanied by qualifiers telling the investor that (a) other investment alternatives with similar risk and return characteristics may be available under the plan and identifying where information about those alternatives can be obtained, and (b) in applying particular asset allocation models to their individual situations, participants should consider their other assets, income, and investments. The DoL has not demonstrated that IB 96-1 has resulted in misinformation or harmed investors in any way. This information bulletin is not “outdated”, but was specifically designed to address the shift to participant-directed defined contribution plans. We believe this bulletin should be expanded to expressly permit use by IRA owners.

Moreover, the DOL should clearly state that identifying specific investment options to plan sponsors – regardless of their size – should not be considered investment advice. Plan sponsors need – and are requesting from their asset managers – information and education regarding all aspects of the establishment and maintenance of their plans, including alternative plan designs, how to increase savings levels and improve retirement outcomes for their employees, and custom glidepath alternatives for target date products. For these conversations to be meaningful and helpful to the plan sponsor, the asset manager needs to be able to discuss not only asset allocation and diversification but also different investment options available under the plan and how they may help the plan sponsor improve retirement outcomes for its employees.

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<sup>18</sup> DoL Fact Sheet, Final Rule to Increase Workers' Access to High Quality Investment Advice (Oct. 2011), available at <http://www.dol.gov/ebsa/newsroom/factsheet/fsinvestmentadvicefinal.html>.

<sup>19</sup> Investors are more likely to save when saving is made easier. See David Laibson, Lecture at the American Economic Association, "The Psychology and Economics of Household Investment Decisions" (Jan. 2010), available at [http://scholar.harvard.edu/files/laibson/files/thepsychologyandeconomicsofdefaults\\_laibsonaelecture3.pdf](http://scholar.harvard.edu/files/laibson/files/thepsychologyandeconomicsofdefaults_laibsonaelecture3.pdf) (highlighting the impact of automatic enrollment on making investing easier); Sheena S. Iyengar, W. Jiang and Gur Huberman, "How Much Choice Is Too Much: Determinants of Individual Contributions to 401(k) Retirement Plans," Olivia S. Mitchell and Stephen P. Utkus, eds., *Pension Design and Structure: New Lessons from Behavioral Finance*. Oxford, UK: Oxford University Press, 2004: 83–95, working paper available at <http://www.archetype-advisors.com/Images/Archetype/Participation/how%20much%20is%20too%20much.pdf> (Study showing that if a plan offered more funds it depressed the probability of employee 401(k) participation at a rate of, for every ten funds added, a 1.5 to 2 percent drop in participation. Where only two funds were offered, participation rates peaked at 75 percent, but when 59 funds were offered, participation dipped to a low of approximately 60 percent.).

<sup>20</sup> DoL, Interpretive Bulletin 96-1; Participant Investment Education, 61 Fed. Reg. 29586, 29 C.F.R. § 2509.96-1 (Jun. 11, 1996), available at [https://www.dol.gov/ebsa/regs/fedreg/final/96\\_14093.pdf](https://www.dol.gov/ebsa/regs/fedreg/final/96_14093.pdf).

## B. Best Interest Contract Exemption

The DOL adopted the BIC in an effort to preserve existing market practices. However, the BIC's burdensome requirements have obliged financial intermediaries through whom BlackRock offers its products to design and plan for revised programs and strategies, which, if implemented, would limit investor choice and include certain constraints that would not be in the best interests of plan clients, including IRAs. In our view, the BIC should be simpler and streamlined and drafted only after an active dialogue with firms that would actually utilize the exemption.

Although, as an asset manager, BlackRock would not generally rely on the BIC, we see the following critical problems based on our work with financial intermediaries through whom we distribute our products:

- Investors must by contract be permitted to participate in class action lawsuits. The threat (and fear) of class action lawsuits has had a material impact on how financial intermediaries have designed and in many cases reduced or eliminated products and services for IRAs and plans. The litigation risk, in particular the risk of overly zealous plaintiffs' class action litigation designed to induce settlement, motivates financial institutions to take extremely cautious and restrictive approaches that may not be in the best interests of retirement investors. The right to participate in a class action should be removed from the BIC entirely and enforcement for IRAs left subject to FINRA rules applicable to disputes between its registrants and their clients and the Internal Revenue Service. FINRA's rules and disciplinary procedures offer a well-established, efficient enforcement mechanism for federal securities laws and SEC rules and regulations that could be readily extended to enforcement of a best interest conduct standard for retirement investment advice.
- The BIC imposes complicated, burdensome, unclear and costly compliance requirements on financial institutions who want to maintain brokerage platforms for their IRA and other smaller plan clients. In response to the rule, some financial intermediaries have announced that they will discontinue permitting IRAs or mutual funds on brokerage platforms. Elimination of brokerage IRAs limits choice and may result in some investors – in particular small investors – not receiving any advice.
- The stringent requirements of the BIC impose undue obstacles to IRA rollovers. These obstacles fail to take into account that for some individuals, an IRA rollover, rather than staying in a plan, will be in their best interests because it helps consolidate assets and offers a potentially broader array of investment options and the assistance of a financial advisor.
- Any exemptive relief should be available for all types of advice, including "robo-advice." The current BIC is only available to robo-advisers who are "level fee" fiduciaries.<sup>21</sup> The DoL's stated reason for not making the BIC broadly available is that this could adversely affect developments in the robo-advice market.<sup>22</sup> However, any limitation on the availability of an exemption actually limits options for retirement investors. A robo-adviser would not be required to use BIC (as opposed to a different exemption if needed), but it is helpful for the exemption to be available.

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<sup>21</sup> 81 Fed. Reg. at 21010.

<sup>22</sup> 81 Fed. Reg. at 20158.

- Likewise, the availability of any exemption should not be limited to certain types of retirement investors. As written, the BIC is only available for advice to “Retirement Investors,” essentially defined to include IRAs and “Retail Fiduciaries”.<sup>23</sup> There is no reason why it should not be available to cover advice to other fiduciaries, including fiduciaries of larger plans if the conditions are satisfied.

## **Conclusion**

President Trump’s February 3, 2017 Memorandum indicates any fiduciary rule should “empower Americans to make their own financial decisions, [facilitate] their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses,” and it should not “adversely affect the ability of Americans to gain access to retirement information and financial advice.” As detailed above, a number of important changes need to be made in order to meet the goals of the Memorandum. As such, BlackRock urges the DoL to (a) further extend the Fiduciary Rule’s applicability date beyond June 9<sup>th</sup>, 2017 to properly complete the required review and analysis, (b) revise the Fiduciary Rule to narrow the definition of investment advice and broaden the exceptions and (c) craft streamlined and workable prohibited transaction exemptions.

Sincerely,

Barbara Novick  
Vice Chairman

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<sup>23</sup> 81 Fed. Reg. at 21076.