



September 24, 2015

Submitted Electronically – [e-ORI@dol.gov](mailto:e-ORI@dol.gov) and [e-OED@dol.gov](mailto:e-OED@dol.gov)

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

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

Ladies and Gentlemen:

We appreciate the opportunity to offer additional comments regarding the Department’s regulatory package expanding the definition of fiduciary investment advice and preventing conflicts of interest in advice provided to ERISA-covered retirement plans and Individual Retirement Accounts (“IRAs”).

The extensive comments received by the Department and the four days of public hearings on the proposed rule and the accompanying prohibited transaction exemptions demonstrated the significant public interest in these issues. This interest is quite appropriate given the Department’s goal of changing the way investment advice is provided to all ERISA-covered retirement plans and to all Individual Retirement Accounts (“IRAs”), representing many trillions of dollars in retirement savings. These public hearings also served to highlight the fact that there are many discrete items of discussion within the broader package, some of which are quite controversial.

As we previously wrote<sup>1</sup>, NAREIT shares the Department’s goal of improving the quality of investment advice provided to plans, plan participants and IRA owners, and of ensuring such advice is in their best interests. However, we remain very concerned that the Department must achieve this goal without limiting retirement investors’ access to the full range of investment products and services available to plans and IRAs.

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<sup>1</sup> See, letter from the Executive Committee of the Public Non-listed REIT Council of the National Association of Real Estate Investment Trusts (NAREIT), July 21, 2015 to the Department of Labor *available at*. <http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html>

As a number of witnesses testified during the public hearings, retirement investors must be able to diversify their holdings across a broad spectrum of risks as part of a prudent retirement portfolio. Further, each plan, each participant, and each IRA owner has individualized retirement needs and objectives. Consequently, the Department's regulatory efforts must ensure that advisors to these plans, participants, and IRA owners are able to discuss all available investment alternatives, not just selected asset types. Those alternatives must include a broad range of real estate investments to allow advisors to act in the best interest of retirement investors.

**About NAREIT:**

The National Association of Real Estate Investment Trusts ("NAREIT") is the worldwide voice for REITs and real estate companies with interests in U.S. real estate and capital markets. NAREIT's members are REITs and other real estate businesses throughout the world that own, operate and finance commercial and residential real estate. Public Non-Listed REITS ("PNLR") participate at NAREIT through the Public Non-Listed REIT Council (the "PNLR Council"), which consists of 42 NAREIT PNLR corporate members. The mission of the PNLR Council is to advise NAREIT's Executive Board on matters of interest and importance to PNLRs.

NAREIT's PNLR Council has reviewed the public comments filed in July and the testimony presented at the August hearings, and has developed the attached additional comment letter for submission and consideration by the Department.

NAREIT and its PNLR Council look forward to working with the Department as it works on developing a final rule and final prohibited transaction class exemptions, and we would be pleased to answer any questions the Department may have.

Please feel free to contact me if you would like to discuss our positions in greater detail.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S.A. Wechsler", enclosed in a thin black rectangular border.

Steven A. Wechsler  
President & CEO

September 24, 2015

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

Ladies and Gentlemen:

The Public Non-Listed REIT Council (“PNLR Council”) of the National Association of Real Estate Investment Trusts (“NAREIT”) appreciates the opportunity to submit these additional comments following the public hearings on the Department’s regulatory efforts to redefine fiduciary investment advice provided to ERISA plans, plan participants and beneficiaries, and IRA owners. Specifically, we submit additional comments on the proposed regulation (the “Proposal”)<sup>1</sup> redefining the term “fiduciary” with respect to investment advice under ERISA §3(21)(A)(ii), and the proposed prohibited transaction class exemption “Best Interest Contract Exemption” (the “BIC Exemption”).<sup>2</sup>

### **About PNLRs:**

As we discussed in our July 21, 2015 letter to the Department<sup>3</sup>, PNLRs are valuable investment options for many investors and are commonly found in IRA portfolios. They are public companies whose securities are registered with the SEC, though not listed on a stock exchange. PNLRs are subject to IRS requirements that include distributing all of their taxable income to shareholders annually in order to be subject to just one level of taxation, and must make regular SEC disclosures, including quarterly and yearly financial reports, which are publicly available through the SEC’s EDGAR database. As with mutual funds or any other pooled investment, there are a variety of fees charged in connection with PNLRs that are reflected in net returns and clearly disclosed in the prospectus, which is publicly available from the SEC. These fees will become even more transparent to PNLR shareholders when [FINRA Regulatory Notice 15-02](#) comes into effect next year.

