

April 16, 2015

## **Pre-Existing Transaction Exemption** **(Supplemental Exemption under the Best Interest Contract Exemption)**

### **1) Rationale for Exemption**

a. DOL recognized that some investment professionals may have, prior to the applicability date of the new investment advice regulation, provided advice without considering themselves fiduciaries. Their receipt, after the effective date (or “Applicability Date”) of the investment advice regulation, of ongoing compensation payments attributable to a pre-Applicability Date purchase, sale or holding of an asset might otherwise raise prohibited transaction concerns. This proposed “Pre-Existing Transaction Exemption, which is part of the Best Interest Contract Exemption, would provide relief for the receipt of this compensation.

b. The exemption is also intended to assist those investment advisers who were considered fiduciaries before the Applicability Date, but who entered into transactions involving plans and IRAs before that date accordance with the terms of a prohibited transaction exemption that has since been amended.

### **2) Transactions Covered and Relief**

The exemption provides relief from ERISA sections 406(a)(1)(D) and 406(b) and Code sections 4975(c)(1)(D), (E), and (F) for the receipt of compensation by an Adviser, Financial Institution, and any Affiliate and Related Entity, for services provided in connection with the purchase, holding or sale of an Asset, as a result of the Adviser’s and Financial Institution’s advice, that was purchased, sold, or held by a Plan, participant or beneficiary account, or an IRA before the Applicability Date.

An “Asset” is defined in the Best Interest Contract Exemption to include bank deposits, CDs, shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, certain corporate bonds, certain agency debt securities, U.S. Treasury Securities, insurance and annuity contracts (both securities and non-securities), guaranteed investment contracts, and certain equity securities.

### **3) Covered Providers of Advice**

a. Advisers, Financial Institutions, and their Affiliates and Related Persons, all as defined in the Best Interest Contract Exemption.

### **4) Covered Recipients of Advice**

a. Any employee benefit plan described in section 3(3) of ERISA and any plan described in section 4975(e)(1)(A) of the Code.

- b. A participant or beneficiary account.
- c. An IRA.

**5) Conditions**

- a. The compensation is received pursuant to an agreement, arrangement or understanding that was entered into prior to the Applicability Date.
- b. The Adviser and Financial Institution do not provide additional advice to the plan or IRA regarding the purchase, sale or holding of the Asset after the Applicability Date.
- c. The original purchase or sale of the Asset was not a non-exempt transaction pursuant to ERISA section 406 and Code section 4975 on the date it occurred.
- d. The compensation is not excluded for one of the following reasons:
  - The Plan is covered by Title I of ERISA, and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser or Financial Institution is a named fiduciary or plan administrator with respect to the Plan, or an affiliate thereof, that was selected to provide advice to the Plan by a fiduciary who is not Independent, as defined in the Best Interest Contract Exemption.
  - The compensation is received as a result of a transaction in which the Adviser is acting on behalf of its own account or the account of the Financial Institution, or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution.
  - The compensation is received as a result of investment advice to a Retirement Investor generated solely by an interactive website in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the website without any personal interaction or advice from an individual Adviser (i.e., “robo advice”).
  - The Adviser (i) exercises any discretionary authority or discretionary control respecting management of the Plan or IRA assets involved in the transaction or exercises any authority or control respecting management or disposition of the assets, or (ii) has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA.