Wells Fargo & Company
420 Montgomery Street
San Francisco, California 94104
wellsfargo.com

April 17, 2017

***Via* e-mail to EBSA.FiduciaryRuleExamination@dol.gov**

The Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule Examination
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Reexamination of Definition of the Term "Fiduciary" and Related Exemptions (RIN 1210-AB79)

Dear Sir or Madam:

Wells Fargo & Company, and its affiliates, ("Wells Fargo") welcomes the opportunity to respond to the U.S. Department of Labor's (the "Department") request for comment on the questions raised in the February 3, 2017 Presidential Memorandum and on other questions of law and policy concerning the regulation redefining the definition of the term "fiduciary," new prohibited transaction exemptions and amendments to existing exemptions granted with the final rule (collectively, the "Rule").

The Presidential Memorandum directs the Department to consider whether the Rule: (1) "has harmed or is likely to harm investors due to a reduction of Americans' access to retirement savings information [and] related financial advice;" (2) "has resulted in dislocations and disruptions within the retirement services industry that may adversely affect investors;" and (3) "is likely to cause an increase in litigation" and "in the prices investors…pay to gain access to retirement services." The Presidential Memorandum further directs the Department to publish for notice and comment a proposed rule that rescinds or revises the Rule should it make an affirmative determination as to any of these considerations.[1]

For the reasons set forth below, we would answer all three questions in the affirmative and hope our comments help inform the Department's decision-making with respect to the Rule.

Executive Summary

Clients deserve a best interest standard of care when receiving personalized investment advice. We have been consistent on this point in our comments to the Securities and Exchange Commission ("SEC")[2] and the Department since 2010.[3] While we commend the Department's efforts to craft a workable Rule, we continue to believe the most straightforward path to achieving this goal is for the SEC, in coordination with the Department, to adopt a uniform best interest standard of care applicable to the provision of all personalized investment advice regardless of service model or account type.

Developments in the market for retirement savings services and products since the Rule's issuance have only reinforced our concern that it will cause "investors, particularly middle-class savers, [to] receive less individualized retirement education and have fewer choices when preparing for retirement."[4] We have seen our concern borne out as financial services providers have responded to the Rule, and attempted to avoid the litigation risks it poses, by:

- Limiting the availability of products and services, particularly for small balance retirement investors,
- Eliminating service model choices and
- Narrowing the range of products available to retail investors.

Critically, these changes mean, in certain instances, that investors may face the task of saving for retirement without the personalized assistance of an experienced financial professional. This will adversely affect retirement investors because, as we have found and studies show, Americans working with a financial professional generally save more,[5] enjoy greater investment returns[6] and have greater wealth at retirement than those who do not work with a financial professional.[7] Moreover, the benefits retirement investors receive from working with a financial professional far outweigh any savings the Department believes will materialize from the Rule.[8] This is the result of financial professionals helping clients to understand their goals, develop financial strategies to achieve those goals and adhere to those strategies during times of uncertainty.[9]

At the heart of the changes disrupting the marketplace for retirement advice is the contractual devices and warranties utilized by the Department to address its limited enforcement jurisdiction over individual retirement accounts ("IRAs"). Unless the contractual devices and warranties are eliminated or modified, the market dynamics already adversely affecting retirement investors will continue unabated.

These marketplace disruptions provide the Department with a new factual record upon which to reexamine the Rule. Based on this new record, we do not believe the Rule will achieve the Presidential Memorandum's stated priority of facilitating Americans' "ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses."

Consequently, we recommend the Department rescind or revise the Rule in order to work with the SEC to formulate a uniform best interest standard applicable to all accounts that builds on current federal securities regulations and Financial Industry Regulatory Authority ("FINRA") rules. Should the Department choose to revise the Rule, we set forth in the second-half of this letter the minimum essential changes that must be made to arrive at a workable version of the Rule. We begin by addressing the three principal issues the Presidential Memorandum directs the Department to consider in its reexamination of the Rule.

1. The Rule Is Reducing Access to Retirement Information and Financial Advice

The preamble to the Rule states, "[t]he Department…sought to preserve beneficial business models for delivery of investment advice."[10] To the contrary, since the Rule was made final, financial services providers have announced one limitation after another to the products and services they plan to offer retirement investors in an attempt to comply with the Rule. For example, certain providers have announced that small balance retirement investors will receive different treatment than other segments of the investor population. This includes an announcement by one financial services provider that it will raise the minimum on its commission-based IRAs to $100,000 and not offer any retirement services whatsoever to investors with less than $5,000.[11] While we will continue to serve all of our clients investing for retirement, the service models under which we provide those services will likely evolve under the Rule.

Should the Department choose to move forward with the Rule, we, like many other financial services providers,[12] also plan to reduce the number of investment products offered for purchase in retirement accounts. Other financial services providers have gone further and made whole classes of investment products unavailable for purchase in certain circumstances.[13] For example, one of the largest financial services providers announced last year that mutual funds would no longer be available in its brokerage IRAs.[14] This reduction in investor choice negatively impacts retail investors and we have serious concerns that certain investors may not be able to purchase the particular product that best suits their retirement savings needs.

Moreover, we currently plan to offer our retail clients a choice between paying for advice on a commission-basis or an asset-based fee, but other financial services providers will not offer investors the option of selecting a brokerage-based commission service model, regardless of their account balance.[15] This decision allows providers to avoid the litigation risks of relying on the Rule's Best Interest Contract ("BIC") and Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs ("Principal Transaction") Exemptions. However, such an "advisory-only approach will raise client costs in situations where a cheaper solution may be available. Stated differently, clients will be forced to pay higher costs as providers find ways to reduce their risks. Even if not mandated now, the migration to asset-based fees will only continue as financial services providers determine the Rule exposes their retirement brokerage business to excessive risk, especially if class action claims are successfully instituted based on provisions of the BIC and Principal Transaction Exemptions.

While such service model changes help financial services providers avoid liability and operational issues under the Rule, the impact to retail investors is significant. Retirement investors want access to both service models[16] and our prior comment letters to the SEC and the Department emphasized the importance of maintaining such access.[17] A number of independent studies, as well as our own observations of our clients, show that the preference for brokerage services is evident across all wealth segments but strongest for smaller investors with less than $200,000 in account balances.[18] For these investors, who trade relatively infrequently, commission-based accounts can be the most cost-effective option. Thus, the practical impact of the Rule is to eliminate the availability of a generally popular option from certain significant financial services providers.

Furthermore, the broad scope of the definition of "fiduciary" will curtail the provision of much needed investment education to Employee Retirement Income Security Act ("ERISA") plan participants.[19] Plan fiduciaries have frequently relied on plan service providers to provide customized participant-facing educational communications, which may emphasize the benefits of diversification or increased contribution levels, and to respond to participant questions about their accounts.[20] The absence of an exception or exclusion from the Rule that unequivocally encompasses these activities has led plan service providers to reconsider providing such services.[21]

As these new limitations in the marketplace for retirement investors did not exist when the Department issued the Rule, they were not accounted for by the Department in its Regulatory Impact Analysis ("RIA").[22] The RIA should be updated to account for, among other changes, movement to advisory accounts, significant product changes and the costs of less access to advice and education, which we discuss below. To be reliable, the Department's estimate of the Rule's economic impact must reflect these market changes caused by the Rule.

2. The Rule Will Result in Dislocations and Disruptions in the Retirement Services Industry

The Rule has caused, and will continue to cause, major disruptions in the market for retirement products and services that will adversely affect investors. Specifically, we have grave concerns that the Rule is causing retirement investors to lose access to the personalized assistance of a financial professional. Investors will lose such access as financial services providers modify their service models and, in some cases, decide not to serve small balance accounts at all.[23]

This major shift in the availability of personalized investment advice is inconsistent with the RIA's conclusions, including that the Rule "avoid[ed] greater than necessary disruption of existing business practices"[24] and that the Rule is expected "to have little effect on access to investment advice."[25] In contrast, the Department recognized in prior rulemakings the substantial cost to investors of lost access to the personalized assistance of a financial profession.[26] For example, the Department estimated in 2011 that the increased availability of investment advice would amount to investor gains of between $7 billion and $18 billion annually due to "reductions in investment errors such as poor trading strategies and inadequate diversification."[27]

Further, the RIA speculates that "IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 50 to 100 basis points per year."[28] The figures, if they are accurate, are far eclipsed by the gains of receiving professional financial assistance, which have been calculated by independent studies at between 1.59 and 3.32%.[29]

In fact, the RIA focuses on a projected reduction of certain product prices to the point of ignoring the Rule's costs on other elements of saving for retirement. The Department has consistently referenced a $17 billion dollar cost of "conflicted" advice that was calculated by extrapolating from potential changes to front-end mutual funds to estimate the gains from all investment products under Rule.[30] We disagree both with this loose conclusion and the very concept of attempting to force changes in pricing at the expense of access to advice. In our estimation, the Rule will do more harm than good. The serious adverse effects of known service model changes caused by the Rule should be included in the RIA's estimate of the Rule's costs.

3. The Rule's Private Right of Action Will Cause an Increase in Litigation and Costs

The changes to the market for retirement services that are adversely affecting investors are principally due to the significant litigation risks created by the Rule's BIC and Principal Transaction Exemptions. The Rule's requirement that financial services providers agree to certain contractual provisions and warranties in order to avail themselves of the BIC and Principal Transaction Exemptions was created as an unprecedented solution to address the Department and the Internal Revenue Service's limited enforcement jurisdiction. As the Department states, "[w]ithout a contract, the possible imposition of an excise tax provides…inadequate incentive to ensure compliance with the [Rule]."[31] But the Department determined that "the risk of litigation…provid[es] a remedy" and added such a risk to the Rule knowing that it would inevitably increase litigation costs.[32]

The private right of action is unnecessary and undermines the certainty of established dispute practices. In particular, FINRA rules provide for the resolution of disputes through arbitration.[33] This process allows investors to seek redress for grievances before a panel with experience in resolving such claims. However, the Rule's imposition of new contractual provisions and warranties will give rise to new claims in this forum with unpredictable damage awards and greater defense costs.

These contractual provisions and warranties will also provide significant incentives for third-party plaintiff attorneys to bring new forms of major class action claims with unknown awards, but with the certainty of significantly higher costs. The resulting increase in litigation costs will inevitably affect the price of available products and services, a material issue not adequately accounted for in the RIA.[34] The primary beneficiary of the class action law suits will be attorneys, who, as studies show, stand to receive substantial fees while individual consumers receive comparatively little or nothing at all.[35]

Although the RIA "expects some insurance premiums to increase" due to "exposure for liability and litigation costs" under the Rule, it only estimated a 10% premium increase.[36] This figure is at odds with the risk assessment of financial services providers who have exited whole segments of the retirement services market in order to avoid the risk of litigation.[37] The RIA should be updated to account for such decisions.[38]

The Rule's costs have grossly exceeded the RIA's estimates in other respects. The RIA estimated that large firms such as Wells Fargo would spend less than $15 million to comply with the Rule.[39] Our anticipated compliance costs are significantly higher than this estimate and we have yet to spend the vast majority of what we expect to spend over the next ten years to comply with the Rule. As discussed below, we expect to spend substantial sums on a technological infrastructure to support compliance with the Rule and, until such systems are built, to hire a significant number of employees at considerable expense while we rely on manual processes.

In sum, not only will our costs exceed the RIA's estimates, the Rule's requirement that financial services providers agree to certain contractual provisions and warranties in order to avail themselves of the BIC and Principal Transaction Exemptions will inevitably lead to increased investor costs and decreased availability of products and services. This would not occur if responsibility for enforcing a more principles-based rule resided with a self-regulatory organization or a regulatory agency. The focus in such an approach would be solely on protecting the interests of investors as opposed to relying upon litigation, which, by its nature, disproportionately benefits those who pursue claims. Therefore, we recommend the Department rescind or revise the Rule in order to work with the SEC to formulate a uniform best interest standard applicable to all accounts.

We Have Consistently Supported a Uniform Best Interest Standard Applicable to All Accounts

The Department plays an important role in protecting retirement investors and its goal of ensuring retirement investors have access to investment advice without being subjected to abusive sales practices is laudable. However, structuring key elements of the Rule to address the jurisdictional issues faced by the Department is a prime example of why a uniform best interest standard of care promulgated by an agency with direct enforcement powers is a superior solution to the current Rule.

Investors do not think of saving as an account based activity. Yet, the Rule is necessarily account based.[40] Investors view investing, and expect their financial professionals to render advice, based on their entire financial situation.[41] In fact, FINRA's Suitability Rule requires financial professionals to consider an investor's "financial situation and needs," among other criteria, and not their retirement accounts in isolation.[42] Consequently, when a financial professional formulates a plan for a person to save for retirement, he or she considers how that person's entire portfolio of investment assets can best be marshaled to achieve that goal. Different standards of care for different account types will only lead to confusion for investors and inefficiency in the marketplace.

In our view, the appropriate path is straightforward. The SEC is best positioned to develop a best interest standard of care that applies across taxable and non-taxable accounts. As such, we respectfully recommend the Department work with the SEC to adopt a uniform standard of care. That is what we have consistently advocated for since 2010 and still believe is the appropriate course today.[43]

A uniform best interest standard should require financial services providers and financial professionals to:

- Act in the best interest of the client;
- Provide advice with skill, care and diligence based upon information that is known about the client's investment objectives, risk tolerance, financial situation and other needs; and
- Disclose material conflicts of interest, avoid them when possible and obtain informed client consent to act when such conflicts cannot be reasonably avoided.

A single standard of care that adheres to these basic tenants acknowledges the variety of ways investors save for retirement and completely supports the priority identified in the Presidential Memorandum of facilitating Americans' "ability to save for retirement."

In establishing a uniform best interest standard of care, the SEC could also work with the principal brokerage regulator, FINRA, to ensure that the new standard does not conflict with existing regulations. A standard of care that builds on existing principles of federal securities laws and FINRA rules would place financial services providers in the best position to develop successful and efficient compliance procedures. In addition, and as discussed further below, we believe investors would benefit from a common dispute resolution process for all of their accounts.

If the Department Moves Forward with the Rule, Certain Revisions Must Be Made

While we remain committed to assisting with the development of a uniform best interest standard of care, we offer the following comments on specific provisions of the Rule that must be revised to make it workable. As discussed above, we commented on the Rule when it was originally proposed in 2010 and twice when it was re-proposed in 2015. Our September 2015 comment letter to the Department also contained red-lined edits to the Rule, which are included here as Appendix B.[44] We also met with the Department on several occasions to discuss our concerns with the Rule.

We believe our revisions to the Rule would better serve the Presidential Memorandum's stated priority "to empower Americans…to save for retirement and build the individual wealth necessary to afford typical lifetime expenses." Furthermore, our suggested changes more closely align the Rule with current securities and Department regulations. For example, we incorporated language from these authorities, where appropriate, into the Rule: FINRA Regulatory Notice 13-45 ("Notice 13-45"),[45] Department Interpretive Bulletin 96-1,[46] FINRA Rule 2111, and the Department's *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure.*[47] In sum, our suggested changes create a principles-based regulation that would: (1) establish and acknowledge a best interest standard of care; (2) disclose fees; (3) mitigate and disclose conflicts of interest; (4) ensure compensation is reasonable with respect to services rendered; and (5) hold advice providers accountable.

Rather than repeat all of the comments contained in our prior letters, we ask that the Department consider them incorporated here. What follows is a list of the provisions of the Rule that must – at a minimum – be addressed in a revision of the Rule or a new rule developed with the involvement of both the SEC and the DOL. These changes would give retirement investors access to the information they need, the ability to control their own retirement savings if they change jobs, choices between products and services and clear, "plain-English" information about their investments.

1. The Private Right of Action Must Be Eliminated

The private right of action created by the BIC and Principal Transactions Exemptions is not needed and must be eliminated. As set forth above, the BIC and Principal Transaction Exemptions will, as the Presidential Memorandum asks, "cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services." Additionally, the litigation risk created by the exemptions will limit the availability of products and services, particularly for small investors.

In the alternative, the goal of putting retirement investors' interests first can be accomplished far more simply. The Department could create an exemption from the Rule for accounts, including IRAs, and financial professionals subject to a best interest standard of care for the provision of personalized investment advice under the regulatory jurisdiction of a self-regulatory organization or a regulatory agency.[48] Such an approach would be consistent with existing practices. For example, FINRA currently has enforcement responsibility for Municipal Securities Rulemaking Board ("MSRB") rules. In addition, an election by the Department to rely on self-regulatory organizations and regulatory agencies to enforce a best interest standard would mitigate the overlap between regulatory frameworks under the Rule.

2. The Restrictions on the Movement of Retirement Assets Are Infeasible

We recommend that flexibility be built into the Rule to permit the provision of guidance on the importance of retaining retirement benefits instead of cashing them out. We asked when the Rule was proposed that the principles of FINRA's Notice 13-45 be incorporated into the advice definition.[49] Notice 13-45 imposes a standard of care on rollover discussions that ensures they are fair, balanced and not misleading. Such a change to the Rule would encourage conversations with plan participants, including urging them to keep their assets in a retirement account and not cash them out.

The Rule as presently constructed focuses on fees to the exclusion of financial literacy. While a discussion of fees, as set forth in Notice 13-45, should always be had, a comparison of ERISA plan fees to IRA fees is not warranted in each instance. As a practical matter, ERISA plan fee information is not available in every rollover discussion.

Moreover, recent studies show that 30% or more of retirement plan participants in their 20s, 30s and 40s who changed jobs chose to cash out their plan assets.[50] In contrast, 88% of households that made a withdrawal from an IRA, which by the nature of the account includes access to advice, were retired.[51] This is further evidence of how access to advice from financial professionals encourages retirement savings. While the RIA acknowledges that 69% of rollovers are due to a job change, layoff or termination,[52] the RIA does not consider the costs of cashing out plan assets in the absence of financial assistance. These are the very discussions that the Rule should promote.

Incorporating the principles of Notice 13-45 into the Rule would ensure that no one requirement, such as the need to gather plan-specific information, is so burdensome as to prevent investors from getting the assistance they need. This would mean that after a fair and balanced discussion of potential reasons to rollover or reasons to remain in the ERISA plan, including a general discussion of the impact of costs upon savings, if a retirement investor indicates that he or she has a specific need that is not cost related, such as consolidation of accounts, tax reasons, or a desire for additional investment options or personalized investment advice, then a financial professional could base the recommendation to rollover on that specific need.

We also note that rollovers have been a source of continual regulatory scrutiny. They were FINRA examination priorities during 2014 to 2015. In addition, the SEC launched ReTIRE in June 2015, a multi-year initiative focused on examining the reasonable basis for recommendations made to investors, among other issues. As rollovers are already highly regulated, the Rule's additional restrictions are unwarranted.

3. Neutral Factors Have Led to New Risks When Paying Differential Compensation

The Department states in the preamble to the BIC Exemption that "[t]he exemption takes a principles-based approach that permits Financial Institutions and Advisers to receive many forms of compensation that would otherwise be prohibited, including, inter alia, commissions, trailing commissions, sales loads, 12b–1 fees, and revenue-sharing payments from investment providers or other third parties to Advisers and Financial Institutions."[53] What is unclear is how these forms of differential compensation can meet the Rule's requirement of being based on neutral factors.

The neutral factors analysis creates an artificial link between compensation and products and services that effectively eliminates most forms of differential compensation. Aligning a product's commissions with neutral factors such as the difference in time and analysis needed to provide advice about the product will present a challenge for financial services providers as their working assumptions will require a degree of subjectivity. Accordingly, the standards for aligning a product's compensation with such considerations will necessarily be set by litigation and, specifically, class action litigation.

These litigation risks have led financial services providers to either avoid neutral factors analysis altogether by shifting their clients to fee-based relationships that may carry higher costs to the customer or to limit available products and services. For example, a financial services provider announced that its commission-based IRAs will only permit purchases of stocks, bonds, variable annuities and certificates of deposit. Two products that have long served a central role in retirement savings – mutual funds and exchange-traded funds – will not be available due to the difficulty of correlating the compensation structures for these product categories with neutral factors.[54]

Compliance with policies and procedures reasonably designed to ensure adherence to the best interest standard is sufficiently protective.[55] Therefore, the neutral factors requirement should be eliminated.

4. The Required Disclosures Are Unnecessary

We support the need for effective disclosures as part of a best interest standard of care. However, the Department's choice to create entirely new disclosures in the BIC and Principal Transaction Exemptions is at odds with the conclusion in the RIA that "disclosures often fail to make investors aware of their advisers' conflicts, let alone understand their nature and potential implications. [F]or many investors, the fact that they were given disclosures was seen as meaningless."[56] This is especially true given the construct of the BIC and Principal Transaction Exemptions. With contractual provisions and warranties designed to be subject to class action litigation, the disclosures are likely to include complicated language aimed at anticipating defenses in such cases rather than the "clear and prominent" information called for in the Rule.

Furthermore, creating additional disclosures is unnecessarily burdensome when existing disclosures have not been properly leveraged. We also agree that disclosure alone does not sufficiently help investors to make more informed decisions. For these reasons, we see no benefit to adding another layer to the ubiquity of disclosures already required. Instead, we continue to encourage the Department to leverage disclosures such as those disclosures provided under ERISA Section 408(b)(2) and Form ADV.[57]

Should the transaction disclosure required under Section III(a) of the BIC Exemption be retained, such disclosure should only be required to be provided to investors annually and electronically, if the investor so elects, instead of on a transaction by transaction basis. An annual disclosure would provide information regarding fees and charges for products and services without overwhelming investors with another disclosure virtually every time they make a purchase in their retirement account. Furthermore, the website disclosure required under Section III(b) is duplicative of the other required disclosures and adds no value except to create a tool to be used in the hands of litigators. As such, the website disclosure should be eliminated.

5. Retirement Investors Need Access to Education

As the Presidential Memorandum states, Americans facing important financial decisions should have access to more, not less, "retirement savings information [and] related financial advice." For this reason, the Rule's prohibition on providing investment examples in asset allocation models is unwarranted.[58] The limitation relegates discussions regarding investment alternatives to esoteric conversations and prohibits the provision of specific information. Financial professionals should be able to discuss what types of investments fall into various asset classes, such as providing objective information on mutual funds that may satisfy the investor's needs, without being considered a fiduciary, so long as the recommendation of a particular investment is not made.

We note that the Department stated that "the final rule mirrors the FINRA guidance in stating [whether] the communication will be viewed as a recommendation."[59] Yet, the Rule alters the FINRA definition of a "recommendation" through its prohibition on investment examples. This divergence from well-established concepts concerning the meaning of "recommendation" will both curtail retirement investor access to information and advice and create unnecessary ambiguity.

6. The Broad Definition of Fiduciary May Limit the Availability of Investment Education and Services to Plan Participants and Beneficiaries

The Rule will harm plan participants and beneficiaries by unnecessarily constraining the types of retirement savings information and resources that plan service providers have traditionally been able to provide in a non-fiduciary capacity. As discussed above, these services include preparing and distributing participant-facing educational communications and responding to participant questions via call centers. Under the Rule, this type of informational assistance could be considered fiduciary investment advice, which means plan service providers may no longer deliver such services under the Rule. The Rule should be revised to make clear that such investment information provided by a plan service provider at the direction of the plan fiduciary is not investment advice.

In addition, the Rule should provide clear exclusions for routine sales and marketing activities in the ERISA plan marketplace when there is no mutual understanding between the parties that the sales or marketing activities were intended to constitute investment advice. Currently, the Rule may prevent plan fiduciaries, and particularly smaller plan fiduciaries, which have less than $50 million in assets and do not qualify for the exception from the definition of "fiduciary" for "Transactions with independent fiduciaries with financial expertise" in Section (c)(1), from accessing certain products and services, such as participant advisory services that comply with the Department's Advisory Opinion 2001-09A.[60]

7. The Principal Transaction Exemption Is Overly Restrictive

As set forth in our prior comments, a limitation on principal trading will not benefit retirement investors.[61] Instead, the Principal Transaction Exemption should exempt all principal transactions. Alternatively, should there be any limitation on principal trading, there is no need for the approved list of assets as the requirements that the debt security possess no greater than "moderate credit risk" and is "sufficiently liquid" obviate the need for restrictions on trading assets such as debt securities issued by the firm or any affiliate, foreign debt and taxable municipal bonds. The unavailability of the exemption for these types of debt will effectively eliminate retirement investor access to such products even when their purchase may otherwise be in the investor's best interest.

8. Needless Compliance Burdens Should Be Eliminated From the Rule

The following issues should be addressed in any revised version of the Rule:

- The BIC Exemption should be available to all plans, regardless of account size. In the absence of such a provision, the Department should clarify the definition of "holds, or has under management or control, total assets of at least $50 million."[62]

- The exception from the definition of "fiduciary" for "Transactions with independent fiduciaries with financial expertise" in Section (c)(1) imposes unnecessary compliance requirements for institutional and wholesale activities. When the Department proposed the Rule in 2015, the "Counterparty transaction with plan fiduciary with financial expertise" provided a straightforward carve-out from the definition of "fiduciary," with which we largely agreed. The exception in the final Rule imposes additional disclosures requirements, including "inform[ing] the independent fiduciary of the existence and nature of the person's financial interests." As institutional and wholesale activities are not sales to retail retirement investors, they do not require the Rule's additional protections and should be clearly exempt from the definition.

- Individual 401(k) plans ("I(k)s") should be treated the same as 401(k) plans subject to ERISA. While the Rule treats I(k)s differently, these plans are managed by financial services providers as if they are subject to ERISA because they could become subject to ERISA any time (e.g., as soon as a small business adds its first employee). By virtue of the Rule's treatment of I(k)s, financial services providers must create an entirely new infrastructure to properly comply with the Rule's exemptions, including entering into BIC and Principal Transaction Exemption agreements.

9. An Appropriate Implementation Time Period Is Crucial

The Rule is one of the most complicated regulatory initiatives in recent memory. In fact, the Rule requires financial services providers to largely restructure their entire approach to advising retirement investors. As such, we, along with numerous other commenters, recommended the Department establish an implementation time period of at least three years. We believed at the time of the Rule's proposal, and continue to believe, that this timeframe is needed to implement the significant required changes in a prudent manner that will not adversely impact client service. To rush through the development of new disclosure systems, policies, processes, employee training and programs required by the Rule could lead to shortcomings that increase, rather than decrease, investor protections.

We plan to rely on automated systems and processes to comply with the Rule. As Wells Fargo serves over 4 million IRA owners and over 3 million retirement plan participants, manual processes are not the optimal solution to comply with the Rule's requirements. The essential technology changes include updates to our data mapping systems and archiving and storage protocols. Significant time and resources are necessary to code, build and implement the entirely new infrastructure to service and support these changes in addition to performing system testing and complying with security and governance protocols. Until such technology changes are completed, we will have to artificially constrict products and services while we rely on manual processes. For this reason, we continue to encourage the Department to give financial services providers sufficient time to implement the Rule.

An Additional Delay of the Applicability Date Is Imperative

We disagree with the Department's contention "that it would be inappropriate to broadly delay application of the fiduciary definition and Impartial Conduct Standards for an extended period" while it considers the issues addressed above. In particular, imposition of the new definition of "fiduciary" and the Impartial Conduct Standards, which form the heart of the Rule and its exemptions, before this examination is finished means that much of the Rule may be implemented before the Department and the incoming Secretary of Labor review public comments and make a decision with respect to rescission or revision of the Rule. Implementing a rule that could be rescinded or revised within the year is not in anyone's best interest. For this reason, we urge the Department to delay the applicability date of the Rule in its entirety by at least another 180 days.

We thank the Department for this opportunity to comment again on the Rule. We restate our desire to stay engaged with the Department on this important topic and stand ready to work with the Department to achieve a workable outcome for retirement investors. If you would like to further discuss any of Wells Fargo's comments, please contact Robert J. McCarthy, Director of Regulatory Policy for Wells Fargo Advisors, at robert.j.mccarthy@wellsfargoadvisors.com or (314) 242-3193, or Kenneth L. Pardue, Managing Director, Retirement Plans for Wells Fargo Advisors, at kenneth.pardue@wellsfargoadvisors.com or (314) 875-2927.

Sincerely,

David M. Carroll

David M. Carroll
Wells Fargo & Company
Head of Wealth and Investment Management

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[1] The Presidential Memorandum also directs the Department to propose rescinding or revising the Rule should it discern "any other reason after appropriate review that the final rule is inconsistent with the priority…to empower Americans…to save for retirement and build the individual wealth necessary to afford typical lifetime expenses." 82 Fed. Reg. 12,319, at 12,320.

[2] *See* Correspondence from Robert J. McCarthy, Director of Regulatory Policy at Wells Fargo Advisors, LLC, to Elizabeth M. Murphy, Secretary of SEC, *regarding* File No. 4-606; Release No. 34-69013; IA-3558; Duties of Brokers, Dealers and Investment Advisers (July 5, 2013) ("Wells Fargo July 5, 2013 Letter"), at 2-7, *available at:* https://www.sec.gov/comments/4-606/4606-3127.pdf.

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[3] *See* Correspondence from Joseph Ready, Executive Vice President of Wells Fargo Institutional Retirement and Trust to the Office of Regulations and Interpretations, Employee Benefits Securities Administration ("EBSA"), Dep't of Labor, *regarding* RIN 1210-AB32, Definition of Fiduciary Proposed Rule (Feb. 3, 2011) ("Wells Fargo Feb. 3, 2011 Letter"); Correspondence from David M. Carroll, Senior Executive Vice President, Wealth, Brokerage & Retirement, Wells Fargo, to John J. Canary, Director, Office of Regulations and Interpretations, Office of Exemption Determinations, EBSA, Dep't of Labor, *regarding* Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25] (July 21, 2015) ("Wells Fargo July 21, 2015 Letter"), at 2-3, *available at:* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00647.pdf and (Sept. 24, 2015) ("Wells Fargo Sept. 24, 2015 Letter"), at 2-3, *available at:* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/03063.pdf. Well Fargo July 21, 2015 Letter and Wells Fargo Sept. 24, 2015 Letter are attached hereto as Appendix A and B, respectively.
[4] *See* Wells Fargo July 21, 2015 Letter, at 2.
[5] *See*, *e.g.*, Claude Montmarquette and Nathalie Viennot-Briot, *Econometric Models on the Value of Advice of a Financial Advisor*, Centre for Interuniversity Research and Analysis on Organizations (CIRANO) (July 2012), at 9, 15-35, 56, *available at:* http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf ("[O]n average, participants retaining the service of a financial advisor for more than 15 years have about 173% more financial assets (in other words, 2.73x the level of assets) than non-advised respondents.").
[6] *See*, *e.g.*, David Blanchett and Paul Kaplan, *Alpha, Beta, and Now…Gamma*, Morningstar Investment Mgmt. (Aug. 28, 2013), at 16, *available at:* https://corporate1.morningstar.com/uploadedFiles/US/AlphaBetaandNowGamma.pdf ("[W]e estimate a retiree can be expected to generate 22.6% more certainty-equivalent income utilizing" more intelligent financial planning decisions.).
[7] *See*, *e.g.*, Oliver Wyman, *The Role of Financial Advisors in the US Retirement Market* (June 18, 2015) ("Oliver Wyman 2015 Study"), at 16, *available at:* http://fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf (Advised individuals have a minimum of 25% more assets that non-advised individuals.).
[8] *Compare* Department of Labor, *Regulating Advice Markets: Definition of the Term "Fiduciary" Conflicts of Interest- Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions* (Apr. 2016) ("Dep't of Labor RIA"), at 158, *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf ("IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 50 to 100 basis points per year.") *with* Aon Hewitt, *Help in Defined Contribution Plans: 2006 through 2012* (May 2014), at 14, *available at*: http://www.aon.com/attachments/human-capital-consulting/HelpReport_May-2014.pdf ("On average, across eight different age cohorts, the difference in annual returns for Help Participants was 3.32% (332 basis points) higher than for Non-Help Participants, net of fees.").
[9] *See*, *e.g.*, Oliver Wyman 2015 Study, at 16-34.
[10] 81 Fed. Reg. 20,946, at 20,946.
[11] *See, e.g.*, Jim Gallagher, "Edward Jones to Keep Commissions Under 'Fiduciary Rule,'" St. Louis Post-Dispatch (Aug. 17, 2016), *available at*: http://www.stltoday.com/business/local/edward-jones-to-keep-commissions-under-fiduciary-rule/article_d8d71458-3312-5195-b011-194588212eb3.html (Edward Jones announced that only clients with more than $100,000 invested for retirement will have the choice to pay on a commission basis.).
[12] *See, e.g.*, Michael Wursthorn, "A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'," Wall St. Journal (Feb. 6, 2017), *available at*: https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491.
[13] *See, e.g.*, Megan Leonhardt, "Why This Brokerage Won't Let Investors Buy Funds and ETFs in Their IRAs," Time (Aug. 22, 2016), *available at*: http://time.com/money/4459130/edward-jones-bans-funds-etfs-in-iras/ (customers wishing to purchase funds and ETFs in an IRA will have to have an advisory account).
[14] *See, e.g.*, Michael Wursthorn, "Merrill Lynch Ends Mutual-Fund Purchases in Commission IRAs," Wall St. Journal (Nov. 1, 2016), *available at*: https://www.wsj.com/articles/merrill-lynch-ends-mutual-fund-purchases-in-commission-iras-1478040836.
[15]*See, e.g.*, Michael Wursthorn, "Merrill Lynch to End Commission-Based Options for Retirement Savers," Wall St. Journal (Oct. 6, 2016), *available at*: https://www.wsj.com/articles/merrill-lynch-to-end-commission-based-options-for-retirement-savers-1475784928 (New clients and current IRA brokerage clients will be directed to Merrill's investment advisory program, a robo-advisory service or a self-directed brokerage platform.).

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[16] *See*, *e.g.*, Tobias Salinger, "Commission-Based Clients Don't Want Fee-Only Accounts, Survey Finds," Bank Investment Consultant (Mar. 20, 2017), *available at*: https://www.bankinvestmentconsultant.com/news/fiduciary-changes-could-turn-clients-off-jd-power (citing J.D. Power survey).
[17] *See*, *e.g.*, Wells Fargo July 5, 2013 Letter, at 5.
[18] *See*, *e.g.*, Oliver Wyman, *Standard of Care Harmonization: Impact Assessment for SEC* (Oct. 27, 2010), at 26, *available at*: http://www.sifma.org/issues/item.aspx?id=21999.
[19] *See*, *e.g.*, Lisa Greenwald, et al., *The 2017 Retirement Confidence Survey: Many Workers Lack Retirement Confidence and Feel Stressed About Retirement Preparations," Employee Benefit Research Institute* (Mar. 21, 2017), at 16, *available at*: https://www.ebri.org/pdf/briefspdf/EBRI_IB_431_RCS.21Mar17.pdf ("When…retirement savings plan participants are asked about the likelihood of seeking advice…nearly 7 in 10 say that they are very likely or somewhat likely to seek advice from their retirement plan provider.").
[20] ERISA Advisory Council, *Successful Plan Communications for Various Population Segments* (Nov. 2013), at 6, *available at*: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2013ACreport1.pdf ("[C]ommunications used by plan sponsors to specifically target participants based upon their interests, background, and/or economic status were more successful than providing general communications intended for every participant/employee in the retirement plan.").
[21] *See*, *e.g.*, Brian Menickella, "Fidelity and Other Record Keepers Vary Approaches to Forthcoming Fiduciary Role Changes," Forbes (Feb. 2, 2017), *available at*: https://www.forbes.com/sites/brianmenickella/2017/02/02/fidelity-and-other-record-keepers-vary-approaches-to-forthcoming-fiduciary-role-changes/#1d5dad31fc81.
[22] *See generally* Dep't of Labor RIA.
[23] *See*, *e.g.*, Gallagher *supra* note 11.
[24] Dep't of Labor RIA, at 328.
[25] *Id*. at 244.
[26] *See*, *e.g.*, Dep't of Labor, *Investment Advice – Participants and Beneficiaries, Final Rule* (Oct. 2011), 76 Fed. Reg. 66,136, at 66,151.
[27] *Id*.
[28] Dep't of Labor RIA at 158.
[29] *See* Blanchett *supra* note 6, at 16 (The impact of more intelligent financial planning decisions is "an annual return increase of +1.59%."); Aon Hewitt *supra* note 8, at 14 ("On average, across eight different age cohorts, the difference in annual returns for Help Participants was 3.32% (332 basis points) higher than for Non-Help Participants, net of fees.").
[30] *See* Council of Economic Advisors (CEA), *The Effects of Conflicted Investment Advice on Retirement Savings* (Feb. 2015), *available at*: https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf. The Department acknowledged in the RIA conclusion that its "quantitative estimate of investor gains from the final rule and exemptions takes into account only one type of adviser conflict: the conflict that arises from variation in the share of front-end-loads that advisers receive when selling different mutual funds that charge such loads to IRA investors." Dep't of Labor RIA at 326; *see also* NERA Economic Consulting, *Comment on the Department of Labor's Proposal and Regulatory Impact Analysis* (July 17, 2015) ("NERA Study"), at 32-33, *available at*: http://www.sifma.org/issues/item.aspx?id=8589955443 (The research cited in the RIA takes results associated with higher-than-average load funds and misapplies them to all funds.).
[31] 81 Fed. Reg. 21,002, at 21,022.
[32] *Id*.
[33] *See*, *e.g.*, FINRA, Rule 12200, *Arbitration Under Arbitration Agreement or the Rules of FINRA*.
[34] *See*, *e.g.*, Dep't of Labor RIA, at 309 (noting firms "might absorb or pass on to customers the cost of satisfying applicable PTE conditions").
[35] *See*, *e.g.*, Mayer Brown LLP, *Do Class Action Benefit Class Member?: An Empirical Analysis of Class Actions*, (2013), at 1, *available at*: https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf ("The vast majority of [class actions] produced no benefits to most members of the putative class—even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process (and the lawyers representing the defendants always did).").
[36] Dep't of Labor RIA, at 239-240.
[37] *See also* Michael Wong, "The Costs of Fiduciary Rule Underestimated," Morningstar Investment Mgmt. (Feb. 19, 2017), *available at*: http://news.morningstar.com/articlenet/article.aspx?id=793268 ("[A]ssessments of the Department of Labor's fiduciary rule are missing a key input: the potential class-action litigation cost of using the best interest contract, or BIC, to receive commissions. We estimate a long-term annual range for the industry from

class-action settlements of $70 million–$150 million [and] we wouldn't be surprised if near-term class-action lawsuit settlements exceed this by a multiple.").

[38] The Rule's new definition of "fiduciary" and its exceptions and exclusions will also increase litigation costs. Determining whether a "recommendation" was made is a fact-based inquiry on which courts may be unwilling to issue rulings in the early stages of litigation. Courts may also view compliance with the conditions of the Rule's exceptions and exclusions as affirmative defenses for which defendants bear the burden of proof.

[39] *See* Dep't of Labor RIA, at 223.

[40] The Rule creates the potential for as many as six sets of standards for any product. *See* Correspondence from Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, to Office of Regulations and Interpretations and Office of Exemption Determinations, EBSA, Dep't of Labor, *regarding* Proposed Conflict of Interest Rule and Related Proposals, RIN 1210-AB32 (July 17, 2015) ("FINRA Letter"), at 4, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00405.pdf.

[41] *See* Oliver Wyman 2015 Study, at 19.

[42] *See* FINRA, Rule 2111, *Suitability*.

[43] *See* Wells Fargo Feb. 3, 2011 Letter; Wells Fargo July 21, 2015 Letter; Wells Fargo Sept. 24, 2015 Letter.

[44] *See* Wells Fargo Sept. 24, 2015 Letter, at App. B-D.

[45] *See* FINRA, Regulatory Notice 13-45, *Rollovers to Individual Retirement Accounts* (Dec. 2013), *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.

[46] *See* Dep't of Labor, Pension and Welfare Benefits Admin., *Interpretive Bulletin 96-1; Participant Investment Education; Final Rule*, 61 Fed. Reg. 29,586 (June 11, 1996) (to be codified at 29 C.F.R. pt. 2509), *available at:* http://www.gpo.gov/fdsys/pkg/FR-1996-06-11/pdf/96-14093.pdf.

[47] *See* Dep't of Labor, EBSA, *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 72 Fed. Reg. 70,988 (proposed Dec. 13, 2007) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2007-12-13/pdf/E7-24064.pdf.

[48] *See* Wells Fargo July 21 2015 Letter, App. A, at 33-35.

[49] Wells Fargo July 21, 2015 Letter, at 12, n.21; Wells Fargo Sept. 24, 2015Letter, at 2 and App. B, at 10-11.

[50] *See* Vanguard, *How America Saves 2016* (June 2016), at 100, *available at*: https://pressroom.vanguard.com/nonindexed/HAS2016_Final.pdf.

[51] *See* Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2016* (Jan. 2017), at 2, *available at*: https://www.ici.org/pdf/per23-01.pdf.

[52] Dep't of Labor RIA, at 100.

[53] 81 Fed. Reg. 21,0002, at 21,007.

[54] *See, e.g.*, Wursthorn, Michael, "Edward Jones Shakes Up Retirement Offerings Ahead of Fiduciary Rule," Wall St. Journal (Aug. 17, 2016), *available at*: https://www.wsj.com/articles/edward-jones-shakes-up-retirement-offerings-ahead-of-fiduciary-rule-1471469692.

[55] Although we strongly recommend elimination of the warranties, should they be retained in any form, financial services providers should have a choice between adopting policies and procedures that address the conflicts of interest arising from differential compensation or paying only neutral compensation to financial professionals. For this reason, we continue to suggest that the Department follow FINRA's suggestion, *see* Well Fargo Sept. 21, 2015 Letter, App. C, at 5, and replace Sections II(d)(3) and (4) in the BIC Exemption with this alternative to neutral compensation. *See* FINRA Letter, at 9.

[56] Dep't of Labor RIA, at 268 (citing Angela Hung, et al., *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND Corp. (2008)).

[57] Wells Fargo July 21, 2015 Letter, at 3-4, and App. A, at 24-27; Wells Fargo Sept. 24, 2015 Letter, at 3, and App. C, at 6-8.

[58] We continue to recommend that the Department adopt in full into the Rule its 1996 Interpretive Bulletin on investment education. *See* Wells Fargo July 21 2015 Letter, App. A, at 9-11.

[59] 81 Fed. Reg. 20,946, at 20,972.

[60] Dep't of Labor, Office of Regulations and Interpretations, Advisory Opinion 2001-09A (Dec. 14, 2001), *available at*: https://www.dol.gov/ebsa/programs/ori/advisory2001/2001-09A.htm.

[61] Well Fargo Sept. 24, 2015 Letter, at 3-4.

[62] § 2510.3-21(c)(1)(i)(E).

Wells Fargo & Company
420 Montgomery Street
San Francisco, California 94104
wellsfargo.com

July 21, 2015

***Via* e-mail to e-ORI@dol.gov and e-OED@dol.gov**

Mr. John J. Canary, Director
Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25]

Dear Mr. Canary:

Wells Fargo & Company, and its affiliates, ("Wells Fargo") welcomes the opportunity to comment on the U.S. Department of Labor's (the "Department") proposals regarding the definition of the term "fiduciary," new prohibited transaction exemptions and amendments to existing exemptions (collectively, the "Proposal").[1] We hope that our comments are helpful to the Department as it assesses the potential impacts of the Proposal on retirement plans and their participants.

Who We Are and Whom We Serve

Wells Fargo is committed to providing individuals and their families with the advice and guidance they need to plan and save for retirement. We supported the Department's core 2010 "best interest" standard of care concepts[2] and the Securities and Exchange Commission's (the "SEC" or the "Commission") exploration of a uniform standard of care under the Federal Securities Laws,[3] and we remain supportive today of a "best interest" standard of care for clients. We welcome the Department's continued focus on this important issue and intend to be a collaborative partner with the Department as this dialogue continues.

Wells Fargo serves 70 million clients or one in every three American households. We hold over $390 billion in individual retirement account ("IRA") assets for over 4 million IRA owners and $400 billion in institutional retirement plan assets for over 3 million retirement plan participants. This makes us the 6th largest IRA provider and the 7th largest institutional retirement plan recordkeeper (based on assets) in the United States. We serve our clients when, where and how they want to be served – through financial professionals, bank and brokerage branches, call centers, websites, mobile devices or a combination of these options – to help them succeed financially.

As a leading provider of retirement solutions to millions of people of varying means and needs, we are uniquely positioned to provide insight into how the Proposal may impact the ability of Americans to invest for retirement. We, like the Department, see the growing importance of saving through both IRAs and individual and employer-sponsored retirement plans (e.g., 401(k) plans). Based on our first-hand experience, we believe a "best interest" standard of care for clients must both facilitate greater access to financial information and services and be flexible enough to serve all retirement investors – from those just beginning their savings journey to those nearing or in retirement.

We have found, consistent with independent studies, that Americans working with a financial professional generally save more,[4] enjoy greater investment returns[5] and have greater wealth at retirement than those who do not work with a financial professional.[6] Indeed, Wells Fargo's 2014 Middle-Class Retirement Study showed that people with a written plan for retirement were saving a median of $250 per month, far greater than the median $100 per month being saved by those without a written plan. This difference is the result of financial professionals working hard every day to help clients understand their goals, developing financial strategies to achieve those goals and encouraging clients to stick to those strategies during times of uncertainty.

Therefore, we support efforts by the Department to encourage Americans to work with a financial professional to obtain the assistance they need to successfully plan for their financial future. As a recent Vanguard study found, an advisor's added value "is more aptly demonstrated by the ability to effectively act as wealth manager, financial planner, and behavioral coach – providing discipline and reason to clients who are often undisciplined and emotional – than efforts to beat the market."[7] In other words, people facing difficult, and critical, financial choices benefit when working with a financial professional – and not just from technical advice on particular investments.

Wells Fargo Supports a Best Interest Standard

We agree with the core concept of the Proposal that financial professionals should be required to act in the "best interest" of their clients at all times. We also commend the Department for making great strides since 2010 in developing a new "fiduciary" definition that seeks to incorporate input from many stakeholders. We believe, however, the Proposal remains too broad in some respects, too strict in others and too complex overall. If the Proposal becomes effective as currently envisioned, the likely result will be that investors, particularly middle-class savers, will receive less individualized retirement education and support and have fewer choices when preparing for retirement than they have today.

We propose to address these challenges by recommending a "best interest" standard of care that fosters greater access to financial education and retirement services for every investor. Our recommendation is to simplify and incorporate additional flexibility into the Proposal so that retirement investors will retain access to the information, advice and services that best fit their individual circumstances, while also benefitting from an explicit higher standard of care.

We believe a "best interest" standard of care based on the following core principles could be implemented relatively quickly and, most importantly, would help investors meet their retirement planning goals. Below each principle, we summarize our recommended changes to the Proposal to better align it with that principle. In Appendix A to this letter, titled *Detailed Comments of Wells Fargo Regarding the Department's "Fiduciary" Proposal*, we provide our detailed comments on the key areas where we believe retirement investors will be negatively affected by the Proposal and offer alternative solutions to address those impacts and to achieve our common goal of establishing a "best interest" standard of care.

1. **Encourage Clients' Financial Education**

People facing important financial decisions should have access to more, not less, financial information and assistance. In these times, financial professionals should continue to serve as an important source of financial education and information for all investors.

Recommendation: We recommend the definition of "fiduciary" in the Proposal be narrowed and the Proposal's carve-outs and contemplated exemptions be expanded. This will allow investors to continue to obtain the financial information and education they need from financial professionals or retirement plan service providers, helping them to be better informed decision-makers.

2. **Establish a "Best Interest" Standard of Care for Clients**

A financial professional should be required to act in the client's best interest with the flexibility to recommend individualized investments and service models to help each client achieve their unique retirement planning goals.

Recommendation: The complexity and cost of the Best Interest Contract Exemption ("BIC Exemption") as proposed makes it an unworkable solution; as a result, there may be fewer available investment and service options, particularly for middle-class savers. For example, we are uncertain whether recommending best in class products and services to clients that are not the lowest cost option are permitted under the BIC Exemption's "impartial conduct standards." Consequently, such products would likely not be offered to clients. We believe the proposed contract under the BIC Exemption should be narrowed to focus on establishing a "best interest" standard of care for clients, which would ensure investment advice is based on the unique needs of each investor. Likewise, to serve the best interests of each client, we believe principal transactions should be permitted without the complicated conditions of the proposed Principal Transaction Exemption. Alternatively, any conditions should align with the Investment Advisers Act of 1940 to reduce regulatory conflicts and likely improve and simplify clients' experiences.

3. **Disclose Fees and Commissions to Clients**

Clients should be provided clear "plain-English" information regarding fees and charges for products and services and should not be overwhelmed with complex disclosures.

Recommendation: The disclosure requirements contemplated by the BIC Exemption should leverage existing disclosures, instead of creating entirely new and overly complex requirements. For example, the Department recently developed new disclosures requirements under Employee Retirement Income Security Act ("ERISA") Section 408(b)(2), to specifically address fee and conflict issues for ERISA-covered plans. Service providers have spent considerable time and effort developing systems and documents that comply with these requirements. In the interest of simplicity and efficiency, the existing 408(b)(2) disclosures should be used to provide IRA accountholders with the same detailed fee transparency and conflict information.

4. Reduce or Eliminate Conflicts of Interest and Disclose Them to Clients

Conflicts of interest that may impact a financial professional's ability to act in the best interest of the client should be reduced or, where possible, eliminated and in any event, disclosed.

Recommendation: The BIC Exemption should use existing Form ADV (presently used by SEC registered investment advisers). Form ADV was designed specifically to inform investors of potential conflicts of interest and could help clients further understand a financial professional's compensation and reduce or eliminate conflicts of interest.

5. Hold Advice Providers Accountable

Clients should be confident that a financial professional is providing advice in their best interest.

Recommendation: The parties should enter into a binding agreement – similar to the BIC Exemption contract discussed in our detailed comments – at account opening, which commits the financial institution to work in the best interest of each client and provides a remedy should the standard be breached.

6. Eliminate Overlapping Regulations with a Regulatory Exemption

Based on our experience, we believe clients will receive the best advice under a uniform standard of care. A uniform standard would provide the most beneficial protection for clients by creating one set of obligations across all account types, eliminating client confusion concerning what advice comes with a particular type of account.

Recommendation: To encourage broader adoption of a uniform "best interest" standard of care for clients, we believe an exemption should be created for broker-dealers or other regulated entities that are subject to a "best interest" standard of care for their clients adopted by another regulator or self-regulatory organization meeting the Department's fundamental requirements.

7. <u>HSAs and Similar Accounts Serve Different Client Needs</u>

Health Savings Accounts ("HSAs"), Coverdell Education Savings Accounts ("ESAs") and other similar accounts are fundamentally different from retirement accounts in their purpose and operation.

<u>*Recommendation:*</u> The Department requested comment on the advisability of including HSAs, ESAs and other similar accounts in this Proposal. We believe HSAs and ESAs and other similar accounts should be excluded from the Proposal altogether, because clients primarily use these accounts as spending accounts and not to save for retirement.

8. <u>An Appropriate Implementation Time Period Is Crucial to Client Service</u>

Retirement savers have trillions of dollars invested under the existing regulatory structure. A reasonable time to design, build, test and train on new documentation, disclosures, procedures and systems must be permitted to continue servicing existing and new clients.

<u>*Recommendation:*</u> Clients may have limited service and investment options if service providers are not able to implement all the new documentation, disclosures, procedures and systems called for in the Proposal within the implementation time period. For example, we could not use the BIC Exemption until all the proper controls and disclosures are in place. Given the complexity of the Proposal in its current form, the eight month implementation time period is simply unattainable and unrealistic. We believe three years, if not more, is necessary to ensure all the requirements of the Department's proposed rule are properly implemented.

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Once again, we thank the Department for the opportunity to comment on the Proposal and intend to stay engaged with the Department on this important topic. In addition to <u>Appendix A</u> – *Detailed Comments of Wells Fargo Regarding the Department's "Fiduciary" Proposal*, <u>Appendix B</u> – *A Summary of Wells Fargo's Recommended Changes to the Proposal* has also been included for your quick reference.

Sincerely,

David M. Carroll
Senior Executive Vice President
Wealth, Brokerage & Retirement
Wells Fargo & Company

cc: The Honorable Thomas E. Perez, Secretary of Labor

[1] Dep't of Labor, Employee Benefits Security Admin., *Definition of Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 80 Fed. Reg. 21928 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pts. 2509 and 2510), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08831.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Best Interest Contract Exemption*, 80 Fed. Reg. 21960 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs*, 80 Fed. Reg. 21989 (proposed Apr. 20, 2015) (to be codified 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08833.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to Prohibited Transaction Exemption (PTE) 75-1, Part V, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Broker-Dealers; Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, 80 Fed. Reg. 22004 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08836.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters*, 80 Fed. Reg. 22010 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08837.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Proposed Partial Revocation of PTE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, 80 Fed. Reg. 22021 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08838.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1*, 80 Fed. Reg. 22035 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08839.pdf.

[2] *See generally* Correspondence from Joseph Ready, Executive Vice President of Wells Fargo Institutional Retirement and Trust to the Office of Regulations and Interpretations, Employee Benefits Securities Administration, *regarding* RIN 1210-AB32, Definition of Fiduciary Proposed Rule (Feb. 3, 2011), *available at:* http://www.dol.gov/ebsa/pdf/1210-AB32-176.pdf.

[3] *See* Correspondence from Robert J. McCarthy, Director of Regulatory Policy at Wells Fargo Advisors, LLC, to Elizabeth M. Murphy, Secretary of Securities and Exchange Commission, *regarding* File No. 4-606; Release No. 34-69013; IA-3558; Duties of Brokers, Dealers and Investment Advisers, at 2-7 (July 5, 2013), *available at:* https://www.sec.gov/comments/4-606/4606-3127.pdf (outlining Wells Fargo's support for a uniform fiduciary duty that: (i) incorporates a duty of loyalty to act in the client's best interests; (ii) protects broker-dealer and investment adviser business models; (iii) preserves client choice in service and pricing models; (iv) applies only to personalized investment advice; (v) covers only transactions resulting in compensation; (vi) preserves access to the full range of securities products and services; and, (vii) facilitates flexible and practical disclosure and consent).

[4] Claude Montmarquette and Nathalie Viennot-Briot, "Econometric Models on the Value of Advice of a Financial Advisor," Centre for Interuniversity Research and Analysis on Organizations (CIRANO) (July 2012), at 9, 15-35, 56, *available at:* http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf.

[5] David Blanchett and Paul Kaplan, "Alpha, Beta, and Now…Gamma," Morningstar Investment Management (Aug. 28, 2013), at 16, *available at:* http://corporate.morningstar.com/ib/documents/PublishedResearch/AlphaBetaandNowGamma.pdf.

[6] *Id.*

[7] Donald G. Bennyhoff and Francis M. Kinniry Jr., "Advisor's Alpha," Vanguard Research (Apr. 2013), at 3, *available at:* https://advisors.vanguard.com/iwe/pdf/ICRAA.pdf?cbdForceDomain=true.

Wells Fargo & Co.
Appendix A

DETAILED COMMENTS OF WELLS FARGO
REGARDING THE DEPARTMENT'S "FIDUCIARY" PROPOSAL

We applaud the Department's efforts to establish a "best interest" standard and recognize that the Proposal represents a significant undertaking. The Proposal's complicated provisions, however, contain elements that effectively undermine its stated objectives and impose new limits on retirement investors' choice of investment products and services, and their access to financial education at times when they need it the most. This appendix discusses the key areas where we believe retirement investors will be negatively affected by the Proposal and provides specific recommendations on how to address those impacts to achieve our common goals. We include at the outset a table of contents to guide the Department through our comments. While we believe there should be one uniform "best interest" standard for all clients, we secondarily believe the Department's Proposal, which impacts retirement advice only, may be made more workable by incorporating the recommendations set forth herein.

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I. THE PROPOSED DEFINITION OF "FIDUCIARY" IS OVERLY BROAD AND RESTRICTS ACCESS TO INFORMATION.

Planning for their financial future is one of the most important and daunting tasks facing retirement investors and businesses today. Investors face an investment landscape filled with a broad choice of retirement products and investment options that is accompanied by reams of complex information. Sorting through these options and information can be confusing and overwhelming. Consequently, many individuals and business owners seek assistance to help them understand the strategies, retirement products and investment options that may be appropriate to help them achieve their financial goals, both to accumulate assets for retirement and to spend those assets responsibly during retirement.

Indeed, the Department noted in the Proposal's preamble "the need for plans and IRA owners to seek out and rely on sophisticated financial advisers to make critical investment decisions in an increasingly complex financial marketplace."[1] The Department further states the Proposal is "intended to ensure that small plan fiduciaries, plan participants and IRA owners would be able to obtain the essential information regarding important decisions they make regarding their investments without the providers of that information crossing the line into fiduciary status."[2]

Unfortunately, the combination of expanding the definition of covered advice so broadly as to classify all manner of information as fiduciary advice while providing only narrow exemptive relief from Employee Retirement Income Security Act's ("ERISA") prohibited transaction provisions, undermines the stated intent of the Proposal. Below, we make recommended modifications to the Proposal to help ensure that retirement investors will continue to have access to the information they need to be informed decision-makers while receiving the protections sought by the Department.

A. *The Definition of Investment Advice Should Be Narrowed.*

Individuals and their families seeking retirement assistance, whether in a retirement plan or otherwise, want to know what products and services are available to help them. They can then make an informed decision about whether to invest with a financial professional, select their own retirement products or take no action. As noted above, the Department concurs that financial professionals should be able to provide "essential information" to retirement investors without crossing the line into fiduciary status.

The current regulation regarding the establishment of a fiduciary relationship is straightforward and workable. Under the regulation, a financial professional becomes a fiduciary by providing investment advice, when it is provided on a regular basis and where there is a

[1] 80 Fed. Reg. at 21929.

[2] *Id*. at 21942.

mutual agreement, arrangement or understanding that the advice will form a primary basis for the investment decision. Thus, fiduciaries know when they are fiduciaries and the identity of the persons relying on them for investment advice. This also leaves investors free to seek retirement investment information from financial professionals without that professional crossing the line to become a fiduciary.

Under the Proposal, fiduciary status attaches at the “suggestion”[3] that a person take a particular course of action that is “individualized to” or “specifically directed to” that person for “consideration in making investment…decisions.”[4] This is so broad as to encompass nearly every conversation between a financial professional and a client or prospective client regarding retirement products and services. As a result, we believe the Proposal will unreasonably restrict the essential information that individuals receive unless it is modified as set forth below.

i. We Recommend Clarifying that Providing General Information About Our Products and Services Does Not Constitute Investment Advice.

Any conversation between a financial professional and a retirement investor regarding retirement products or services will inevitably be used by the investor to determine if the financial professional is the right fit for them, which means the conversation will necessarily be classified as “for consideration in making investment…decisions” and fiduciary obligations would attach under the Proposal. To encourage the free flow of information between a retirement investor and a financial professional, we recommend the Department revise the Proposal to permit individuals to receive information about available retirement product options (including available investment options and the costs associated with particular products) so that they can understand the available options before establishing a binding fiduciary relationship with a financial professional.

The fiduciary commitment should begin at the point at which the retirement investor relies on the financial professional and the financial professional receives compensation. Most logically, this would occur at the time an account is opened or the product is purchased by the investor. This means that access to investment, distribution and other assistance would be preserved while investors would still be protected through the application of a “best interest” standard when the investor opens an account, deposits funds, acquires a specific product, acknowledges a fiduciary relationship or reviews specific investment recommendations with the financial professional as discussed further in Section I.A.iv. below.

In addition, the scope of the Proposal in its current form also potentially pulls in relationships where each party’s status is unclear. For example, mutual fund wholesalers often provide education to financial professionals on the product their company offers and mutual fund service center representatives answer product questions from financial professionals. These

[3] 80 Fed. Reg. at 21960 (§ 2510.3-21(f)(1)).

[4] *Id*. at 21957 (§ 2510.3-21(a)(2)(ii)).

activities may be deemed fiduciary if the inquiring financial professional is a plan fiduciary or if the call center provides distribution options even without providing advice. We recommend the Department clarify that this type of activity is information sharing between intermediaries and not investment advice.

ii. We Recommend Adding a "Mutual Understanding" Element to the Definition.

The Department has eliminated the "mutual agreement" requirement contained in the current regulation. However, financial professionals must have the ability to discuss their products and services, which is the "essential information" an investor needs, without arbitrarily "crossing the line into fiduciary status." We believe the most appropriate and easily determinable time to attach fiduciary obligations is when the financial professional and the retirement investor reach some mutual understanding that they have entered into an advice relationship. If the understanding is not mutual, providers seeking to comply with the duties of a fiduciary will not know when those duties attach and will not know what information they may give.

The Department's broader language could make a larger group of providers liable as fiduciaries and does not accomplish the objective of enhancing the quality of advice that providers give to individuals while still providing access to "essential information." We understand that the Department is concerned that individuals or entities may seek to avoid fiduciary status by deliberately refusing to agree to such status, even when the other facts of the relationship would support a fiduciary role. For this reason, we suggest that the parties should have a reasonable expectation that they are in a fiduciary relationship and that the final rule include a requirement that this arrangement or agreement be "mutually understood."

iii. We Recommend Deleting "Specifically Directed to" from the Definition or, at a Minimum, Adding the Phrase "Advice that Is Individually Tailored" to Narrow the "Specifically Directed to" Element of the Definition.

In order to make an informed decision about retirement assets, individuals need to have information about the products and services available to them. However, because investment advice is defined so broadly under the Proposal, even activities such as mailing brochures that discuss a financial institution's product and service offerings, including IRA or plan services, would be considered "specifically directed to" a recipient and thus inappropriately be considered fiduciary investment advice.

Furthermore, advertisements that are specifically targeted to investors based upon past consumer behavior or demographic information would also inappropriately be considered fiduciary investment advice. For instance, today, by virtue of online activity, individuals receive advertisements that are tailored to them based on prior online activity. In these instances, the information may be delivered in response to prospective client needs or interests, but the financial institution does not have enough information to make a true recommendation for the information recipient, nor would the recipient reasonably understand the information to be anything other than sales material.

If an individual pursued a product or service as a result of this kind of material, he or she typically would receive additional specific information and, if working with a financial professional, would be able to provide personal information that could help the financial professional make a specific fiduciary recommendation. Thus, we believe the "specifically directed to" element of the definition by itself is unnecessarily broad and any recommendation should be individually tailored to the recipient before it could be considered "advice." We recommend either deleting the phrase "specifically directed to" from the definition of "investment advice" or adding "advice that is individually tailored" to the definition.

Finally, a materiality or reliance qualifier is also necessary to narrow the scope of fiduciary advice. Such a qualifier will focus the application of fiduciary obligations on activities and actions of the most importance and raise the very low bar set by the proposed "for consideration" standard. Logically, if the retirement investor does not rely on the advice there should be no compensable damages, but the absence of an explicit qualifier from the regulation will likely have a chilling effect on the provision of general education information that the producer does not intend as advice.

iv. We Recommend Clarifying that "Investment Advice" Means a "Recommendation" – Consistent With Current Securities Law – and Should Apply After New Account Opening.

The Department states that it looked to Financial Industry Regulatory Authority ("FINRA") guidance on when suitability obligations attach to recommendations to help guide the Department in determining when fiduciary obligations should attach to retirement investor interactions.[5] FINRA guidance to its Rule 2111, or the "Suitability Rule," applies to recommendations to a "potential investor" who then becomes a "customer." Thus, the Suitability Rule's investor protections extend to prospective clients *if* that individual executes transactions through the broker-dealer that made the recommendation or if the broker-dealer receives or will receive compensation as a result of the transaction.[6] Under FINRA's guidance, broker-dealers do not escape liability for a recommendation made prior to account opening but later implemented at account opening.[7] We believe the same standard would be appropriate for determining when fiduciary obligations attach under the Proposal and would establish a brighter line for when fiduciary status begins for both the investor and financial professional.

[5] *See*, *e.g.*, 80 Fed. Reg. at 21938 and 21945.

[6] *See* FINRA, Regulatory Notice 12-55, *Suitability* (Dec. 2012), at 2 (FAQs 6(a) and 6(b)), *available at:* https://www.finra.org/sites/default/files/NoticeDocument/p197435.pdf.

[7] *See Id.* at 6 (FAQ 6(b), n.10) ("[For a] recommendation to a *potential investor*, suitability obligations attach when the transaction occurs, but the suitability of the recommendation is evaluated based on the circumstances that existed at the time the recommendation was made.").

B. ***Additional Parties Should Be Included in the Seller's Carve-Out.***

The Department states that the "overall purpose" of the carve-out for counterparty transactions with plan fiduciaries[8] ("Seller's Carve-Out") is "to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of proposed deals."[9] As currently proposed, the Seller's Carve-Out fails to achieve this purpose.

i. <u>We Recommend Including All ERISA-Covered Plans, Regardless of Size.</u>

The availability of the Seller's Carve-Out depends on (1) the number of participants in the plan and (2) the amount of plan assets under management of the plan fiduciary. If a plan does not satisfy these threshold requirements, the Seller's Carve-Out is unavailable whether or not "neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser."[10] Any requirement based on plan size will raise the practical problem of monitoring plan sizes, which tend to vary. Thus, it may not be clear whether a plan falls within the Seller's Carve-Out at the time a particular recommendation is made. As *all* ERISA fiduciaries are required to have or obtain sufficient expertise to prudently discharge their duties, we recommend the Seller's Carve-Out should not be conditioned on plan size.

Recognizing the Department's efforts in this area, plan fiduciaries are typically educated on these requirements and use many of the same bidding and review processes when engaging a provider and making investment decisions. We note also that plan size does not necessarily correlate to the investment sophistication of the plan's fiduciary or to their willingness to engage consulting assistance when needed. Small companies may engage in complex and expensive business transactions and are considered to have sufficient expertise for such transactions. As we believe commercial entities do have different expectations and expertise than individuals, we recommend the Seller's Carve-Out should be amended to cover all ERISA-covered plans, regardless of size.

ii. <u>We Recommend Including Sophisticated Investors.</u>

As set forth above, we believe all plans should be carved-out. At a minimum, however, we believe the Seller's Carve-Out should include accredited retail and institutional investors. The stated purpose of the Seller's Carve-Out's current conditions is to serve as "proxies for identifying persons with sufficient investment-related expertise to be included in a Seller's Carve-Out."[11] Accreditation serves to identify those with sufficient financial sophistication to understand and bear economic risk. Moreover, including accredited investors in the Seller's Carve-Out would be consistent with other securities regulations, such as Regulation D of the

[8] 80 Fed. Reg. at 21957 (§ 2510.3-21(b)(1)(i)).

[9] *Id*. at 21941.

[10] *Id*.

[11] *Id*.

Securities Act,[12] where regulators have acknowledged that accredited investors do not require the same protections as other investors.

iii. We Recommend Revising the Carve-Out to Accommodate Requests for Proposals and Similar Sales Transactions.

Under the Proposal, the Seller's Carve-Out has a number of conditions, including a requirement that the counterparty receive certain written representations (or have a reasonable belief that the counterparty meets certain size or sophistication criteria). However, for ERISA-covered plans, it is unlikely that this kind of information would be received in a sales transaction.

Service providers often receive requests for proposals ("RFPs") or other similar sales proposals from plan fiduciaries or their agents, such as consultants. The RFP may or may not disclose sufficient information for the service provider to determine whether the Seller's Carve-Out would apply, and is often in a format that would make it difficult to obtain the various representations required under the Carve-Out. RFPs often ask for sample fund line-ups and other criteria which would likely be considered investment advice under the Proposal. The service provider is usually one of many providers competing for the business offered in the RFP, and may respond, but not win the business. As RFPs and similar types of sales transactions are well-recognized as arm's length discussions and both parties understand that a subsequent negotiation must take place, we recommend RFP responses and similar types of sales transactions should be included in the types of transactions carved-out from "investment advice."

C. ***The Platform Providers and Selection and Monitoring Assistance Carve-Outs Should Be Expanded.***

i. We Recommend the Carve-Outs Cover All Platforms.

Products and product platforms are not developed with individual plans, participants or retirement investors in mind. The investments available through a platform may be impacted by a number of operational or other considerations, such as the availability of an agreement with a particular fund family. Because of such considerations, we are not aware of any platform that offers every permissible investment option available in the universe of investment options. By

[12] *See* Rule 501, Regulation D, Securities Act of 1933, *Definitions and Terms Used in Regulation D* (17 CFR 230.501 (a)):

(a) Accredited investor shall mean any person who comes within any of the following categories…:

(1) [A]ny employee benefit plan within the meaning of [ERISA] if the investment decision is made by a plan fiduciary…

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000…

(6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.

providing limited carve-outs for platform providers[13] ("Platform Provider Carve-Out") and selection monitoring and assistance[14] ("Selection and Monitoring Assistance Carve-Out"), we are concerned the Department has implied that the development of a platform, including the choice or restriction of investments generally available through the platform, is fiduciary in nature.

We agree that development and provision of a platform for investment is not a fiduciary activity. However, the limitations included in the current Platform Provider and Selection and Monitoring Assistance Carve-Outs suggest that platforms other than those of 401(k) recordkeepers somehow include fiduciary advice. We note individuals and plan fiduciaries would still have protection for the advice given specifically in connection with their retirement assets even if these Carve-Outs are explicitly broadened. As such, we recommend the Department broaden the Platform Provider and Selection and Monitoring Assistance Carve-Outs to cover any type of platform, including platforms provided to IRAs, Health Savings Accounts ("HSAs"), Coverdell Education Savings Accounts ("ESAs") and any other type of platform provider.

ii. We Recommend Allowing the Provision of Objective, Publicly Available Investment Information.

We agree with the Department that service providers should be able to market their platforms and give objective investment information without such activity being considered investment advice. However, we believe Platform Provider and Selection and Monitoring Assistance Carve-Outs must better accommodate situations where neither party is expecting to be in a fiduciary relationship, but plan fiduciaries need additional investment information. For those reasons, we recommend the Platform Provider and Selection and Monitoring Assistance Carve-Outs be available to any service provider – and not just recordkeepers – providing objective, publicly available investment information to plan fiduciaries. So long as the information is not coupled with a recommendation to make a particular plan investment choice and the service provider furnishes fee disclosures in accordance with 408(b)(2) and a statement that the provider is not offering investment advice as set forth in the Proposal, it should be clear that providing such information is not a fiduciary activity.

iii. We Recommend Allowing Service Providers to Assist Plan Fiduciaries in Creating a Platform and Believe Clarity Is Needed Regarding Platform Marketing.

Many service providers offer a platform with "open architecture," meaning plan fiduciaries are able to pick any investment option (such as a mutual fund or collective fund) that is compatible with the provider's operating system. This provides plan fiduciaries with the greatest amount of flexibility to choose prudent investment options for the plan's participants. Other service providers offer a short list of investment options in each investment category, or only proprietary investments.

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[13] 80 Fed. Reg. at 21957-58 (§ 2510.3-21(b)(3)).

[14] *Id*. at 21958 (§ 2510.3-21(b)(4)).

Given the large number of mutual and collective funds to choose from, plan fiduciaries often need meaningful assistance in limiting the number of investment options in particular categories (e.g., large cap growth) when selecting or replacing investments. Often, even with objective, narrow criteria used to reduce the number of funds, there still can be dozens of funds that meet the criteria selected. Faced with such decisions, plan fiduciaries may request assistance in narrowing the possible investment options to a more manageable number of funds. A similar process may also occur during the initial sales process. Service providers often provide such assistance, fully disclosing the impact to their fees as required under the Department's 408(b)(2) regulations.

In the absence of such assistance, plan fiduciaries may need to hire additional consultants to assist in analyzing fund selections, which would impose additional costs to the plan, likely borne by participants. Furthermore, service providers may begin restricting investment choices offered on their platforms, which limitation would be detrimental to retirement plan participants.

We believe that by providing fee disclosures in accordance with 408(b)(2), along with the proposed statement that the provider is not offering investment advice,[15] plan fiduciaries should be adequately informed of a service provider's interests to permit service providers to continue to assist plan fiduciaries in narrowing the range of investment options for plan participants. Thus, we recommend the Platform Provider and Selection and Monitoring Assistance Carve-Outs be clarified to permit such functions, so long as disclosures are provided and specific recommendations are not made.

Additionally, as creating a platform has traditionally not been viewed as a fiduciary act, marketing the platform should not be limited to the creator of the platform, but rather intermediaries should be allowed to market a platform. Likewise, we recommend clarifying that a service provider may market to an intermediary plan fiduciary under the Platform Provider and Selection and Monitoring Assistance Carve-Outs rather than being limited to marketing to the plan itself. This is necessary now that there is an implication that marketing a platform would be fiduciary in nature if a service provider were to use an indirect distribution channel. We would also recommend clarifying that marketing of multiple platforms would not be considered fiduciary advice if retirement investors are segmented into investor types and marketed a corresponding platform (i.e., open architecture for large plans and a more limited platform for micro-plans).

D. *The Financial Reports and Valuations Carve-Out Should Be Expanded.*

Many service providers supply valuations for plan investments. In particular, many large, participant-directed plans offer unitized investment options (including, but not limited to, company stock funds).[16] The service provider will perform calculations regarding the value of

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[15] 80 Fed. Reg. at 21957-58 (§ 2510.3-21(b)(3)) ("if the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity").

[16] We note collective funds may have only *one* investor. We recommend the Department clarify the language of the Financial Reports and Valuations Carve-Out to ensure that it is available to such funds.

such funds in order to calculate a net asset value to facilitate daily trading. As currently drafted, the carve-out for financial reports and valuations[17] ("Financial Reports and Valuations Carve-Out") may not include these types of calculations.

Providing these calculations is mostly an administrative function using asset valuations provided by the market or another fiduciary. The Department rightly points out that this prong of covered advice does not require a recommendation. There is no particular call to action. As these calculations are not fiduciary in nature, the Financial Reports and Valuations Carve-Out should clearly include them.

E. ***The Investment Education Carve-Out Should Be Expanded.***

i. We Recommend Permitting the Provision of Investment Information as Education.

In 1996, the Department published guidance outlining the types of information that would not be considered fiduciary investment advice. [18] In the nearly twenty years since, the Department has recognized that certain classes of information provided to participants of ERISA participant-directed account plans are more accurately considered investment education and have not been treated as fiduciary investment advice.

Under the Proposal, the Department is proposing to expand the scope of the exception so that it will now apply to IRAs and to ERISA plans that do not provide for participant-directed investments, and to cover communications to plan fiduciaries and IRA owners. However, the Department is proposing new conditions on the 1996 guidance under the carve-out for investment education[19] ("Investment Education Carve-Out") that materially dilute the positive effect of extending the guidance to cover advice related to IRA plans.

While we applaud the Department's expansion of its 1996 guidance regarding financial education to IRAs and other ERISA plans, the limiting conditions of Investment Education Carve-Out effectively undercut the utility of the guidance:

- First, the Investment Education Carve-Out adds a specific condition that the information *cannot* include any advice or recommendations concerning specific investment products, investment managers or the value of investments.

- Second, asset allocation models *cannot* include any specific investment alternatives offered under the plan, and interactive investment materials can include specific plan investment alternatives only if such alternatives are specifically selected by the participant. Thus,

[17] 80 Fed. Reg. at 21958 (§ 2510.3-21(b)(5)).

[18] *See* Dep't of Labor, Pension and Welfare Benefits Admin., *Interpretive Bulletin 96-1; Participant Investment Education; Final Rule*, 61 Fed. Reg. 29586 (June 11, 1996) (codified at 29 C.F.R. pt. 2509) *available at:* http://www.gpo.gov/fdsys/pkg/FR-1996-06-11/pdf/96-14093.pdf.

[19] 80 Fed. Reg. at 21958 (§ 2510.3-21(b)(6)).

> educational materials that include asset allocation models or interactive investment tools cannot identify specific investment alternatives available under the plan for those materials to come within the Investment Education Carve-Out.

We recommend the Investment Education Carve-Out be modified to more closely resemble the Department's 1996 guidance and that the Carve-Out more specifically cover the situations described below.

Plan sponsors and administrators rely heavily on service providers to help operate their retirement plans. In an effort to assist plan participants with retirement preparedness, many plan administrators enlist the assistance of their service providers to help educate participants regarding how participants' investment decisions may affect their retirement plan accounts. For example, plan administrators may design (or approve a service provider's) mailers reminding participants of the benefits of diversification if they are heavily invested in one particular asset class, including employer securities. Generally, such educational efforts are targeted toward those participants whose selected investments indicate they would benefit from such education.[20]

As currently drafted, such informational assistance could be considered investment advice under the proposed regulation. Some of these communications may include references to specific investment options available in the plan, which may exclude them from the Investment Education Carve-Out. Furthermore, if such information is only sent to certain participants, it could be sufficiently "individualized" or "specifically directed to" participants to be considered investment advice. Most service providers would be unwilling to take on fiduciary status based on the distribution of such information. Plan sponsors and administrators would have similar concerns and participants would lose access to valuable information regarding their investment decisions. Therefore, we recommend the Department clarify the regulation so that such generalized investment information would not be considered investment advice.

The revised description of investment education raises other issues as well. As previously discussed, under the Proposal, a financial professional is only permitted to provide a retirement investor with generic education materials and asset allocation information (without mention of any specific investment products or services) to avoid fiduciary status. This is especially problematic in the retirement plan space. Such plans have a set of investment options available that have been selected by the plan sponsor. The inability of a financial professional to provide basic information about these investments, what they are and how they are priced, would seem counter-productive to helping educate investors.

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[20] While sending the information to all plan participants may make the information no longer individualized or specifically directed to, that would (1) confuse many participants for whom the information is not relevant and (2) involve additional expense, which would likely be charged against participants' accounts. For example, mailers may be sent to participants who have more than 20% of their account invested in employer securities, as mentioned on participant statements. Another example would be sending mailers to participants under age 30 who have all their account balance invested in a principal preservation vehicle, informing them of the risk that inflation may pose to retirement income. A third example could be a mailers discussing "target date" funds to individuals who have invested their account balances in multiple target date funds (of the same series, but with different target dates), which may indicate such participants are unclear on how target date funds are intended to operate.

In addition, the limitation on the provision of investment examples for asset allocation models is too severe. The limitation relegates discussions regarding investment alternatives to esoteric conversations and prohibits the provision of plan-specific information. We believe a financial professional should be able to discuss what types of investments fall into various asset classes (e.g., providing objective information on mutual funds that may satisfy the investor's needs), without being considered a fiduciary, so long as he or she is not making a recommendation as to a particular investment.

ii. <u>We Recommend Rollover Assistance Be Considered Education.</u>

Retirement plan service providers also assist plan participants when the participants have terminated employment and are deciding what to do with their retirement plan benefits. Such services typically are provided through call centers that provide information to plan participants regarding the plan's distribution options. Our experience has been that many participants call because they are unsure about their options and the related financial or tax implications. Service provider call centers often provide critical information to such participants, including whether the participant can leave the funds in the plan, take a cash distribution, or rollover the funds to another retirement plan or IRA.

As recognized by the Department, rolling over the account balance can be a good option for participants as it preserves the tax-deferred nature of their retirement benefits. Our experience has shown that participants who are more informed of their distribution options are more likely to retain their retirement benefits instead of cashing them out. The Department has noted that it is generally in the participants' best interest not to take a pre-retirement distribution.

While the Department has clarified that distribution education is not investment advice, the Department should understand that participants often have additional questions after receiving an explanation of their distribution options. Participants often ask if the service provider or its affiliates offer IRAs. Given that the BIC Exemption may not cover rollovers by its terms, and that it would be difficult, if not impossible, to implement the BIC Exemption in a call center setting, service providers will not be able to answer participants' reasonable inquiries for fear that the discussion would be considered fiduciary investment advice.

The result will be that participants, who reasonably request information about a service provider or an affiliate's products, will be left without the information they need. In addition, if participants ask to be connected to an affiliate, such as an affiliated call center, that offers such products (e.g., bank IRAs, direct-to-fund IRAs, self-directed IRAs or advised IRA brokerage accounts) to obtain information about the products offered, they will not receive this support.

For these reasons, we recommend the Department clarify that the provision of general information about the products and services offered is not investment advice if it is part of a discussion that is otherwise educational in nature. If a financial institution is providing information about plan distribution options in a manner that would be considered investment education under the Proposal, the financial institution should be able to mention that it offers

IRAs or other products so long as it does not recommend such products or that the individual take a particular action with respect to plan assets.[21]

F. ***HSAs and ESAs – non-ERISA accounts – Should Be Carved-Out of the Proposal.***

The Department requested comment as to whether it is appropriate to cover and treat HSAs and ESAs (non-ERISA accounts) under the Proposal in a manner similar to IRAs with regard to both coverage and applicable carve-outs. These non-ERISA accounts serve entirely different purposes than the covered ERISA accounts and plans identified in the Proposal and should therefore not be covered.

i. HSAs Are Used to Pay for Health Care Expenses and Cannot Receive Rollovers from Traditional ERISA Plans.