### **Overview:**

As we explained in our July 21, 2015 comment letter, the PNLR Council supports the goals behind the Department’s regulatory efforts. We agree that retirement investors should receive advice that is in their best interest—the needs of the participant or IRA owner should come first.

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<sup>1</sup> 80 Fed. Reg. 21,928 (Apr. 20, 2015).

<sup>2</sup> Id at 21,960.

<sup>3</sup> See, letter from the Executive Committee of the Public Non-listed REIT Council of the National Association of Real Estate Investment Trusts (NAREIT), July 21, 2015 to the Department of Labor *available at* <http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html>.

In fact, it is precisely because of our strong belief in this core principle that we are again writing to ask the Department to remove the limited definition of “asset” in the Best Interest Contract Exemption (the “BIC Exemption”). The practical effect of the limited list of assets in the definition is to prevent advisors from putting the participant or IRA owner first—an advisor using the BIC Exemption is simply not allowed to discuss assets not on the list, no matter how much those assets are in the best interest of the participant. This outcome is inconsistent with the Department’s purpose in proposing the rule.

### **The BIC Exemption Should Allow Advisors to Provide Individualized Advice in the Best Interest of Investors Planning for Retirement:**

The Department received extensive comments on this regulatory package, and heard testimony from witnesses for four full days at the recent administrative hearings. This public interest is due to a basic but crucial fact—the Department’s decisions will have significant consequences on the adequacy of the retirement savings of America’s workers. We reviewed many of these comments, and followed the testimony presented at the hearings, particularly as they related to the BIC Exemption.

This review suggests a contradiction between the Department’s policy goals and the effect of the BIC Exemption. The purpose of the regulatory package is to ensure retirement investors get quality, impartial, individualized advice from financial professionals. The Proposal and the BIC Exemption are both designed to do this by removing conflicts of interest. Yet the list of “approved” assets in the BIC Exemption prevents those same advisors from giving quality, impartial, individualized advice about any asset not on the list. Regardless of the individual circumstances of the IRA owner, her impartial advisor cannot discuss an asset not on the Department’s one-size-fits-all list of assets if the advisor is using the BIC Exemption.

Obviously, each retirement investor has different needs, different retirement objectives, and different types of personal assets outside of retirement accounts—all of this must be taken into account when an advisor makes an investment recommendation. Advice in the retirement investor’s best interest is individualized, and an investment right for one person may not be right for another. Logically then, it doesn’t make sense for the Department to exclude entire asset classes from advice available to tens of millions of retirement investors, especially when doing so adds no additional protection from conflicts of interest.

### **The BIC Exemption Must Be Redrafted to Avoid Negative Consequences for Participants and IRA Owners:**

In an exchange regarding the BIC Exemption asset list between a hearing witness and a Department official, the official suggested that the asset list didn’t prevent an advisor from giving advice on any asset so long as that advice occurred outside of the BIC Exemption.<sup>4</sup> While this is technically true, it does not address the fundamental problem. The BIC Exemption will likely be necessary for a large number of plan transactions. For example, the BIC Exemption will likely be necessary for advisors assisting plan participants with IRA rollovers. It is also

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<sup>4</sup> Raw transcript of testimony presented on August 11, 2015, at 638, accessed on September 21, 2015 at <http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript2.pdf>.

likely that the BIC Exemption could become a preferred compliance method for advisors operating under the new rules to address other situations. Consequently, our concerns regarding the asset list underscore a fundamental flaw in the structure of the BIC Exemption and the entire regulatory package.

For all of these reasons, the PNLRC Council continues to believe that the Department must address this issue in the final rule. As written, the Proposal and the BIC Exemption would have a negative effect on the availability of quality investments, like PNLRs, used by IRA owners and participants to diversify their retirement portfolios.

- **Remove the List from the Asset Definition**

Our preferred solution to the problem would be to amend the BIC Exemption definition of assets in Sec. VIII(c)<sup>5</sup> to remove the list entirely. It serves only to limit investment and advice options for IRA owners and participants, while offering them no additional benefits.

As discussed above and in our July 21, 2015 comment letter, the Proposal and the BIC Exemption already prohibit conflicts of interest—the asset list provides no additional protection against conflicts. Further, the structure of the asset list is contrary to the purpose of the BIC Exemption, which was to “...flexibly accommodate a wide range of current business practices...” through a principles-based exemption.<sup>6</sup> The asset list is anything but flexible—it is a bright line dividing assets into those that can and can’t be discussed, regardless of their merits to any particular individual.

Finally, as we highlighted in our previous letter, the Department historically has rejected investment asset class limits, writing, “no such list could be complete...”<sup>7</sup> This is a very good point—an asset list in BIC would be fixed as of that point in time. No new investments would be eligible for the BIC exemption absent a separate regulatory approval granted on a case-by-case basis.

- **Other Alternatives**

If the Department will not remove the asset list from the BIC Exemption, we ask that the definition be modified to permit important investments like PNLRs that help IRA owners achieve diversified portfolios composed of asset classes with relatively uncorrelated risks and returns.

One solution would be to add PNLRs to the list of assets in the definition. As we discussed in our July 21, 2015 comment letter, we believe PNLRs meet the criteria identified in the Preamble to the BIC Exemption that investments be “commonly purchased”<sup>8</sup> by retirement plans and IRAs, and contribute to a “basic diversified portfolio” with investments that are “relatively transparent and liquid” even if there is no “ready market price.”<sup>9</sup>

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<sup>5</sup> 80 Fed. Reg. 21,987 (Apr. 20, 2015).

<sup>6</sup> Id. at 21,961

<sup>7</sup> 44 Fed. Reg. 31,639 (June 1, 1979).

<sup>8</sup> 80 Fed. Reg. 21,968 (Apr. 20, 2015).

<sup>9</sup> Id.

We also urge the Department to consider the promising approach proposed by the Investment Program Association (“IPA”) in its September 24, 2015 comment letter, which sets forth an expanded set of Policies and Procedures applicable solely to retirement plan investments in “Public Products” (including PNLRs). We would welcome the opportunity to discuss these ideas further with the Department.

**The Proposal and the BIC Exemption Need a Reasonable Transition Rule:**

As the Department heard from a number of witnesses in the hearings, the transition rule for the Proposal and the BIC Exemption does not work as proposed. The Department suggests that the new fiduciary definition and its associated exemptions would take effect eight months following the publication of the final rule in the Federal Register. Without a transition rule, this would result in tens of millions of existing advice arrangements having to be fundamentally reformed on a single day. Unfortunately, the only transition rule provided by the Department is in Section VII(b)(3) of the BIC Exemption, which would permit only certain eligible existing arrangements to continue, and only up to the point that additional advice would be provided after the effective date. If additional advice would be provided, the existing arrangement would have to be modified. The PNLR Council initially raised this in its July 21, 2015 comment letter and our review of the hearing testimony has reinforced our view that the Proposal’s approach to the effective date is fundamentally flawed in a number of ways.

First, the asset definition would affect the BIC Exemption transition rule; PNLRs and other investments not on the “legal list” of assets set forth in the BIC Exemption would be ineligible. Thus, the same IRA account might have assets to which the transition rule applies, and assets to which it does not. Further, the Proposal would disrupt legal contracts entered into voluntarily by willing parties under the prior rule—it is questionable whether the Department can disrupt these otherwise valid contracts.

Accordingly, we reiterate our request that the Department adopt the following clear and straightforward transition rule: With respect to new advice arrangements entered into on or after the effective date, the new regulatory standards would apply. With respect to existing advice arrangements entered into prior to the effective date—including assets acquired pursuant to such previous arrangements—the previous regulatory standards governing these arrangements would remain in effect until they are terminated or renewed by the parties.

We further request that this effective date language be included in the general rule, not in the BIC Exemption only, so that this sensible approach is generally applicable.

**Conclusion:**

We continue to believe IRA owners and plan participants would be best served by removing the asset list from the asset definition in the BIC Exemption. This would ensure advisors are able to act in their client’s individualized best interest, rather than having the Department make that decision for IRA owners and plan participants. We also urge the Department to adopt a clear, straightforward and traditional transition rule permitting contractual arrangements agreed to prior to the effective date to be governed by the regulatory standards in place at that time.

The PNL Council looks forward to working with the Department, and we would be pleased to answer any questions the Department may have regarding PNLs or REITs generally.

Thank you for your consideration of our comments, and please feel free to contact me if you would like to discuss our positions in greater detail.

Respectfully submitted,

Executive Committee  
NAREIT PNL Council

CHAIR:



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