MEMORANDUM

To: Public Comment File on proposed Regulation Best Interest (File No. S7-07-18)

From: Elizabeth Blase, Counsel to Commissioner Elad L. Roisman

Re: Meeting with Fiduciary Benchmarks (“FB”)

On October 22, 2018, Commissioner Elad L. Roisman and his counsels (Elizabeth Blase, Christina Thomas, Matthew Estabrook, and Nicholas Losurdo) met with the following representatives from FB:

- Tom Kmak (CEO);
- Fred Reish (Partner at Drinker Biddle & Reath LLP, Outside Counsel); and
- Jim Lundy (Partner at Drinker Biddle & Reath LLP, Outside Counsel).

The participants discussed a number of issues, including the Commission’s proposed Regulation Best Interest. In particular, FB presented the materials attached here.
Rollover/Distribution Thoughts
1. There are 4 different types of Distribution/Rollover Services

2. Fee Differences can be substantial – thus use real data

3. Recommendation can be done quickly and easily

4. FINRA 13-45 & DOL Fiduciary Rule are a solid regulatory approach
Reporting, management and regulatory purposes.

Recommendation - this is where the Advisor wishes to really help the participant understand the alternatives on an apples-to-apples basis consistent with FINRA T3-45 and the revoked Fiduciary Rule.

Unsolicited Request - this is where the participant has assets that CANNOT remain in the qualified plan because of the cash-out rules for the plan (e.g. $1,000 or $5,000). While similar to Hire Me, FBL tracks separately for $5,000 or $5,000.

Hire Me - this is where the participant has already made a decision to rollover their balance from a plan to an IRA. An example would be a participant wishing to rollover a small balance in a plan to an IRA with a large balance that is already managed by their Advisor.

Cash Outs

Education - this is where the Advisor provides education of the same factors that exist in the Recommendation. In this case, however, the participant is left to sort through the issues on their own.
Figure 2

Percentage of Lump-Sum Recipients by Amount of Most Recent Distribution, Ages 21 and Over, 2012

Recommnedation
Assumed to be 50% Hire Me
Cash-Outs - Hire Me
Assumed to be 50% Education
Assumed to be 27.7%
12.9%
2012 Dollars
$1-$4,999
$5,000-$9,999
$10,000-$19,999
$20,000-$49,999
$50,000-$99,999
$100,000-$499,999
$500,000-$999,999
$1,000,000-$1,999,999
$2,000,000-$4,999,999
$5,000,000-$9,999,999
$10,000,000-$49,999,999

Note: The distribution amounts are top-coded at $37,500.

Based on multiple data points from BDs that process hundreds of thousands of rollovers per year, the average advisor will encounter about 15 rollover opportunities per year. Combining this data point with the prior page provides a distribution of rollover types as shown below.

<table>
<thead>
<tr>
<th>Type of Rollover</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash Out</td>
<td>30%</td>
</tr>
<tr>
<td>Hire Me</td>
<td>21%</td>
</tr>
<tr>
<td>Education</td>
<td>22%</td>
</tr>
<tr>
<td>Recommendation 1</td>
<td>27%</td>
</tr>
<tr>
<td>Recommendation 2</td>
<td></td>
</tr>
</tbody>
</table>

The chart above shows the distribution of rollover types by advisor per year.
Acknowledgment Regarding Participant's Unsolicited Distribution and Rollover Decision

Howard Clark ("Participant") has decided to take a lump-sum distribution from Participant's qualified retirement plan (the "Plan") and to roll the distribution into an Individual Retirement Account (IRA).

ACKNOWLEDGMENT BY PARTICIPANT:
The decision to take a distribution and to roll over to an IRA was my decision. I acknowledge that I made the decision to take a distribution from my qualified retirement plan and roll it over into an IRA without discussions with the Adviser. Adviser was not requested to and did not provide education or information about distributions and rollovers, and did not recommend: (i) whether to take a distribution; (ii) the form of distribution; or (iii) whether to roll over the distribution into an IRA. I understand that I could possibly leave my money in the plan (if the plan permits), transfer it to the plan of successor employer (if I were to work for a new employer with a plan that permitted transfers); take a taxable distribution; and/or roll over to an IRA. I also understand that fees, investments, and services vary among those alternatives, and that the fees and expenses in a plan may be less than in an IRA.

While I independently made the decision to take a distribution and roll it over to an IRA, I did ask Adviser to explain the services that Adviser provides for IRA investments. Adviser described the investment advisory and management services offered by the advisory firm, the fees charged for these services, and the qualifications of Adviser and the firm. However, Adviser did not recommend that I take a distribution from my retirement plan or that I roll over the distribution into an IRA.

Participant: __________________________
Print Name: Howard Clark

Adviser: __________________________
Print Name: Tom Kamad

Date: _________________

Acknowledgment Regarding Participant's Unsolicited Distribution and Rollover Decision

Output for Hire Me and Unsolicited Request
Sometimes people need to take early withdrawals from their retirement accounts for living expenses, but it is important to see what you might be giving up if you do so to take a look at the example below, which reflects your account balance, income, federal and state tax brackets and rate, and your specific account.

Value of $50,000 Rollover at Retirement

Repayment: 1/1/2027

Cash Today

$28,500

$98,358

$50,000

Taxes

Federal

5% 

State

5%

Penalty

Taxes

$28,500

Taking $50,000 in Cash Now

If you were to take $50,000 of your retirement account as cash right now, the chart below estimates that you would only receive about $28,500 because of taxes and penalties. If, however, you choose to rollover the $50,000 and invest it in an account or cash right now, the chart below shows the value of $50,000 at retirement versus the $28,500 you would receive in cash today.

Note that this example assumes an annual compounded earnings rate of 7%, which is consistent (historically) with returns in an account invested mostly in equities.
Fiduciary Benchmarks

To help you with this decision, XYZ Consulting has hired Fiduciary Benchmarks - a leading benchmarking service for defined contribution plans and IRAs. Below, Fiduciary Benchmarks presents the key characteristics of the various options available for your rollover BASED ON YOUR DATA AND PREFERENCES. This information will help XYZ Consulting make a prudent and suitable recommendation on your behalf, and help you make an informed decision about that recommendation.

### Recommendation

<table>
<thead>
<tr>
<th>Option 1</th>
<th>Option 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rollover Decision</td>
<td>Rollover Decision</td>
</tr>
<tr>
<td>&gt; Your Data and Preferences:</td>
<td>&gt; Your Data and Preferences:</td>
</tr>
<tr>
<td><strong>Oregon Cherry Growers, Inc. 401(k) Profit Sharing Plan</strong></td>
<td><strong>Oregon Cherry Growers, Inc. 401(k) Profit Sharing Plan</strong></td>
</tr>
<tr>
<td>Financial Planning Needed:</td>
<td>Financial Planning Needed:</td>
</tr>
<tr>
<td>Broad financial planning</td>
<td>Broad financial planning</td>
</tr>
<tr>
<td>Retirement planning</td>
<td>Retirement planning</td>
</tr>
<tr>
<td>Contact Method:</td>
<td>Contact Method:</td>
</tr>
<tr>
<td>Face to face</td>
<td>Face to face</td>
</tr>
<tr>
<td>Phone/email/web conference</td>
<td>Phone/email/web conference</td>
</tr>
<tr>
<td>Financial Planning Needed:</td>
<td>Financial Planning Needed:</td>
</tr>
<tr>
<td>Somewhat important</td>
<td>Yes - except new 401(k)s</td>
</tr>
<tr>
<td>Assets not consolidated</td>
<td>Assets not consolidated</td>
</tr>
<tr>
<td>Roth Option:</td>
<td>Roth Option:</td>
</tr>
<tr>
<td>Somewhat important</td>
<td>Available</td>
</tr>
<tr>
<td>Roth conversion not available</td>
<td>Roth conversion not available</td>
</tr>
<tr>
<td>Tax Optimization Algorithm:</td>
<td>Tax Optimization Algorithm:</td>
</tr>
<tr>
<td>Somewhat important</td>
<td>Yes, offered</td>
</tr>
<tr>
<td>No, no offered</td>
<td>No, no offered</td>
</tr>
<tr>
<td>Concern Over Outlive Assets:</td>
<td>Concern Over Outlive Assets:</td>
</tr>
<tr>
<td>Very worried</td>
<td>Lump sum/installments</td>
</tr>
<tr>
<td></td>
<td>Lump sum</td>
</tr>
<tr>
<td>Investing Help Needed:</td>
<td>Investing Help Needed:</td>
</tr>
<tr>
<td>A lot (delegator)</td>
<td>General advisor service team</td>
</tr>
<tr>
<td>Online &amp; 800M support</td>
<td>Online &amp; 800M support</td>
</tr>
<tr>
<td>Preferred Advisor:</td>
<td>Preferred Advisor:</td>
</tr>
<tr>
<td>Financial advisor - Prior employer not preferred</td>
<td>Financial advisor - Prior employer not preferred</td>
</tr>
<tr>
<td>Investment Flexibility:</td>
<td>Investment Flexibility:</td>
</tr>
<tr>
<td>Very important</td>
<td>Individuals invest in cash, bonds, stocks, plan investments (includ. ETFs,mutual funds)</td>
</tr>
<tr>
<td>Unit investment trusts/or SMAs</td>
<td>Unit investment trusts/or SMAs</td>
</tr>
<tr>
<td>Cash Now:</td>
<td>Cash Now:</td>
</tr>
<tr>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>-- Taxes and Penalties may apply</td>
<td>-- Taxes and Penalties may apply</td>
</tr>
<tr>
<td>Pay 10% tax if required 55+</td>
<td>Pay 10% tax if required 55+</td>
</tr>
<tr>
<td>Pay 10% tax if required 55+</td>
<td>Pay 10% tax if required 55+</td>
</tr>
<tr>
<td>Loans Later:</td>
<td>Loans Later:</td>
</tr>
<tr>
<td>Not important</td>
<td>Loans not available by law</td>
</tr>
<tr>
<td>No loans</td>
<td>No loans</td>
</tr>
<tr>
<td>Withdrawal Protection:</td>
<td>Withdrawal Protection:</td>
</tr>
<tr>
<td>Not important</td>
<td>Same as the plan for your state</td>
</tr>
<tr>
<td>More protection</td>
<td>More protection</td>
</tr>
<tr>
<td>Options</td>
<td>Options</td>
</tr>
<tr>
<td>Fee Preference:</td>
<td>Fee Preference:</td>
</tr>
<tr>
<td>Total fees: $0.86%</td>
<td>Total fees: $0.86%</td>
</tr>
</tbody>
</table>
| Investment fees: 0.27% | Investment fees: 0.59%
| Administrative fees: 0.05% | Administrative fees: 0.05%
| Advice fees - ongoing: 0.56% | Advice fees - ongoing: 0.56%
| Total fees: $0.86% | Total fees: $0.86%

**Recommendation:** a Rollover to IRA

XYZ Consulting and Tom Kmok make the recommendation above after taking into account the participant’s options to a rollover, including keeping the money in the plan if permitted. The evaluation of the participant’s alternatives took into account, among other things, the fees and expenses associated with both the plan and rolling over to an IRA, the recommendation of the fiduciary advisor, if any, that the employer pays or pays some of the plan’s administrative expenses, and the different levels of services and investments available under such options.

### Follow-up Sample for Recommendation

**Follow-up Analysis:**

- **Simulation:**
  - Cash now: No
  - Pay 10% tax if required 55+
  - No 1099 tax if retire 55+
  - Loans not available by law
  - No loans
  - More protection
- **Options:**
  - Financial planning
  - Retirement planning
  - Face to face, phone/email/web conference
  - Yes - except new 401(k)s
  - Available
  - Yes, offered
  - Lump sum
  - General advisor service team
  - Online & 800M support
  - Prior employer not preferred
  - Individuals invest in cash, bonds, stocks
  - Yes, offered
  - No, no offered
  - Lump sum
  - A lot (delegator)
  - Loans not available by law
  - Yes, offered
  - No, no offered
  - Loans not available by law
  - Yes, offered
  - No, no offered
  - Loans not available by law
  - Yes, offered

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  - Individuals invest in cash, bonds, stocks
  - Yes, offered
  - No, no offered
  - Loans not available by law
  - Yes, offered
  - No, no offered
  - Loans not available by law
  - Yes, offered
  - No, no offered
  - Loans not available by law
  - Yes, offered

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  - Yes, offered
  - Lump sum
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  - Online & 800M support
  - Prior employer not preferred
  - Individuals invest in cash, bonds, stocks
  - Yes, offered
  - No, no offered
  - Loans not available by law
  - Yes, offered
  - No, no offered
  - Loans not available by law
  - Yes, offered
  - No, no offered
  - Loans not available by law
  - Yes, offered

**Recommendation:** a Rollover to IRA

XYZ Consulting and Tom Kmok make the recommendation above after taking into account the participant’s options to a rollover, including keeping the money in the plan if permitted. The evaluation of the participant’s alternatives took into account, among other things, the fees and expenses associated with both the plan and rolling over to an IRA, the recommendation of the fiduciary advisor, if any, that the employer pays or pays some of the plan’s administrative expenses, and the different levels of services and investments available under such options.
1. There are 4 different types of Distribution/Rollover Services
2. Fee Differences can be substantial - thus use real data
3. Recommendation can be done quickly and easily
4. FINRA 13-45 & DOL Fiduciary Rule are a solid regulatory approach
### Fiduciary Benchmarks

#### Range of Fees for 401(k) Plan

<table>
<thead>
<tr>
<th>Investment Fee</th>
<th>Advice Fee</th>
<th>Recordkeeping Fee</th>
<th>Total Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.49%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.49%</td>
</tr>
<tr>
<td>0.44%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.44%</td>
</tr>
<tr>
<td>0.38%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.38%</td>
</tr>
<tr>
<td>0.33%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.33%</td>
</tr>
<tr>
<td>0.29%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.29%</td>
</tr>
<tr>
<td>0.25%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.25%</td>
</tr>
<tr>
<td>0.21%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.21%</td>
</tr>
<tr>
<td>0.17%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.17%</td>
</tr>
<tr>
<td>0.13%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.13%</td>
</tr>
<tr>
<td>0.09%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.09%</td>
</tr>
</tbody>
</table>

The 1 percent difference in fees and expenses would reduce your account balance at retirement by 28 percent.

#### Additional Information

- Money market fund earning 0.75%
- Stable value or general account earning 3.00%
- Allocation to fixed income could have these differences:

In addition, for a participant approaching retirement, the 50% allocation to fixed income could exacerbate the difference in fees.

Above example does not include TPA fees or advisor fees, which could exacerbate the difference in fees.

### Example

Range of Fees for 401(k) Plan, Avg Balance $70k
1. There are 4 different types of Distribution/Rollover Services.

2. Fee Differences can be substantial — thus use real data.

3. Recommendation can be done quickly and easily.

4. FINRA 13-45 & DOL Fiduciary Rule are a solid regulatory approach.
Cash Outs
No data is necessary
Unsolicited Request

Hire Me
No data is necessary

Education
- IRA — can be customized for type of customer with one click
- New Qualified Plan — benchmarking data based on plan size with one click
- Old Qualified Plan — benchmarking data based on plan size with one click

Recommendation
- IRA — can be customized for type of customer with one click
- New Qualified Plan — Participant Statement, 404(a)(5) Statement, 9 questions
- Old Qualified Plan — Participant Statement, 404(a)(5) Statement, 9 questions

Types of Followers

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Participants Statement:
Rollover amount
Roth or pre-tax

Plan Question:
questions

Plan: Calendar Year

Renew: Each Time

Recordkeeper tested with major RKS

NOT on Form 5500

NOT on Part Statement (a)(5)

Admin Fees
Advice Fees
Investment Fees

404(a)(5) Statement:

Web site:
available via the recordkeeper's internet
has the 404(a)(5) information immediately
Every recordkeeper that FBI has surveyed

Renew: Calendar Year

Statement:
Investment fees
Advice fees
Admin fees

Questions:

Plan: Calendar Year

Reviewed 500+ provisions

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1. There are 4 different types of Distribution/Rollover Services
2. Fee Differences can be substantial — thus use real data
3. Recommendation can be done quickly and easily
4. FINRA 13-45 & DOL Fiduciary Rule are a solid regulatory approach
Fiduciary

Fiduciary Rule 13-45

Regulatory Notice

FINRA

December 2013

FINRA Rule 13-45

Jurisdiction: Federal

Notices:

FINRA reminds firms of their responsibilities

Role of the Individual

Retirement Accounts

IRA

Notices:

FINRA Rule 13-45

FINRA

Regulatory Notice

December 2013

FINRA Rule 13-45

Jurisdiction: Federal

Notices:

FINRA reminds firms of their responsibilities

Role of the Individual

Retirement Accounts

IRA

Notices:

FINRA Rule 13-45

Jurisdiction: Federal

Notices:

FINRA reminds firms of their responsibilities

Role of the Individual

Retirement Accounts

IRA

Notices:
These rollovers, which will be one-time and not "on a regular basis."
Although the documentation requirement is only specifically noted in the level fee provisions of the BIC Exemption, the documentation required is only specifically noted in the level fee provisions of the BIC Exemption.

Complying with the full BIC Exemption:

Investment advisors of retirement plans are held to a "reasonable standard of prudence," a level of prudence that encompasses the risk and return characteristics of the retirement plan and the plan's investment objective. To comply with the BIC Exemption, the documentation required and considerations are integral to a prudent analysis and cannot be disregarded.

The BIC Exemption is only specifically noted in the level fee provisions of the BIC Exemption.

Other data were reasonable:

A fiduciary level fee is reasonable if the fiduciary classifies the level fee as "level" under the level fee provisions of the BIC Exemption. The documentation required and considerations are integral to a prudent analysis and cannot be disregarded.

The BIC Exemption is only specifically noted in the level fee provisions of the BIC Exemption.

Although the documentation requirement is only specifically noted in the level fee provisions of the BIC Exemption, the documentation required is only specifically noted in the level fee provisions of the BIC Exemption.
I participated in a 401(k) plan at an old job. Can I get investment advice on what to do with my account in the 401(k) at my old employer?

Q26. Yes. Deciding how to handle your 401(k) account and whether to leave the account in your old

account at your old employer. Your financial adviser should ask you for information on your 401(k) account and consider your alternatives to the rollover, including leaving the money in your 401(k) will result in a substantial reduction of your special protections apply. Your financial adviser must consider your alternatives to the rollover, including leaving the money in your 401(k). If your financial adviser recommends that you roll over a 401(k) plan account to an IRA, then fees and expenses charged by your 401(k) plan in order to compare it to fees that will be charged for your IRA should be considered by your financial adviser. Your financial adviser must ask you for information on the fees and expenses charged by your 401(k) plan in order to compare it to fees that will be charged for your IRA.
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