The focus of the Proposal is on retirement savings vehicles like qualified pension plans and IRAs. In including HSAs within the definition of IRAs, the Department observes that HSAs can be used as "long term savings vehicles for retiree health care expenses."[22] Although this is possible, HSAs are much different than IRAs. To make or receive HSA contributions, individuals must meet eligibility criteria, including being enrolled in a high-deductible health plan ("HDHP"). HSAs permit individuals with HDHP coverage to save money on a pre-tax basis to pay for medical expenses incurred before their deductible is met. Thus, while IRAs are designed to encourage the accumulation of retirement assets with significant penalties for withdrawals, HSAs are primarily designed for the payment of current medical and other healthcare expenses.

Our experience is that HSA balances generally are deposited and withdrawn on a regular basis (using, for example, a debit card) and carry relatively small balances. The average balance of our account owners is $3,062 (as of April 2015). For the Wells Fargo HSA product, individuals have to accumulate at least $1,000.00 in a deposit account before investment in a mutual fund is allowed. In fact, 90% of Wells Fargo HSA account owners keep their money in a deposit account and do not invest their HSA balances (as of April 2015).

Rollovers to HSAs are also very limited. HSAs can only receive rollovers from other HSAs, Archer MSAs and IRAs. Further, the ability to "roll" funds from an IRA is subject to maximum annual HSA contribution limits of roughly $6,650 (for family coverage) and is limited to a "once in a lifetime" transfer of funds. Thus, the Department's concern for protecting funds rolled from traditional ERISA plans into IRAs does not apply to HSAs.

In addition, HSA owners are subject to strict oversight, including IRS audit, regarding the use of their accounts. The imposition of additional regulatory restrictions on top of the current

[21] FINRA Regulatory Notice 13-45 sets forth a list of factors that should be considered by an investor in making a rollover decision. The Investment Education Carve-Out could also accommodate the presentation of these factors in a non-biased fashion. *See* FINRA, Regulatory Notice 13-45, *Rollovers to Individual Retirement Accounts* (Dec. 2013), at 2-3, *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.

[22] 80 Fed. Reg. at 21947.

extensive regulatory structure is unnecessary. For these reasons, we believe that HSAs should not be covered under the final rule. If, however, HSAs are included in the final rule, we recommend the following amendments to the Proposal:

- *Clarify that the Platform Provider Carve-Out Applies to HSAs.* All HSAs should be included under the Platform Provider Carve-Out. HSAs differ from IRAs in that employers are frequently involved in the selection of an HSA provider for their employee population,[23] often using an RFP process to evaluate potential providers. Employers may select a single HSA provider for their employees for purposes of facilitating HSA contributions without triggering ERISA, as long as the employer does not restrict the employees' ability to move their balances to another HSA and meet other criteria established by the Department.[24] Although employers do not select an HSA provider in a fiduciary capacity, they do serve as an independent entity interacting with the provider to ensure that an appropriate product is offered to the account owners.

  The investment platform we offer for HSAs is a limited selection of mutual funds, including proprietary and nonproprietary funds. We are able to offer this simple platform today without charging separate fees for investing or transactions because its management is administratively straightforward. An account owner must accumulate at least $1,000.00 in a deposit account before investment in the platform is allowed and the platform is the same whether or not Wells Fargo is selected by the HSA owner's employer or an individual who sets up an HSA outside of the employer relationship or who de-affiliates with an employer. Given that only roughly 10% of account owners invest their HSA funds, it would be difficult to justify the cost of offering different products to different segments of the population. As such, we believe the Platform Provider Carve-Out should include all HSAs so that the same rules apply to all segments of the account owner population.

- *Clarify that the Investment Education Carve-Out applies to discussions of distributions from HSAs for qualified medical expenses.* At present, the Investment Education Carve-Out does not address certain aspects of HSA products that are different in nature from ERISA plans and IRAs. For example, the Investment Education Carve-Out does not include the provision of information regarding "qualified medical expenses."[25] In addition, HSAs are transactional accounts, and individuals need information on how to access their funds for medical expenses, including use of the associated debit card. Thus, we believe informational communications to account owners regarding how to take distributions from their HSA should be considered investment education.

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[23] In 2015, 72% percent of accounts at Wells Fargo were affiliated with an employer.

[24] *See, e.g.*, Dep't of Labor, Field Assistance Bulletin No. 2006-02, *Health Savings Accounts – ERISA Q&As* (Oct. 27, 2006), *available at*: http://www.dol.gov/ebsa/regs/fab_2006-2.html; Dep't of Labor, Field Assistance Bulletin No. 2004-01, *Health Savings Accounts* (Apr. 7, 2004), *available at*: http://www.dol.gov/ebsa/regs/fab_2004-1.html.

[25] 26 U.S.C. § 213(d).

ii. ESAs Are Used to Pay for Education Expenses and Cannot Receive Rollovers from Traditional ERISA Plans.

Like HSAs, ESAs are very different in nature than IRAs. ESAs are savings accounts designed exclusively for funding education expenses for a designated beneficiary who is under age 18 or is a special needs beneficiary. The annual contribution limit is $2,000 for each designated beneficiary, no matter how many ESAs are set up for that beneficiary.

Traditional ERISA plan assets are not eligible to be transferred or rolled into an ESA. Assets can only be rolled over from one ESA to another. Generally, funds must be distributed when the designated beneficiary reaches age 30, unless he or she is a special needs beneficiary. Thus, the Department's concern for protecting funds rolled from traditional ERISA plans into IRAs also does not apply to ESAs.

Considering the limited funding and generally short life of the account, additional regulatory restrictions are unnecessary. Thus, we believe that including ESAs in the final rule would not comport with the Proposal's stated objectives. If, however, ESAs continue to be included in the Proposal, we recommend communications to accountholders regarding ESA-related regulations and key product features should be included in the Investment Education Carve-Out. In addition, the identification of specific investment products or alternatives available for an ESA should also be permitted.

II. THE BEST INTEREST CONTRACT EXEMPTION IS IMPRACTICABLE AS PROPOSED.

The Department's expansion of the definition of fiduciary investment advice has the potential to not only disrupt the ability of retirement investors to receive appropriate investment information, but to restrict the provision of investment advice (even if the advice is in the investor's best interest) and to limit the freedom of investors to choose among varying service and fee models. This is because the prohibited transaction rules prohibit fiduciaries from providing advice if the advice could affect the compensation of the fiduciary. Consequently, many of the advice models most economical for smaller accounts and small businesses would become prohibited under the Proposal.

To lessen the harsh effects of the proscriptions contained in ERISA's prohibited transaction provisions, the Proposal includes a Best Interest Contract Exemption (the "BIC Exemption"), which is intended to "preserve beneficial business models for delivery of investment advice"[26] and which the Department believes will "permit firms to continue common fee and compensation practices, as long as they are willing to adhere to basic standards aimed at ensuring their advice is in the best interest of their customers."[27]

[26] 80 Fed. Reg. at 21929.

[27] *Id*.

We believe the Department's objective to craft an exemption providing certain retirement investors and financial professionals with the flexibility to determine what service and fee models are appropriate for a particular investor is the right course. However, the BIC Exemption as currently designed is an unviable solution with overly complex requirements. Below we recommend specific changes to the BIC Exemption that attempt to address these practical problems, protect investors and fulfill the stated purpose of the Exemption.

A. ***The Proposed "Written Contract" Is Not Operationally Feasible.***

We understand that the BIC Exemption's "written contract"[28] represents the Department's desire to have a binding commitment from financial institutions that they will live up to the Department's "best interest" standard. As proposed, however, the contract presents a number of challenges that essentially undercut the BIC Exemption's purpose.

i. We Recommend the Contract Only Be Executed After a Prospective Customer Becomes a Customer**.**

A plan, participant, beneficiary or IRA owner should not be required to enter into a contract with a financial institution or financial professional prior to deciding whether to hire that financial institution or financial professional, particularly when any investment advice will be subject to the "best interest" standard. To facilitate the exchange of information between financial institution, financial professional and prospective customer, any contract should be executed at or shortly after the time of account opening. At the most basic level, a contract establishes the agreement that parties have made and to fix their rights and duties in accordance with that agreement. Consequently, it makes sense that when establishing an account and depositing funds with a financial institution or financial professional that the parties execute a document detailing the terms and conditions of their relationship.

Under the terms of the BIC Exemption, the Department requires that a BIC Exemption contract be executed before a retirement investor can obtain basic investment information from a financial institution or financial professional that will permit the investor to make an informed decision on whether to hire the financial professional or purchase products or services from the financial institution. Requiring that a consumer execute a contract even before being presented with a proposal or at least a general description of the products and services offered, will be disconcerting and may inhibit a consumer's willingness to shop for retirement investment services.

The simple fix is to include the BIC Exemption contract as part of new account opening ("NAO") documentation which would fulfill the Department's policy objectives while permitting retirement investors to gather the information they need about investment options, products or services to make an informed decision. If a prospective client does decide to purchase products or services from or open an account and deposit funds with the financial institution, the client will receive the fiduciary protections sought by the Department prior to the execution of any transactions.

[28] 80 Fed. Reg. at 21984 (§ II(a)).

The execution of the BIC contract as part of the NAO documents is also consistent with current commercial practices and regulatory requirements. For example, as noted earlier, FINRA's guidance to the Suitability Rule provides assistance in determining when its requirements apply. The Suitability Rule applies to a "customer" and FINRA has indicated (for purposes of the Suitability Rule) that a "customer" is a person who opens an account at a broker-dealer or purchases a security for which the broker-dealer receives or will receive compensation – directly or indirectly – even if the security is not held at the broker-dealer. [29]

The Suitability Rule also applies to a "potential investor" who then becomes a "customer." Thus, the Suitability Rule's investor protections extend to prospective clients *if* that individual executes the transaction through the broker-dealer that made the recommendation or if the broker-dealer receives or will receive compensation as a result of the transaction.[30]

Conversely, the Suitability Rule does not apply to a recommendation made to a prospective client if the prospective client does not act on the recommendation or executes the recommended transaction away from the broker-dealer without the broker-dealer receiving compensation for the trade.[31] However, this does not mean that broker-dealers are not responsible for such recommendations, as broker-dealers are subject to stringent conduct standards even when dealing with prospective clients.[32]

By contrast, the BIC Exemption would create a contractual relationship between a retirement investor and a financial professional even in instances where, for example, the retirement investor chooses to work with another financial professional. Thus, there could be more than one fiduciary and questions could arise regarding which fiduciary has liability for recommendations made to the investor.

Thus, we recommend, consistent with current regulations applicable to broker-dealers, the BIC Exemption be modified so that any required contract need only be executed *concurrent with or after* a prospective client becomes a client. The BIC Exemption contract should simply be included as part of the NAO documentation. The execution of the contract with the NAO documentation will provide retirement investors with "best interest" protections, while providing retirement investors with unfettered access to financial professionals and needed retirement products and services.

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[29] *See* FINRA, Regulatory Notice 12-55, at 2 (FAQ 6(a)).

[30] *See id*. (FAQ 6(b)).

[31] *See id*.

[32] For example, FINRA Rule 2010 requires that broker-dealers observe high standards of commercial honor and just and equitable principles of trade and Rule 2020 prohibits broker-dealers from effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance. *See* FINRA, Rule 2010, *Standards of Commercial Honor and Principles of Trade*, *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5504 and FINRA, Rule 2020, *Use of Manipulative, Deceptive or Other Fraudulent Devices*, *available at*: http://finra.complinet.com/ en/display/display_main.html?rbid=2403&element_id=5513.

ii. We Recommend Any Required Repapering of Current Client Agreements Be Effectuated Via Notice.

Similarly, requiring the execution of tri-party contracts for millions of existing contracts, within eight months or even twelve months, is not feasible and would be extremely costly. For example, Wells Fargo Advisors ("WFA") incurred costs of over $4 million to implement new account documentation requirements under FINRA Rule 2090.[33] Moreover, only about 25% of WFA brokerage clients currently receive account documents via electronic delivery. Therefore, the costs for obtaining new tri-party contracts for millions of accounts would be extraordinary and may not be economical for smaller balance accounts.

In addition, not all clients diligently sign and return paperwork – either electronically or through the mail, which means that only a fraction of retirement investors may affirmatively enter into the contract envisioned by the Department in the proposed implementation timeframe. Thus, for existing clients, we recommend the Department confirm that the BIC Exemption is available if existing contracts are amended consistent with the contract's amendment provisions, including, without limitation, provisions authorizing amendment by notice or negative consent. Permitting financial institutions to amend existing contracts by notification would be efficient and would allow them to be in compliance with the contract requirements under the BIC Exemption within a relatively short period of time. We estimate it could be completed within twenty-four months.

Utilizing a notice amendment process alleviates the practical issue of how to address instances where the retirement investor does *not* sign the contract. Should the Department require affirmative execution of BIC Exemption contracts for existing retirement investors, there is not a good service alternative for the potential "non-responders." Moreover, some retirement account custodians and trustees may feel obligated to resign from a "non-responder" account which would result in a distribution to the retirement investor, leading to more issues and concerns. Consequently, should there be a requirement to establish a new contractual relationship for existing clients, we recommend it be done though a negative consent process.

iii. We Recommend the BIC Exemption Not Require Actual Signatures in Connection with the Contract.

The BIC Exemption appears to contemplate that the contract will be signed by the financial institution, financial professional and the client. As part of NAO procedures, client agreements typically only require a client signature, which is sufficient to create a legally enforceable right on the part of the client. We believe the requirement that the financial institution sign the contract will raise operational issues, while not enhancing responsibility for contract terms. We also believe the requirement that financial professionals sign the contract will result in numerous practical problems. For example, financial institutions with multiple service models may provide client services through multiple financial professionals. In addition, it may not be possible to

[33] FINRA, Rule 2090, *Know Your Client Rule* (adopted by SR-FINRA-2010-039 and amended by SR-FINRA-2011-016 effective July 9, 2012), *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9858.

identify the impacted financial professionals in advance of contract execution and the financial professionals servicing a particular client may change over time. We also note that financial professionals are agents of their respective financial institutions and as such their signatures are not necessary for the financial institution to enforce its policies and procedures against them. Therefore, we recommend financial professional signatures should not be required so long as the financial institution remains bound by the terms of the contract and the financial institution implements policies and procedures to hold the financial professional accountable for any breach of contract terms.

B. ***The Terms Used in the "Impartial Conduct Standards" Should Be Clarified to Ensure Investor Choice.***

A source of confusion is that the "Impartial Conduct Standards" do not exactly mirror related ERISA provisions. These standards should be modified to use the exact language of ERISA Section 404 or, alternatively, be inapplicable to ERISA covered plans.[34] In order to ensure investor choice is retained, we recommend the Department provide clarity regarding how the "Impartial Conduct Standards"[35] permit common compensation structures "that, in the absence of an exemption, would not be permitted."[36] This includes providing examples of how to apply the "Impartial Conduct Standards" to similar products with different compensation structures, payment models and proprietary products.

i. We Recommend Retirement Investors <u>Have the Ability to Choose Prudent Products.</u>

In order to make a recommendation that is in a retirement investor's "best interest," a financial professional should not be restricted to only recommending the least expensive product or strategy. A prudent investment product is not necessarily the lowest cost alternative. As such, there should be no "low fee exemption" (as the Department indicated it is exploring in the Proposal),[37] nor bias for passive products, because investment cost should be only one factor in determining what product or service is in the investor's best interest.

The "Impartial Conduct Standards" allow financial institutions and financial professionals (and their affiliates) to receive "reasonable compensation" under certain conditions.[38] The Department should confirm that this condition does not require financial professionals and financial institutions to recommend the lowest cost alternative. In this respect, the Department has long recognized that a fiduciary need not select the lowest-cost service provider so long as the compensation or fees paid to the service provider are determined to be reasonable in light of

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[34] 29 U.S.C. § 1104.

[35] 80 Fed. Reg. at 21984 (§ II(c)).

[36] *Id*. at 21961.

[37] *See id*. at 21977-80. Furthermore, even if we wanted to provide substantive comments on this undefined proposal, we do not have adequate information to do so.

[38] *Id*. at 21984 (§ II(c)(2)).

the particular facts and circumstances.[39] The BIC Exemption clearly contemplates a wide variety of indirect compensation. We believe this provision should not prohibit the financial institution from receiving different types and different amounts of fees from different sources with respect to services provided in connection with a plan.

The BIC Exemption also requires financial institutions to contractually warrant they have adopted written policies and procedures that are reasonably designed to "mitigate the impact of material conflicts of interest" that exist with the provision of investment advice and ensure adherence to the "Impartial Conduct Standards."[40] While the Department stated in the preamble to the BIC Exemption that a "level-fee" structure is not required to mitigate "material conflicts of interest," the Department provided five examples of permissible compensation structures, all of which are variations of level-fee arrangements.[41] Thus, recommending an investment product where a level-fee arrangement is not in effect could be deemed an unacceptable contractual liability risk by financial institutions in view of the examples that the Department has provided.

As an example of a situation where a level-fee is not paid, a financial professional may recommend Fund A – which has historically outperformed against its benchmark – to a retirement investor instead of Fund B – which has historically underperformed against its benchmark. If Fund A pays more in compensation to "the Adviser, Financial Institution, or any Affiliate and Related Entity"[42] than Fund B, we are concerned the investor could seek a claim for damages simply because, despite the stronger performance of Fund A, the investor believes the financial professional was not acting without regard to his or her own financial interests because of the greater compensation paid to the financial professional by Fund A. The possibility of this claim, therefore, would make financial professionals reluctant to recommend an investment in Fund A, even where Fund A may be the more appropriate investment. We request that the Department provide examples of fee arrangements other than level-fee structures to illustrate that a higher compensation level does not result in a per se violation of the "best interest" standard or required contractual warranties.

The Department should also confirm that merely recommending products that are not the lowest cost alternative would not, in and of itself, "tend to encourage individual Advisors to make recommendations that are not in the Best Interest of the Retirement Investor" in violation of the proposed warranties.[43] FINRA Regulatory Notice 12-25 ("Notice 12-25") provides guidance as to the appropriate factors to be considered in making a recommendation in the best

[39] *See, e.g.*, Dep't of Labor, Employee Benefits Security Admin., *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 72 Fed. Reg. 70988, at 70993 (proposed Dec. 13, 2007) (to be codified at 29 C.F.R. pt. 2550) ("A responsible plan fiduciary should not consider any one factor, including the fees or compensation to be paid to the service provider, to the exclusion of other factors."), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2007-12-13/pdf/E7-24064.pdf.

[40] 80 Fed. Reg. at 21984 (§ II(d)(2)).

[41] *Id*. at 21971.

[42] *Id*. at 21984 (§ II(c)(1)).

[43] *Id*. (§ II(d)(4)).

interests of the client. Notice 12-25 clarifies aspects of FINRA's Suitability Rule, and states with respect to product or strategy costs that:

> The requirement that a broker's recommendation must be consistent with the customer's best interests does not obligate a broker to recommend the "least expensive" security or investment strategy…as long as the recommendation is suitable and the broker is not placing his or her interests ahead of the customer's interests. … *The cost associated with a recommendation…ordinarily is only one of many important factors to consider when determining whether the subject security or investment strategy involving a security or securities is suitable.*
>
> The customer's investment profile, for example, is critical to the assessment, as are a host of product- or strategy-related factors in addition to cost, such as the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions. These are all important considerations in analyzing the suitability of a particular recommendation, which is why the suitability rule and the concept that a broker's recommendation must be consistent with the customer's best interests are inextricably intertwined.[44]

We recommend the Department adopt this standard. The inclusion of this standard would permit financial professionals to recommend a product or service that is in the investor's best interest, whether it is the least expensive option or not, and will allow transaction-based accounts to continue to be viable options for client accounts.

ii. We Recommend Retirement Investors Have <u>the Freedom to Choose Appropriate Payment Models.</u>

The interaction between the Proposal's "Impartial Conduct Standards" and the BIC Exemption's conflict mitigation provisions appear to restrict an investor's choice regarding advice models if the alternatives involve differential compensation received by the financial institution or financial professional.[45] The ability to choose the most economical payment models is critically important for smaller balance accounts. Many clients, retirement or otherwise, choose a "pay as you go" model where clients incur charges when a transaction occurs while higher income clients tend to have a mix of commission based accounts and advisory or asset fee based accounts.

We have observed in households served by our WFA affiliate that as wealth increases, a greater percentage of investors elect a "hybrid model" of investing in which some of their assets are held in commission-based brokerage accounts and an increasing percentage of assets shifts toward fee-based advisory accounts. Among WFA households maintaining at least one advisory

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[44] *See* FINRA, Regulatory Notice 12-25, *Suitability* (May 2012), at 3 (FAQ 1) (emphasis added).

[45] Retirement investors currently have several choices of how to pay for service (1) a one-time fee for advice, (2) an ongoing fee for continuing advice, (3) fee for transactions, including incidental to advice and (4) fee for transactions effected without receiving any personalized advice.

account, nearly two thirds also have a brokerage account. Moreover, WFA households with both brokerage and advisory accounts hold nearly four times the assets of households with only a brokerage account.

Similarly, when reviewing the effects of simply extending the Investment Advisers Act of 1940 (the "Advisers Act") to cover client activity with broker-dealers the SEC stated:

> If, in response to the elimination of the broker-dealer exclusion, broker-dealers elected to convert their brokerage accounts from commission-based accounts to fee-based accounts, certain retail customers might face increased costs, and consequently the profitability of their investment decisions could be eroded, especially accounts that are not actively traded, e.g., fee-based accounts that trade so infrequently that they would have incurred lower costs for the investor had the accounts been commission-based. This practice is commonly referred to as "reverse churning" or "underutilization."[46]

Consequently, the Department must ensure that investors retain the ability to choose the appropriate fee and advice model for their particular situation. We request the Department clarify how the requirements of the BIC Exemption can be satisfied through a commission-based account. As we note above, the only compliant examples provided by the Department in the Proposal were level-fee options. This is particularly important in light of the fact that level-fee accounts may not be the best option for investors with limited trading activity.

iii. We Recommend Providing Guidance on How Financial Professionals Can Recommend Proprietary Products Under the "Impartial Conduct Standards."

The impact of the BIC Exemption on proprietary products[47] is unclear. We recommend the Department clarify that as long as a proprietary product is in the best interest of the investor and the cost is reasonable compared to other like products, the investor should not be restricted from using the product. To do so, we recommend the Department either eliminate the phrase "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity or other party" [48] or replace it with "despite the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity or other party." We believe that this better captures the intent of the Department which has a history of permitting conflicted fiduciaries to continue to act, subject to conditions, through its administrative exemption process. Should it remain unaltered, the Department must provide guidance on how this provision can be applied in a differential compensation environment and where proprietary products may be available.

[46] SEC, *Study on Investment Advisers and Broker-Dealers* (Jan. 2011), at 152-153, *available at*: https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[47] Virtually all major broker-dealers have proprietary funds. Typically proprietary products are developed, in part, because a financial institution sees a client need and believes it can satisfy it.

[48] 80 Fed. Reg. at 21984 (§ II(c)(1)).

Furthermore, if sales of proprietary funds do indeed have different standards applicable to them under the Proposal, we believe the final rule will have to address many nuances surrounding proprietary status, which may change over time. For example, many existing Wells Fargo proprietary funds held by our clients date from a period when they were acquired from a predecessor firm. They are proprietary today but were not proprietary when purchased. Conversely, some financial institutions have divested their asset management businesses and a fund that was proprietary may become non-proprietary. On a smaller scale, when a financial professional moves from one financial institution to another, he or she typically keeps existing clients in existing investments and those investments may move between proprietary and non-proprietary status. We believe the fact that "proprietary" status is transient is one more reason not to adopt rules that place extra burdens on sales of proprietary funds.

C. ***The Definition of "Asset" Unnecessarily Limits Investor Choice.***

The BIC Exemption covers the receipt of compensation for only the limited list of approved investment products and securities included in the definition of "Asset."[49] This definition excludes numerous investments that investors make in IRAs, including, for example, limited partnerships, hedge funds, private equity funds, and covered calls, and may exclude future product innovations unless it is frequently updated. In excluding these investments, the Proposal fails to recognize the value that other types of investments, such as alternative investments, can add to investor retirement portfolios. Furthermore, the definition of Asset does not appear to cover the recommendation of services, such as advisory or discretionary management programs.

i. We Believe the Recommendation of a Firm Sponsored Advisory Program Must Be Clearly Permitted.

We are unclear whether a financial professional may refer or recommend retirement investors to an affiliated or unaffiliated investment adviser or proprietary investment advisory product under the BIC Exemption. We understand the Department did not intend to restrict access to such services; if so, the Department should eliminate the "Asset" list, or revise the list to include such services.[50] Moreover, we believe the sale of any product or service subject to an existing exemption, or otherwise compliant, should be excluded from the Proposal or subject only to the "best interest" standard requirement of the BIC Exemption.

ii. We Recommend Eliminating the "Asset" List.

Financial professionals and retirement investors should be permitted to make judgments about appropriate investments. The Department should not substitute its judgment for that of a fiduciary, concerning product and service selections. As all recommendations will be subject to

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[49] 80 Fed. Reg. at 21987 (§ VIII(c)).

[50] We ask that the Department confirm that to the extent that the recommendation of a related investment adviser does not result in third-party compensation to the recommender and the advisory program itself does not result in differential compensation to the financial professional, there should be no need for compliance with BIC Exemption for the initial recommendation of the advisory program.

a "best interest" standard, there is no need to place limits on investments beyond those Congress has already established.[51] The "best interest" standard requires investment advice be "based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor." This standard makes a "one-size fits all" limitation on investor choice of products and services unnecessary, as financial professionals are already restricted to recommending only those products or services that are in their clients' best interest.

Finally, a limited definition of "Asset" also does not allow for the introduction of innovative products. For example, no one could have predicted the development and tremendous growth of exchange traded funds ("ETFs") – which are included in the current definition of "Asset" – over the past decade and a half. Therefore, we recommend replacing the term "Asset" with the phrase "securities or other property" in order to eliminate the concept of a permitted list of investments.

iii. <u>We Recommend Annuities Continue to Be Offered Under PTE 84-24.</u>

Annuities are commonly used by retirement investors in their IRAs as a source of regular income. However, the Department has proposed modification or elimination of existing prohibited transaction exemptions ("PTE") upon which the insurance industry currently relies that will present significant challenges to their continued use. In particular, PTE 84-24 would be revised to exclude advice about variable annuities and other registered products to IRA owners, which advice would now have to meet the requirements of the BIC Exemption.[52] Financial professionals and institutions will be challenged to offer annuities under the BIC Exemption, however, because of the investment platforms that are built in to such products. As such, we recommend, due to variable annuities' unique insurance component, they should continue to be offered under PTE 84-24.

iv. <u>We Recommend Eliminating Limits on Sophisticated Investor Choice.</u>

Should the Department choose to retain its narrow definition of "Asset," we recommend the definition not apply to retirement investors that can be designated as accredited retail or institutional investors. We are making a similar recommendation with respect to the Seller's Carve-Out in Section I.B.ii. The apparent rationale behind the definition of "Asset" was to capture the most common IRA investments. This limitation should not apply to more sophisticated investors who are familiar with the potential risks of less common investment types. Such an approach would also be consistent with FINRA's Suitability Rule, which includes a carve-out from the customer-specific suitability obligation for institutional accounts.[53]

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[51] *See* 26 U.S.C. § 408.

[52] 80 Fed. Reg. at 22010-22020.

[53] *See* FINRA, Rule 2111(b). "A member or associated person fulfills the customer-specific suitability obligation for an institutional account…if (1) the member or associated person has a reasonable basis to believe that the institutional customer is capable of evaluating investment risks independently…and (2) the institutional customer affirmatively indicates that it is exercising independent judgment in evaluating the member's or associated person's recommendations."

v. We Recommend the BIC Exemption Provide Limited Compliance Requirements for Products and Services that Address Conflict Issues Under Existing Regulations.

Many financial institutions have developed products and services – both discretionary and non-discretionary – under which they act as a fiduciary today. These products and services were developed to comply with existing exemptions or are otherwise structured to avoid conflict and prohibited transaction issues. We believe that the most appropriate solution for these types of products and services is to make clear that the sale of such a product or service is not "investment advice." However, to the extent that such a sale might be considered a recommendation that is advice, we recommend the BIC Exemption provide relief for the recommendation and the associated compliance conditions be limited to contractual provisions implementing the "best interest" standard of care. We believe the other proposed requirements for the BIC Exemption, such as the list of permissible "Assets" and lengthy disclosures, do not provide additional protections for investors when the product or service is already compliant with ERISA and the prohibited transaction restrictions of the Internal Revenue Code.

D. ***The Proposed Disclosures Fail to Leverage Existing Disclosures and Will Not Be Effective.***

We support the need for effective disclosures as part of a well-designed best-interest standard, and encourage the Department to craft a disclosure regime that advances investor protection while avoiding duplication that may frustrate and confuse retirement investors. The BIC Exemption requires extensive new disclosures, which are duplicative of many current disclosures. The nature and format of the new disclosures would also require extensive rebuilding of current systems. There is simply no way to plan, build, test and implement the bevy of disclosures set forth in the proposed implementation timeframe.

The only practical avenue we see to implement additional disclosure requirements in a reasonable time period is to leverage existing disclosure requirements. Robust disclosures are already provided under ERISA Section 408(b)(2). These disclosures were implemented less than three years ago by the industry at considerable expense. Therefore, we recommend, instead of requiring new disclosures, the Department should rely on these 408(b)(2) disclosures as currently in place, as well as leverage other disclosures that are already provided, such as summary prospectuses, prospectuses, confirms, informational guides, Form ADV Part 2(a) and (b) and account agreements.[54]

[54] In addition, Wells Fargo provides numerous guides and disclosures in paper and electronically through our websites, such as our *A Guide to Investing in Mutual Funds*, *Guide to Buying Annuities*, *A Guide to Choosing a Financial Professional with Wells Fargo Advisors* or *Wells Fargo Advisors Financial Network*, *A Guide to Financial Protection for Older Investors* and *Investment Advisory and Brokerage Services* guide. These guides, and others, are available at: https://www.wellsfargoadvisors.com/disclosures/guide-to-investing.htm.

i. We Believe the Point of Sale Transaction <u>Disclosure Is Duplicative of Existing Disclosures.</u>

The BIC Exemption's point of sale transaction disclosure requires provision of a chart setting forth the "all-in" cost and anticipated future costs over a 1, 5 and 10 year period of a recommended asset prior to execution of the purchase of the asset. We believe this disclosure as proposed will be difficult, if not impossible, to provide.

As an initial matter, the Proposal calls for a point of sale disclosure but the total cost of transaction – to the penny[55] – cannot be provided until *after* the transaction has been executed. In addition, the disclosure appears to be modeled after mutual fund summary prospectuses. Other asset types such as stocks or bonds do not have future costs that can be readily broken down into 1, 5 and 10 year segments. Furthermore, providing "reasonable assumptions" about an investment's future performance could be perceived as conflicting with FINRA rules prohibiting predictions or projections of future performance.[56]

In addition, this disclosure would also unnecessarily interrupt the investment process. As the disclosure must be in form of a chart, it cannot be communicated verbally over the phone. By the time the chart is provided to an investor, the recommendation itself could be stale, such as in cases where a stock price changes.

Mutual fund summary prospectuses provide investors with 1, 3, 5 and 10 year total costs (based on a $10,000 investment with a reasonable growth assumption) at or prior to settlement of a transaction. Additional disclosures are also provided regarding annuity costs and qualified plan fees and other costs are disclosed on transaction confirms. Because retirement investors are already provided with a wealth of information at or prior to settlement regarding initial and ongoing costs of their investments, we believe an additional point of sale disclosure is unnecessary. If the point of sale disclosure is not eliminated, we recommend the Department rely on mutual fund summary prospectuses for mutual fund transactions, as these documents provide a large portion of the information proposed to be disclosed. As we note above, we believe the existing 408(b)(2) disclosure process could also provide this information and already serves this purpose for ERISA-covered plans today.

The Department has also asked for comment on the effectiveness and cost of a "cigarette warning"-style disclosure, which could be placed on a confirmation, and provided instead of the point of sale disclosure. While such a disclosure would be less costly, we believe there is nothing *inherently bad* for a person about investing with a financial professional. Even though we do not believe such a "warning" is necessary, we recommend this type of disclosure at account opening as the more appropriate course should the Department decide additional information should be provided.

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[55] Wells Fargo recommends that this requirement be changed to provide for the disclosure of ranges of expenses.

[56] *See, e.g.*, FINRA, Regulatory Notice 12-29, *Communications with the Public* (June 2012), at 16 (Predictions and Projections of Performance), *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p127014.pdf. FINRA Rule 2210(d)(1)(F) prohibits communications predicting and projecting performance with an allowance for hypothetical illustrations of mathematical principles.

ii. <u>We Believe the Annual Disclosure Is Unnecessary.</u>

The Department has also proposed in the BIC Exemption an annual disclosure (1) identifying assets purchased or sold, (2) total amount of fees or expenses paid by retirement investor on each asset and (3) compensation received by the financial institution and financial professional for each asset. As an initial matter, these proposed disclosures are unlikely to assist the average investor in making informed decisions. Assets purchased and sold throughout the year already appear on account statements throughout the year, as does much fee and expense information. Moreover, we reiterate our belief that the Department should leverage existing fulsome 408(b)(2) disclosures rather than create a new disclosure. While some information, such as indirect compensation received in connection with an asset, may not appear on regular statements, it could be disclosed using the 408(b)(2) disclosure that is already available.

Finally, systematically collecting a detailed accounting of the dollars attributable to each asset in every account, if it is even possible, will significantly add to the cost of servicing accounts, making the servicing of small balance accounts uneconomical or driving investor costs higher. It is also unclear how such an amount could be determined in time to meet the 45 day deadline. We understand that the Department seeks to ensure that individuals have information about the cost and compensation associated with their account. However, because of the complexity of the proposed disclosure, we recommend that the Department leverage existing disclosures as part of the implementation of the Proposal and engage in a subsequent process to consider a disclosure that supplements existing disclosures and is easier to understand and implement.

iii. <u>We Are Concerned that the Public Website Disclosure Will Increase Costs.</u>

In addition to the transaction and annual disclosures, the BIC Exemption requires disclosure on a public website of direct and indirect material compensation within the last 365 days. This is a hugely complicated undertaking requiring the listing of tens of thousands of products that requires daily updating.

We estimate the cost of the proposed website will be significant and expect it cannot be constructed within the proposed eight-month implementation period. In addition, the phrase "last 365 days" implies a rolling disclosure that must be updated daily as to potentially tens of thousands of data points. Continually updating the website in this manner will lead to substantial additional costs. We believe given the comprehensive disclosure regime already in place such costs are unwarranted. Therefore, if the public website disclosure is retained, we recommend it be limited to a static website with the current 408(b)(2) disclosure and quarterly updates of recent changes. We believe this would considerably reduce compliance costs, while providing investors with the information they need to make an informed decision. As is the case with the proposed transaction and annual disclosures, this information will be supplemented by existing disclosures contained in prospectuses, confirms and retirement investor statements.

iv. We Believe the Data Disclosure to <u>the Department is Overly Burdensome.</u>

The BIC Exemption requires financial institutions to disclose to the Department, within six months of a request, data for the preceding six year period concerning investment inflows, outflows and holdings for each asset purchased, sold or held under the BIC Exemption. In addition, financial institutions must maintain a record of individual investors' portfolio performance and the identity of their adviser. Even if individually-identifiable financial information is removed in any public disclosure of such data, we are concerned that sensitive information about individual investors would remain at risk in the event of a data breach, such as those which have recently victimized millions of federal employees.

In addition, we believe the proposed method of aggregating this data will fail to show how the choice of a particular investment strategy, including asset selections or decisions based on investor age or risk tolerance, may have impacted portfolio performance. Judging financial professionals in the absence of such critical nuance would unfairly assess their roles in assisting investors to meet their unique goals.

Finally, we are unclear how this requirement will benefit retirement investors as a comprehensive disclosure framework is already administered by the SEC and FINRA. We anticipate the systems necessary to effect this additional reporting requirement will take significant time and money to build. As such, we believe this requirement is unnecessary and unduly burdensome and the Department should leverage existing recordkeeping requirements instead of imposing new, costly recordkeeping requirements that will add to the costs of servicing retirement accounts.

E. ***The BIC Exemption Contract Warranties Are Unnecessary.***

Given the comprehensive legal and regulatory framework already in place,[57] and the other proposed provisions of the BIC Exemption contract, we believe that the proposed warranties should not be part of the contract. We believe the ability of investors to seek redress should the "best interest" standard be violated is sufficiently protective. In addition, as set forth above, we believe conflicts of interest should be addressed by utilizing the existing Form ADV to help investors further understand a financial professional's compensation and to reduce or eliminate conflicts of interest.

We are concerned that the inclusion of the warranties in the contract will give rise to significant risk and uncertainty on the part of financial institutions. For example, a warranty to comply with federal or state law may have the effect of penalizing financial institutions and financial professionals for any slight violation or failure to comply. As we are subject to

[57] Investor protections under the broker-dealer model are quite extensive and include, among other requirements, qualification and registration for broker-dealer representatives, continuing education requirements, a transparent system for reporting of disciplinary information of all kinds, specific supervision requirements, pre-use review and approval of communications with the public and formal rules governing a broker-dealer representative's outside business activity. Furthermore, FINRA routinely examines financial institutions for compliance with these and other requirements.

substantial regulatory and legal oversight, we think the provision related to compliance with all applicable federal and state law should be eliminated entirely. We do not believe that this warranty gives an additional protection to investors unavailable under the relevant law itself.

While we believe the "best interest" standard obviates the need for the other proposed warranties, if they are retained in any form, we believe they should instead be conditions of the BIC Exemption itself. We note that regulators generally are better positioned to review the types of activities covered by the proposed warranties. For example, it would be extremely burdensome to respond to individual claims to review policies and procedures. Because the requirements of the BIC Exemption are so complex, we also suggest that the Department consider some procedure for financial institutions to correct errors and maintain compliance on an ongoing basis.

F. ***The Range of Investment Options Notice and The BIC Exemption's Other Provisions Are Incongruous.***

We are uncertain of the purpose of the notice required under the Range of Investment Options provision of the BIC Exemption.[58] While the Department restricted the types of investments that retirement investors can make in IRAs elsewhere in the BIC Exemption, the provision's "limited range of investment options" notice appears to penalize financial professionals or financial institutions who only offer a limited set of investments, such as certain investment specialists. The business of such specialists, who are not responsible for a retirement investor's entire portfolio, should not be hampered by the requirement that they notify a client or prospective client that they do not "recommend a sufficiently broad range of Assets."[59] Furthermore, the definition of "sufficiently broad" is unclear. For example, a retirement investor requiring only the purchase of a particular "Asset" from a financial professional may very well have their needs satisfied. We recommend the Department provide greater clarity with respect to when the requirements of the notice would apply to financial institutions with only proprietary products (e.g., offering only proprietary mutual funds and direct to fund retirement investors).

G. ***The Pre-Existing Transactions Exemption Should Be Broadened.***

The Pre-Existing Transaction Exemption is conditioned on not providing additional advice to existing clients and does not include investments that are not "Assets." We believe the Pre-Existing Transaction Exemption should be expanded to permit the ongoing advice most consumers expected at the time of purchase without fundamentally disrupting the relationship by requiring a contract and the other BIC conditions. Therefore, we recommend that the Department consider an exemption to *all* accounts existing as of the effective date of the final rule.

Alternatively, the BIC Exemption conditions should only apply to investments purchased after the applicable date. Under this alternative, we would still require guidance and examples of

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[58] 80 Fed. Reg. 21985 (§ IV(b)).

[59] *Id*. (§ IV(b)(4)).

how financial institutions should deal with such new limitations and restrictions on existing investments so that they remain grandfathered. Furthermore, this exemption should include existing investments that do not conform to the definition of "Assets." For example, if a client has a municipal bond, that client should be permitted to keep the bond instead of having to liquidate it prematurely or purchase another asset regardless of whether it falls within the BIC Exemption's "Asset" list. In addition, institutions should be permitted to advise an individual to liquidate such a grandfathered holding, without such a recommendation being considered "investment advice."

III. THE PRINCIPAL TRANSACTION EXEMPTION IS TOO NARROW AND SHOULD LEVERAGE EXISTING REGULATORY REQUIREMENTS.

As an initial matter, we believe a limitation on principal trading, and therefore the Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs ("Principal Transaction Exemption"), will not benefit retirement investors and, thus, *all* principal transactions should be exempted. Alternatively, should there be any limitation on principal trading, it should be consistent with the relief provided by the SEC under Rule 206(3)-3T ("Rule 206(3)-3T" or the "Rule") of Advisers Act.[60]

Rule 206(3)-3T applies to institutions that are dually registered as investment advisers and broker-dealers and to transactions in non-discretionary accounts at such institutions. Rule 206(3)-3T does not relieve in any way an investment adviser from acting in the best interests of an advisory client, including fulfilling the duty with respect to the best price and execution for the particular transaction for an advisory client. Nor does the Rule relieve an investment adviser from any obligation that may be imposed by section 206(1) or (2) of the Advisers Act[61] or by other applicable provisions of the federal securities laws.

We believe the Principal Transaction Exemption should mirror Rule 206(3)-3T, including with respect to the best execution and pricing obligations. Furthermore, harmonizing the Principal Transaction Exemption with the requirements under Rule 206(3)-3T would make the Exemption both operationally workable and would benefit investors purchasing or selling certain securities on a principal basis.

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[60] *See* SEC, Rule 206(3)-3T, Investment Advisers Act of 1940, *Temporary Rule for Principal Trades with Certain Advisory Clients* (codified at 17 C.F.R. pt. 275.206(3)-3T).

[61] 15 U.S.C. § 80b-6:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly –
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

A. *The Exemption Should Include Other Types of Securities.*

The Principal Transaction Exemption is unnecessarily limited to certain debt securities.[62] We believe retirement investor's will be afforded greater, and equally prudent, choices under a limitation similar to Rule 206(3)-3T with respect to the types of securities covered. Rule 206(3)-3T permits principal transactions in *any* security. The only exception is where the investment adviser or affiliate is the issuer of, or, at the time of the sale, an underwriter of, the security – unless the security is an "investment grade debt security."[63] We encourage the Department to make such a change to provide retirement investors flexibility to choose what accounts are most appropriate for purchasing initial public offerings ("IPOs") and other such capital markets transactions.

B. *A Client's Written Prospective Consent to Act as a Principal Should Be Sufficient.*

We believe the contract required under the Principal Transaction Exemption is not necessary. The contract required under the Principal Transaction Exemption contains the same elements as the BIC Exemption and, therefore, raises many of the same issues. In particular, we note again that the industry typically relies on negative consent for account changes and obtaining the retirement investor's affirmative written consent will be operationally challenging.

We recommend the contract element of the Principal Transaction Exemption be limited to a written prospective consent similar to those which financial institutions customarily capture under the Rule 206(3)-3T.[64] Such a consent would authorize the financial professionals – directly or indirectly – to act as principal. These disclosures would also include a conspicuous, plain English statement that the client may revoke the written consent without penalty at any time by written notice to the financial professional.

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[62] The Principal Transaction Exemption also contains an unclear requirement that the debt possess no greater than "moderate credit risk." This term is not defined in the Proposal. Wells Fargo suggests that the Department adopt the Rule 206(3)-3T definition of "investment grade debt security." *See* 17 C.F.R. pt. 275.206(3)-3T(c).

[63] "Investment grade debt security means a non-convertible debt security that, at the time of the sale, is rated in one of the four highest rating categories of at least two nationally recognized statistical rating organizations." *Id*.

[64] Under Rule 206(3)-3T, an advisory client must execute "a written, revocable consent prospectively authorizing the investment adviser directly or indirectly to act as principal for its own account in selling any security to or purchasing any security from the advisory client, so long as such written consent is obtained after written disclosure to the advisory client explaining:

(i) the circumstances under which the investment adviser directly or indirectly may engage in principal transactions;

(ii) the nature and significance of conflicts with its client's interests as a result of the transactions; and

(iii) how the investment adviser addresses those conflicts."

Id. at 206(3)-3T(a)(3).

C. *The Disclosures Required Under the Exemption Are Unnecessarily Burdensome.*

The pre-transaction disclosures required under the Principal Transaction Exemption are operationally impracticable. In particular, the requirement that the price is at least as favorable to the plan or IRA as the contemporaneous price for the debt security (or similar security if a price is not available for the same debt security) offered by two ready and willing counterparties that are not affiliated with the financial institution. As an initial matter, the idea that there are at least two other counterparties is somewhat inconsistent with the stated rationale of the Principal Transaction Exemption.[65] More importantly, compliance with this condition would increase costs and narrow the universe of securities for which the Principal Transaction Exemption is available.

We recommend the two quote requirement be eliminated. In the alternative, we recommend an allowance for instances in which obtaining two quotes is impossible. For example, retirement investors may need to liquidate a percentage of their account to meet an immediate income need. We believe the Department's assumption that it will only take "five minutes" to get the two quotes,[66] based upon our experience, is faulty in many instances and that retirement investors will be harmed if they are forced to wait the duration of time that it will take to accumulate the necessary information.

We believe the mark-up/mark-down disclosure is also unreasonable. For example, this disclosure will require a unique confirm for IRA accounts. Our recommendation is that this disclosure be eliminated.

The Principal Transaction Exemption further requires the financial institution and financial professional to provide certain written information to the retirement investor annually. This annual disclosure includes a list identifying each principal transaction engaged in during the applicable period, the prevailing market price at which the debt security was purchased or sold, and the applicable mark-up/mark-down or other payment for each debt security. We believe this disclosure is unnecessary and that the disclosure of the transaction price as per Rule 206(3)-3T is sufficient to achieve the objectives of the Principal Transaction Exemption.[67]

The Principal Transaction Exemption also requires upon-request disclosures at any time within six years of the debt security's purchase or sale. We are uncertain exactly what additional information, not already provided, must be saved for six years. We recommend the Department eliminate these burdensome requirements and adopt the disclosures required under Rule 206(3)-3T.

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[65] We understand the Department's rationale to be that the danger of conflicts of interest in principal transactions involving other types of securities, which may be more "widely available," outweighs the reduced choices for plans. 80 Fed. Reg. 21994. Whereas "debt securities…may need to be sold on a principal basis because particular bond issues may be sold by only one or a limited number of financial institutions." *Id*.

[66] *Id*. at 22000.

[67] Rule 206(3)-3T requires investment advisers to send to the client, no less frequently than annually, written disclosure containing a list of all transactions that were executed in the client's account in reliance upon this rule, and the date and price of such transactions. *See* 17 C.F.R. pt. 275.206(3)-3T(a)(6).

D. *Existing Investor Protections Mitigate the Risk of Excessive Mark-Ups/Mark-Downs and the Need for Additional Pricing Transparency*.

The Principal Transaction Exemption requires financial institutions to provide a written confirmation of the principal transaction in accordance with Rule 10b-10 of the Securities Exchange Act of 1934[68] that also includes disclosure of the mark-up/mark-down or other payment to the financial institution, financial professional or affiliate in connection with the principal transaction. As an initial matter, we note that Rule 10b-10 does not require disclosure of mark-ups/mark-downs and that putting such information on the trade confirmation may have to be approved by the SEC.

Rule 206(3)-3T requires investment advisers to send a written confirmation of the transaction at or before completion of each such transaction that includes, in addition to the information required by Rule 10b-10, a conspicuous, plain English statement of the information that the adviser disclosed to the client. This includes disclosure to the client prior to the execution of the transaction that the adviser may be acting in a principal capacity in connection with the transaction and the client authorized the transaction; and that the adviser sold the security to, or bought the security from, the client for its own account.[69] We believe this confirmation is sufficient.

IV. MEETING THE EIGHT-MONTH IMPLEMENTATION DEADLINE IS IMPOSSIBLE.

The Proposal is one of the most complicated regulatory initiatives proposed in recent memory. Yet the Department is proposing a short eight-month implementation time period to largely restructure our entire approach to advising retirement investors, including, but not limited to, repapering millions of existing retirement accounts, developing new disclosure processes, new supervisory processes, new training classes/modules and new data collection processes. The proposed eight-month implementation time period is not practicable and could cause unintended harm to the retirement investors the Department purportedly seeks to protect.

The Department vastly underestimates the time and resources necessary to code, build and implement entirely new technology infrastructure to service and support the new regulatory requirements. The actual implementation period is compressed even further given required system and compatibility testing prior to any production.

Other significant and less complicated regulatory reporting initiatives have taken far longer to be fully implemented than the Department's proposed implementation timeline. The Department allowed a two year implementation period for the development of Rule 408(b)(2)

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[68] SEC, *Confirmation of Transactions*, Rule 10b-10, Securities Exchange Act of 1934 (codified at 17 C.F.R. pt. 240.10b-10).

[69] *See* 17 C.F.R. pt. 275.206(3)-3T(4) and (5).

disclosures.[70] Similarly the SEC allowed two years to implement its Large Trader Reporting initiative.[71] We estimate the development, testing and implementation of the Proposal's BIC Exemption's website disclosure alone would take far longer than eight months. To rush through the development of new processes, procedures, disclosure systems and employee training could lead to system and process shortcomings that increase, rather than decrease, investor protections.

In addition, considering the number of IRA accounts we have, and the number of IRA accounts even smaller financial institutions have, taking on manual processes is unworkable. Most financial institutions, large and small, will rely on automated systems and processes to comply. Therefore, an eight-month implementation timeframe is not realistic.

Given the uncertainty as to the details of the final rule, we cannot identify a specific timeframe to implement the Proposal's requirements with confidence. Based on the Proposal, though, processes such as mapping data; archiving and storage protocols; validation; and reconciliation may take three years or longer, notwithstanding other significant work such as system testing, security and governance protocols. Furthermore, this list just captures technology protocols. Implementing these changes alone suggests eight months is an unreasonable time period, and we recommend the Department establish a more realistic implementation time period of at least three years.

We also believe that the Proposal should be implemented in phases and that each phase give adequate time to implement the required activity properly and prepare for the subsequent phase. Our review of the Proposal is ongoing and we hope to provide a more detailed suggestion for phased implementation in a subsequent letter. However, we note that whatever the final form of the regulation and exemptions may be, it appears that there will be substantial change to existing procedures and systems and unanticipated challenges will certainly arise. Therefore, we strongly recommend that the Department provide a compliance relief period for those who make a good faith effort to comply in a timely fashion.[72]

V. AN EXEMPTION SHOULD BE MADE FOR ACTIVITIES REGULATED BY AN SRO OR A REGULATORY AGENCY.

Broker-dealers, investment advisers, banks and other institutions that provide investment advice to investors operate within a comprehensive regulatory framework established and

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[70] *See, e.g.*, Dep't of Labor, Employee Benefits Security Admin., *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 77 Fed. Reg. 5632, at 5649 (Feb. 3, 2012) (codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2012-02-03/pdf/2012-2262.pdf.

[71] *See, e.g.*, SEC, *Order Temporarily Exempting Certain Broker-Dealers and Certain Transactions from the Recordkeeping and Reporting Requirements of Rule 13h-1 under the Securities Exchange Act of 1934,* Release No. 34-70150 (Aug. 8, 2013), *available at:* http://www.sec.gov/rules/exorders/2013/34-70150.pdf.

[72] *See, e.g.*, Dep't of Labor, Employee Benefits Security Admin., *Frequently Asked Questions: The 2009 Form 5500 Schedule C,* at FAQ 40 (providing compliance relief period for good faith compliance efforts), *available at:* http://www.dol.gov/ebsa/faqs/faq_scheduleC.html.

overseen by various federal and state agencies and self-regulatory organizations ("SROs").[73] An exemption from the Proposal for accounts, including IRAs, or persons subject to the regulatory jurisdiction of an SRO or a regulatory agency under a "best interest" standard for the provision of personalized investment advice would mitigate the overlap between these regulatory frameworks and the Proposal.

We have supported the SEC's efforts to establish one harmonized fiduciary standard consistent with Section 913 of the Dodd-Frank Act.[74] We have also supported recent industry proposals to, among other changes, amend FINRA's Suitability Rule to include a "best interest" standard that applies to *all* retail brokerage accounts. Such changes to either SEC or FINRA rules would incorporate much of the "best interest" standard defined by the Department under the BIC Exemption and would build on the extensive protections already provided by current regulation.

As retirement planning includes assets outside of traditional retirement accounts, we believe a uniform standard will provide the most beneficial protection to investors by creating a consistent set of obligations across all account types and eliminating investor confusion concerning the applicable standard of care. Therefore, we propose an exemption under the Proposal for accounts, including IRAs, maintained at a financial institution or with a financial professional subject to the regulatory jurisdiction of an SRO or a federal securities regulator if such SRO or federal securities regulator subjects the associated financial institution or financial professional to standards no less than those specified in the BIC Exemption. The exemption for such accounts would require the SRO or federal securities regulator standards include at a minimum:

- A "best interest" standard of care for activities affecting customers;
- Disclosures of conflicts and commissions, such as summary prospectuses, prospectuses, confirms, Form ADV and 408(b)(2) disclosures, and mitigation of conflicts of interest to the extent practicable; and
- Any other customer protections developed by the SRO or federal securities regulator meeting the Department's fundamental requirements.

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[73] At the federal level, investment advice is regulated primarily by the SEC and FINRA. The investment advice provided by banks is generally exempt from SEC regulation, but depending on whether the bank is nationally chartered or state chartered, is subject to regulation and supervision by one or more of the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("FRB"), the Federal Deposit Insurance Corporation ("FDIC") and state banking authorities. Further regulation is overseen by the Municipal Securities Rulemaking Board ("MSRB") (for advice with respect to municipal securities) and the Commodity Futures Trading Commission ("CFTC") and the National Futures Association ("NFA") (for advice with respect to commodity trading).

[74] *See* Correspondence from Robert J. McCarthy, Director of Regulatory Policy at Wells Fargo Advisors, LLC, to Elizabeth M. Murphy, Secretary of Securities and Exchange Commission, *regarding* File No. 4-606; Release No. 34-69013; IA-3558; Duties of Brokers, Dealers and Investment Advisers, at 2-7 (July 5, 2013), *available at:* https://www.sec.gov/comments/4-606/4606-3127.pdf.

Such an exemption would allow the same standards to be applied across all accounts at broker-dealers. In addition, such an exemption would lead to direct regulatory enforcement of "best interest" standards through resolution of customer claims via existing processes at broker-dealers rather than by contractual litigation.

VI. **CONCLUSION**

Wells Fargo appreciates the opportunity to respond to the Department's Proposal. As discussed above, we have consistently supported, and continue to support, a "best interest" standard of care for retirement and nonretirement advice that enhances protections for investors while preserving access to the full range of investment products and services they currently enjoy. We believe this can be accomplished by establishing a "best interest" standard (to replace the existing suitability standard), enhancing disclosures to investors in a manner consistent with what is currently prescribed (utilizing existing disclosures including, for example, 408(b)(2) disclosures for retirement plan investors) and specifying these "best interest" standards through a new contract with investors that is entered into at the time an account is opened.

While we support the Department's efforts in creating a retirement standard of care that eliminates or mitigates conflicts of interest, we believe the limiting of investor education, the impractical and overly burdensome requirements of the BIC Exemption, the mandating of excessive warranties that create uncertainty, a short eight month implementation deadline and the complexities of overlapping regulatory frameworks make the Proposal an impracticable option as it is written today. We would also recommend the Department provide an additional exemption for IRA accounts of financial institutions regulated by an SRO or regulatory agency that has adopted an agreed upon "best interest" standard for the provision of personalized investment advice.

In sum, we believe the Proposal presents a number of issues for investor access to investment education and advice, investor choice in retirement investments and investor costs. Accordingly, we stand ready to work with the Department to achieve a workable outcome that benefits retirement investors. If you would like to further discuss any of Wells Fargo's comments, please contact Robert J. McCarthy, Director of Regulatory Policy, at (314) 955-2156 or robert.j.mccarthy@wellsfargoadvisors.com or Kenneth L. Pardue, Managing Director, Retirement Plans, at (314) 875-2927 or kenneth.pardue@wellsfargoadvisors.com.

Wells Fargo & Co.
Appendix B

A SUMMARY OF WELLS FARGO'S RECOMMENDED CHANGES TO THE PROPOSAL

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
1-14 § I	The proposed **definition of "fiduciary"** classifies all manner of information as fiduciary advice while providing only narrow carve-outs.	The **definition of "fiduciary" should be narrowed** and the available carve-outs should be appropriately broadened.	Investors will have access to the financial information they need to be informed participants and decision makers.
2 § I.A.i	Under the Proposal, **fiduciary status attaches to advice "for consideration"** by the investor.	Individuals should be **permitted to receive sales information** about available product options before committing to a financial professional or product.	Investors will have access to investment, distribution and other assistance in understanding available options before establishing a binding contractual commitment.
3 § I.A.ii	The Proposal **eliminates the "mutual agreement"** requirement contained in the current regulation.	Fiduciary obligations should attach when the financial professional and the investor **"mutually understand"** they have entered into an advice relationship.	A best interest fiduciary standard will protect the investor from the point an advice relationship begins while providing investors with access to essential information beforehand.
3 § I.A.iii	The proposed definition of "fiduciary" includes **advice that is "specifically directed to"** the investor.	The language "**specifically directed to" should be eliminated** to avoid capturing activities such as mailings discussing specific products and services.	Providing specific product and service information to an investor directly is essential to establishing a disciplined approach to retirement investing and planning.
4 § I.A.iv	The Proposal's distinction between **when a recommendation becomes advice** is unclear.	A brighter line for when fiduciary status begins should be established, **consistent with** the definition of "customer" under **FINRA Rule 2111 –** the "Suitability Rule."	Establishing a consistent regulatory framework – regardless of account type – will reduce investor confusion.

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Appendix B

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
5 § I.B.i	The **availability of the proposed Seller's Carve-Out** depends on (1) the number of participants in the plan, and (2) the amount of plan assets under management of the plan fiduciary.	As all ERISA fiduciaries must have sufficient expertise to prudently discharge their duties, the Seller's Carve-Out should cover **all ERISA-covered plans, regardless of size**.	Providing small plans will access to the Carve-Out will allow them to avoid unnecessary expenses.
5 § I.B.ii	The **Seller's Carve-Out** does not include **accredited retail or institutional investors**.	Accredited investors **should be included** in the Carve-Out consistent with current securities law.	Sophisticated investors who are familiar with the potential risks will be permitted greater latitude.
6 § I.B.iii	The **Seller's Carve-Out** has a number of conditions, including a requirement that the **counterparty receive certain written representations**.	The Carve-Out should be drafted to ensure that investment advice does not include **the response of a service provider to a request for proposal.**	Broadening the Carve-Out to include common sales transactions will allow competition and provide investors with greater price efficiency.
6 § I.C.i	The **Platform Providers and Selection and Monitoring Assistance Carve-Outs** could be interpreted as **limited to recordkeepers**.	These Carve-Outs should **include all platforms.**	Broadening the Carve-Outs will allow for the development of a product platform.
7 § I.C.ii	The **Platform Providers and Selection and Monitoring Assistance Carve-Outs** may not accommodate situations where **neither party is expecting to be in a fiduciary relationship.**	These Carve-Outs should allow for the **provision of objective, publicly available investment advice**.	Broadening the Carve-Outs will allow service providers to provide plan fiduciaries with valuable assistance.
7 § I.C.iii	The **Platform Providers and Selection and Monitoring Assistance Carve-Outs** may not permit service providers to **analyze fund selections**.	These Carve-Outs should allow service providers to assist plan fiduciaries in **narrowing the range of investment options for plan participants**.	Broadening the Carve-Outs will allow service providers to continue to assist plan fiduciaries in choosing from available funds.
8 § I.D	The **Financial Reports and Valuations Carve-Out** may **not include** certain **administrative functions**.	The Financial Reports and Valuations Carve-Out should **include valuations of plan investments** provided by plan service providers.	Investors will benefit from the inclusion of such calculations in the Carve-Out because they help to facilitate daily trading.

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
9 § I.E.i	The Proposal places new conditions on what is considered **investment advice**, including that information and asset allocation models ***cannot* include specific investment alternatives**.	The Investment Education Carve-Out should be **modified to more closely resemble the DOL's 1996 guidance**, which allowed discussion of specific investment alternatives.	Investors will receive objective information and benefit from discussing investment alternatives.
11 § I.E.ii	The Proposal **does not accommodate the questions that plan participants have** after receiving an explanation of their distribution options.	Service provider **call centers inform plan participants** about distribution options and should be permitted to continue, at a minimum, to confirm that IRAs are offered by the service provider **without fiduciary status**.	Participants who are more informed of their distribution options will be more likely to retain their retirement benefits instead of cashing them out.
12 § I.F.i	The Proposal covers and treats **HSAs in a manner similar to IRAs**.	The Proposal **should not include HSAs** because they serve an entirely different purpose than IRAs. If HSAs are ultimately included in the Proposal: (1) **Platform Provider Carve-Out** should be **extended to HSAs**; and (2) communications regarding how to use an HSA should be **included in the Investment Education Carve-Out**.	Investors use HSAs to pay for medical and other healthcare expenses and will not benefit from the imposition of additional regulatory restrictions and costs on top of the existing extensive regulatory structure.
14 § I.F.ii	The Proposal covers and treats **ESAs in a manner similar to IRAs**.	The Proposal **should not include ESAs** because they serve an entirely different purpose than IRAs. If ESAs are ultimately included in the Proposal, communications regarding how to use an ESA should be **included in the Investment Education Carve-Out**.	Investors use ESAs to fund education expenses for a designated beneficiary who is under age 18 or is a special needs beneficiary. Given the limited funding options and generally short life of ESAs, additional regulatory restrictions will not benefit investors.

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
14-29 § II	The **BIC Exemption** is intended **to "preserve beneficial business models for delivery of investment advice."**	The BIC Exemption **is impracticable as proposed.**	A revised exemption will provide flexibility to determine the appropriate service and fee models for each investor.
15 § II.A.i	The BIC Exemption's **"written contract" requirement** will cause a number of challenges **for prospective clients**.	Consistent with FINRA's Suitability Rule, the contract should only be **executed after a prospective customer becomes a client**.	The execution of the contract with new account opening documentation will provide investors with "best interest" protections, while providing access to financial professionals.
17 § II.A.ii	The BIC Exemption's **"written contract" requirement** will cause a number of challenges for **existing clients**.	For existing clients, firms should be permitted to amend existing contracts with the new BIC Exemption **via notice**.	Utilizing a notice amendment process alleviates the practical issue of how to address instances where the investor does *not* sign the contract.
17 § II.A.iii	The BIC Exemption's **"written contract" requirement** appears to contemplate **signatures** from the financial institution, the financial professional and the client.	Obtaining financial institution and financial professional **signatures** will raise numerous practical issues and **should not be required**.	Client agreements typically only require a client signature, which is sufficient to create a legally enforceable right on the part of the client.
18 § II.B.i	The BIC Exemption's "Impartial Conduct Standards" may effectively **restrict** financial institutions to recommending the **least expensive product or strategy**.	The Proposal should provide investors with the **freedom to choose prudent products**, e.g., FINRA Regulatory Notice 12-25 provides other factors to consider in addition to cost.	Investors will retain access to products or services that are in their best interest, whether they are the least expensive option or not.
20 § II.B.ii.	The BIC Exemption's "Impartial Conduct Standards" may **restrict** investor choice regarding advice models if the alternatives **involve differential compensation**.	The Proposal should provide investors with the **freedom to choose appropriate payment models**.	Investors will retain the choice to pay for service as (1) a one-time fee, (2) an ongoing fee, (3) a fee for transactions incidental to advice, and (4) fee for transactions without advice.

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
21 § II.B.iii	The **impact** of the BIC Exemption's "Impartial Conduct Standards" **on proprietary products is unclear**.	This **phrase** "**without regard to the financial or other interests** of the Adviser, Financial Institution or any Affiliate, Related Entity or other party" **should be eliminated**.	Investors will retain access to proprietary products so long as the proprietary product is in the investor's best interest.
22 § II.C.i	The **effect** of the BIC Exemption **on** a financial professional's ability to offer services such as **advisory programs** to investors is unclear.	If the Department did not intend to restrict access from advisory services, the Department should **eliminate the "Asset" list**, or revise to include such services.	A financial professional will be permitted to recommend a firm sponsored advisory program if such a recommendation is in the investor's best interest.
22 § II.C.ii	The BIC Exemption includes a **limited definition of "Asset."**	Financial professionals and investors **should be permitted to make judgments** about appropriate investments and the concept of permitted investments should be eliminated.	Investors will retain access to innovative products so long as they are in the investor's best interest.
23 § II.C.iii	**Variable annuities** and other registered products are **included in** the **definition of "Asset."**	**Annuities should continue to be offered under PTE 84-24** as financial professionals and institutions will be challenged to offer annuities under the BIC Exemption.	Annuities provide an important source of cash flow for investors during their retirement years.
23 § II.C.iv	The BIC Exemption **does not contain a carve-out for accredited retail and institutional investors**.	The **definition of "Asset" should not apply to** investors that can be designated as **accredited investors**.	Sophisticated investors are familiar with the potential risks of less common investment types and should be not restricted from using such products.
24 § II.C.v	The BIC Exemption does not distinguish **products and services** that address **conflict issues under existing regulations**.	Compliance conditions associated with such products and services should be **limited to contractual provisions implementing the "best interest" standard of care**.	Investors will not benefit from the proposed additional protections when the product or service is already compliant with ERISA and the prohibited transaction restrictions of the Internal Revenue Code.

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
25 § II.D.i	The BIC Exemption requires a **point of sale transaction disclosure** of the "all-in" cost and anticipated future costs of a recommended asset prior to execution of the purchase of the asset.	Instead of requiring new disclosures, the **408(b)(2) disclosures should be utilized**. Other disclosures that are already provided could also be leveraged.	The transaction disclosure will be difficult, if not impossible, to provide as currently proposed and will unnecessarily interrupt the investment process.
25 § II.D.i	The Department has proposed a **"cigarette warning"-style disclosure**.	This type of disclosure at account opening may be a **more appropriate disclosure than the point of sale disclosure.**	A "cigarette warning"-style point of sale disclosure is unnecessary as there is nothing inherently bad about investing.
26 § II.D.ii	The BIC Exemption requires an **annual disclosure** identifying assets purchased or sold and associated fees and expenses and compensation.	Existing **408(b)(2) disclosures are fulsome disclosures** and they should be applied to IRAs as is without an annual disclosure.	The annual disclosure – if it is even possible as proposed – will significantly add to the cost of servicing accounts, making the servicing of small balance accounts uneconomical.
26 § II.D.iii	The BIC Exemption requires **disclosure on a public website** of direct and indirect material compensation within the last 365 days.	Much of this information can be supplied by **applying current 408(b)(2) requirements** to cover IRA accounts.	The time and resources that would have to be allocated to build the proposed public website will significantly impact the services available to investors.
27 § II.D.iv	The BIC Exemption requires financial institutions to **disclose** to the Department within six months of a request certain **data for the preceding six year period**.	This requirement **is unnecessary** as the Department should leverage existing recordkeeping requirements instead of imposing new, costly requirements.	The proposed data disclosure will add unnecessary costs to servicing retirement accounts.
27 § II.E	The BIC Exemption's **warranties are unnecessary**.	The "best interest" standard **obviates the need** for the other proposed warranties.	The ability of investors to seek redress should the best interest standard be violated is sufficiently protective.

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28 § II.F	The purpose of the BIC Exemption's **notice** to a client or prospective client that an investment specialist **does not "recommend a sufficiently broad range of Assets" is unclear**.	The business of certain **investment specialists**, who are not responsible for an investor's entire portfolio, **should not be hampered by the requirement that they provide such a notice**.	Investors will be encouraged to work with investment specialists if it is in their best interests.
28 § II.G	The BIC Exemption's **Pre-Existing Transactions Exemption** is conditioned on not providing additional advice and **is too narrow**.	An **exemption** should be made for **all investments** that are **held** by investors **on the applicability date of the final rule** without application of the BIC Exemption conditions.	Restricting accounts in line with the Proposal will likely be costly and difficult to implement. The allocation of such resources will ultimately affect the quality of client service.
29-32 § III	The **Principal Transaction Exemption** is too narrow and **does not leverage existing regulatory requirements**.	Any limitation on principal trading should be **consistent with** the relief provided by the SEC under **Rule 206(3)-3T** under the Investment Advisers Act of 1940.	Permitting principal transactions under conditions aligning with the Advisers Act will improve and simplify investors' experiences.
30 § III.A	The Principal Transaction Exemption is unnecessarily **limited to certain debt securities**.	Rule 206(3)-3T permits principal transactions in ***any* security** with a limited exception where the financial professional is an issuer or underwriter of the security.	Broadening the Exemption will provide investors with certain tax advantages such as those associated with purchasing IPOs in IRAs
30 § III.B	The **contract** required under the Principal Transaction Exemption contains the **same elements as the BIC Exemption** and, therefore, **raises many of the same issues**.	The contract element **should be limited to a written prospective consent** similar to those which financial institutions customarily capture under Rule 206(3)-3T.	The investor could revoke such a consent without penalty at any time. This consent will provide investors with sufficient protection without unnecessarily inhibiting principal trades.
31 § III.C	The **pre-transaction disclosures** required under the Principal Transaction Exemption **are operationally impracticable**.	**These disclosures should be eliminated** and the disclosures required under Rule 206(3)-3T should be used.	The provision of the proposed disclosures will be impossible in some cases, and operatically burdensome in many others, with little practical benefit to investors.

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32 § III.D	The Principal Transaction Exemption requires financial institutions to provide a **written confirmation**, including disclosure of the mark-up/mark-down.	**Existing investor protections mitigate the risks of excessive mark-ups/mark-downs**. Further, SEC approval may be required to include mark-ups/mark-downs on the trade confirmations.	Investors already benefit from the pricing transparency provided by the Rule 10b-10 written confirmation. Additional disclosures on confirmations are unnecessary.
32-33 § IV	The Department is proposing **a short eight-month implementation period** to largely restructure the industry's whole approach to advising investors.	Given the uncertainty as to the details of the final rule, we cannot identify a specific timeframe to implement the Proposal's requirements with confidence, but assume it **will be at least three years**.	A hurried implementation of the Proposal in eight months is not only impossible, a less than thorough restructuring would do investors a great disservice.
33-35 § V	The Proposal further contributes to an **overlapping regulatory framework**.	**An exemption** should be made for activities regulated by **an SRO or a federal securities regulator's best interest standard**.	As retirement planning includes assets outside of traditional retirement accounts, a uniform standard will provide the most beneficial protection to investors by creating a consistent set of obligations across all account types.

Wells Fargo & Company
420 Montgomery Street
San Francisco, California 94104
wellsfargo.com

September 24, 2015

***Via* e-mail to e-ORI@dol.gov and e-OED@dol.gov**

Mr. John J. Canary, Director
Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Supplemental Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25]

Dear Mr. Canary:

Wells Fargo & Company, and its affiliates, ("Wells Fargo") welcomes the opportunity to provide additional comments on the U.S. Department of Labor's (the "Department") proposals regarding the definition of the term "fiduciary," new prohibited transaction exemptions and amendments to existing exemptions (collectively, the "Proposal").[1] We hope that these supplemental comments are helpful to the Department and appreciate the Department's willingness to continue to engage in a dialogue over the Proposal.

On July 21, 2015, we submitted a comment letter recommending changes to the Proposal that we believe would provide our clients with the access to education and support and the choices they have today when preparing for retirement while adopting a "best interest" standard of care for investment advice. A copy of this comment letter is attached for your reference as Appendix A. We also discussed these recommendations with Department officials during an in-person meeting at your offices in Washington, D.C. on July 8, 2015 and during a follow-up conference call on July 21, 2015.

We write again to respond to issues raised by Department officials during our July 8th and 21st meetings. In particular, you asked us for (1) the specific language we would use to revise the Proposal in accordance with our recommendations; (2) information regarding how our clients benefit from principal transactions; (3) additional investments that are not included in the Proposal's definition of "Asset" that we believe should be included; (4) an example of non-levelized compensation that we believe still satisfies the Proposal's provision regarding policies and procedures to prevent material conflicts from causing violations of the "Impartial Conduct Standards;" and, (5) a proposed timeline for a phased-in implementation should the Proposal become a final rule.

I. Our Recommended Changes to the Proposal.

In Appendices B, C and D to this letter, we offer revisions to the text of the proposed definition of the term "fiduciary" ("Re-Proposed Rule"), the proposed Best Interest Contract Exemption ("BIC Exemption") and the Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs ("Principal Transaction Exemption"), respectively. Our proposed revisions reflect the recommendations we made in our July 21st comment letter.[2] We have not endeavored to rewrite the entire Re-Proposed Rule, BIC Exemption or Principal Transaction Exemption. Instead, our changes are focused on sections where we understood the Department may be flexible and where we believe alterations are most needed.

We believe our suggested changes are consistent with the Department's core objectives for the Proposal. In sum, our suggested changes would still (1) establish and acknowledge a fiduciary best interest standard; (2) disclose fees; (3) mitigate and disclose conflicts of interest; (4) ensure compensation is reasonable with respect to services rendered; and, (5) hold advice providers accountable.

We also believe our suggested changes better align the Proposal with current securities and Department regulations. For example, we incorporated language from these authorities, where appropriate, into the Proposal: Department Interpretive Bulletin 96-1,[3] Financial Industry Regulatory Authority ("FINRA") Regulatory Notice 13-45,[4] FINRA Rule 2111 (as interpreted by FINRA, including Regulatory Notice 12-25),[5] the Department's *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*[6] and Rule 206(3)-3T under the Investment Advisers Act of 1940 ("Advisers Act").[7]

As more fully set forth in Section II below, we continue to believe any restriction on principal transactions will not benefit retirement investors and, as an alternative to the changes set forth in Appendix D, the Proposal should simply permit *all* principal transactions. In addition, we continue to recommend variable annuities be offered under Prohibited Transaction Exemption ("PTE") 84-24.

We know the Department received comments from numerous parties regarding the Proposal and faces a daunting task in synthesizing the views of many stakeholders into a workable final rule. *At a minimum*, however, we believe the Department must consider changes to the following aspects of the Proposal to make it workable:

- *Provide Investors with Access to Education.* We have proposed changes that would narrow the definition of "fiduciary" and expand the carve-outs from the definition to reflect current securities regulations regarding investor education, including Department Interpretive Bulletin 96-1 and FINRA's Regulatory Notice 13-45.

- *Eliminate the BIC Exemption Warranties*. We continue to be concerned that the inclusion of the warranties in the contract will provide little benefit to clients, while giving rise to significant legal, compliance and regulatory risk and uncertainty on the part of financial institutions. At most, they should be conditions of the BIC Exemption itself.

- *Streamline Execution of a Best Interest Contract*. Consistent with current commercial and regulatory requirements, any required Best Interest Contract should be executed by the client during the new account opening process, instead of the proposed tri-party arrangement. Furthermore, should there be a requirement to establish a new contractual relationship with existing clients, we recommend this be accomplished though a negative consent process.

- *Provide Clients with Access to Advisory Services*. We understand the Department did not intend to restrict access to such services; if so, the Department should accommodate the recommendation of an affiliated or unaffiliated investment adviser or proprietary investment advisory program through a carve-out from the Re-Proposed Rule or under the BIC Exemption.

- *Define "Reasonable Compensation."* As highlighted in the Department's public hearings, recommending an investment product where a level-fee arrangement is not in effect could be deemed an unacceptable risk by certain financial institutions, should the Proposal be adopted in its current form. As such, in our recommended changes to the BIC Exemption, we propose that "reasonable compensation" be defined as "compensation that is normally charged for similar transactions," which definition is consistent with existing Department guidance and FINRA rules.[8]

- *Simplify Disclosures.* We support the need for effective disclosures as part of a "best interest" standard and encourage the Department to leverage existing disclosure requirements, including those disclosures provided under ERISA Section 408(b)(2), summary prospectuses, prospectuses, confirms, informational guides (provided by many firms as a best practice) and, for registered investment advisers, Form ADV Parts 2A and 2B.

- *Establish an Appropriate, Phased Implementation Time Period*. Given the complexity of the Proposal in its current form, the eight month implementation time period is simply unattainable and unrealistic. We believe a phased implementation, over a minimum of three years, will be needed to ensure uninterrupted services are provided to our clients.

The changes we recommend to the Proposal in Appendices B, C and D address these critical concerns. In most cases, we have provided what we believe to be the best resolution of the issue as well as alternates in the footnotes. In addition to changes to the text of the Proposal, in Section V below, we propose a timeline for a phased-in implementation of the final rule.

II. The Benefit to Our Clients of Principal Trades.

Our current principal transaction practices consistently provide our retail investor clients with a wide range of fixed income securities offerings and liquidity for these positions, including the execution of trades when there are limited markets for the underlying securities. In addition, we ensure every principal trade is appropriately priced in relation to the prevailing markets through both point-of-trade and independent oversight processes.

The market we provide to these clients is especially important because of the odd-lot (i.e., less than $100,000 par value) nature of retail investor activity, particularly as odd-lot prices are generally inferior to regular trading markets. At our Wells Fargo Advisors, LLC ("WFA") affiliate, nearly 200,000 accounts of retirement-age individuals (i.e., those over 60 years-old) maintain at least one fixed income position, and those accounts hold roughly 905,000 positions that are valued at less than $25,000.

The Department has stated that saving retirement investors money is one of the main impetuses behind the Proposal.[9] For the reasons set forth in our July 21st comment letter, we believe the proposed Principal Transaction Exemption would ultimately harm clients because of its limited scope and the conditions it imposes. If the Principal Transaction Exemption is adopted as currently envisioned, financial institutions may execute all trades in individual retirement accounts ("IRAs") on an agency-basis and retirement investors' pricing will be negatively affected.

We are concerned the execution of all trades in IRAs on an agency-basis would deteriorate both the quality and quantity of suitable fixed income offerings available to our IRA clients as they may no longer have access to the roughly 4,000 fixed income offerings that WFA makes available to retail investors on a daily basis. These concerns are exacerbated on client liquidations, especially where a liquidation is necessary to effect a client's required minimum distribution, and there may be limited or no other liquidity providers in the market.

Furthermore, we note that principal trading activities are currently subject to a robust regulatory regime, which ensures appropriate handling of customer orders. Dealers are routinely examined by FINRA for compliance with pricing and mark-up requirements under FINRA Rules 5310 and 2121[10] and Municipal Securities Rulemaking Board ("MSRB") Rules G-18 (effective no later than April 2016) and G-30.[11] By contrast, MSRB Rule G-30(b) explicitly establishes a diminished standard for dealers when handling transactions as agent. In addition, where we act as an investment adviser and direct the trades in our client's investment advisory accounts, we must seek to obtain best execution in accordance with our fiduciary duties under the Investment Advisers Act.[12] Finally, we note a wealth of near real-time market information is already available to investors at the click of a button through the Trade Reporting and Compliance Engine ("TRACE") and the Electronic Municipal Market Access ("EMMA") price dissemination platforms.

While we continue to believe there should not be any limitation on principal transactions, in Appendix D, we recommend changes to the Principal Transaction Exemption that will benefit our clients by providing them access to the liquidity they need to take required minimum distributions from their IRAs during their retirement years. Specifically, these changes align the Principal Transaction Exemption with Advisers Act Rule 206(3)-3T, which would address the same conflict concerns while streamlining adoption of the Exemption by eliminating its unwieldy requirements, including its (1) limitation to certain debt securities; (2) required contract; and, (3) burdensome disclosures. These changes would provide our clients with the benefits of our principal trading activities, such as access to suitable, retail-friendly investment options and better execution quality in those transactions.

III. The Impact of the Limited Definition of "Assets" on Our Clients.

The Department has asked us to list any investment that is commonly held in IRAs and not included in the definition of "Asset." [13] In our July 21st comment letter, we noted that the definition of "Asset" in the Proposal does not reflect the state of the current investment environment and excludes numerous investments that investors make in IRAs, including, but not limited to, limited partnerships, hedge funds, syndicate offerings, and covered calls, and may exclude future product innovations unless it is frequently updated.

We write in regard to this topic again to note that the limitation of "equity securities" to only those "within the meaning of 17 CFR section 230.405 that are exchange-traded securities within the meaning of 17 CFR 242.600" will exclude numerous over-the-counter equity securities. At our WFA affiliate, this limitation will affect over 100,000 accounts containing either a domestic or foreign over-the-counter equity position, which positions total over $1.27 billion. A large portion of this total is comprised of such prominent foreign issues as Nestlé S.A., Roche Holding AG and Siemens AG.

In Appendix B, we recommend changes to the BIC Exemption that will eliminate the issues investors will face under the Proposal if they have investments that are not deemed an "Asset." First, we recommend changing the definition of "Asset" to read simply "securities or other property." We continue to believe that as all recommendations will be subject to a "best interest" standard, there is no need to place limits on investments beyond those Congress has already established.[14] Second, we would broaden the Exemption for Pre-Existing Transactions to *all* accounts existing as of the effective date of the final rule or in the alternative, to investments acquired before the effective date.

IV. An Example of a Compensation Structure that Is Not Level-Fee.

The Department has stated a "level-fee" structure is not required to satisfy the contractual warranty regarding policies and procedures. However, as we noted in our July 21st comment letter and during our meetings, the five examples the Department provided of permissible compensation structures are all variations of level-fee arrangements.[15] We believe the following example of a compensation structure that is not a level-fee structure satisfies the warranty regarding policies and procedures:

> Example: Recommending an Investment Product with a Higher Compensation Level. Under this example, Product A pays more in compensation to the Adviser than Product B. When providing investment advice to the Retirement Investor, the Adviser considers the Retirement Investor's investment profile as well as product- or strategy-related factors in addition to cost, such as the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions. Based upon such considerations, the Adviser recommends Product A instead of Product B.

We ask the Department to confirm the above example would satisfy the contractual warranty regarding policies and procedures. Alternatively, we ask the Department to eliminate the warranties as we continue to believe the ability of investors to seek redress should the "best interest" standard be violated is sufficiently protective.

V. A Proposed Phased-In Implementation Timeline.

We, along with numerous other commenters, have recommended the Department establish a more realistic implementation time period of at least three years. Further, if the warranties are included in the final version of the BIC Exemption and the Exemption for Pre-Existing Transactions is not expanded to include all existing IRAs, the implementation time period may need to be extended beyond three years. The inclusion of the warranties, as currently proposed, in the final version of the rule would require financial institutions to service such accounts in a highly controlled environment governed by systems that will take years to build.

We also believe that the Proposal should be implemented in phases and that each phase allow for adequate time to implement the required activity properly and prepare for the subsequent phase. This will ensure there are sufficient resources to devote to designing, building, testing and training on each of the required new documents, disclosures, procedures and systems. Therefore, we suggest implementation be spread across two phases over thirty-six months:

<u>First 24 Months</u>

- "Repapering" of existing contracts (if by negative consent per our recommendation[16])
- Implementation of new account opening ("NAO") documentation (per our recommendation for new contracts[17])
- Implementation of system to ensure investments made after the final rule are restricted to "Asset"[18] list (if "Asset" list is retained as proposed)
- Implementation of transaction disclosure (if existing 408(b)(2) disclosures are provided to IRA accountholders per our recommendation[19])
- Revision of training materials
- Revision of marketing materials

<u>Conclusion of 36 Months</u>

- Implementation of data collection and recordkeeping requirements[20]
- Compliance with the Principal Trading Exemption (if the Exemption is revised per our recommendations)
- Transition investments made before the final rule to meet definition of "Asset" (if "Asset" list is retained as proposed)
- Implementation of systems to ensure adherence to "Impartial Conduct Standards"[21]
- Implementation of annual disclosure[22]
- Implementation of webpage[23]

These phases are consistent with the time periods over which similar initiatives were implemented. For example, we spent two years implementing the SEC's Large Trader Reporting initiative, over two years developing the Department's Rule 408(b)(2) disclosures and nearly three years establishing the systems necessary to comply with FINRA's Order Audit Trail system ("OATS"). Most importantly, the implementation of the Proposal in phases is more likely to ensure that clients have uninterrupted access to the service and investment options.

We also strongly recommend that the Department provide a compliance relief period for those who make a good faith effort to comply in a timely fashion and have added the following Section I(d) to both the BIC Exemption and Principal Transaction Exemption:

> *Good faith*. Notwithstanding any other provision to the contrary, the failure to comply with any term, condition or requirement of this exemption will not result in the loss of the exemption if the failure to comply was insignificant and a good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements.

If you would like to further discuss any of Wells Fargo's comments, please contact Robert J. McCarthy, Director of Regulatory Policy for WFA, at (314) 242-3193 or robert.j.mccarthy@wellsfargoadvisors.com, or Kenneth L. Pardue, Managing Director, Retirement Plans for WFA, at (314) 875-2927 or kenneth.pardue@wellsfargoadvisors.com. Once again, we thank the Department for this additional opportunity to comment on the Proposal and restate our desire to stay engaged with the Department on this important topic.

Sincerely,

David M. Carroll

David M. Carroll
Senior Executive Vice President
Wealth, Brokerage & Retirement
Wells Fargo & Company

cc: The Honorable Thomas E. Perez, Secretary of Labor

[1] Dep't of Labor, Employee Benefits Security Admin., *Definition of Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 80 Fed. Reg. 21928 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pts. 2509 and 2510), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08831.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Best Interest Contract Exemption*, 80 Fed. Reg. 21960 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs*, 80 Fed. Reg. 21989 (proposed Apr. 20, 2015) (to be codified 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08833.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to Prohibited Transaction Exemption (PTE) 75-1, Part V, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Broker-Dealers; Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, 80 Fed. Reg. 22004 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08836.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters*, 80 Fed. Reg. 22010 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08837.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Proposed Partial Revocation of PTE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, 80 Fed. Reg. 22021 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08838.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1*, 80 Fed. Reg. 22035 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08839.pdf.

[2] The revisions we offer in Appendices B, C and D also incorporate changes to the text of the Proposal recommended by other commenters. Our citations to the comments of other parties are not an endorsement of their past or future comments beyond what we specifically included therein.

[3] *See* Dep't of Labor, Pension and Welfare Benefits Admin., *Interpretive Bulletin 96-1; Participant Investment Education; Final Rule*, 61 Fed. Reg. 29586 (June 11, 1996) (codified at 29 C.F.R. pt. 2509), *available at:* http://www.gpo.gov/fdsys/pkg/FR-1996-06-11/pdf/96-14093.pdf.

[4] *See* FINRA, Regulatory Notice 13-45, *Rollovers to Individual Retirement Accounts* (Dec. 2013), *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.

[5] *See* FINRA, Rule 2111, *Suitability*, *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9859; FINRA, Regulatory Notice 12-55, *Suitability* (Dec. 2012), *available at:* https://www.finra.org/sites/default/files/NoticeDocument/p197435.pdf.

[6] *See* Dep't of Labor, Employee Benefits Security Admin., *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 72 Fed. Reg. 70988 (proposed Dec. 13, 2007) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2007-12-13/pdf/E7-24064.pdf.

[7] *See* SEC, Rule 206(3)-3T, Investment Advisers Act of 1940, *Temporary Rule for Principal Trades with Certain Advisory Clients* (codified at 17 C.F.R. pt. 275.206(3)-3T).

[8] *See, e.g.*, Dep't of Labor, Advisory Opinion No. 2002-08A, letter from Louis Campagna, Chief, Division of Fiduciary Interpretations, Office of Regulations and Interpretations to Michael A. Crabtree, Esq., Central Pension Fund of the International Union of Operating Engineers and Participating Employers (Aug. 20, 2002) ("With regard to the selection of service providers under ERISA…the responsible plan fiduciary must engage in an objective process designed to elicit information necessary to assess the qualifications of the provider, the quality of services offered, and the reasonableness of the fees charged in light of the services provided."), *available at*: http://www.dol.gov/ebsa/regs/AOs/ao2002-08a.html; FINRA, Rule 2121, *Fair Prices and Commissions*, *available*

at: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11539; FINRA, Rule 2122, *Charges for Services Performed*, *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11764.

[9] *See*, *e.g.*, Dep't of Labor, Employee Benefits Security Admin., *Fact Sheet: Department of Labor Proposes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle-Class Families Billions of Dollars Every Year* (Apr. 14, 2015), *available at*: http://www.dol.gov/protectyoursavings/FactSheetCOI.pdf.

[10] *See* FINRA, Rule 5310, *Best Execution and Interposition*, *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10455; FINRA, Rule 2121, *Fair Prices and Commissions*, *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11539.

[11] *See* MSRB, Rule G-18, *Best Execution* (effective December 7, 2015), *available at*: http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-18-12-7-2015.aspx; MSRB, Rule G-30, *Prices and Commissions*, *available at*: http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-30.aspx.

[12] *See*, *e.g.*, *In re Jamison, Eaton & Woods, Inc.*, Investment Advisers Act Release No. 2129 (May 15, 2003); *In re Michael L. Smirlock*, Investment Advisers Act Release No. 1393 (Nov. 29, 1993).

[13] *See* 80 Fed. Reg. at 21987 (§ VIII(c)).

[14] *See* 26 U.S.C. § 408.

[15] *See* 80 Fed. Reg. at 21971.

[16] *See* Correspondence from David M. Carroll, Senior Executive Vice President, Wealth, Brokerage & Retirement, Wells Fargo & Company, to John J. Canary, Director, Office of Regulations and Interpretations, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, *regarding* Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25] (July 21, 2015) ("Wells Fargo July 21 Letter"), at App. A, p. 17 (§ II.A.ii), *available at:* http://www.dol.gov/ebsa/pdf/1210-AB32-2-00647.pdf.

[17] *See id*., at App. A, p. 15-16 (§ II.A.i).

[18] *See* 80 Fed. Reg. at 21987 (§ VIII(c)).

[19] *See* Wells Fargo July 21 Letter, at App. A, p. 55 (§ II.D).

[20] *See* 80 Fed. Reg. at 21986 and 21988 (§§ V and IX).

[21] *See id*. at 21984 (§ II(c)).

[22] *See id*. at 21985 (§ III(b)).

[23] *See id*. (§ III(c)).

Wells Fargo & Company
420 Montgomery Street
San Francisco, California 94104
wellsfargo.com

July 21, 2015

***Via* e-mail to e-ORI@dol.gov and e-OED@dol.gov**

Mr. John J. Canary, Director
Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25]

Dear Mr. Canary:

Wells Fargo & Company, and its affiliates, ("Wells Fargo") welcomes the opportunity to comment on the U.S. Department of Labor's (the "Department") proposals regarding the definition of the term "fiduciary," new prohibited transaction exemptions and amendments to existing exemptions (collectively, the "Proposal").[1] We hope that our comments are helpful to the Department as it assesses the potential impacts of the Proposal on retirement plans and their participants.

Who We Are and Whom We Serve

Wells Fargo is committed to providing individuals and their families with the advice and guidance they need to plan and save for retirement. We supported the Department's core 2010 "best interest" standard of care concepts[2] and the Securities and Exchange Commission's (the "SEC" or the "Commission") exploration of a uniform standard of care under the Federal Securities Laws,[3] and we remain supportive today of a "best interest" standard of care for clients. We welcome the Department's continued focus on this important issue and intend to be a collaborative partner with the Department as this dialogue continues.

Wells Fargo serves 70 million clients or one in every three American households. We hold over $390 billion in individual retirement account ("IRA") assets for over 4 million IRA owners and $400 billion in institutional retirement plan assets for over 3 million retirement plan participants. This makes us the 6th largest IRA provider and the 7th largest institutional retirement plan recordkeeper (based on assets) in the United States. We serve our clients when, where and how they want to be served – through financial professionals, bank and brokerage branches, call centers, websites, mobile devices or a combination of these options – to help them succeed financially.

As a leading provider of retirement solutions to millions of people of varying means and needs, we are uniquely positioned to provide insight into how the Proposal may impact the ability of Americans to invest for retirement. We, like the Department, see the growing importance of saving through both IRAs and individual and employer-sponsored retirement plans (e.g., 401(k) plans). Based on our first-hand experience, we believe a "best interest" standard of care for clients must both facilitate greater access to financial information and services and be flexible enough to serve all retirement investors – from those just beginning their savings journey to those nearing or in retirement.

We have found, consistent with independent studies, that Americans working with a financial professional generally save more,[4] enjoy greater investment returns[5] and have greater wealth at retirement than those who do not work with a financial professional.[6] Indeed, Wells Fargo's 2014 Middle-Class Retirement Study showed that people with a written plan for retirement were saving a median of $250 per month, far greater than the median $100 per month being saved by those without a written plan. This difference is the result of financial professionals working hard every day to help clients understand their goals, developing financial strategies to achieve those goals and encouraging clients to stick to those strategies during times of uncertainty.

Therefore, we support efforts by the Department to encourage Americans to work with a financial professional to obtain the assistance they need to successfully plan for their financial future. As a recent Vanguard study found, an advisor's added value "is more aptly demonstrated by the ability to effectively act as wealth manager, financial planner, and behavioral coach – providing discipline and reason to clients who are often undisciplined and emotional – than efforts to beat the market."[7] In other words, people facing difficult, and critical, financial choices benefit when working with a financial professional – and not just from technical advice on particular investments.

Wells Fargo Supports a Best Interest Standard

We agree with the core concept of the Proposal that financial professionals should be required to act in the "best interest" of their clients at all times. We also commend the Department for making great strides since 2010 in developing a new "fiduciary" definition that seeks to incorporate input from many stakeholders. We believe, however, the Proposal remains too broad in some respects, too strict in others and too complex overall. If the Proposal becomes effective as currently envisioned, the likely result will be that investors, particularly middle-class savers, will receive less individualized retirement education and support and have fewer choices when preparing for retirement than they have today.

We propose to address these challenges by recommending a "best interest" standard of care that fosters greater access to financial education and retirement services for every investor. Our recommendation is to simplify and incorporate additional flexibility into the Proposal so that retirement investors will retain access to the information, advice and services that best fit their individual circumstances, while also benefitting from an explicit higher standard of care.

We believe a "best interest" standard of care based on the following core principles could be implemented relatively quickly and, most importantly, would help investors meet their retirement planning goals. Below each principle, we summarize our recommended changes to the Proposal to better align it with that principle. In Appendix A to this letter, titled *Detailed Comments of Wells Fargo Regarding the Department's "Fiduciary" Proposal*, we provide our detailed comments on the key areas where we believe retirement investors will be negatively affected by the Proposal and offer alternative solutions to address those impacts and to achieve our common goal of establishing a "best interest" standard of care.

1. **Encourage Clients' Financial Education**

People facing important financial decisions should have access to more, not less, financial information and assistance. In these times, financial professionals should continue to serve as an important source of financial education and information for all investors.

Recommendation: We recommend the definition of "fiduciary" in the Proposal be narrowed and the Proposal's carve-outs and contemplated exemptions be expanded. This will allow investors to continue to obtain the financial information and education they need from financial professionals or retirement plan service providers, helping them to be better informed decision-makers.

2. **Establish a "Best Interest" Standard of Care for Clients**

A financial professional should be required to act in the client's best interest with the flexibility to recommend individualized investments and service models to help each client achieve their unique retirement planning goals.

Recommendation: The complexity and cost of the Best Interest Contract Exemption ("BIC Exemption") as proposed makes it an unworkable solution; as a result, there may be fewer available investment and service options, particularly for middle-class savers. For example, we are uncertain whether recommending best in class products and services to clients that are not the lowest cost option are permitted under the BIC Exemption's "impartial conduct standards." Consequently, such products would likely not be offered to clients. We believe the proposed contract under the BIC Exemption should be narrowed to focus on establishing a "best interest" standard of care for clients, which would ensure investment advice is based on the unique needs of each investor. Likewise, to serve the best interests of each client, we believe principal transactions should be permitted without the complicated conditions of the proposed Principal Transaction Exemption. Alternatively, any conditions should align with the Investment Advisers Act of 1940 to reduce regulatory conflicts and likely improve and simplify clients' experiences.

3. **Disclose Fees and Commissions to Clients**

Clients should be provided clear "plain-English" information regarding fees and charges for products and services and should not be overwhelmed with complex disclosures.

Recommendation: The disclosure requirements contemplated by the BIC Exemption should leverage existing disclosures, instead of creating entirely new and overly complex requirements. For example, the Department recently developed new disclosures requirements under Employee Retirement Income Security Act ("ERISA") Section 408(b)(2), to specifically address fee and conflict issues for ERISA-covered plans. Service providers have spent considerable time and effort developing systems and documents that comply with these requirements. In the interest of simplicity and efficiency, the existing 408(b)(2) disclosures should be used to provide IRA accountholders with the same detailed fee transparency and conflict information.

4. Reduce or Eliminate Conflicts of Interest and Disclose Them to Clients

Conflicts of interest that may impact a financial professional's ability to act in the best interest of the client should be reduced or, where possible, eliminated and in any event, disclosed.

Recommendation: The BIC Exemption should use existing Form ADV (presently used by SEC registered investment advisers). Form ADV was designed specifically to inform investors of potential conflicts of interest and could help clients further understand a financial professional's compensation and reduce or eliminate conflicts of interest.

5. Hold Advice Providers Accountable

Clients should be confident that a financial professional is providing advice in their best interest.

Recommendation: The parties should enter into a binding agreement – similar to the BIC Exemption contract discussed in our detailed comments – at account opening, which commits the financial institution to work in the best interest of each client and provides a remedy should the standard be breached.

6. Eliminate Overlapping Regulations with a Regulatory Exemption

Based on our experience, we believe clients will receive the best advice under a uniform standard of care. A uniform standard would provide the most beneficial protection for clients by creating one set of obligations across all account types, eliminating client confusion concerning what advice comes with a particular type of account.

Recommendation: To encourage broader adoption of a uniform "best interest" standard of care for clients, we believe an exemption should be created for broker-dealers or other regulated entities that are subject to a "best interest" standard of care for their clients adopted by another regulator or self-regulatory organization meeting the Department's fundamental requirements.

7. HSAs and Similar Accounts Serve Different Client Needs

Health Savings Accounts ("HSAs"), Coverdell Education Savings Accounts ("ESAs") and other similar accounts are fundamentally different from retirement accounts in their purpose and operation.

Recommendation: The Department requested comment on the advisability of including HSAs, ESAs and other similar accounts in this Proposal. We believe HSAs and ESAs and other similar accounts should be excluded from the Proposal altogether, because clients primarily use these accounts as spending accounts and not to save for retirement.

8. An Appropriate Implementation Time Period Is Crucial to Client Service

Retirement savers have trillions of dollars invested under the existing regulatory structure. A reasonable time to design, build, test and train on new documentation, disclosures, procedures and systems must be permitted to continue servicing existing and new clients.

Recommendation: Clients may have limited service and investment options if service providers are not able to implement all the new documentation, disclosures, procedures and systems called for in the Proposal within the implementation time period. For example, we could not use the BIC Exemption until all the proper controls and disclosures are in place. Given the complexity of the Proposal in its current form, the eight month implementation time period is simply unattainable and unrealistic. We believe three years, if not more, is necessary to ensure all the requirements of the Department's proposed rule are properly implemented.

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Once again, we thank the Department for the opportunity to comment on the Proposal and intend to stay engaged with the Department on this important topic. In addition to Appendix A – *Detailed Comments of Wells Fargo Regarding the Department's "Fiduciary" Proposal*, Appendix B – *A Summary of Wells Fargo's Recommended Changes to the Proposal* has also been included for your quick reference.

Sincerely,

David M. Carroll

David M. Carroll
Senior Executive Vice President
Wealth, Brokerage & Retirement
Wells Fargo & Company

cc: The Honorable Thomas E. Perez, Secretary of Labor

[1] Dep't of Labor, Employee Benefits Security Admin., *Definition of Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 80 Fed. Reg. 21928 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pts. 2509 and 2510), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08831.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Best Interest Contract Exemption*, 80 Fed. Reg. 21960 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs*, 80 Fed. Reg. 21989 (proposed Apr. 20, 2015) (to be codified 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08833.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to Prohibited Transaction Exemption (PTE) 75-1, Part V, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Broker-Dealers; Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, 80 Fed. Reg. 22004 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08836.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters*, 80 Fed. Reg. 22010 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08837.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Proposed Partial Revocation of PTE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, 80 Fed. Reg. 22021 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08838.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1*, 80 Fed. Reg. 22035 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08839.pdf.

[2] *See generally* Correspondence from Joseph Ready, Executive Vice President of Wells Fargo Institutional Retirement and Trust to the Office of Regulations and Interpretations, Employee Benefits Securities Administration, *regarding* RIN 1210-AB32, Definition of Fiduciary Proposed Rule (Feb. 3, 2011), *available at:* http://www.dol.gov/ebsa/pdf/1210-AB32-176.pdf.

[3] *See* Correspondence from Robert J. McCarthy, Director of Regulatory Policy at Wells Fargo Advisors, LLC, to Elizabeth M. Murphy, Secretary of Securities and Exchange Commission, *regarding* File No. 4-606; Release No. 34-69013; IA-3558; Duties of Brokers, Dealers and Investment Advisers, at 2-7 (July 5, 2013), *available at:* https://www.sec.gov/comments/4-606/4606-3127.pdf (outlining Wells Fargo's support for a uniform fiduciary duty that: (i) incorporates a duty of loyalty to act in the client's best interests; (ii) protects broker-dealer and investment adviser business models; (iii) preserves client choice in service and pricing models; (iv) applies only to personalized investment advice; (v) covers only transactions resulting in compensation; (vi) preserves access to the full range of securities products and services; and, (vii) facilitates flexible and practical disclosure and consent).

[4] Claude Montmarquette and Nathalie Viennot-Briot, "Econometric Models on the Value of Advice of a Financial Advisor," Centre for Interuniversity Research and Analysis on Organizations (CIRANO) (July 2012), at 9, 15-35, 56, *available at:* http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf.

[5] David Blanchett and Paul Kaplan, "Alpha, Beta, and Now…Gamma," Morningstar Investment Management (Aug. 28, 2013), at 16, *available at:* http://corporate.morningstar.com/ib/documents/PublishedResearch/AlphaBetaandNowGamma.pdf.

[6] *Id.*

[7] Donald G. Bennyhoff and Francis M. Kinniry Jr., "Advisor's Alpha," Vanguard Research (Apr. 2013), at 3, *available at:* https://advisors.vanguard.com/iwe/pdf/ICRAA.pdf?cbdForceDomain=true.

Wells Fargo & Co.
Appendix A

DETAILED COMMENTS OF WELLS FARGO REGARDING THE DEPARTMENT'S "FIDUCIARY" PROPOSAL

We applaud the Department's efforts to establish a "best interest" standard and recognize that the Proposal represents a significant undertaking. The Proposal's complicated provisions, however, contain elements that effectively undermine its stated objectives and impose new limits on retirement investors' choice of investment products and services, and their access to financial education at times when they need it the most. This appendix discusses the key areas where we believe retirement investors will be negatively affected by the Proposal and provides specific recommendations on how to address those impacts to achieve our common goals. We include at the outset a table of contents to guide the Department through our comments. While we believe there should be one uniform "best interest" standard for all clients, we secondarily believe the Department's Proposal, which impacts retirement advice only, may be made more workable by incorporating the recommendations set forth herein.

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Appendix A

I. THE PROPOSED DEFINITION OF "FIDUCIARY" IS OVERLY BROAD AND RESTRICTS ACCESS TO INFORMATION.

Planning for their financial future is one of the most important and daunting tasks facing retirement investors and businesses today. Investors face an investment landscape filled with a broad choice of retirement products and investment options that is accompanied by reams of complex information. Sorting through these options and information can be confusing and overwhelming. Consequently, many individuals and business owners seek assistance to help them understand the strategies, retirement products and investment options that may be appropriate to help them achieve their financial goals, both to accumulate assets for retirement and to spend those assets responsibly during retirement.

Indeed, the Department noted in the Proposal's preamble "the need for plans and IRA owners to seek out and rely on sophisticated financial advisers to make critical investment decisions in an increasingly complex financial marketplace."[1] The Department further states the Proposal is "intended to ensure that small plan fiduciaries, plan participants and IRA owners would be able to obtain the essential information regarding important decisions they make regarding their investments without the providers of that information crossing the line into fiduciary status."[2]

Unfortunately, the combination of expanding the definition of covered advice so broadly as to classify all manner of information as fiduciary advice while providing only narrow exemptive relief from Employee Retirement Income Security Act's ("ERISA") prohibited transaction provisions, undermines the stated intent of the Proposal. Below, we make recommended modifications to the Proposal to help ensure that retirement investors will continue to have access to the information they need to be informed decision-makers while receiving the protections sought by the Department.

A. *The Definition of Investment Advice Should Be Narrowed.*

Individuals and their families seeking retirement assistance, whether in a retirement plan or otherwise, want to know what products and services are available to help them. They can then make an informed decision about whether to invest with a financial professional, select their own retirement products or take no action. As noted above, the Department concurs that financial professionals should be able to provide "essential information" to retirement investors without crossing the line into fiduciary status.

The current regulation regarding the establishment of a fiduciary relationship is straightforward and workable. Under the regulation, a financial professional becomes a fiduciary by providing investment advice, when it is provided on a regular basis and where there is a

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[1] 80 Fed. Reg. at 21929.

[2] *Id*. at 21942.

mutual agreement, arrangement or understanding that the advice will form a primary basis for the investment decision. Thus, fiduciaries know when they are fiduciaries and the identity of the persons relying on them for investment advice. This also leaves investors free to seek retirement investment information from financial professionals without that professional crossing the line to become a fiduciary.

Under the Proposal, fiduciary status attaches at the "suggestion"[3] that a person take a particular course of action that is "individualized to" or "specifically directed to" that person for "consideration in making investment…decisions."[4] This is so broad as to encompass nearly every conversation between a financial professional and a client or prospective client regarding retirement products and services. As a result, we believe the Proposal will unreasonably restrict the essential information that individuals receive unless it is modified as set forth below.

i. We Recommend Clarifying that Providing General Information About Our Products and Services Does Not Constitute Investment Advice.

Any conversation between a financial professional and a retirement investor regarding retirement products or services will inevitably be used by the investor to determine if the financial professional is the right fit for them, which means the conversation will necessarily be classified as "for consideration in making investment…decisions" and fiduciary obligations would attach under the Proposal. To encourage the free flow of information between a retirement investor and a financial professional, we recommend the Department revise the Proposal to permit individuals to receive information about available retirement product options (including available investment options and the costs associated with particular products) so that they can understand the available options before establishing a binding fiduciary relationship with a financial professional.

The fiduciary commitment should begin at the point at which the retirement investor relies on the financial professional and the financial professional receives compensation. Most logically, this would occur at the time an account is opened or the product is purchased by the investor. This means that access to investment, distribution and other assistance would be preserved while investors would still be protected through the application of a "best interest" standard when the investor opens an account, deposits funds, acquires a specific product, acknowledges a fiduciary relationship or reviews specific investment recommendations with the financial professional as discussed further in Section I.A.iv. below.

In addition, the scope of the Proposal in its current form also potentially pulls in relationships where each party's status is unclear. For example, mutual fund wholesalers often provide education to financial professionals on the product their company offers and mutual fund service center representatives answer product questions from financial professionals. These

[3] 80 Fed. Reg. at 21960 (§ 2510.3-21(f)(1)).

[4] *Id*. at 21957 (§ 2510.3-21(a)(2)(ii)).

activities may be deemed fiduciary if the inquiring financial professional is a plan fiduciary or if the call center provides distribution options even without providing advice. We recommend the Department clarify that this type of activity is information sharing between intermediaries and not investment advice.

ii. We Recommend Adding a "Mutual Understanding" Element to the Definition.

The Department has eliminated the "mutual agreement" requirement contained in the current regulation. However, financial professionals must have the ability to discuss their products and services, which is the "essential information" an investor needs, without arbitrarily "crossing the line into fiduciary status." We believe the most appropriate and easily determinable time to attach fiduciary obligations is when the financial professional and the retirement investor reach some mutual understanding that they have entered into an advice relationship. If the understanding is not mutual, providers seeking to comply with the duties of a fiduciary will not know when those duties attach and will not know what information they may give.

The Department's broader language could make a larger group of providers liable as fiduciaries and does not accomplish the objective of enhancing the quality of advice that providers give to individuals while still providing access to "essential information." We understand that the Department is concerned that individuals or entities may seek to avoid fiduciary status by deliberately refusing to agree to such status, even when the other facts of the relationship would support a fiduciary role. For this reason, we suggest that the parties should have a reasonable expectation that they are in a fiduciary relationship and that the final rule include a requirement that this arrangement or agreement be "mutually understood."

iii. We Recommend Deleting "Specifically Directed to" from the Definition or, at a Minimum, Adding the Phrase "Advice that Is Individually Tailored" to Narrow the "Specifically Directed to" Element of the Definition.

In order to make an informed decision about retirement assets, individuals need to have information about the products and services available to them. However, because investment advice is defined so broadly under the Proposal, even activities such as mailing brochures that discuss a financial institution's product and service offerings, including IRA or plan services, would be considered "specifically directed to" a recipient and thus inappropriately be considered fiduciary investment advice.

Furthermore, advertisements that are specifically targeted to investors based upon past consumer behavior or demographic information would also inappropriately be considered fiduciary investment advice. For instance, today, by virtue of online activity, individuals receive advertisements that are tailored to them based on prior online activity. In these instances, the information may be delivered in response to prospective client needs or interests, but the financial institution does not have enough information to make a true recommendation for the information recipient, nor would the recipient reasonably understand the information to be anything other than sales material.

If an individual pursued a product or service as a result of this kind of material, he or she typically would receive additional specific information and, if working with a financial professional, would be able to provide personal information that could help the financial professional make a specific fiduciary recommendation. Thus, we believe the "specifically directed to" element of the definition by itself is unnecessarily broad and any recommendation should be individually tailored to the recipient before it could be considered "advice." We recommend either deleting the phrase "specifically directed to" from the definition of "investment advice" or adding "advice that is individually tailored" to the definition.

Finally, a materiality or reliance qualifier is also necessary to narrow the scope of fiduciary advice. Such a qualifier will focus the application of fiduciary obligations on activities and actions of the most importance and raise the very low bar set by the proposed "for consideration" standard. Logically, if the retirement investor does not rely on the advice there should be no compensable damages, but the absence of an explicit qualifier from the regulation will likely have a chilling effect on the provision of general education information that the producer does not intend as advice.

iv. We Recommend Clarifying that "Investment Advice" Means a "Recommendation" – Consistent With Current Securities Law – and Should Apply After New Account Opening.

The Department states that it looked to Financial Industry Regulatory Authority ("FINRA") guidance on when suitability obligations attach to recommendations to help guide the Department in determining when fiduciary obligations should attach to retirement investor interactions.[5] FINRA guidance to its Rule 2111, or the "Suitability Rule," applies to recommendations to a "potential investor" who then becomes a "customer." Thus, the Suitability Rule's investor protections extend to prospective clients *if* that individual executes transactions through the broker-dealer that made the recommendation or if the broker-dealer receives or will receive compensation as a result of the transaction.[6] Under FINRA's guidance, broker-dealers do not escape liability for a recommendation made prior to account opening but later implemented at account opening.[7] We believe the same standard would be appropriate for determining when fiduciary obligations attach under the Proposal and would establish a brighter line for when fiduciary status begins for both the investor and financial professional.

[5] *See*, *e.g.*, 80 Fed. Reg. at 21938 and 21945.

[6] *See* FINRA, Regulatory Notice 12-55, *Suitability* (Dec. 2012), at 2 (FAQs 6(a) and 6(b)), *available at:* https://www.finra.org/sites/default/files/NoticeDocument/p197435.pdf.

[7] *See Id.* at 6 (FAQ 6(b), n.10) ("[For a] recommendation to a *potential investor*, suitability obligations attach when the transaction occurs, but the suitability of the recommendation is evaluated based on the circumstances that existed at the time the recommendation was made.").

B. ***Additional Parties Should Be Included in the Seller's Carve-Out.***

The Department states that the "overall purpose" of the carve-out for counterparty transactions with plan fiduciaries[8] ("Seller's Carve-Out") is "to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of proposed deals."[9] As currently proposed, the Seller's Carve-Out fails to achieve this purpose.

i. <u>We Recommend Including All ERISA-Covered Plans, Regardless of Size.</u>

The availability of the Seller's Carve-Out depends on (1) the number of participants in the plan and (2) the amount of plan assets under management of the plan fiduciary. If a plan does not satisfy these threshold requirements, the Seller's Carve-Out is unavailable whether or not "neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser."[10] Any requirement based on plan size will raise the practical problem of monitoring plan sizes, which tend to vary. Thus, it may not be clear whether a plan falls within the Seller's Carve-Out at the time a particular recommendation is made. As *all* ERISA fiduciaries are required to have or obtain sufficient expertise to prudently discharge their duties, we recommend the Seller's Carve-Out should not be conditioned on plan size.

Recognizing the Department's efforts in this area, plan fiduciaries are typically educated on these requirements and use many of the same bidding and review processes when engaging a provider and making investment decisions. We note also that plan size does not necessarily correlate to the investment sophistication of the plan's fiduciary or to their willingness to engage consulting assistance when needed. Small companies may engage in complex and expensive business transactions and are considered to have sufficient expertise for such transactions. As we believe commercial entities do have different expectations and expertise than individuals, we recommend the Seller's Carve-Out should be amended to cover all ERISA-covered plans, regardless of size.

ii. <u>We Recommend Including Sophisticated Investors.</u>

As set forth above, we believe all plans should be carved-out. At a minimum, however, we believe the Seller's Carve-Out should include accredited retail and institutional investors. The stated purpose of the Seller's Carve-Out's current conditions is to serve as "proxies for identifying persons with sufficient investment-related expertise to be included in a Seller's Carve-Out."[11] Accreditation serves to identify those with sufficient financial sophistication to understand and bear economic risk. Moreover, including accredited investors in the Seller's Carve-Out would be consistent with other securities regulations, such as Regulation D of the

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[8] 80 Fed. Reg. at 21957 (§ 2510.3-21(b)(1)(i)).

[9] *Id*. at 21941.

[10] *Id*.

[11] *Id*.

Securities Act,[12] where regulators have acknowledged that accredited investors do not require the same protections as other investors.

iii. We Recommend Revising the Carve-Out to Accommodate Requests for Proposals and Similar Sales Transactions.

Under the Proposal, the Seller's Carve-Out has a number of conditions, including a requirement that the counterparty receive certain written representations (or have a reasonable belief that the counterparty meets certain size or sophistication criteria). However, for ERISA-covered plans, it is unlikely that this kind of information would be received in a sales transaction.

Service providers often receive requests for proposals ("RFPs") or other similar sales proposals from plan fiduciaries or their agents, such as consultants. The RFP may or may not disclose sufficient information for the service provider to determine whether the Seller's Carve-Out would apply, and is often in a format that would make it difficult to obtain the various representations required under the Carve-Out. RFPs often ask for sample fund line-ups and other criteria which would likely be considered investment advice under the Proposal. The service provider is usually one of many providers competing for the business offered in the RFP, and may respond, but not win the business. As RFPs and similar types of sales transactions are well-recognized as arm's length discussions and both parties understand that a subsequent negotiation must take place, we recommend RFP responses and similar types of sales transactions should be included in the types of transactions carved-out from "investment advice."

C. ***The Platform Providers and Selection and Monitoring Assistance Carve-Outs Should Be Expanded.***

i. We Recommend the Carve-Outs Cover All Platforms.

Products and product platforms are not developed with individual plans, participants or retirement investors in mind. The investments available through a platform may be impacted by a number of operational or other considerations, such as the availability of an agreement with a particular fund family. Because of such considerations, we are not aware of any platform that offers every permissible investment option available in the universe of investment options. By

[12] *See* Rule 501, Regulation D, Securities Act of 1933, *Definitions and Terms Used in Regulation D* (17 CFR 230.501 (a)):

(a) Accredited investor shall mean any person who comes within any of the following categories…:

(1) [A]ny employee benefit plan within the meaning of [ERISA] if the investment decision is made by a plan fiduciary…

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000…

(6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.

providing limited carve-outs for platform providers[13] ("Platform Provider Carve-Out") and selection monitoring and assistance[14] ("Selection and Monitoring Assistance Carve-Out"), we are concerned the Department has implied that the development of a platform, including the choice or restriction of investments generally available through the platform, is fiduciary in nature.

We agree that development and provision of a platform for investment is not a fiduciary activity. However, the limitations included in the current Platform Provider and Selection and Monitoring Assistance Carve-Outs suggest that platforms other than those of 401(k) recordkeepers somehow include fiduciary advice. We note individuals and plan fiduciaries would still have protection for the advice given specifically in connection with their retirement assets even if these Carve-Outs are explicitly broadened. As such, we recommend the Department broaden the Platform Provider and Selection and Monitoring Assistance Carve-Outs to cover any type of platform, including platforms provided to IRAs, Health Savings Accounts ("HSAs"), Coverdell Education Savings Accounts ("ESAs") and any other type of platform provider.

ii. We Recommend Allowing the Provision of <u>Objective, Publicly Available Investment Information</u>**.**

We agree with the Department that service providers should be able to market their platforms and give objective investment information without such activity being considered investment advice. However, we believe Platform Provider and Selection and Monitoring Assistance Carve-Outs must better accommodate situations where neither party is expecting to be in a fiduciary relationship, but plan fiduciaries need additional investment information. For those reasons, we recommend the Platform Provider and Selection and Monitoring Assistance Carve-Outs be available to any service provider – and not just recordkeepers – providing objective, publicly available investment information to plan fiduciaries. So long as the information is not coupled with a recommendation to make a particular plan investment choice and the service provider furnishes fee disclosures in accordance with 408(b)(2) and a statement that the provider is not offering investment advice as set forth in the Proposal, it should be clear that providing such information is not a fiduciary activity.

iii. We Recommend Allowing Service Providers to Assist Plan Fiduciaries in Creating a Platform and <u>Believe Clarity Is Needed Regarding Platform Marketing.</u>

Many service providers offer a platform with "open architecture," meaning plan fiduciaries are able to pick any investment option (such as a mutual fund or collective fund) that is compatible with the provider's operating system. This provides plan fiduciaries with the greatest amount of flexibility to choose prudent investment options for the plan's participants. Other service providers offer a short list of investment options in each investment category, or only proprietary investments.

[13] 80 Fed. Reg. at 21957-58 (§ 2510.3-21(b)(3)).

[14] *Id*. at 21958 (§ 2510.3-21(b)(4)).

Given the large number of mutual and collective funds to choose from, plan fiduciaries often need meaningful assistance in limiting the number of investment options in particular categories (e.g., large cap growth) when selecting or replacing investments. Often, even with objective, narrow criteria used to reduce the number of funds, there still can be dozens of funds that meet the criteria selected. Faced with such decisions, plan fiduciaries may request assistance in narrowing the possible investment options to a more manageable number of funds. A similar process may also occur during the initial sales process. Service providers often provide such assistance, fully disclosing the impact to their fees as required under the Department's 408(b)(2) regulations.

In the absence of such assistance, plan fiduciaries may need to hire additional consultants to assist in analyzing fund selections, which would impose additional costs to the plan, likely borne by participants. Furthermore, service providers may begin restricting investment choices offered on their platforms, which limitation would be detrimental to retirement plan participants.

We believe that by providing fee disclosures in accordance with 408(b)(2), along with the proposed statement that the provider is not offering investment advice,[15] plan fiduciaries should be adequately informed of a service provider's interests to permit service providers to continue to assist plan fiduciaries in narrowing the range of investment options for plan participants. Thus, we recommend the Platform Provider and Selection and Monitoring Assistance Carve-Outs be clarified to permit such functions, so long as disclosures are provided and specific recommendations are not made.

Additionally, as creating a platform has traditionally not been viewed as a fiduciary act, marketing the platform should not be limited to the creator of the platform, but rather intermediaries should be allowed to market a platform. Likewise, we recommend clarifying that a service provider may market to an intermediary plan fiduciary under the Platform Provider and Selection and Monitoring Assistance Carve-Outs rather than being limited to marketing to the plan itself. This is necessary now that there is an implication that marketing a platform would be fiduciary in nature if a service provider were to use an indirect distribution channel. We would also recommend clarifying that marketing of multiple platforms would not be considered fiduciary advice if retirement investors are segmented into investor types and marketed a corresponding platform (i.e., open architecture for large plans and a more limited platform for micro-plans).

D. ***The Financial Reports and Valuations Carve-Out Should Be Expanded.***

Many service providers supply valuations for plan investments. In particular, many large, participant-directed plans offer unitized investment options (including, but not limited to, company stock funds).[16] The service provider will perform calculations regarding the value of

[15] 80 Fed. Reg. at 21957-58 (§ 2510.3-21(b)(3)) ("if the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity").

[16] We note collective funds may have only *one* investor. We recommend the Department clarify the language of the Financial Reports and Valuations Carve-Out to ensure that it is available to such funds.

such funds in order to calculate a net asset value to facilitate daily trading. As currently drafted, the carve-out for financial reports and valuations[17] ("Financial Reports and Valuations Carve-Out") may not include these types of calculations.

Providing these calculations is mostly an administrative function using asset valuations provided by the market or another fiduciary. The Department rightly points out that this prong of covered advice does not require a recommendation. There is no particular call to action. As these calculations are not fiduciary in nature, the Financial Reports and Valuations Carve-Out should clearly include them.

E. ***The Investment Education Carve-Out Should Be Expanded.***

i. We Recommend Permitting the
<u>Provision of Investment Information as Education.</u>

In 1996, the Department published guidance outlining the types of information that would not be considered fiduciary investment advice. [18] In the nearly twenty years since, the Department has recognized that certain classes of information provided to participants of ERISA participant-directed account plans are more accurately considered investment education and have not been treated as fiduciary investment advice.

Under the Proposal, the Department is proposing to expand the scope of the exception so that it will now apply to IRAs and to ERISA plans that do not provide for participant-directed investments, and to cover communications to plan fiduciaries and IRA owners. However, the Department is proposing new conditions on the 1996 guidance under the carve-out for investment education[19] ("Investment Education Carve-Out") that materially dilute the positive effect of extending the guidance to cover advice related to IRA plans.

While we applaud the Department's expansion of its 1996 guidance regarding financial education to IRAs and other ERISA plans, the limiting conditions of Investment Education Carve-Out effectively undercut the utility of the guidance:

- First, the Investment Education Carve-Out adds a specific condition that the information *cannot* include any advice or recommendations concerning specific investment products, investment managers or the value of investments.

- Second, asset allocation models *cannot* include any specific investment alternatives offered under the plan, and interactive investment materials can include specific plan investment alternatives only if such alternatives are specifically selected by the participant. Thus,

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[17] 80 Fed. Reg. at 21958 (§ 2510.3-21(b)(5)).

[18] *See* Dep't of Labor, Pension and Welfare Benefits Admin., *Interpretive Bulletin 96-1; Participant Investment Education; Final Rule*, 61 Fed. Reg. 29586 (June 11, 1996) (codified at 29 C.F.R. pt. 2509) *available at:* http://www.gpo.gov/fdsys/pkg/FR-1996-06-11/pdf/96-14093.pdf.

[19] 80 Fed. Reg. at 21958 (§ 2510.3-21(b)(6)).

educational materials that include asset allocation models or interactive investment tools cannot identify specific investment alternatives available under the plan for those materials to come within the Investment Education Carve-Out.

We recommend the Investment Education Carve-Out be modified to more closely resemble the Department's 1996 guidance and that the Carve-Out more specifically cover the situations described below.

Plan sponsors and administrators rely heavily on service providers to help operate their retirement plans. In an effort to assist plan participants with retirement preparedness, many plan administrators enlist the assistance of their service providers to help educate participants regarding how participants' investment decisions may affect their retirement plan accounts. For example, plan administrators may design (or approve a service provider's) mailers reminding participants of the benefits of diversification if they are heavily invested in one particular asset class, including employer securities. Generally, such educational efforts are targeted toward those participants whose selected investments indicate they would benefit from such education.[20]

As currently drafted, such informational assistance could be considered investment advice under the proposed regulation. Some of these communications may include references to specific investment options available in the plan, which may exclude them from the Investment Education Carve-Out. Furthermore, if such information is only sent to certain participants, it could be sufficiently "individualized" or "specifically directed to" participants to be considered investment advice. Most service providers would be unwilling to take on fiduciary status based on the distribution of such information. Plan sponsors and administrators would have similar concerns and participants would lose access to valuable information regarding their investment decisions. Therefore, we recommend the Department clarify the regulation so that such generalized investment information would not be considered investment advice.

The revised description of investment education raises other issues as well. As previously discussed, under the Proposal, a financial professional is only permitted to provide a retirement investor with generic education materials and asset allocation information (without mention of any specific investment products or services) to avoid fiduciary status. This is especially problematic in the retirement plan space. Such plans have a set of investment options available that have been selected by the plan sponsor. The inability of a financial professional to provide basic information about these investments, what they are and how they are priced, would seem counter-productive to helping educate investors.

[20] While sending the information to all plan participants may make the information no longer individualized or specifically directed to, that would (1) confuse many participants for whom the information is not relevant and (2) involve additional expense, which would likely be charged against participants' accounts. For example, mailers may be sent to participants who have more than 20% of their account invested in employer securities, as mentioned on participant statements. Another example would be sending mailers to participants under age 30 who have all their account balance invested in a principal preservation vehicle, informing them of the risk that inflation may pose to retirement income. A third example could be a mailers discussing "target date" funds to individuals who have invested their account balances in multiple target date funds (of the same series, but with different target dates), which may indicate such participants are unclear on how target date funds are intended to operate.

In addition, the limitation on the provision of investment examples for asset allocation models is too severe. The limitation relegates discussions regarding investment alternatives to esoteric conversations and prohibits the provision of plan-specific information. We believe a financial professional should be able to discuss what types of investments fall into various asset classes (e.g., providing objective information on mutual funds that may satisfy the investor's needs), without being considered a fiduciary, so long as he or she is not making a recommendation as to a particular investment.

ii. <u>We Recommend Rollover Assistance Be Considered Education.</u>

Retirement plan service providers also assist plan participants when the participants have terminated employment and are deciding what to do with their retirement plan benefits. Such services typically are provided through call centers that provide information to plan participants regarding the plan's distribution options. Our experience has been that many participants call because they are unsure about their options and the related financial or tax implications. Service provider call centers often provide critical information to such participants, including whether the participant can leave the funds in the plan, take a cash distribution, or rollover the funds to another retirement plan or IRA.

As recognized by the Department, rolling over the account balance can be a good option for participants as it preserves the tax-deferred nature of their retirement benefits. Our experience has shown that participants who are more informed of their distribution options are more likely to retain their retirement benefits instead of cashing them out. The Department has noted that it is generally in the participants' best interest not to take a pre-retirement distribution.

While the Department has clarified that distribution education is not investment advice, the Department should understand that participants often have additional questions after receiving an explanation of their distribution options. Participants often ask if the service provider or its affiliates offer IRAs. Given that the BIC Exemption may not cover rollovers by its terms, and that it would be difficult, if not impossible, to implement the BIC Exemption in a call center setting, service providers will not be able to answer participants' reasonable inquiries for fear that the discussion would be considered fiduciary investment advice.

The result will be that participants, who reasonably request information about a service provider or an affiliate's products, will be left without the information they need. In addition, if participants ask to be connected to an affiliate, such as an affiliated call center, that offers such products (e.g., bank IRAs, direct-to-fund IRAs, self-directed IRAs or advised IRA brokerage accounts) to obtain information about the products offered, they will not receive this support.

For these reasons, we recommend the Department clarify that the provision of general information about the products and services offered is not investment advice if it is part of a discussion that is otherwise educational in nature. If a financial institution is providing information about plan distribution options in a manner that would be considered investment education under the Proposal, the financial institution should be able to mention that it offers

IRAs or other products so long as it does not recommend such products or that the individual take a particular action with respect to plan assets.[21]

F. ***HSAs and ESAs – non-ERISA accounts – Should Be Carved-Out of the Proposal.***

The Department requested comment as to whether it is appropriate to cover and treat HSAs and ESAs (non-ERISA accounts) under the Proposal in a manner similar to IRAs with regard to both coverage and applicable carve-outs. These non-ERISA accounts serve entirely different purposes than the covered ERISA accounts and plans identified in the Proposal and should therefore not be covered.

i. HSAs Are Used to Pay for Health Care Expenses and Cannot Receive Rollovers from Traditional ERISA Plans.

The focus of the Proposal is on retirement savings vehicles like qualified pension plans and IRAs. In including HSAs within the definition of IRAs, the Department observes that HSAs can be used as "long term savings vehicles for retiree health care expenses."[22] Although this is possible, HSAs are much different than IRAs. To make or receive HSA contributions, individuals must meet eligibility criteria, including being enrolled in a high-deductible health plan ("HDHP"). HSAs permit individuals with HDHP coverage to save money on a pre-tax basis to pay for medical expenses incurred before their deductible is met. Thus, while IRAs are designed to encourage the accumulation of retirement assets with significant penalties for withdrawals, HSAs are primarily designed for the payment of current medical and other healthcare expenses.

Our experience is that HSA balances generally are deposited and withdrawn on a regular basis (using, for example, a debit card) and carry relatively small balances. The average balance of our account owners is $3,062 (as of April 2015). For the Wells Fargo HSA product, individuals have to accumulate at least $1,000.00 in a deposit account before investment in a mutual fund is allowed. In fact, 90% of Wells Fargo HSA account owners keep their money in a deposit account and do not invest their HSA balances (as of April 2015).

Rollovers to HSAs are also very limited. HSAs can only receive rollovers from other HSAs, Archer MSAs and IRAs. Further, the ability to "roll" funds from an IRA is subject to maximum annual HSA contribution limits of roughly $6,650 (for family coverage) and is limited to a "once in a lifetime" transfer of funds. Thus, the Department's concern for protecting funds rolled from traditional ERISA plans into IRAs does not apply to HSAs.

In addition, HSA owners are subject to strict oversight, including IRS audit, regarding the use of their accounts. The imposition of additional regulatory restrictions on top of the current

[21] FINRA Regulatory Notice 13-45 sets forth a list of factors that should be considered by an investor in making a rollover decision. The Investment Education Carve-Out could also accommodate the presentation of these factors in a non-biased fashion. *See* FINRA, Regulatory Notice 13-45, *Rollovers to Individual Retirement Accounts* (Dec. 2013), at 2-3, *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.

[22] 80 Fed. Reg. at 21947.

extensive regulatory structure is unnecessary. For these reasons, we believe that HSAs should not be covered under the final rule. If, however, HSAs are included in the final rule, we recommend the following amendments to the Proposal:

- *Clarify that the Platform Provider Carve-Out Applies to HSAs.* All HSAs should be included under the Platform Provider Carve-Out. HSAs differ from IRAs in that employers are frequently involved in the selection of an HSA provider for their employee population,[23] often using an RFP process to evaluate potential providers. Employers may select a single HSA provider for their employees for purposes of facilitating HSA contributions without triggering ERISA, as long as the employer does not restrict the employees' ability to move their balances to another HSA and meet other criteria established by the Department.[24] Although employers do not select an HSA provider in a fiduciary capacity, they do serve as an independent entity interacting with the provider to ensure that an appropriate product is offered to the account owners.

  The investment platform we offer for HSAs is a limited selection of mutual funds, including proprietary and nonproprietary funds. We are able to offer this simple platform today without charging separate fees for investing or transactions because its management is administratively straightforward. An account owner must accumulate at least $1,000.00 in a deposit account before investment in the platform is allowed and the platform is the same whether or not Wells Fargo is selected by the HSA owner's employer or an individual who sets up an HSA outside of the employer relationship or who de-affiliates with an employer. Given that only roughly 10% of account owners invest their HSA funds, it would be difficult to justify the cost of offering different products to different segments of the population. As such, we believe the Platform Provider Carve-Out should include all HSAs so that the same rules apply to all segments of the account owner population.

- *Clarify that the Investment Education Carve-Out applies to discussions of distributions from HSAs for qualified medical expenses.* At present, the Investment Education Carve-Out does not address certain aspects of HSA products that are different in nature from ERISA plans and IRAs. For example, the Investment Education Carve-Out does not include the provision of information regarding "qualified medical expenses."[25] In addition, HSAs are transactional accounts, and individuals need information on how to access their funds for medical expenses, including use of the associated debit card. Thus, we believe informational communications to account owners regarding how to take distributions from their HSA should be considered investment education.

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[23] In 2015, 72% percent of accounts at Wells Fargo were affiliated with an employer.

[24] *See, e.g.*, Dep't of Labor, Field Assistance Bulletin No. 2006-02, *Health Savings Accounts – ERISA Q&As* (Oct. 27, 2006), *available at*: http://www.dol.gov/ebsa/regs/fab_2006-2.html; Dep't of Labor, Field Assistance Bulletin No. 2004-01, *Health Savings Accounts* (Apr. 7, 2004), *available at*: http://www.dol.gov/ebsa/regs/fab_2004-1.html.

[25] 26 U.S.C. § 213(d).

ii. ESAs Are Used to Pay for Education Expenses and Cannot Receive Rollovers from Traditional ERISA Plans.

Like HSAs, ESAs are very different in nature than IRAs. ESAs are savings accounts designed exclusively for funding education expenses for a designated beneficiary who is under age 18 or is a special needs beneficiary. The annual contribution limit is $2,000 for each designated beneficiary, no matter how many ESAs are set up for that beneficiary.

Traditional ERISA plan assets are not eligible to be transferred or rolled into an ESA. Assets can only be rolled over from one ESA to another. Generally, funds must be distributed when the designated beneficiary reaches age 30, unless he or she is a special needs beneficiary. Thus, the Department's concern for protecting funds rolled from traditional ERISA plans into IRAs also does not apply to ESAs.

Considering the limited funding and generally short life of the account, additional regulatory restrictions are unnecessary. Thus, we believe that including ESAs in the final rule would not comport with the Proposal's stated objectives. If, however, ESAs continue to be included in the Proposal, we recommend communications to accountholders regarding ESA-related regulations and key product features should be included in the Investment Education Carve-Out. In addition, the identification of specific investment products or alternatives available for an ESA should also be permitted.

II. THE BEST INTEREST CONTRACT EXEMPTION IS IMPRACTICABLE AS PROPOSED.

The Department's expansion of the definition of fiduciary investment advice has the potential to not only disrupt the ability of retirement investors to receive appropriate investment information, but to restrict the provision of investment advice (even if the advice is in the investor's best interest) and to limit the freedom of investors to choose among varying service and fee models. This is because the prohibited transaction rules prohibit fiduciaries from providing advice if the advice could affect the compensation of the fiduciary. Consequently, many of the advice models most economical for smaller accounts and small businesses would become prohibited under the Proposal.

To lessen the harsh effects of the proscriptions contained in ERISA's prohibited transaction provisions, the Proposal includes a Best Interest Contract Exemption (the "BIC Exemption"), which is intended to "preserve beneficial business models for delivery of investment advice"[26] and which the Department believes will "permit firms to continue common fee and compensation practices, as long as they are willing to adhere to basic standards aimed at ensuring their advice is in the best interest of their customers."[27]

[26] 80 Fed. Reg. at 21929.

[27] *Id*.

We believe the Department's objective to craft an exemption providing certain retirement investors and financial professionals with the flexibility to determine what service and fee models are appropriate for a particular investor is the right course. However, the BIC Exemption as currently designed is an unviable solution with overly complex requirements. Below we recommend specific changes to the BIC Exemption that attempt to address these practical problems, protect investors and fulfill the stated purpose of the Exemption.

A. ***The Proposed "Written Contract" Is Not Operationally Feasible.***

We understand that the BIC Exemption's "written contract"[28] represents the Department's desire to have a binding commitment from financial institutions that they will live up to the Department's "best interest" standard. As proposed, however, the contract presents a number of challenges that essentially undercut the BIC Exemption's purpose.

i. We Recommend the Contract Only Be Executed After a Prospective Customer Becomes a Customer**.**

A plan, participant, beneficiary or IRA owner should not be required to enter into a contract with a financial institution or financial professional prior to deciding whether to hire that financial institution or financial professional, particularly when any investment advice will be subject to the "best interest" standard. To facilitate the exchange of information between financial institution, financial professional and prospective customer, any contract should be executed at or shortly after the time of account opening. At the most basic level, a contract establishes the agreement that parties have made and to fix their rights and duties in accordance with that agreement. Consequently, it makes sense that when establishing an account and depositing funds with a financial institution or financial professional that the parties execute a document detailing the terms and conditions of their relationship.

Under the terms of the BIC Exemption, the Department requires that a BIC Exemption contract be executed before a retirement investor can obtain basic investment information from a financial institution or financial professional that will permit the investor to make an informed decision on whether to hire the financial professional or purchase products or services from the financial institution. Requiring that a consumer execute a contract even before being presented with a proposal or at least a general description of the products and services offered, will be disconcerting and may inhibit a consumer's willingness to shop for retirement investment services.

The simple fix is to include the BIC Exemption contract as part of new account opening ("NAO") documentation which would fulfill the Department's policy objectives while permitting retirement investors to gather the information they need about investment options, products or services to make an informed decision. If a prospective client does decide to purchase products or services from or open an account and deposit funds with the financial institution, the client will receive the fiduciary protections sought by the Department prior to the execution of any transactions.

[28] 80 Fed. Reg. at 21984 (§ II(a)).

The execution of the BIC contract as part of the NAO documents is also consistent with current commercial practices and regulatory requirements. For example, as noted earlier, FINRA's guidance to the Suitability Rule provides assistance in determining when its requirements apply. The Suitability Rule applies to a "customer" and FINRA has indicated (for purposes of the Suitability Rule) that a "customer" is a person who opens an account at a broker-dealer or purchases a security for which the broker-dealer receives or will receive compensation – directly or indirectly – even if the security is not held at the broker-dealer. [29]

The Suitability Rule also applies to a "potential investor" who then becomes a "customer." Thus, the Suitability Rule's investor protections extend to prospective clients *if* that individual executes the transaction through the broker-dealer that made the recommendation or if the broker-dealer receives or will receive compensation as a result of the transaction.[30]

Conversely, the Suitability Rule does not apply to a recommendation made to a prospective client if the prospective client does not act on the recommendation or executes the recommended transaction away from the broker-dealer without the broker-dealer receiving compensation for the trade.[31] However, this does not mean that broker-dealers are not responsible for such recommendations, as broker-dealers are subject to stringent conduct standards even when dealing with prospective clients.[32]

By contrast, the BIC Exemption would create a contractual relationship between a retirement investor and a financial professional even in instances where, for example, the retirement investor chooses to work with another financial professional. Thus, there could be more than one fiduciary and questions could arise regarding which fiduciary has liability for recommendations made to the investor.

Thus, we recommend, consistent with current regulations applicable to broker-dealers, the BIC Exemption be modified so that any required contract need only be executed *concurrent with or after* a prospective client becomes a client. The BIC Exemption contract should simply be included as part of the NAO documentation. The execution of the contract with the NAO documentation will provide retirement investors with "best interest" protections, while providing retirement investors with unfettered access to financial professionals and needed retirement products and services.

[29] *See* FINRA, Regulatory Notice 12-55, at 2 (FAQ 6(a)).

[30] *See id*. (FAQ 6(b)).

[31] *See id*.

[32] For example, FINRA Rule 2010 requires that broker-dealers observe high standards of commercial honor and just and equitable principles of trade and Rule 2020 prohibits broker-dealers from effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance. *See* FINRA, Rule 2010, *Standards of Commercial Honor and Principles of Trade*, *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5504 and FINRA, Rule 2020, *Use of Manipulative, Deceptive or Other Fraudulent Devices*, *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5513.

ii. We Recommend Any Required Repapering of Current Client Agreements Be Effectuated Via Notice.

Similarly, requiring the execution of tri-party contracts for millions of existing contracts, within eight months or even twelve months, is not feasible and would be extremely costly. For example, Wells Fargo Advisors ("WFA") incurred costs of over $4 million to implement new account documentation requirements under FINRA Rule 2090.[33] Moreover, only about 25% of WFA brokerage clients currently receive account documents via electronic delivery. Therefore, the costs for obtaining new tri-party contracts for millions of accounts would be extraordinary and may not be economical for smaller balance accounts.

In addition, not all clients diligently sign and return paperwork – either electronically or through the mail, which means that only a fraction of retirement investors may affirmatively enter into the contract envisioned by the Department in the proposed implementation timeframe. Thus, for existing clients, we recommend the Department confirm that the BIC Exemption is available if existing contracts are amended consistent with the contract's amendment provisions, including, without limitation, provisions authorizing amendment by notice or negative consent. Permitting financial institutions to amend existing contracts by notification would be efficient and would allow them to be in compliance with the contract requirements under the BIC Exemption within a relatively short period of time. We estimate it could be completed within twenty-four months.

Utilizing a notice amendment process alleviates the practical issue of how to address instances where the retirement investor does *not* sign the contract. Should the Department require affirmative execution of BIC Exemption contracts for existing retirement investors, there is not a good service alternative for the potential "non-responders." Moreover, some retirement account custodians and trustees may feel obligated to resign from a "non-responder" account which would result in a distribution to the retirement investor, leading to more issues and concerns. Consequently, should there be a requirement to establish a new contractual relationship for existing clients, we recommend it be done though a negative consent process.

iii. We Recommend the BIC Exemption Not Require Actual Signatures in Connection with the Contract.

The BIC Exemption appears to contemplate that the contract will be signed by the financial institution, financial professional and the client. As part of NAO procedures, client agreements typically only require a client signature, which is sufficient to create a legally enforceable right on the part of the client. We believe the requirement that the financial institution sign the contract will raise operational issues, while not enhancing responsibility for contract terms. We also believe the requirement that financial professionals sign the contract will result in numerous practical problems. For example, financial institutions with multiple service models may provide client services through multiple financial professionals. In addition, it may not be possible to

[33] FINRA, Rule 2090, *Know Your Client Rule* (adopted by SR-FINRA-2010-039 and amended by SR-FINRA-2011-016 effective July 9, 2012), *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9858.

identify the impacted financial professionals in advance of contract execution and the financial professionals servicing a particular client may change over time. We also note that financial professionals are agents of their respective financial institutions and as such their signatures are not necessary for the financial institution to enforce its policies and procedures against them. Therefore, we recommend financial professional signatures should not be required so long as the financial institution remains bound by the terms of the contract and the financial institution implements policies and procedures to hold the financial professional accountable for any breach of contract terms.

B. *The Terms Used in the "Impartial Conduct Standards" Should Be Clarified to Ensure Investor Choice.*

A source of confusion is that the "Impartial Conduct Standards" do not exactly mirror related ERISA provisions. These standards should be modified to use the exact language of ERISA Section 404 or, alternatively, be inapplicable to ERISA covered plans.[34] In order to ensure investor choice is retained, we recommend the Department provide clarity regarding how the "Impartial Conduct Standards"[35] permit common compensation structures "that, in the absence of an exemption, would not be permitted."[36] This includes providing examples of how to apply the "Impartial Conduct Standards" to similar products with different compensation structures, payment models and proprietary products.

i. We Recommend Retirement Investors Have the Ability to Choose Prudent Products.

In order to make a recommendation that is in a retirement investor's "best interest," a financial professional should not be restricted to only recommending the least expensive product or strategy. A prudent investment product is not necessarily the lowest cost alternative. As such, there should be no "low fee exemption" (as the Department indicated it is exploring in the Proposal),[37] nor bias for passive products, because investment cost should be only one factor in determining what product or service is in the investor's best interest.

The "Impartial Conduct Standards" allow financial institutions and financial professionals (and their affiliates) to receive "reasonable compensation" under certain conditions.[38] The Department should confirm that this condition does not require financial professionals and financial institutions to recommend the lowest cost alternative. In this respect, the Department has long recognized that a fiduciary need not select the lowest-cost service provider so long as the compensation or fees paid to the service provider are determined to be reasonable in light of

[34] 29 U.S.C. § 1104.

[35] 80 Fed. Reg. at 21984 (§ II(c)).

[36] *Id*. at 21961.

[37] *See id*. at 21977-80. Furthermore, even if we wanted to provide substantive comments on this undefined proposal, we do not have adequate information to do so.

[38] *Id*. at 21984 (§ II(c)(2)).

the particular facts and circumstances.[39] The BIC Exemption clearly contemplates a wide variety of indirect compensation. We believe this provision should not prohibit the financial institution from receiving different types and different amounts of fees from different sources with respect to services provided in connection with a plan.

The BIC Exemption also requires financial institutions to contractually warrant they have adopted written policies and procedures that are reasonably designed to "mitigate the impact of material conflicts of interest" that exist with the provision of investment advice and ensure adherence to the "Impartial Conduct Standards."[40] While the Department stated in the preamble to the BIC Exemption that a "level-fee" structure is not required to mitigate "material conflicts of interest," the Department provided five examples of permissible compensation structures, all of which are variations of level-fee arrangements.[41] Thus, recommending an investment product where a level-fee arrangement is not in effect could be deemed an unacceptable contractual liability risk by financial institutions in view of the examples that the Department has provided.

As an example of a situation where a level-fee is not paid, a financial professional may recommend Fund A – which has historically outperformed against its benchmark – to a retirement investor instead of Fund B – which has historically underperformed against its benchmark. If Fund A pays more in compensation to "the Adviser, Financial Institution, or any Affiliate and Related Entity"[42] than Fund B, we are concerned the investor could seek a claim for damages simply because, despite the stronger performance of Fund A, the investor believes the financial professional was not acting without regard to his or her own financial interests because of the greater compensation paid to the financial professional by Fund A. The possibility of this claim, therefore, would make financial professionals reluctant to recommend an investment in Fund A, even where Fund A may be the more appropriate investment. We request that the Department provide examples of fee arrangements other than level-fee structures to illustrate that a higher compensation level does not result in a per se violation of the "best interest" standard or required contractual warranties.

The Department should also confirm that merely recommending products that are not the lowest cost alternative would not, in and of itself, "tend to encourage individual Advisors to make recommendations that are not in the Best Interest of the Retirement Investor" in violation of the proposed warranties.[43] FINRA Regulatory Notice 12-25 ("Notice 12-25") provides guidance as to the appropriate factors to be considered in making a recommendation in the best

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[39] *See, e.g.*, Dep't of Labor, Employee Benefits Security Admin., *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 72 Fed. Reg. 70988, at 70993 (proposed Dec. 13, 2007) (to be codified at 29 C.F.R. pt. 2550) ("A responsible plan fiduciary should not consider any one factor, including the fees or compensation to be paid to the service provider, to the exclusion of other factors."), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2007-12-13/pdf/E7-24064.pdf.

[40] 80 Fed. Reg. at 21984 (§ II(d)(2)).

[41] *Id*. at 21971.

[42] *Id*. at 21984 (§ II(c)(1)).

[43] *Id*. (§ II(d)(4)).

interests of the client. Notice 12-25 clarifies aspects of FINRA's Suitability Rule, and states with respect to product or strategy costs that:

> The requirement that a broker's recommendation must be consistent with the customer's best interests does not obligate a broker to recommend the "least expensive" security or investment strategy…as long as the recommendation is suitable and the broker is not placing his or her interests ahead of the customer's interests. … *The cost associated with a recommendation…ordinarily is only one of many important factors to consider when determining whether the subject security or investment strategy involving a security or securities is suitable.*
>
> The customer's investment profile, for example, is critical to the assessment, as are a host of product- or strategy-related factors in addition to cost, such as the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions. These are all important considerations in analyzing the suitability of a particular recommendation, which is why the suitability rule and the concept that a broker's recommendation must be consistent with the customer's best interests are inextricably intertwined.[44]

We recommend the Department adopt this standard. The inclusion of this standard would permit financial professionals to recommend a product or service that is in the investor's best interest, whether it is the least expensive option or not, and will allow transaction-based accounts to continue to be viable options for client accounts.

ii. We Recommend Retirement Investors Have <u>the Freedom to Choose Appropriate Payment Models.</u>

The interaction between the Proposal's "Impartial Conduct Standards" and the BIC Exemption's conflict mitigation provisions appear to restrict an investor's choice regarding advice models if the alternatives involve differential compensation received by the financial institution or financial professional.[45] The ability to choose the most economical payment models is critically important for smaller balance accounts. Many clients, retirement or otherwise, choose a "pay as you go" model where clients incur charges when a transaction occurs while higher income clients tend to have a mix of commission based accounts and advisory or asset fee based accounts.

We have observed in households served by our WFA affiliate that as wealth increases, a greater percentage of investors elect a "hybrid model" of investing in which some of their assets are held in commission-based brokerage accounts and an increasing percentage of assets shifts toward fee-based advisory accounts. Among WFA households maintaining at least one advisory

[44] *See* FINRA, Regulatory Notice 12-25, *Suitability* (May 2012), at 3 (FAQ 1) (emphasis added).

[45] Retirement investors currently have several choices of how to pay for service (1) a one-time fee for advice, (2) an ongoing fee for continuing advice, (3) fee for transactions, including incidental to advice and (4) fee for transactions effected without receiving any personalized advice.

account, nearly two thirds also have a brokerage account. Moreover, WFA households with both brokerage and advisory accounts hold nearly four times the assets of households with only a brokerage account.

Similarly, when reviewing the effects of simply extending the Investment Advisers Act of 1940 (the "Advisers Act") to cover client activity with broker-dealers the SEC stated:

> If, in response to the elimination of the broker-dealer exclusion, broker-dealers elected to convert their brokerage accounts from commission-based accounts to fee-based accounts, certain retail customers might face increased costs, and consequently the profitability of their investment decisions could be eroded, especially accounts that are not actively traded, e.g., fee-based accounts that trade so infrequently that they would have incurred lower costs for the investor had the accounts been commission-based. This practice is commonly referred to as "reverse churning" or "underutilization."[46]

Consequently, the Department must ensure that investors retain the ability to choose the appropriate fee and advice model for their particular situation. We request the Department clarify how the requirements of the BIC Exemption can be satisfied through a commission-based account. As we note above, the only compliant examples provided by the Department in the Proposal were level-fee options. This is particularly important in light of the fact that level-fee accounts may not be the best option for investors with limited trading activity.

iii. We Recommend Providing Guidance on How Financial Professionals Can Recommend Proprietary Products Under the "Impartial Conduct Standards."

The impact of the BIC Exemption on proprietary products[47] is unclear. We recommend the Department clarify that as long as a proprietary product is in the best interest of the investor and the cost is reasonable compared to other like products, the investor should not be restricted from using the product. To do so, we recommend the Department either eliminate the phrase "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity or other party" [48] or replace it with "despite the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity or other party." We believe that this better captures the intent of the Department which has a history of permitting conflicted fiduciaries to continue to act, subject to conditions, through its administrative exemption process. Should it remain unaltered, the Department must provide guidance on how this provision can be applied in a differential compensation environment and where proprietary products may be available.

[46] SEC, *Study on Investment Advisers and Broker-Dealers* (Jan. 2011), at 152-153, *available at*: https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[47] Virtually all major broker-dealers have proprietary funds. Typically proprietary products are developed, in part, because a financial institution sees a client need and believes it can satisfy it.

[48] 80 Fed. Reg. at 21984 (§ II(c)(1)).

Furthermore, if sales of proprietary funds do indeed have different standards applicable to them under the Proposal, we believe the final rule will have to address many nuances surrounding proprietary status, which may change over time. For example, many existing Wells Fargo proprietary funds held by our clients date from a period when they were acquired from a predecessor firm. They are proprietary today but were not proprietary when purchased. Conversely, some financial institutions have divested their asset management businesses and a fund that was proprietary may become non-proprietary. On a smaller scale, when a financial professional moves from one financial institution to another, he or she typically keeps existing clients in existing investments and those investments may move between proprietary and non-proprietary status. We believe the fact that "proprietary" status is transient is one more reason not to adopt rules that place extra burdens on sales of proprietary funds.

C. ***The Definition of "Asset" Unnecessarily Limits Investor Choice.***

The BIC Exemption covers the receipt of compensation for only the limited list of approved investment products and securities included in the definition of "Asset." [49] This definition excludes numerous investments that investors make in IRAs, including, for example, limited partnerships, hedge funds, private equity funds, and covered calls, and may exclude future product innovations unless it is frequently updated. In excluding these investments, the Proposal fails to recognize the value that other types of investments, such as alternative investments, can add to investor retirement portfolios. Furthermore, the definition of Asset does not appear to cover the recommendation of services, such as advisory or discretionary management programs.

i. We Believe the Recommendation of a Firm Sponsored Advisory Program Must Be Clearly Permitted.

We are unclear whether a financial professional may refer or recommend retirement investors to an affiliated or unaffiliated investment adviser or proprietary investment advisory product under the BIC Exemption. We understand the Department did not intend to restrict access to such services; if so, the Department should eliminate the "Asset" list, or revise the list to include such services.[50] Moreover, we believe the sale of any product or service subject to an existing exemption, or otherwise compliant, should be excluded from the Proposal or subject only to the "best interest" standard requirement of the BIC Exemption.

ii. We Recommend Eliminating the "Asset" List.

Financial professionals and retirement investors should be permitted to make judgments about appropriate investments. The Department should not substitute its judgment for that of a fiduciary, concerning product and service selections. As all recommendations will be subject to

[49] 80 Fed. Reg. at 21987 (§ VIII(c)).

[50] We ask that the Department confirm that to the extent that the recommendation of a related investment adviser does not result in third-party compensation to the recommender and the advisory program itself does not result in differential compensation to the financial professional, there should be no need for compliance with BIC Exemption for the initial recommendation of the advisory program.

a "best interest" standard, there is no need to place limits on investments beyond those Congress has already established.[51] The "best interest" standard requires investment advice be "based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor." This standard makes a "one-size fits all" limitation on investor choice of products and services unnecessary, as financial professionals are already restricted to recommending only those products or services that are in their clients' best interest.

Finally, a limited definition of "Asset" also does not allow for the introduction of innovative products. For example, no one could have predicted the development and tremendous growth of exchange traded funds ("ETFs") – which are included in the current definition of "Asset" – over the past decade and a half. Therefore, we recommend replacing the term "Asset" with the phrase "securities or other property" in order to eliminate the concept of a permitted list of investments.

iii. <u>We Recommend Annuities Continue to Be Offered Under PTE 84-24.</u>

Annuities are commonly used by retirement investors in their IRAs as a source of regular income. However, the Department has proposed modification or elimination of existing prohibited transaction exemptions ("PTE") upon which the insurance industry currently relies that will present significant challenges to their continued use. In particular, PTE 84-24 would be revised to exclude advice about variable annuities and other registered products to IRA owners, which advice would now have to meet the requirements of the BIC Exemption.[52] Financial professionals and institutions will be challenged to offer annuities under the BIC Exemption, however, because of the investment platforms that are built in to such products. As such, we recommend, due to variable annuities' unique insurance component, they should continue to be offered under PTE 84-24.

iv. <u>We Recommend Eliminating Limits on Sophisticated Investor Choice.</u>

Should the Department choose to retain its narrow definition of "Asset," we recommend the definition not apply to retirement investors that can be designated as accredited retail or institutional investors. We are making a similar recommendation with respect to the Seller's Carve-Out in Section I.B.ii. The apparent rationale behind the definition of "Asset" was to capture the most common IRA investments. This limitation should not apply to more sophisticated investors who are familiar with the potential risks of less common investment types. Such an approach would also be consistent with FINRA's Suitability Rule, which includes a carve-out from the customer-specific suitability obligation for institutional accounts.[53]

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[51] *See* 26 U.S.C. § 408.

[52] 80 Fed. Reg. at 22010-22020.

[53] *See* FINRA, Rule 2111(b). "A member or associated person fulfills the customer-specific suitability obligation for an institutional account…if (1) the member or associated person has a reasonable basis to believe that the institutional customer is capable of evaluating investment risks independently…and (2) the institutional customer affirmatively indicates that it is exercising independent judgment in evaluating the member's or associated person's recommendations."

v. We Recommend the BIC Exemption Provide Limited Compliance Requirements for Products and Services that Address Conflict Issues Under Existing Regulations.

Many financial institutions have developed products and services – both discretionary and non-discretionary – under which they act as a fiduciary today. These products and services were developed to comply with existing exemptions or are otherwise structured to avoid conflict and prohibited transaction issues. We believe that the most appropriate solution for these types of products and services is to make clear that the sale of such a product or service is not "investment advice." However, to the extent that such a sale might be considered a recommendation that is advice, we recommend the BIC Exemption provide relief for the recommendation and the associated compliance conditions be limited to contractual provisions implementing the "best interest" standard of care. We believe the other proposed requirements for the BIC Exemption, such as the list of permissible "Assets" and lengthy disclosures, do not provide additional protections for investors when the product or service is already compliant with ERISA and the prohibited transaction restrictions of the Internal Revenue Code.

D. ***The Proposed Disclosures Fail to Leverage Existing Disclosures and Will Not Be Effective.***

We support the need for effective disclosures as part of a well-designed best-interest standard, and encourage the Department to craft a disclosure regime that advances investor protection while avoiding duplication that may frustrate and confuse retirement investors. The BIC Exemption requires extensive new disclosures, which are duplicative of many current disclosures. The nature and format of the new disclosures would also require extensive rebuilding of current systems. There is simply no way to plan, build, test and implement the bevy of disclosures set forth in the proposed implementation timeframe.

The only practical avenue we see to implement additional disclosure requirements in a reasonable time period is to leverage existing disclosure requirements. Robust disclosures are already provided under ERISA Section 408(b)(2). These disclosures were implemented less than three years ago by the industry at considerable expense. Therefore, we recommend, instead of requiring new disclosures, the Department should rely on these 408(b)(2) disclosures as currently in place, as well as leverage other disclosures that are already provided, such as summary prospectuses, prospectuses, confirms, informational guides, Form ADV Part 2(a) and (b) and account agreements.[54]

[54] In addition, Wells Fargo provides numerous guides and disclosures in paper and electronically through our websites, such as our *A Guide to Investing in Mutual Funds*, *Guide to Buying Annuities*, *A Guide to Choosing a Financial Professional with Wells Fargo Advisors* or *Wells Fargo Advisors Financial Network*, *A Guide to Financial Protection for Older Investors* and *Investment Advisory and Brokerage Services* guide. These guides, and others, are available at: https://www.wellsfargoadvisors.com/disclosures/guide-to-investing.htm.

i. We Believe the Point of Sale Transaction <u>Disclosure Is Duplicative of Existing Disclosures.</u>

The BIC Exemption's point of sale transaction disclosure requires provision of a chart setting forth the "all-in" cost and anticipated future costs over a 1, 5 and 10 year period of a recommended asset prior to execution of the purchase of the asset. We believe this disclosure as proposed will be difficult, if not impossible, to provide.

As an initial matter, the Proposal calls for a point of sale disclosure but the total cost of transaction – to the penny[55] – cannot be provided until *after* the transaction has been executed. In addition, the disclosure appears to be modeled after mutual fund summary prospectuses. Other asset types such as stocks or bonds do not have future costs that can be readily broken down into 1, 5 and 10 year segments. Furthermore, providing "reasonable assumptions" about an investment's future performance could be perceived as conflicting with FINRA rules prohibiting predictions or projections of future performance.[56]

In addition, this disclosure would also unnecessarily interrupt the investment process. As the disclosure must be in form of a chart, it cannot be communicated verbally over the phone. By the time the chart is provided to an investor, the recommendation itself could be stale, such as in cases where a stock price changes.

Mutual fund summary prospectuses provide investors with 1, 3, 5 and 10 year total costs (based on a $10,000 investment with a reasonable growth assumption) at or prior to settlement of a transaction. Additional disclosures are also provided regarding annuity costs and qualified plan fees and other costs are disclosed on transaction confirms. Because retirement investors are already provided with a wealth of information at or prior to settlement regarding initial and ongoing costs of their investments, we believe an additional point of sale disclosure is unnecessary. If the point of sale disclosure is not eliminated, we recommend the Department rely on mutual fund summary prospectuses for mutual fund transactions, as these documents provide a large portion of the information proposed to be disclosed. As we note above, we believe the existing 408(b)(2) disclosure process could also provide this information and already serves this purpose for ERISA-covered plans today.

The Department has also asked for comment on the effectiveness and cost of a "cigarette warning"-style disclosure, which could be placed on a confirmation, and provided instead of the point of sale disclosure. While such a disclosure would be less costly, we believe there is nothing *inherently bad* for a person about investing with a financial professional. Even though we do not believe such a "warning" is necessary, we recommend this type of disclosure at account opening as the more appropriate course should the Department decide additional information should be provided.

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[55] Wells Fargo recommends that this requirement be changed to provide for the disclosure of ranges of expenses.

[56] *See, e.g.*, FINRA, Regulatory Notice 12-29, *Communications with the Public* (June 2012), at 16 (Predictions and Projections of Performance), *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p127014.pdf. FINRA Rule 2210(d)(1)(F) prohibits communications predicting and projecting performance with an allowance for hypothetical illustrations of mathematical principles.

ii. We Believe the Annual Disclosure Is Unnecessary.

The Department has also proposed in the BIC Exemption an annual disclosure (1) identifying assets purchased or sold, (2) total amount of fees or expenses paid by retirement investor on each asset and (3) compensation received by the financial institution and financial professional for each asset. As an initial matter, these proposed disclosures are unlikely to assist the average investor in making informed decisions. Assets purchased and sold throughout the year already appear on account statements throughout the year, as does much fee and expense information. Moreover, we reiterate our belief that the Department should leverage existing fulsome 408(b)(2) disclosures rather than create a new disclosure. While some information, such as indirect compensation received in connection with an asset, may not appear on regular statements, it could be disclosed using the 408(b)(2) disclosure that is already available.

Finally, systematically collecting a detailed accounting of the dollars attributable to each asset in every account, if it is even possible, will significantly add to the cost of servicing accounts, making the servicing of small balance accounts uneconomical or driving investor costs higher. It is also unclear how such an amount could be determined in time to meet the 45 day deadline. We understand that the Department seeks to ensure that individuals have information about the cost and compensation associated with their account. However, because of the complexity of the proposed disclosure, we recommend that the Department leverage existing disclosures as part of the implementation of the Proposal and engage in a subsequent process to consider a disclosure that supplements existing disclosures and is easier to understand and implement.

iii. We Are Concerned that the Public Website Disclosure Will Increase Costs.

In addition to the transaction and annual disclosures, the BIC Exemption requires disclosure on a public website of direct and indirect material compensation within the last 365 days. This is a hugely complicated undertaking requiring the listing of tens of thousands of products that requires daily updating.

We estimate the cost of the proposed website will be significant and expect it cannot be constructed within the proposed eight-month implementation period. In addition, the phrase "last 365 days" implies a rolling disclosure that must be updated daily as to potentially tens of thousands of data points. Continually updating the website in this manner will lead to substantial additional costs. We believe given the comprehensive disclosure regime already in place such costs are unwarranted. Therefore, if the public website disclosure is retained, we recommend it be limited to a static website with the current 408(b)(2) disclosure and quarterly updates of recent changes. We believe this would considerably reduce compliance costs, while providing investors with the information they need to make an informed decision. As is the case with the proposed transaction and annual disclosures, this information will be supplemented by existing disclosures contained in prospectuses, confirms and retirement investor statements.

iv. We Believe the Data Disclosure to the Department is Overly Burdensome.

The BIC Exemption requires financial institutions to disclose to the Department, within six months of a request, data for the preceding six year period concerning investment inflows, outflows and holdings for each asset purchased, sold or held under the BIC Exemption. In addition, financial institutions must maintain a record of individual investors' portfolio performance and the identity of their adviser. Even if individually-identifiable financial information is removed in any public disclosure of such data, we are concerned that sensitive information about individual investors would remain at risk in the event of a data breach, such as those which have recently victimized millions of federal employees.

In addition, we believe the proposed method of aggregating this data will fail to show how the choice of a particular investment strategy, including asset selections or decisions based on investor age or risk tolerance, may have impacted portfolio performance. Judging financial professionals in the absence of such critical nuance would unfairly assess their roles in assisting investors to meet their unique goals.

Finally, we are unclear how this requirement will benefit retirement investors as a comprehensive disclosure framework is already administered by the SEC and FINRA. We anticipate the systems necessary to effect this additional reporting requirement will take significant time and money to build. As such, we believe this requirement is unnecessary and unduly burdensome and the Department should leverage existing recordkeeping requirements instead of imposing new, costly recordkeeping requirements that will add to the costs of servicing retirement accounts.

E. ***The BIC Exemption Contract Warranties Are Unnecessary.***

Given the comprehensive legal and regulatory framework already in place,[57] and the other proposed provisions of the BIC Exemption contract, we believe that the proposed warranties should not be part of the contract. We believe the ability of investors to seek redress should the "best interest" standard be violated is sufficiently protective. In addition, as set forth above, we believe conflicts of interest should be addressed by utilizing the existing Form ADV to help investors further understand a financial professional's compensation and to reduce or eliminate conflicts of interest.

We are concerned that the inclusion of the warranties in the contract will give rise to significant risk and uncertainty on the part of financial institutions. For example, a warranty to comply with federal or state law may have the effect of penalizing financial institutions and financial professionals for any slight violation or failure to comply. As we are subject to

[57] Investor protections under the broker-dealer model are quite extensive and include, among other requirements, qualification and registration for broker-dealer representatives, continuing education requirements, a transparent system for reporting of disciplinary information of all kinds, specific supervision requirements, pre-use review and approval of communications with the public and formal rules governing a broker-dealer representative's outside business activity. Furthermore, FINRA routinely examines financial institutions for compliance with these and other requirements.

substantial regulatory and legal oversight, we think the provision related to compliance with all applicable federal and state law should be eliminated entirely. We do not believe that this warranty gives an additional protection to investors unavailable under the relevant law itself.

While we believe the "best interest" standard obviates the need for the other proposed warranties, if they are retained in any form, we believe they should instead be conditions of the BIC Exemption itself. We note that regulators generally are better positioned to review the types of activities covered by the proposed warranties. For example, it would be extremely burdensome to respond to individual claims to review policies and procedures. Because the requirements of the BIC Exemption are so complex, we also suggest that the Department consider some procedure for financial institutions to correct errors and maintain compliance on an ongoing basis.

F. *The Range of Investment Options Notice and The BIC Exemption's Other Provisions Are Incongruous.*

We are uncertain of the purpose of the notice required under the Range of Investment Options provision of the BIC Exemption.[58] While the Department restricted the types of investments that retirement investors can make in IRAs elsewhere in the BIC Exemption, the provision's "limited range of investment options" notice appears to penalize financial professionals or financial institutions who only offer a limited set of investments, such as certain investment specialists. The business of such specialists, who are not responsible for a retirement investor's entire portfolio, should not be hampered by the requirement that they notify a client or prospective client that they do not "recommend a sufficiently broad range of Assets."[59] Furthermore, the definition of "sufficiently broad" is unclear. For example, a retirement investor requiring only the purchase of a particular "Asset" from a financial professional may very well have their needs satisfied. We recommend the Department provide greater clarity with respect to when the requirements of the notice would apply to financial institutions with only proprietary products (e.g., offering only proprietary mutual funds and direct to fund retirement investors).

G. *The Pre-Existing Transactions Exemption Should Be Broadened.*

The Pre-Existing Transaction Exemption is conditioned on not providing additional advice to existing clients and does not include investments that are not "Assets." We believe the Pre-Existing Transaction Exemption should be expanded to permit the ongoing advice most consumers expected at the time of purchase without fundamentally disrupting the relationship by requiring a contract and the other BIC conditions. Therefore, we recommend that the Department consider an exemption to *all* accounts existing as of the effective date of the final rule.

Alternatively, the BIC Exemption conditions should only apply to investments purchased after the applicable date. Under this alternative, we would still require guidance and examples of

[58] 80 Fed. Reg. 21985 (§ IV(b)).

[59] *Id*. (§ IV(b)(4)).

how financial institutions should deal with such new limitations and restrictions on existing investments so that they remain grandfathered. Furthermore, this exemption should include existing investments that do not conform to the definition of "Assets." For example, if a client has a municipal bond, that client should be permitted to keep the bond instead of having to liquidate it prematurely or purchase another asset regardless of whether it falls within the BIC Exemption's "Asset" list. In addition, institutions should be permitted to advise an individual to liquidate such a grandfathered holding, without such a recommendation being considered "investment advice."

III. THE PRINCIPAL TRANSACTION EXEMPTION IS TOO NARROW AND SHOULD LEVERAGE EXISTING REGULATORY REQUIREMENTS.

As an initial matter, we believe a limitation on principal trading, and therefore the Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs ("Principal Transaction Exemption"), will not benefit retirement investors and, thus, *all* principal transactions should be exempted. Alternatively, should there be any limitation on principal trading, it should be consistent with the relief provided by the SEC under Rule 206(3)-3T ("Rule 206(3)-3T" or the "Rule") of Advisers Act.[60]

Rule 206(3)-3T applies to institutions that are dually registered as investment advisers and broker-dealers and to transactions in non-discretionary accounts at such institutions. Rule 206(3)-3T does not relieve in any way an investment adviser from acting in the best interests of an advisory client, including fulfilling the duty with respect to the best price and execution for the particular transaction for an advisory client. Nor does the Rule relieve an investment adviser from any obligation that may be imposed by section 206(1) or (2) of the Advisers Act[61] or by other applicable provisions of the federal securities laws.

We believe the Principal Transaction Exemption should mirror Rule 206(3)-3T, including with respect to the best execution and pricing obligations. Furthermore, harmonizing the Principal Transaction Exemption with the requirements under Rule 206(3)-3T would make the Exemption both operationally workable and would benefit investors purchasing or selling certain securities on a principal basis.

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[60] *See* SEC, Rule 206(3)-3T, Investment Advisers Act of 1940, *Temporary Rule for Principal Trades with Certain Advisory Clients* (codified at 17 C.F.R. pt. 275.206(3)-3T).

[61] 15 U.S.C. § 80b-6:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly –
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

A. ***The Exemption Should Include Other Types of Securities.***

The Principal Transaction Exemption is unnecessarily limited to certain debt securities.[62] We believe retirement investor's will be afforded greater, and equally prudent, choices under a limitation similar to Rule 206(3)-3T with respect to the types of securities covered. Rule 206(3)-3T permits principal transactions in *any* security. The only exception is where the investment adviser or affiliate is the issuer of, or, at the time of the sale, an underwriter of, the security – unless the security is an "investment grade debt security."[63] We encourage the Department to make such a change to provide retirement investors flexibility to choose what accounts are most appropriate for purchasing initial public offerings ("IPOs") and other such capital markets transactions.

B. ***A Client's Written Prospective Consent to Act as a Principal Should Be Sufficient.***

We believe the contract required under the Principal Transaction Exemption is not necessary. The contract required under the Principal Transaction Exemption contains the same elements as the BIC Exemption and, therefore, raises many of the same issues. In particular, we note again that the industry typically relies on negative consent for account changes and obtaining the retirement investor's affirmative written consent will be operationally challenging.

We recommend the contract element of the Principal Transaction Exemption be limited to a written prospective consent similar to those which financial institutions customarily capture under the Rule 206(3)-3T.[64] Such a consent would authorize the financial professionals – directly or indirectly – to act as principal. These disclosures would also include a conspicuous, plain English statement that the client may revoke the written consent without penalty at any time by written notice to the financial professional.

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[62] The Principal Transaction Exemption also contains an unclear requirement that the debt possess no greater than "moderate credit risk." This term is not defined in the Proposal. Wells Fargo suggests that the Department adopt the Rule 206(3)-3T definition of "investment grade debt security." *See* 17 C.F.R. pt. 275.206(3)-3T(c).

[63] "Investment grade debt security means a non-convertible debt security that, at the time of the sale, is rated in one of the four highest rating categories of at least two nationally recognized statistical rating organizations." *Id*.

[64] Under Rule 206(3)-3T, an advisory client must execute "a written, revocable consent prospectively authorizing the investment adviser directly or indirectly to act as principal for its own account in selling any security to or purchasing any security from the advisory client, so long as such written consent is obtained after written disclosure to the advisory client explaining:

(i) the circumstances under which the investment adviser directly or indirectly may engage in principal transactions;

(ii) the nature and significance of conflicts with its client's interests as a result of the transactions; and

(iii) how the investment adviser addresses those conflicts."

Id. at 206(3)-3T(a)(3).

C. *The Disclosures Required Under the Exemption Are Unnecessarily Burdensome.*

The pre-transaction disclosures required under the Principal Transaction Exemption are operationally impracticable. In particular, the requirement that the price is at least as favorable to the plan or IRA as the contemporaneous price for the debt security (or similar security if a price is not available for the same debt security) offered by two ready and willing counterparties that are not affiliated with the financial institution. As an initial matter, the idea that there are at least two other counterparties is somewhat inconsistent with the stated rationale of the Principal Transaction Exemption.[65] More importantly, compliance with this condition would increase costs and narrow the universe of securities for which the Principal Transaction Exemption is available.

We recommend the two quote requirement be eliminated. In the alternative, we recommend an allowance for instances in which obtaining two quotes is impossible. For example, retirement investors may need to liquidate a percentage of their account to meet an immediate income need. We believe the Department's assumption that it will only take "five minutes" to get the two quotes,[66] based upon our experience, is faulty in many instances and that retirement investors will be harmed if they are forced to wait the duration of time that it will take to accumulate the necessary information.

We believe the mark-up/mark-down disclosure is also unreasonable. For example, this disclosure will require a unique confirm for IRA accounts. Our recommendation is that this disclosure be eliminated.

The Principal Transaction Exemption further requires the financial institution and financial professional to provide certain written information to the retirement investor annually. This annual disclosure includes a list identifying each principal transaction engaged in during the applicable period, the prevailing market price at which the debt security was purchased or sold, and the applicable mark-up/mark-down or other payment for each debt security. We believe this disclosure is unnecessary and that the disclosure of the transaction price as per Rule 206(3)-3T is sufficient to achieve the objectives of the Principal Transaction Exemption.[67]

The Principal Transaction Exemption also requires upon-request disclosures at any time within six years of the debt security's purchase or sale. We are uncertain exactly what additional information, not already provided, must be saved for six years. We recommend the Department eliminate these burdensome requirements and adopt the disclosures required under Rule 206(3)-3T.

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[65] We understand the Department's rationale to be that the danger of conflicts of interest in principal transactions involving other types of securities, which may be more "widely available," outweighs the reduced choices for plans. 80 Fed. Reg. 21994. Whereas "debt securities…may need to be sold on a principal basis because particular bond issues may be sold by only one or a limited number of financial institutions." *Id*.

[66] *Id*. at 22000.

[67] Rule 206(3)-3T requires investment advisers to send to the client, no less frequently than annually, written disclosure containing a list of all transactions that were executed in the client's account in reliance upon this rule, and the date and price of such transactions. *See* 17 C.F.R. pt. 275.206(3)-3T(a)(6).

D. *Existing Investor Protections Mitigate the Risk of Excessive Mark-Ups/Mark-Downs and the Need for Additional Pricing Transparency*.

The Principal Transaction Exemption requires financial institutions to provide a written confirmation of the principal transaction in accordance with Rule 10b-10 of the Securities Exchange Act of 1934[68] that also includes disclosure of the mark-up/mark-down or other payment to the financial institution, financial professional or affiliate in connection with the principal transaction. As an initial matter, we note that Rule 10b-10 does not require disclosure of mark-ups/mark-downs and that putting such information on the trade confirmation may have to be approved by the SEC.

Rule 206(3)-3T requires investment advisers to send a written confirmation of the transaction at or before completion of each such transaction that includes, in addition to the information required by Rule 10b-10, a conspicuous, plain English statement of the information that the adviser disclosed to the client. This includes disclosure to the client prior to the execution of the transaction that the adviser may be acting in a principal capacity in connection with the transaction and the client authorized the transaction; and that the adviser sold the security to, or bought the security from, the client for its own account.[69] We believe this confirmation is sufficient.

IV. MEETING THE EIGHT-MONTH IMPLEMENTATION DEADLINE IS IMPOSSIBLE.

The Proposal is one of the most complicated regulatory initiatives proposed in recent memory. Yet the Department is proposing a short eight-month implementation time period to largely restructure our entire approach to advising retirement investors, including, but not limited to, repapering millions of existing retirement accounts, developing new disclosure processes, new supervisory processes, new training classes/modules and new data collection processes. The proposed eight-month implementation time period is not practicable and could cause unintended harm to the retirement investors the Department purportedly seeks to protect.

The Department vastly underestimates the time and resources necessary to code, build and implement entirely new technology infrastructure to service and support the new regulatory requirements. The actual implementation period is compressed even further given required system and compatibility testing prior to any production.

Other significant and less complicated regulatory reporting initiatives have taken far longer to be fully implemented than the Department's proposed implementation timeline. The Department allowed a two year implementation period for the development of Rule 408(b)(2)

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[68] SEC, *Confirmation of Transactions*, Rule 10b-10, Securities Exchange Act of 1934 (codified at 17 C.F.R. pt. 240.10b-10).

[69] *See* 17 C.F.R. pt. 275.206(3)-3T(4) and (5).

disclosures.[70] Similarly the SEC allowed two years to implement its Large Trader Reporting initiative.[71] We estimate the development, testing and implementation of the Proposal's BIC Exemption's website disclosure alone would take far longer than eight months. To rush through the development of new processes, procedures, disclosure systems and employee training could lead to system and process shortcomings that increase, rather than decrease, investor protections.

In addition, considering the number of IRA accounts we have, and the number of IRA accounts even smaller financial institutions have, taking on manual processes is unworkable. Most financial institutions, large and small, will rely on automated systems and processes to comply. Therefore, an eight-month implementation timeframe is not realistic.

Given the uncertainty as to the details of the final rule, we cannot identify a specific timeframe to implement the Proposal's requirements with confidence. Based on the Proposal, though, processes such as mapping data; archiving and storage protocols; validation; and reconciliation may take three years or longer, notwithstanding other significant work such as system testing, security and governance protocols. Furthermore, this list just captures technology protocols. Implementing these changes alone suggests eight months is an unreasonable time period, and we recommend the Department establish a more realistic implementation time period of at least three years.

We also believe that the Proposal should be implemented in phases and that each phase give adequate time to implement the required activity properly and prepare for the subsequent phase. Our review of the Proposal is ongoing and we hope to provide a more detailed suggestion for phased implementation in a subsequent letter. However, we note that whatever the final form of the regulation and exemptions may be, it appears that there will be substantial change to existing procedures and systems and unanticipated challenges will certainly arise. Therefore, we strongly recommend that the Department provide a compliance relief period for those who make a good faith effort to comply in a timely fashion.[72]

V. AN EXEMPTION SHOULD BE MADE FOR ACTIVITIES REGULATED BY AN SRO OR A REGULATORY AGENCY.

Broker-dealers, investment advisers, banks and other institutions that provide investment advice to investors operate within a comprehensive regulatory framework established and

[70] *See, e.g.*, Dep't of Labor, Employee Benefits Security Admin., *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 77 Fed. Reg. 5632, at 5649 (Feb. 3, 2012) (codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2012-02-03/pdf/2012-2262.pdf.

[71] *See, e.g.*, SEC, *Order Temporarily Exempting Certain Broker-Dealers and Certain Transactions from the Recordkeeping and Reporting Requirements of Rule 13h-1 under the Securities Exchange Act of 1934,* Release No. 34-70150 (Aug. 8, 2013), *available at:* http://www.sec.gov/rules/exorders/2013/34-70150.pdf.

[72] *See, e.g.*, Dep't of Labor, Employee Benefits Security Admin., *Frequently Asked Questions: The 2009 Form 5500 Schedule C,* at FAQ 40 (providing compliance relief period for good faith compliance efforts), *available at:* http://www.dol.gov/ebsa/faqs/faq_scheduleC.html.

overseen by various federal and state agencies and self-regulatory organizations ("SROs").[73] An exemption from the Proposal for accounts, including IRAs, or persons subject to the regulatory jurisdiction of an SRO or a regulatory agency under a "best interest" standard for the provision of personalized investment advice would mitigate the overlap between these regulatory frameworks and the Proposal.

We have supported the SEC's efforts to establish one harmonized fiduciary standard consistent with Section 913 of the Dodd-Frank Act.[74] We have also supported recent industry proposals to, among other changes, amend FINRA's Suitability Rule to include a "best interest" standard that applies to *all* retail brokerage accounts. Such changes to either SEC or FINRA rules would incorporate much of the "best interest" standard defined by the Department under the BIC Exemption and would build on the extensive protections already provided by current regulation.

As retirement planning includes assets outside of traditional retirement accounts, we believe a uniform standard will provide the most beneficial protection to investors by creating a consistent set of obligations across all account types and eliminating investor confusion concerning the applicable standard of care. Therefore, we propose an exemption under the Proposal for accounts, including IRAs, maintained at a financial institution or with a financial professional subject to the regulatory jurisdiction of an SRO or a federal securities regulator if such SRO or federal securities regulator subjects the associated financial institution or financial professional to standards no less than those specified in the BIC Exemption. The exemption for such accounts would require the SRO or federal securities regulator standards include at a minimum:

- A "best interest" standard of care for activities affecting customers;
- Disclosures of conflicts and commissions, such as summary prospectuses, prospectuses, confirms, Form ADV and 408(b)(2) disclosures, and mitigation of conflicts of interest to the extent practicable; and
- Any other customer protections developed by the SRO or federal securities regulator meeting the Department's fundamental requirements.

[73] At the federal level, investment advice is regulated primarily by the SEC and FINRA. The investment advice provided by banks is generally exempt from SEC regulation, but depending on whether the bank is nationally chartered or state chartered, is subject to regulation and supervision by one or more of the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("FRB"), the Federal Deposit Insurance Corporation ("FDIC") and state banking authorities. Further regulation is overseen by the Municipal Securities Rulemaking Board ("MSRB") (for advice with respect to municipal securities) and the Commodity Futures Trading Commission ("CFTC") and the National Futures Association ("NFA") (for advice with respect to commodity trading).

[74] *See* Correspondence from Robert J. McCarthy, Director of Regulatory Policy at Wells Fargo Advisors, LLC, to Elizabeth M. Murphy, Secretary of Securities and Exchange Commission, *regarding* File No. 4-606; Release No. 34-69013; IA-3558; Duties of Brokers, Dealers and Investment Advisers, at 2-7 (July 5, 2013), *available at:* https://www.sec.gov/comments/4-606/4606-3127.pdf.

Such an exemption would allow the same standards to be applied across all accounts at broker-dealers. In addition, such an exemption would lead to direct regulatory enforcement of "best interest" standards through resolution of customer claims via existing processes at broker-dealers rather than by contractual litigation.

VI. CONCLUSION

Wells Fargo appreciates the opportunity to respond to the Department's Proposal. As discussed above, we have consistently supported, and continue to support, a "best interest" standard of care for retirement and nonretirement advice that enhances protections for investors while preserving access to the full range of investment products and services they currently enjoy. We believe this can be accomplished by establishing a "best interest" standard (to replace the existing suitability standard), enhancing disclosures to investors in a manner consistent with what is currently prescribed (utilizing existing disclosures including, for example, 408(b)(2) disclosures for retirement plan investors) and specifying these "best interest" standards through a new contract with investors that is entered into at the time an account is opened.

While we support the Department's efforts in creating a retirement standard of care that eliminates or mitigates conflicts of interest, we believe the limiting of investor education, the impractical and overly burdensome requirements of the BIC Exemption, the mandating of excessive warranties that create uncertainty, a short eight month implementation deadline and the complexities of overlapping regulatory frameworks make the Proposal an impracticable option as it is written today. We would also recommend the Department provide an additional exemption for IRA accounts of financial institutions regulated by an SRO or regulatory agency that has adopted an agreed upon "best interest" standard for the provision of personalized investment advice.

In sum, we believe the Proposal presents a number of issues for investor access to investment education and advice, investor choice in retirement investments and investor costs. Accordingly, we stand ready to work with the Department to achieve a workable outcome that benefits retirement investors. If you would like to further discuss any of Wells Fargo's comments, please contact Robert J. McCarthy, Director of Regulatory Policy, at (314) 955-2156 or robert.j.mccarthy@wellsfargoadvisors.com or Kenneth L. Pardue, Managing Director, Retirement Plans, at (314) 875-2927 or kenneth.pardue@wellsfargoadvisors.com.

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A SUMMARY OF WELLS FARGO'S RECOMMENDED CHANGES TO THE PROPOSAL

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
1-14 § I	The proposed **definition of "fiduciary"** classifies all manner of information as fiduciary advice while providing only narrow carve-outs.	The **definition of "fiduciary" should be narrowed** and the available carve-outs should be appropriately broadened.	Investors will have access to the financial information they need to be informed participants and decision makers.
2 § I.A.i	Under the Proposal, **fiduciary status attaches to advice "for consideration"** by the investor.	Individuals should be **permitted to receive sales information** about available product options before committing to a financial professional or product.	Investors will have access to investment, distribution and other assistance in understanding available options before establishing a binding contractual commitment.
3 § I.A.ii	The Proposal **eliminates the "mutual agreement"** requirement contained in the current regulation.	Fiduciary obligations should attach when the financial professional and the investor **"mutually understand"** they have entered into an advice relationship.	A best interest fiduciary standard will protect the investor from the point an advice relationship begins while providing investors with access to essential information beforehand.
3 § I.A.iii	The proposed definition of "fiduciary" includes **advice that is "specifically directed to"** the investor.	The language "**specifically directed to" should be eliminated** to avoid capturing activities such as mailings discussing specific products and services.	Providing specific product and service information to an investor directly is essential to establishing a disciplined approach to retirement investing and planning.
4 § I.A.iv	The Proposal's distinction between **when a recommendation becomes advice** is unclear.	A brighter line for when fiduciary status begins should be established, **consistent with** the definition of "customer" under **FINRA Rule 2111 –** the "Suitability Rule."	Establishing a consistent regulatory framework – regardless of account type – will reduce investor confusion.

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5 § I.B.i	The **availability of the proposed Seller's Carve-Out** depends on (1) the number of participants in the plan, and (2) the amount of plan assets under management of the plan fiduciary.	As all ERISA fiduciaries must have sufficient expertise to prudently discharge their duties, the Seller's Carve-Out should cover **all ERISA-covered plans, regardless of size**.	Providing small plans will access to the Carve-Out will allow them to avoid unnecessary expenses.
5 § I.B.ii	The **Seller's Carve-Out** does not include **accredited retail or institutional investors**.	Accredited investors **should be included** in the Carve-Out consistent with current securities law.	Sophisticated investors who are familiar with the potential risks will be permitted greater latitude.
6 § I.B.iii	The **Seller's Carve-Out** has a number of conditions, including a requirement that the **counterparty receive certain written representations**.	The Carve-Out should be drafted to ensure that investment advice does not include **the response of a service provider to a request for proposal.**	Broadening the Carve-Out to include common sales transactions will allow competition and provide investors with greater price efficiency.
6 § I.C.i	The **Platform Providers and Selection and Monitoring Assistance Carve-Outs** could be interpreted as **limited to recordkeepers**.	These Carve-Outs should **include all platforms.**	Broadening the Carve-Outs will allow for the development of a product platform.
7 § I.C.ii	The **Platform Providers and Selection and Monitoring Assistance Carve-Outs** may not accommodate situations where **neither party is expecting to be in a fiduciary relationship.**	These Carve-Outs should allow for the **provision of objective, publicly available investment advice**.	Broadening the Carve-Outs will allow service providers to provide plan fiduciaries with valuable assistance.
7 § I.C.iii	The **Platform Providers and Selection and Monitoring Assistance Carve-Outs** may not permit service providers to **analyze fund selections**.	These Carve-Outs should allow service providers to assist plan fiduciaries in **narrowing the range of investment options for plan participants**.	Broadening the Carve-Outs will allow service providers to continue to assist plan fiduciaries in choosing from available funds.
8 § I.D	The **Financial Reports and Valuations Carve-Out** may **not include** certain **administrative functions**.	The Financial Reports and Valuations Carve-Out should **include valuations of plan investments** provided by plan service providers.	Investors will benefit from the inclusion of such calculations in the Carve-Out because they help to facilitate daily trading.

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9 § I.E.i	The Proposal places new conditions on what is considered **investment advice**, including that information and asset allocation models ***cannot*** **include specific investment alternatives**.	The Investment Education Carve-Out should be **modified to more closely resemble the DOL's 1996 guidance**, which allowed discussion of specific investment alternatives.	Investors will receive objective information and benefit from discussing investment alternatives.
11 § I.E.ii	The Proposal **does not accommodate the questions that plan participants have** after receiving an explanation of their distribution options.	Service provider **call centers inform plan participants** about distribution options and should be permitted to continue, at a minimum, to confirm that IRAs are offered by the service provider **without fiduciary status**.	Participants who are more informed of their distribution options will be more likely to retain their retirement benefits instead of cashing them out.
12 § I.F.i	The Proposal covers and treats **HSAs in a manner similar to IRAs**.	The Proposal **should not include HSAs** because they serve an entirely different purpose than IRAs. If HSAs are ultimately included in the Proposal: (1) **Platform Provider Carve-Out** should be **extended to HSAs**; and (2) communications regarding how to use an HSA should be **included in the Investment Education Carve-Out**.	Investors use HSAs to pay for medical and other healthcare expenses and will not benefit from the imposition of additional regulatory restrictions and costs on top of the existing extensive regulatory structure.
14 § I.F.ii	The Proposal covers and treats **ESAs in a manner similar to IRAs**.	The Proposal **should not include ESAs** because they serve an entirely different purpose than IRAs. If ESAs are ultimately included in the Proposal, communications regarding how to use an ESA should be **included in the Investment Education Carve-Out**.	Investors use ESAs to fund education expenses for a designated beneficiary who is under age 18 or is a special needs beneficiary. Given the limited funding options and generally short life of ESAs, additional regulatory restrictions will not benefit investors.

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14-29 § II	The **BIC Exemption** is intended **to "preserve beneficial business models for delivery of investment advice."**	The BIC Exemption **is impracticable as proposed.**	A revised exemption will provide flexibility to determine the appropriate service and fee models for each investor.
15 § II.A.i	The BIC Exemption's **"written contract" requirement** will cause a number of challenges **for prospective clients**.	Consistent with FINRA's Suitability Rule, the contract should only be **executed after a prospective customer becomes a client**.	The execution of the contract with new account opening documentation will provide investors with "best interest" protections, while providing access to financial professionals.
17 § II.A.ii	The BIC Exemption's **"written contract" requirement** will cause a number of challenges for **existing clients**.	For existing clients, firms should be permitted to amend existing contracts with the new BIC Exemption **via notice**.	Utilizing a notice amendment process alleviates the practical issue of how to address instances where the investor does *not* sign the contract.
17 § II.A.iii	The BIC Exemption's **"written contract" requirement** appears to contemplate **signatures** from the financial institution, the financial professional and the client.	Obtaining financial institution and financial professional **signatures** will raise numerous practical issues and **should not be required**.	Client agreements typically only require a client signature, which is sufficient to create a legally enforceable right on the part of the client.
18 § II.B.i	The BIC Exemption's "Impartial Conduct Standards" may effectively **restrict** financial institutions to recommending the **least expensive product or strategy**.	The Proposal should provide investors with the **freedom to choose prudent products**, e.g., FINRA Regulatory Notice 12-25 provides other factors to consider in addition to cost.	Investors will retain access to products or services that are in their best interest, whether they are the least expensive option or not.
20 § II.B.ii.	The BIC Exemption's "Impartial Conduct Standards" may **restrict** investor choice regarding advice models if the alternatives **involve differential compensation**.	The Proposal should provide investors with the **freedom to choose appropriate payment models**.	Investors will retain the choice to pay for service as (1) a one-time fee, (2) an ongoing fee, (3) a fee for transactions incidental to advice, and (4) fee for transactions without advice.

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21 § II.B.iii	The **impact** of the BIC Exemption's "Impartial Conduct Standards" **on proprietary products is unclear**.	This **phrase** "**without regard to the financial or other interests** of the Adviser, Financial Institution or any Affiliate, Related Entity or other party" **should be eliminated**.	Investors will retain access to proprietary products so long as the proprietary product is in the investor's best interest.
22 § II.C.i	The **effect** of the BIC Exemption **on** a financial professional's ability to offer services such as **advisory programs** to investors is unclear.	If the Department did not intend to restrict access from advisory services, the Department should **eliminate the "Asset" list**, or revise to include such services.	A financial professional will be permitted to recommend a firm sponsored advisory program if such a recommendation is in the investor's best interest.
22 § II.C.ii	The BIC Exemption includes a **limited definition of "Asset."**	Financial professionals and investors **should be permitted to make judgments** about appropriate investments and the concept of permitted investments should be eliminated.	Investors will retain access to innovative products so long as they are in the investor's best interest.
23 § II.C.iii	**Variable annuities** and other registered products are **included in** the **definition of "Asset."**	**Annuities should continue to be offered under PTE 84-24** as financial professionals and institutions will be challenged to offer annuities under the BIC Exemption.	Annuities provide an important source of cash flow for investors during their retirement years.
23 § II.C.iv	The BIC Exemption **does not contain a carve-out for accredited retail and institutional investors**.	The **definition of "Asset" should not apply to** investors that can be designated as **accredited investors**.	Sophisticated investors are familiar with the potential risks of less common investment types and should be not restricted from using such products.
24 § II.C.v	The BIC Exemption does not distinguish **products and services** that address **conflict issues under existing regulations**.	Compliance conditions associated with such products and services should be **limited to contractual provisions implementing the "best interest" standard of care**.	Investors will not benefit from the proposed additional protections when the product or service is already compliant with ERISA and the prohibited transaction restrictions of the Internal Revenue Code.

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25 § II.D.i	The BIC Exemption requires a **point of sale transaction disclosure** of the "all-in" cost and anticipated future costs of a recommended asset prior to execution of the purchase of the asset.	Instead of requiring new disclosures, the **408(b)(2) disclosures should be utilized**. Other disclosures that are already provided could also be leveraged.	The transaction disclosure will be difficult, if not impossible, to provide as currently proposed and will unnecessarily interrupt the investment process.
25 § II.D.i	The Department has proposed a **"cigarette warning"-style disclosure**.	This type of disclosure at account opening may be a **more appropriate disclosure than the point of sale disclosure.**	A "cigarette warning"-style point of sale disclosure is unnecessary as there is nothing inherently bad about investing.
26 § II.D.ii	The BIC Exemption requires an **annual disclosure** identifying assets purchased or sold and associated fees and expenses and compensation.	Existing **408(b)(2) disclosures are fulsome disclosures** and they should be applied to IRAs as is without an annual disclosure.	The annual disclosure – if it is even possible as proposed – will significantly add to the cost of servicing accounts, making the servicing of small balance accounts uneconomical.
26 § II.D.iii	The BIC Exemption requires **disclosure on a public website** of direct and indirect material compensation within the last 365 days.	Much of this information can be supplied by **applying current 408(b)(2) requirements** to cover IRA accounts.	The time and resources that would have to be allocated to build the proposed public website will significantly impact the services available to investors.
27 § II.D.iv	The BIC Exemption requires financial institutions to **disclose** to the Department within six months of a request certain **data for the preceding six year period**.	This requirement **is unnecessary** as the Department should leverage existing recordkeeping requirements instead of imposing new, costly requirements.	The proposed data disclosure will add unnecessary costs to servicing retirement accounts.
27 § II.E	The BIC Exemption's **warranties are unnecessary**.	The "best interest" standard **obviates the need** for the other proposed warranties.	The ability of investors to seek redress should the best interest standard be violated is sufficiently protective.

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28 § II.F	The purpose of the BIC Exemption's **notice** to a client or prospective client that an investment specialist **does not "recommend a sufficiently broad range of Assets" is unclear**.	The business of certain **investment specialists**, who are not responsible for an investor's entire portfolio, **should not be hampered by the requirement that they provide such a notice**.	Investors will be encouraged to work with investment specialists if it is in their best interests.
28 § II.G	The BIC Exemption's **Pre-Existing Transactions Exemption** is conditioned on not providing additional advice and **is too narrow**.	An **exemption** should be made for **all investments** that are **held** by investors **on the applicability date of the final rule** without application of the BIC Exemption conditions.	Restricting accounts in line with the Proposal will likely be costly and difficult to implement. The allocation of such resources will ultimately affect the quality of client service.
29-32 § III	The **Principal Transaction Exemption** is too narrow and **does not leverage existing regulatory requirements**.	Any limitation on principal trading should be **consistent with** the relief provided by the SEC under **Rule 206(3)-3T** under the Investment Advisers Act of 1940.	Permitting principal transactions under conditions aligning with the Advisers Act will improve and simplify investors' experiences.
30 § III.A	The Principal Transaction Exemption is unnecessarily **limited to certain debt securities**.	Rule 206(3)-3T permits principal transactions in ***any* security** with a limited exception where the financial professional is an issuer or underwriter of the security.	Broadening the Exemption will provide investors with certain tax advantages such as those associated with purchasing IPOs in IRAs
30 § III.B	The **contract** required under the Principal Transaction Exemption contains the **same elements as the BIC Exemption** and, therefore, **raises many of the same issues**.	The contract element **should be limited to a written prospective consent** similar to those which financial institutions customarily capture under Rule 206(3)-3T.	The investor could revoke such a consent without penalty at any time. This consent will provide investors with sufficient protection without unnecessarily inhibiting principal trades.
31 § III.C	The **pre-transaction disclosures** required under the Principal Transaction Exemption **are operationally impracticable**.	**These disclosures should be eliminated** and the disclosures required under Rule 206(3)-3T should be used.	The provision of the proposed disclosures will be impossible in some cases, and operatically burdensome in many others, with little practical benefit to investors.

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32 § III.D	The Principal Transaction Exemption requires financial institutions to provide a **written confirmation**, including disclosure of the mark-up/mark-down.	**Existing investor protections mitigate the risks of excessive mark-ups/mark-downs**. Further, SEC approval may be required to include mark-ups/mark-downs on the trade confirmations.	Investors already benefit from the pricing transparency provided by the Rule 10b-10 written confirmation. Additional disclosures on confirmations are unnecessary.
32-33 § IV	The Department is proposing **a short eight-month implementation period** to largely restructure the industry's whole approach to advising investors.	Given the uncertainty as to the details of the final rule, we cannot identify a specific timeframe to implement the Proposal's requirements with confidence, but assume it **will be at least three years**.	A hurried implementation of the Proposal in eight months is not only impossible, a less than thorough restructuring would do investors a great disservice.
33-35 § V	The Proposal further contributes to an **overlapping regulatory framework**.	**An exemption** should be made for activities regulated by **an SRO or a federal securities regulator's best interest standard**.	As retirement planning includes assets outside of traditional retirement accounts, a uniform standard will provide the most beneficial protection to investors by creating a consistent set of obligations across all account types.

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WELLS FARGO'S RECOMMENDED CHANGES TO THE DEFINITION OF THE TERM "FIDUCIARY"; CONFLICT OF INTEREST RULE – RETIREMENT INVESTMENT ADVICE

§ 2510.3-21 Definition of "Fiduciary."

(a) *Investment advice*. For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (Act) and section 4975(e)(3)(B) of the Internal Revenue Code (Code), except as provided in paragraph (b) of this section, a person renders investment advice with respect to moneys or other property of a plan or IRA described in paragraph (f)(2) of this section if—

(1) Such person provides, directly to a plan, plan fiduciary (as described in section 3(21)(A)(i) of the Act)[1], plan participant or beneficiary, IRA, or IRA owner the following types of advice in exchange for a fee or other compensation, whether direct or indirect:

(i) A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(ii) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

~~(iii) 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 transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA;~~[2]

(iii~~iv~~) A recommendation as to the advisability of engaging ~~of~~ a person who is also going to receive a fee or other compensation for providing any of the types of

We have not endeavored to rewrite the entire Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice ("Re-Proposed Rule"). Instead, our changes are focused on sections where we understood the Department may be flexible and where we believe alterations in any final rule are most needed. The revisions we offer herein also incorporate changes to the text of the Re-Proposed Rule recommended by other commenters. Our citations to the comments of other parties are not an endorsement of their past or future comments beyond what we have specifically included.

[1] *See* Correspondence from David M. Carroll, Senior Executive Vice President, Wealth, Brokerage & Retirement, Wells Fargo & Company, to John J. Canary, Director, Office of Regulations and Interpretations, Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25] (July 21, 2015) ("Wells Fargo July 21 Letter"), at App. A, pp 2-3 (§ I.A.i.), *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00647.pdf).

[2] *See* Wells Fargo July 21 Letter, at App. A, pp 8-9 (§ I.D.); Correspondence from Lisa J. Bleier, Managing Director, Federal Government Relations and Associate General Counsel, Securities Industry and Financial Markets Association, to Office of Regulations and Interpretations, Employee Benefits Security Admin., Dep't of Labor, *regarding* RIN: 1210-AB32 (July 20, 2015) ("SIFMA Definition of Fiduciary Letter"), at 12-18, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00506.pdf.

advice described in section 3(21)(A)(i) or (ii) of the Act~~paragraphs (i) through (iii)~~;[3] and

(2) Such person~~, either directly or indirectly (e.g., through or together with any affiliate),~~[4]—

(i) Expressly states ~~Represents or acknowledges~~ that it is acting as a fiduciary within the meaning of the Act with respect to the advice described in paragraph (a)(1) of this section that is or will be provided with respect to a particular account in connection with a particular recommendation of an investment transaction or series of recommendations regarding such a transaction or series of transactions, provided that the express acknowledgement of fiduciary status with respect to a particular transaction, account or recommendation will not, by itself, cause the person to become a fiduciary with respect to any other transaction, account or recommendation[5]; or

(ii) Renders the advice pursuant to a written or verbal agreement, arrangement or mutual[6] understanding that the advice is individualized to, or that such advice is specifically directed and individually tailored[7] to, the advice recipient as the primary basis for ~~consideration in~~[8] making investment or management decisions with respect to securities or other property of the plan or IRA.[9]

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[3] *See* SIFMA Definition of Fiduciary Letter, at 18.

[4] *See also* Correspondence from Catherine J. Weatherford, President and Chief Executive Officer, Insured Retirement Institute, to Office of Regulations and Interpretations and Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, RIN 1210-AB32; Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters, ZRIN 1210-ZA25; Proposed Best Interest Contract Exemption, ZRIN 1210-ZA25 (July 21, 2015) ("IRI Letter"), at 19, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00626.pdf.

[5] SIFMA Definition of Fiduciary Letter, at 27.

[6] *See* Wells Fargo July 21 Letter, at App. A, p. 3 (§ I.A.ii.).

[7] *See id*. (§ I.A.iii.).

[8] *See id*., at p. 4 (§ I.A.iii.).

[9] Alternatively:

(ii) Renders the advice in a manner where the advice recipient reasonably believes that such person is acting in their best interest in providing such ~~pursuant to a written or verbal agreement, arrangement or understanding that the~~ advice and is not acting in an educational, marketing or sales capacity. This determination is based on the relevant facts and circumstances. Under this clause, relevant factors include the individualized nature of the advice provided, the reliance placed on it by the advice recipient and any disclosures provided to the advice recipient; however, no single factor shall be determinative~~is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA~~.

See Correspondence from Anne Cooney, Managing Director and General Counsel of Morgan Stanley Wealth Management to Office of Regulations and Interpretations and Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Comments on the Department's Fiduciary Definition Proposal, ZRIN 1210-ZA25; RIN 1210-AB32 (July 21, 2015) ("Morgan Stanley Letter"), at 6, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00662.pdf; Correspondence from David M. Abbey, Deputy General

(b) *Carve-outs – investment advice*. Except for ~~persons~~ advice described in paragraph (a)(1) of this section with respect to which the person has represented or acknowledged that it is acting as a fiduciary as [10]described in paragraph (a)(2)(i) of this section with respect to a particular account (or particular assets in an account) and a particular transaction[11], the rendering of advice or other communications in conformance with a carve-out set forth in paragraph (b)(1) through (9~~6~~) of this section shall not cause the person who renders the advice to be treated as a fiduciary under paragraph (a) of this section.

(1) *Counterparties to the plan*—

(i) *Counterparty transaction with plan fiduciary with financial expertise*.

(A) In such person's capacity as a counterparty (or representative of a counterparty) to an employee benefit plan (as described in section 3(3) of the Act) or to any plan described in section 4975(e)(1) of the Code[12], the person provides advice to a plan fiduciary who is independent of such person and who exercises authority or control with respect to the management or disposition of the plan's assets, with respect to an arm's length sale, purchase, loan, provision of services[13] or bilateral contract between the plan and the counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral contract, if, prior to providing any recommendation with respect to the transaction, such person satisfies the requirements of either paragraph (b)(1)(i)(B) or (C) of this section.

(B) Such person—

(1) Knows or reasonably believes that[14] ~~Obtains a written representation from the independent plan fiduciary~~ that the independent fiduciary exercises authority or control with respect to the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act)~~, that the employee benefit plan has 100 or~~

Counsel – Retirement Policy, and David W. Blass, General Counsel, Investment Company Institute to Office of Regulations and Interpretations and Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* RIN 1210-AB3: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice (July 21, 2015) ("ICI Letter"), at 9, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00747.pdf.

If such a change is not made, we recommend the carve-outs be expanded under § 2510.3-21(b), *see infra* at pp 3-7, "to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions." 80 Fed. Reg. at 21941.

[10] *See* SIFMA Definition of Fiduciary Letter, at 37.

[11] *See id*.

[12] *See* Wells Fargo July 21 Letter, at App. A, p. 5 (§ I.B.).

[13] *See* Correspondence from Barbara Novick, Vice Chairman, and Patricia Anne Kuhn, Managing Director, BlackRock, Inc., to Office of Regulations and Interpretations and Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice (RIN 1210-AB32) and Proposed Best Interest Contract Exemption and the Proposed Amendments to and Proposed Partial Revocation of PTEs 86-128 and 75-1 (RIN 1210-ZA25) (July 21, 2015) ("BlackRock Letter"), at 15, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00684.pdf.

[14] *See* Wells Fargo July 21 Letter, at App. A, p. 6 (§ I.B.iii.).

~~more participants covered under the plan,~~[15] and that the independent fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity;

(2) Fairly informs the independent plan fiduciary of the existence and nature of the person's financial interests in the transaction;

(3) Does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction;[16] and

(4) Knows or reasonably believes that the independent plan fiduciary has sufficient expertise to evaluate the transaction and to determine whether the transaction is prudent and in the best interest of the plan participants (the person may rely on written representations from the plan or the plan fiduciary to satisfy this subsection (b)(1)(i)(B)(4)).

~~(C) Such person —~~

~~(1) Knows or reasonably believes that the independent plan fiduciary has responsibility for managing at least $100 million in employee benefit plan assets (for purposes of this paragraph (b)(1)(i)(C), when dealing with an individual employee benefit plan, a person may rely on the information on the most recent Form 5500 Annual Return/Report filed for the plan to determine the value and, in the case of an independent fiduciary acting as an asset manager for multiple employee benefit plans, a person may rely on representations from the independent plan fiduciary regarding the value of employee benefit plan assets under management);~~

~~(2) Fairly informs the independent plan fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity; and~~

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[15] *See id.*, at p. 5 (§ I.B.i.).

[16] Alternatively:

(3) Such person ~~Does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction;~~

(A) Does not receive any separate fee or other compensation directly or indirectly from the plan, or plan fiduciary with respect to any advice provided in connection with a proposed provision of investment advice or purchase of an investment fund, security or other Plan investment (as opposed to compensation received after such person is hired to provide investment management or advisory services or the plan or plan fiduciary makes an investment); or

(B) The person does not receive a fee or other compensation for the provision of investment advice (as opposed to other services) in connection with the transaction or proposed transaction; and

BlackRock Letter, at 15-16.

~~(3) Does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction.~~[17]

(C) Such person is an Accredited Investor.[18]

(ii) *Swap and security-based swap transactions*. The person is a counterparty to an employee benefit plan (as described in section 3(3) of the Act) in connection with a swap or security-based swap, as defined in section 1(a) of the Commodity Exchange Act (7 U.S.C. 1(a) and section 3(a) of the Securities Exchange Act (15 U.S.C. 78c(a)), if—

(A) The plan is represented by a fiduciary independent of the person;

(B) The person is a swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant;

(C) The person (if a swap dealer or security-based swap dealer), is not acting as an advisor to the plan (within the meaning of section 4s(h) of the Commodity Exchange Act or section 15F(h) of the Securities Exchange Act of 1934) in connection with the transaction; and

(D) In advance of providing any recommendations with respect to the transaction, the person obtains a written representation from the independent plan fiduciary, that the fiduciary will not rely on recommendations provided by the person.

(2) *Employees*. In his or her capacity as an employee of any employer or employee organization sponsoring the employee benefit plan (as described in section 3(3) of the Act), the person provides the advice to a plan fiduciary, and he or she receives no fee or other compensation, direct or indirect, in connection with the advice beyond the employee's normal compensation for work performed for the employer or employee organization.

(3) *Platform providers*. The person merely markets ~~and makes available~~ to an employee benefit plan (as described in section 3(3) of the Act) or to any plan described in section 4975(e)(1) of the Code,[19] without regard to the individualized needs of the plan, its participants, or beneficiaries or to an IRA or IRA owner,[20] securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, if the person discloses in writing to the plan fiduciary or IRA owner[21] that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity. The provision of sample line-ups is permitted in the platform marketing process so long as the sample line-ups are developed

[17] *See* Wells Fargo July 21 Letter, at App. A, p. 5 (§ I.B.i.).

[18] *See id*., at p. 5 (§ I.B.ii.).

[19] *See id*., at pp 6-7 (§ I.C.i.); IRI Letter, at 23-24.

[20] *See id*.

[21] *See id*.

using objective criteria that is disclosed to the plan and are not individualized to the needs of the particular plan.[22]

(4) *Selection and monitoring assistance*. In connection with the activities described in paragraph (b)(3) of this section with respect to an employee benefit plan (as described in section 3(3) of the Act) or to any plan described in section 4975(e)(1) of the Code,[23] the person –

(i) Merely identifies investment alternatives that meet objective criteria specified by the plan fiduciary (e.g., stated parameters concerning expense ratios, size of fund, type of asset, credit quality);~~ or~~

(ii) Merely provides objective financial data and comparisons with independent benchmarks to the plan fiduciary; or

(iii) Merely provides objective, publicly available information so long as the information is not coupled with a recommendation to make a particular plan investment choice.[24]

(5) *Financial reports and valuations*. The person provides an appraisal, fairness opinion, ~~or~~ statement of value, or unitization calculation of the value of an investment[25] to –

(i) An employee stock ownership plan (as defined in section 407(d)(6) of the Act) regarding employer securities (as defined section 407(d)(5) of the Act);

(ii) An investment fund, such as a collective investment fund or pooled separate account~~, in which more than one unaffiliated plan has an investment, or which holds plan assets of more than one unaffiliated plan under 29 CFR 2510.3-101~~[26]; or

(iii) A plan, a plan fiduciary, a plan participant or beneficiary, an IRA or IRA owner solely for purposes of compliance with the reporting and disclosure provisions under the Act, the Code, and the regulations, forms and schedules issued thereunder, or any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization rule or regulation.

(6) *Hiring and referrals*. The person merely recommends, urges, responds to request for proposals regarding or otherwise promotes its or an affiliate's own hiring.[27]

(7) *Information sharing that is not investment advice*. The person is acting in an educational, marketing or sales capacity and provides information where, under the

[22] *See* Wells Fargo July 21 Letter, at App. A, pp 7-8 (§ I.C.iii.).

[23] *See* Wells Fargo July 21 Letter, at App. A, pp 6-7 (§ I.C.i.); IRI Letter, at 23-24.

[24] *See* Wells Fargo July 21 Letter, at App. A, p. 7 (§ I.C.ii.).

[25] *See id*., at pp 8-9 (§ I.D.) (recommended should the Department retain § 2510.3-21(a)(1)(iii)).

[26] *See id*., at pp 8-9, note 16 (§ I.D.).

[27] *See id*., at pp 5-8 (§§ I.B. and C.); SIFMA Definition of Fiduciary Letter, at 38; Morgan Stanley Letter, at 9; *see also* SEC, Rule 206(4)-3, Investment Advisers Act of 1940, *Cash Payments for Client Solicitations* (codified at 17 C.F.R. pt. 275.206(4)-3).

relevant facts and circumstances, there can be no reasonable expectation on the part of the recipient of the information that such person is acting in recipient's best interest in providing such information. Under this carve-out, the relevant factors include the individualized nature of the information provided, the reliance placed on it by the recipient of the information and any disclosures provided to the recipient of the information; however, no single factor shall be determinative.[28]

(8) *Products and services addressing conflict issues under existing regulations*. The person provides recommendations or advice with respect to products or services that do not present conflicts of interest (due to compliance with prohibited transaction exemptions or otherwise) should not be considered fiduciary investment advice that requires compliance with an additional exemption.[29]

(9~~6~~) *Investment education*. The person furnishes or makes available any of the following categories of investment-related information and materials described in paragraphs (b)(9~~6~~)(i) through (v~~iv~~) of this section to a plan, plan fiduciary, participant or beneficiary, IRA or IRA owner irrespective of who provides or makes available the information and materials (e.g., plan sponsor, fiduciary or service provider), the frequency with which the information and materials are provided, the form in which the information and materials are provided (e.g., on an individual or group basis, in writing or orally, or via call center, video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of information and materials identified in paragraphs (b)(9~~6~~)(i) through (v~~iv~~)~~, provided that the information and materials do not include (standing alone or in combination with other materials) recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations on investment, management, or value of a particular security or securities, or other property~~.[30]

(i) *Plan information*. Information and materials that, without reference to the appropriateness of any individual investment alternative or any individual benefit distribution option for the plan or IRA, or a particular participant or beneficiary or IRA owner, describe the investment products and services available,[31] the terms or operation of the plan or IRA, inform a plan fiduciary, participant, beneficiary, or IRA owner about the benefits of plan or IRA participation, the benefits of increasing plan or IRA contributions, the impact of preretirement withdrawals on retirement income,

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[28] *See* Wells Fargo July 21 Letter, at App. A, pp 2-3 (§ I.A.i.); Morgan Stanley Letter, at 6, ICI Letter, at 9; *see also supra* at p. 2, note 9.

[29] *See* Wells Fargo July 21 Letter, at App. A, p. 24 (§ II.D.v.).

[30] *See id*., at pp 9-11 (§ I.E.i.); Dep't of Labor, Pension and Welfare Benefits Admin., Interpretive Bulletin 96-1, *Participant Investment Education; Final Rule*, 61 Fed. Reg. 29586 (June 11, 1996) (codified at 29 C.F.R. pt. 2509) ("Dep't of Labor IB 96-1"), *available at*: http://www.gpo.gov/fdsys/pkg/FR-1996-06-11/pdf/96-14093.pdf.

[31] *See* Correspondence from Christopher Gilkerson, Senior Vice President and General Counsel, and Gail B. Mayland, Vice President and Associate General Counsel, Charles Schwab & Co., Inc., to Office of Regulations and Interpretations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Definition of the Term "Fiduciary" (RIN 1210-AB32); Best Interest Contract Exemption (ZRIN 1210-ZA-25); Principal Transaction in Certain Debt Securities Exemption (ZRIN 1210-ZA-25) (July 20, 2015) ("Charles Schwab Letter"), at 35, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00571.pdf.

retirement income needs, the benefits of[32] varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (e.g., immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions, or describe investment objectives and philosophies, risk and return characteristics, historical return information or related prospectuses of investment alternatives under the plan or IRA.

(ii) *General financial, investment and retirement information*. Information and materials on financial, investment and retirement matters ~~that do not address specific investment products, specific plan or IRA alternatives or distribution options available to the plan or IRA or to participants, beneficiaries and IRA owners, or specific alternatives or services offered outside the plan or IRA, and inform the plan fiduciary, participant or beneficiary, or IRA owner~~[33] about —

(A) General financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment;

(B) Historic differences in rates of return between different asset classes (e.g., equities, bonds, or cash) based on standard market indices;

(C) Effects of inflation;

(D) Estimating future retirement income needs;

(E) Determining investment time horizons;

(F) Assessing risk tolerance;

(G) Retirement-related risks (e.g., longevity risks, market/interest rates, inflation, health care and other expenses); and

(H) General methods and strategies for managing assets in retirement (e.g., systematic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits), including those offered outside the plan or IRA.

(iii) *Asset allocation models*. Information and materials (e.g., pie charts, graphs, or case studies) that provide a plan fiduciary, participant or beneficiary, or IRA owner with models of asset allocation portfolios of hypothetical individuals with different time horizons (which may extend beyond an individual's retirement date) and risk profiles, where —

(A) Such models are based on generally accepted investments theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time;

(B) All material facts and assumptions on which such models are based (e.g., retirement ages, life expectancies, income levels, financial resources,

[32] *See* Charles Schwab Letter, at 35.

[33] *See* Wells Fargo July 21 Letter, at App. A, pp 9-11 (§ I.E.i.); Dep't of Labor IB 96-1.

replacement income ratios, inflation rates, and rates of return) accompany the models;

(C) To the extent ~~S~~such models ~~do not~~ include or identify any specific investment product or specific alternative available under the plan or IRA, the models are accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan or IRA and identifying where information on those investment alternatives may be obtained[34]; and

(D) The asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual situations, participants, beneficiaries, or IRA owners should consider their other assets, income, and investments (e.g., equity in a home, Social Security benefits, individual retirement plan investments, savings accounts and interests in other qualified and non-qualified plans) in addition to their interests in the plan or IRA, to the extent those items are not taken into account in the model or estimate.

(iv) *Interactive investment materials*. Questionnaires, worksheets, software, and similar materials which provide a plan fiduciary, participant or beneficiary, or IRA owners the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income; questionnaires, worksheets, software and similar materials which allow a plan fiduciary, participant or beneficiary, or IRA owners to evaluate distribution options, products or vehicles by providing information under paragraphs (b)(9~~6~~)(i) and (ii) of this section; questionnaires, worksheets, software, and similar materials that provide a plan fiduciary, participant or beneficiary, or IRA owner the means to estimate a retirement income stream that could be generated by an actual or hypothetical account balance, where —

(A) Such materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time;

(B) There is an objective correlation between the asset allocations generated by the materials and the information and data supplied by the participant, beneficiary or IRA owner;

(C) There is an objective correlation between the income stream generated by the materials and the information and data supplied by the participant, beneficiary or IRA owner;

(D) All material facts and assumptions (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, rates of return and other features and rates specific to income annuities or systematic withdrawal plan) that may affect a participant's, beneficiary's or IRA owner's assessment of the different asset allocations or

[34] *See id*.

different income streams accompany the materials or are specified by the participant, beneficiary or IRA owner;

(E) To the extent that such ~~The~~ materials ~~do not~~ include or identify any specific investment alternative available or distribution option available under the plan or IRA, ~~unless such alternative or option is specified by the participant, beneficiary or IRA owner~~ the materials are accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan or IRA and identifying where information on those investment alternatives may be obtained[35]; and

(F) The materials either take into account other assets, income and investments (e.g., equity in a home, Social Security benefits, individual retirement account/ annuity investments, savings accounts, and interests in other qualified and non-qualified plans) or are accompanied by a statement indicating that, in applying particular asset allocations to their individual situations, or in assessing the adequacy of an estimated income stream, participants, beneficiaries or IRA owners should consider their other assets, income, and investments in addition to their interests in the plan or IRA.[36]

(v) *Rollover education*. Oral or written information which does not include recommendations or advice but merely lays out the following considerations, each of which must be mentioned without biased emphasis:

(A) *Investment options*. An IRA often enables an investor to select from a broader range of investment options than a plan. The importance of this factor will depend in part on how satisfied the investor is with the options available under the plan under consideration. For example, an investor who is satisfied by the low-cost institutional funds available in some plans may not regard an IRA's broader array of investments as an important factor.

(B) *Fees and expenses*. Both plans and IRAs typically involve (i) investment-related expenses and (ii) plan or account fees. Investment-related expenses may include sales loads, commissions, the expenses of any mutual funds in which assets are invested and investment advisory fees. Plan fees typically include plan administrative fees (e.g., recordkeeping, compliance, trustee fees) and fees for services such as access to a customer service representative. In some cases, employers pay for some or all of the plan's administrative expenses. An IRA's account fees may include, for example, administrative, account set-up and custodial fees.

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[35] *See* Wells Fargo July 21 Letter, at App. A, pp 9-11 (§ I.E.i.); Dep't of Labor IB 96-1.

[36] *See* Charles Schwab Letter, at 37, also recommends the addition of the following subclause:

(v) *Portfolio tools for self-directed investors*. Securities research reports or ratings, investment screeners and planners, and portfolio analyzers, whether made available through a "brokerage window," self-directed brokerage account or otherwise, that allow a plan fiduciary, participant or beneficiary, or IRA owner to analyze their current or potential investment alternatives to help them make their own investment decisions, provided that the portfolio tools do not make recommendations as to the appropriateness of any individual investment products for the plan or IRA or a particular participant or beneficiary or IRA owner.

(C) *Services*. An investor may wish to consider the different levels of service available under each option. Some plans, for example, provide access to investment advice, planning tools, telephone help lines, educational materials and workshops. Similarly, IRA providers offer different levels of service, which may include full brokerage service, investment advice, distribution planning and access to securities execution online.

(D) *Penalty-free withdrawals*. If an employee leaves her job between age 55 and 59½, she may be able to take penalty-free withdrawals from a plan. In contrast, penalty-free withdrawals generally may not be made from an IRA until age 59½.

(E) *Protection from creditors and legal judgments*. Generally speaking, plan assets have unlimited protection from creditors under federal law, while IRA assets are protected in bankruptcy proceedings only. State laws vary in the protection of IRA assets in lawsuits.

(F) *Required minimum distributions*. Once an individual reaches age 70½, the rules for both plans and IRAs require the periodic withdrawal of certain minimum amounts, known as the required minimum distribution. If a person is still working at age 70½, however, he generally is not required to make required minimum distributions from his current employer's plan. This may be advantageous for the increasing population of Americans who plan to work into their 70s.

(G) *Employer stock*. An investor who holds significantly appreciated employer stock in a plan should consider the negative tax consequences of rolling the stock to an IRA. If employer stock is transferred in-kind to an IRA, stock appreciation will be taxed as ordinary income upon distribution. The tax advantages of retaining employer stock in a non-qualified account should be balanced with the possibility that the investor may be excessively concentrated in employer stock. It can be risky to have too much employer stock in one's retirement account; for some investors, it may be advisable to liquidate the holdings and roll over the value to an IRA, even if it means losing long-term capital gains treatment on the stock's appreciation.[37]

(vi~~v~~) The information and materials described in paragraphs (b)(9~~6~~)(i) through (v~~iv~~) of this section represent examples of the type of information and materials that may be furnished to plans, plan fiduciaries, participants, beneficiaries and IRA owners without such information and materials constituting investment advice. Determinations as to whether the provision of any information, materials or educational services not described herein constitutes the rendering of investment advice must be made by reference to the criteria set forth in paragraph (a) of this section.

[37] *See* Wells Fargo July 21 Letter, at App. A, p. 12, note 21 (§ I.E.ii.); FINRA, Regulatory Notice 13-45, *Rollovers to Individual Retirement Accounts* (Dec. 2013), at 2-3, *available at*: https://www.finra.org/sites/default/files/ NoticeDocument/p418695.pdf.

(c) *Scope of fiduciary duty – investment advice*. A person who is a fiduciary with respect to an employee benefit plan or IRA by reason of rendering investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, direct or indirect, with respect to any securities or other property of such plan, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (a)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(1) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(2) Exclude such person from the definition of the term “party in interest” (as set forth in section 3(14)(B) of the Act or “disqualified person” as set forth in section 4975(e)(2) of the Code) with respect to a plan.

(d) *Execution of securities transactions*.

(1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code, with respect to an employee benefit plan or IRA solely because such person executes transactions for the purchase or sale of securities on behalf of such plan in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA, if:

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) The instructions specify:

(A) The security to be purchased or sold;

(B) A price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, et seq.), a price which is determined in accordance with Rule 22c1 under the Investment Company Act of 1940 (17 CFR270.22c1);

(C) A time span during which such security may be purchased or sold (not to exceed five business days); and

(D) The minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to an employee benefit plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA, or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the provisions of paragraph (d)(1) of this section, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such brokerdealer, reporting dealer or bank does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition of the term party in interest (as set forth in section 3(14)(B) of the Act) or disqualified person 4975(e)(2) of the Code with respect to any assets of the plan or IRA.

(e) *Internal Revenue Code*. Section 4975(e)(3) of the Code contains provisions parallel to section 3(21)(A) of the Act which define the term "fiduciary" for purposes of the prohibited transaction provisions in Code section 4975. Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237 transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. 120 All references herein to section 3(21)(A) of the Act should be read to include reference to the parallel provisions of section 4975(e)(3) of the Code. Furthermore, the provisions of this section shall apply for purposes of the application of Code section 4975 with respect to any plan described in Code section 4975(e)(1).

(f) *Definitions*. For purposes of this section—

(1) "Recommendation" means

(i) A~~a~~ communication that, based on its content, context, and presentation, would reasonably be viewed as a call to take action or to refrain from taking ~~suggestion that the advice recipient engage in or refrain from taking a particular course of~~ action[38]; and

(ii) With respect to a Financial Institution or Adviser that recommends a transaction or investment strategy involving a security or securities, "recommendation" shall have the same meaning as Financial Industry Regulatory

[38] *See* Wells Fargo July 21 Letter, at App. A, p. 2 (§§ I.A.); IRI Letter, at 18.

Authority (FINRA) Rule 2111 (Suitability) or any successor rule, as interpreted by FINRA.[39]

(2)

(i) "Plan" means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code, and

(ii) "IRA" means any trust, account or annuity described in Code section 4975(e)(1)(B) through (C~~F~~), including, for example, an individual retirement account described in section 408(a) of the Code ~~and a health savings account described in section 223(d) of the Code~~.[40]

(3) "Plan participant" means for a plan described in section 3(3) of the Act, a person described in section 3(7) of the Act.

(4) "IRA owner" means with respect to an IRA either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) "Plan fiduciary" means a person described in section (3)(21) of the Act and 4975(e)(3) of the Code.

(6) "Fee or other compensation, direct or indirect" for purposes of this section and section 3(21)(A)(ii) of the Act, means any fee or compensation for the advice received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. The term fee or other 121 compensation includes, for example, brokerage fees, mutual fund and insurance sales commissions.

(7) "Affiliate" includes: any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such person; and any corporation or partnership of which such person is an officer, director or partner.

(8) "Control" for purposes of paragraph (f)(7) of this section means the power to exercise a controlling influence over the management or policies of a person other than an individual.

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[39] *See* Wells Fargo July 21 Letter, at App. A, pp 2 and 4 (§§ I.A.i. and iv.); Correspondence from Marcia E. Asquith, Senior Vice President and Corporate Secretary, Financial Industry Regulatory Authority, to Office of Regulations and Interpretations and Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Proposed Conflict of Interest Rule and Related Proposals, RIN 1210-AB32 (July 17, 2015), at 13, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00405.pdf.

[40] *See* Wells Fargo July 21 Letter, at App. A, pp 12-14 (§§ I.F.i. and ii.). This change to the definition of "IRA" was also made in Appendices C and D to this letter.

(9) "Accredited Investor" means any person or entity as defined under Rule 501(a) of Regulation D of the Securities Act of 1933 or any applicable state law.[41]

[41] *See id*., at p. 5 (§ I.B.ii.). For example, the definition of "accredited investor" under Rule 501, Regulation D, Securities Act of 1933, *Definitions and Terms Used in Regulation D* (17 CFR 230.501 (a)) includes:

(1) [A]ny employee benefit plan within the meaning of [the Act] if the investment decision is made by a plan fiduciary…

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000…

(6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.

Wells Fargo & Co.
Appendix C

WELLS FARGO'S RECOMMENDED CHANGES TO
PROPOSED BEST INTEREST CONTRACT EXEMPTION

Section I – Best Interest Contract Exemption

(a) *In general*. ERISA and the Internal Revenue Code prohibit fiduciary advisers to employee benefit plans (Plans) and individual retirement plans (IRAs) from receiving compensation that varies based on their investment recommendations. Similarly, fiduciary advisers are prohibited from receiving compensation from third parties in connection with their advice. This exemption permits certain persons who provide investment advice to Retirement Investors, and their associated financial institutions, affiliates and other related entities, to receive such otherwise prohibited compensation as described below.

(b) *Covered transactions*. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities to receive compensation for services provided in connection with a purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or IRA, as a result of the Adviser's and Financial Institution's advice to any of the following "Retirement Investors:"

(1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution;

(2) The beneficial owner of an IRA acting on behalf of the IRA; or

(3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof) of a ~~non-participant-directed~~ Plan subject to Title I of ERISA ~~with fewer than 100 participants~~,[1] to the extent it acts as a fiduciary who has authority to make investment decisions for the Plan.

As detailed below, parties seeking to rely on the exemption must ~~contractually~~ agree to adhere to Impartial Conduct Standards in rendering advice regarding Assets; ~~warrant that they have adopted policies and procedures designed to mitigate the dangers posed by Material Conflicts of Interest;~~ disclose important information relating to fees, compensation, and Material Conflicts of Interest; and retain documents and data relating to investment recommendations regarding Assets. The exemption provides relief from the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F). The Adviser and Financial Institution must comply with the conditions of Sections II-V to rely on this exemption.

We have not endeavored to rewrite the entire Best Interest Contract Exemption ("BIC Exemption"). Instead, our changes are focused on sections where we understood the Department may be flexible and where we believe alterations in any final exemption are most needed. The revisions we offer herein also incorporate changes to the text of the BIC Exemption recommended by other commenters. Our citations to the comments of other parties are not an endorsement of their past or future comments beyond what we have specifically included.

[1] *See* Correspondence from David M. Carroll, Senior Executive Vice President, Wealth, Brokerage & Retirement, Wells Fargo & Company, to John J. Canary, Director, Office of Regulations and Interpretations, Office of Exemption Determinations, Employee Benefits Security Admin., U.S. Dep't of Labor, *regarding* Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25] (July 21, 2015) ("Wells Fargo July 21 Letter"), at App. A, p. 5 (§ I.B.i.), *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00647.pdf.

(c) *Exclusions*. This exemption does not apply if:

(1) 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 (as defined in ERISA section 3(16)(A)) 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;

(2) 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 (i.e., a principal transaction);

(3) 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"); or

(4) 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.

(d) *Good faith*. Notwithstanding any other provision to the contrary, the failure to comply with any term, condition or requirement of this exemption will not result in the loss of the exemption if the failure to comply was insignificant and a good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements.[2]

Section II – Contract, Impartial Conduct, and Other Requirements

(a) *Contract*. Prior to the transaction for which relief is sought under Section I, ~~recommending that the Plan, participant or beneficiary account, or IRA purchase, sell or hold the Asset,~~ either the Adviser or~~and~~ Financial Institution with primary responsibility for oversight of the Adviser, as appropriate, provide an enforceable agreement (under applicable law) to ~~enter~~

[2] *See* Wells Fargo July 21 Letter, at App. A, p. 33 (§ IV); Correspondence from Marcia E. Asquith, Senior Vice President and Corporate Secretary, Financial Industry Regulatory Authority, to Office of Regulations and Interpretations and Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Proposed Conflict of Interest Rule and Related Proposals, RIN 1210-AB32 (July 17, 2015) ("FINRA Letter"), at 20, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00405.pdf.

~~into a written contract with~~ the Retirement Investor that incorporates the terms required by Section II(b)- (d~~e~~).[3]

(b) *Fiduciary*. The agreement ~~written contract~~ [4]affirmatively states that the Adviser and Financial Institution are fiduciaries under ERISA or the Code, or both, with respect to any investment recommendations to the Retirement Investor.

(c) *Impartial Conduct Standards*. The Adviser and the Financial Institution affirmatively agree to~~, and comply with,~~[5] the following:

> (1) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (i.e., advice that considers the Retirement Investor's investment profile as well as product- or strategy-related factors in addition to cost, such as the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions ~~reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party~~[6]);

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[3] *See* Wells Fargo July 21 Letter, at App. A, pp 15-18 (§ II.A.); FINRA, Regulatory Notice 12-55, *Suitability* (Dec. 2012), at 2 (FAQ 6(a)), *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p197435.pdf; Correspondence from Catherine J. Weatherford, President and Chief Executive Officer, Insured Retirement Institute, to Office of Regulations and Interpretations and Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, RIN 1210-AB32; Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters, ZRIN 1210-ZA25; Proposed Best Interest Contract Exemption, ZRIN 1210-ZA25 (July 21, 2015) ("IRI Letter"), at 38, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00626.pdf.

[4] *See supra* note 3.

[5] *See* IRI Letter, at 43.

[6] *See* Wells Fargo July 21 Letter, at App. A, pp 18-20 (§ II.B.i.); FINRA, Regulatory Notice 12-25, *Suitability* (May 2012), at 3 (FAQ 1), *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p126431.pdf; Dep't of Labor, Employee Benefits Security Admin., *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 72 Fed. Reg. 70988, at 70993 (proposed Dec. 13, 2007) (to be codified at 29 C.F.R. pt. 2550). Alternatively:

(1) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (i.e., (i) provide advice with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and (ii) solely in the interest of the Retirement Investor, in each case as such standards are interpreted under Section 404 of ERISA ~~advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party~~);

See Correspondence from Edward Van Dolsen, Executive Vice President, President of Retirement and Individual Financial Services, TIAA CREF Financial Services, to Office of Regulations and Interpretations, Employee Benefits

(2) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will not recommend an Asset if the total amount of compensation anticipated to be received by the Adviser, Financial Institution, Affiliates and Related Entities in connection with the purchase, sale or holding of the Asset by the Plan, participant or beneficiary account, or IRA, will exceed R~~r~~easonable C~~c~~ompensation ~~in relation to the total services they provide to the Retirement Investor[7]~~; and

(3) The Adviser's and Financial Institution's statements about the Asset, fees, Material Conflicts of Interest, and any other matters relevant to a Retirement Investor's investment decisions, will not be misleading.

~~(d) *Warranties*. The Adviser and Financial Institution affirmatively warrant the following:~~

~~(1) The Adviser, Financial Institution, and Affiliates will comply with all applicable federal and state laws regarding the rendering of the investment advice, the purchase, sale and holding of the Asset, and the payment of compensation related to the purchase, sale and holding of the Asset;~~

~~(2) The Financial Institution has adopted written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest and ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c);~~

~~(3) In formulating its policies and procedures, the Financial Institution has specifically identified Material Conflicts of Interest and adopted measures to prevent the Material Conflicts of Interest from causing violations of the Impartial Conduct Standards set forth in Section II(c); and~~

~~(4) Neither the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor. Notwithstanding the foregoing, the contractual warranty set forth in this Section II(d)(4) does not prevent the Financial Institution or its Affiliates and Related Entities from providing Advisers with differential compensation based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent such compensation would not encourage advice that runs counter to the Best Interest of the Retirement Investor (e.g., differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible).~~[8]

Security Admin., Dep't of Labor, *regarding* Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Advice; Proposed Rule (RIN 1210-AB32), Proposed Best Interest Contract Exemption (ZRIN: 1210-ZA25), Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption 84-24 (ZRIN: 1210-ZA25), Proposed Amendment to Prohibited Transaction Exemption 75-1 (ZRIN: 1210-ZA25), Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption 86-128 (ZRIN 1210-ZA25) (July 20, 2015) ("TIAA-CREF Letter"), at 35, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00540.pdf; *see also infra* note 25.

[7] *See* Wells Fargo July 21 Letter, at App. A, pp 18-19 (§ I.B.i.).

[8] *See id*., at 27-28 (§ II.E.). Alternatively:

(d~~e~~) *Disclosures*. The agreement ~~written contract~~[9] must specifically:

(1) Identify and disclose any Material Conflicts of Interest, which for registered investment advisers, could be made via Form ADV;[10]

(2) Inform the Retirement Investor that the Retirement Investor has the right to obtain complete information about ~~all~~ the direct fees currently associated with the Assets in which it is invested (e.g., summary prospectuses, prospectuses, confirms, Financial Institution informational guides, and account agreements)[11]~~, including all of the direct and indirect fees paid payable to the Adviser, Financial Institution, and any Affiliates~~;[12] and

(3) Disclose to the Retirement Investor whether the Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the purchase, sale or holding of any Asset~~, and of the address of the website required by Section III(c) that discloses the compensation arrangements entered into by Advisers and the Financial Institution~~[13].

(d) *Conditions* ~~*Warranties*~~. As a condition of this exemption, ~~T~~the Adviser and Financial Institution affirmatively agree to ~~warrant~~ the following:

~~(1)~~

(1~~2~~) The Financial Institution has adopted written policies and procedures reasonably designed to identify and mitigate ~~the impact of~~ Material Conflicts of Interest and ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c);

(2) If the Financial Institution or (to the best of its knowledge) any Affiliate or Related Entity pays any form of compensation to Advisers that varies based on the Assets that they recommend, including payouts based upon commissions, trail commissions or 12b-1 fees, ticket charge discounts, awards, or product contests, and not solely on neutral factors such as the difference in time and analysis necessary to provide prudent advice, then the written policies and procedures described in paragraph (1) must be reasonably designed to ensure that such Advisers only make recommendations that are in the Best Interest of the Retirement Investor. These policies and procedures must include procedures to mitigate, to the extent practical, the effects of these forms of compensation on an Adviser's choice of Asset, to supervise the recommendations made by those Advisers, to promptly detect possible recommendations that may not be in the Best Interest of the Retirement Investor, and to take prompt and appropriate action concerning any recommendation that is found to have not been in the Best Interest of the Retirement Investor.

~~(3)~~

~~(4)~~

See FINRA Letter, at 9.

[9] *See supra* note 3.

[10] *See* Wells Fargo July 21 Letter, at App. A, at p. 24 (§ II.D.).

[11] *See id*., at pp 24-27 (§ II.D.).

[12] Alternatively:

(2) Inform the Retirement Investor that the Retirement Investor has the right to obtain complete information about all the fees currently associated with the Assets in which it is invested, including all of the direct ~~and indirect~~ fees paid payable to the Adviser, Financial Institution, and any Affiliates;

[13] *See infra* note 20.

(e~~f~~) *Prohibited Contractual Provisions*. The agreement ~~written contract~~[14] shall not contain the following:

(1) Exculpatory provisions disclaiming or otherwise limiting liability of the Adviser or Financial Institution for a violation of the agreement~~contract~~'s[15] terms; and

(2) A provision under which the Plan, IRA or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution, or agrees to an amount representing liquidated damages for breach of the agreement; provided that the parties may agree to limit damages to an amount equal to the return an investor would have earned from an investment that was in the Best Interest of the Retirement Investor at the time of the recommendation and the return that the Retirement Investor actually earned, and to preclude the right to rescind any transaction the rescission of which is not otherwise contemplated by federal law.[16]

(g) *Monitoring*. The agreement describes whether or not the Adviser and Financial Institution will monitor the Retirement Investor's investments and alert the Retirement Investor to any recommended change to those investments, and if so, the frequency with which the monitoring will occur and the reasons for which the customer will be alerted.[17]

~~**Section III – Disclosure Requirements**~~

~~(a)*Transaction Disclosure.*~~

~~(1) *Disclosure*. Prior to the execution of the purchase of the Asset by the Plan, participant or beneficiary account, or IRA, the Adviser furnishes to the Retirement Investor a chart that provides, with respect to each Asset recommended, the Total Cost to the Plan, participant or beneficiary account, or IRA, of investing in the Asset for 1-, 5- and 10-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the Adviser and reasonable assumptions about investment performance that are disclosed.~~

~~The disclosure chart required by this section need not be provided with respect to a subsequent recommendation to purchase the same investment product if the chart was previously provided to the Retirement Investor within the past twelve months and the Total Cost has not materially changed.~~

~~(2) *Total Cost*. The "Total Cost" of investing in an Asset means the sum of the following, as applicable:~~

~~(A) *Acquisition costs*. Any costs of acquiring the Asset that are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or that reduce the amount invested in the Asset (e.g., any loads, commissions, or mark-ups on Assets bought from dealers, and account opening fees, if applicable).~~

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[14] *See supra* note 3.

[15] *See id.*

[16] *See* FINRA Letter, at 21.

[17] *See id.*, at 8.

~~(B) *Ongoing costs*. Any ongoing (e.g., annual) costs attributable to fees and expenses charged for the operation of an Asset that is a pooled investment fund (e.g., mutual fund, bank collective investment fund, insurance company pooled separate account) that reduces the Asset's rate of return (e.g., amounts attributable to a mutual fund expense ratio and account fees). This includes amounts paid by the pooled investment fund to intermediaries, such as sub-TA fees, subaccounting fees, etc.~~

~~(C) *Disposition costs*. Any costs of disposing of or redeeming an interest in the Asset that are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or that reduce the amounts received by the Plan, participant or beneficiary account, or IRA (e.g., surrender fees, back-end loads, etc., that are always applicable (i.e., do not sunset), mark-downs on assets sold to dealers, and account closing fees, if applicable).~~

~~(D) *Others*. Any costs not described in (A)-(C) that reduce the Asset's rate of return, are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or reduce the amounts received by the Plan, participant or beneficiary account, or IRA (e.g., contingent fees, such as back-end loads that phase out over time (with such terms explained beneath the table)).~~

~~(3) *Model Chart*. Appendix II to this exemption contains a model chart that may be used to provide the information required under this Section III(a). Use of the model chart is not mandatory. However, use of an appropriately completed model chart will be deemed to satisfy the requirements of this Section III(a).~~[18]

~~(b) *Annual Disclosure*. The Adviser or Financial Institution provides the following written information to the Retirement Investor, annually, within 45 days of the end of the applicable year, in a succinct single disclosure:~~

~~(1) A list identifying each Asset purchased or sold during the applicable period and the price at which the Asset was purchased or sold;~~

~~(2) A statement of the total dollar amount of all fees and expenses paid by the Plan, participant or beneficiary account, or IRA (directly and indirectly) with respect to each Asset purchased, held or sold during the applicable period; and~~

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[18] *See* Wells Fargo July 21 Letter, at App. A, p. 25 (§ II.D.i.). Alternatively:

(a) *Transaction Disclosure*.

~~(1) *Disclosure*.~~ At or p~~P~~rior to the execution of the purchase of the Asset by the Plan, participant or beneficiary account, or IRA, the Adviser furnishes to the Retirement Investor ~~a chart that provides~~, with respect to each Asset recommended, a mutual fund summary prospectus (if applicable) or makes available via webpage a disclosure that meets the requirements of ERISA Section 408(b)(2)~~the Total Cost to the Plan, participant or beneficiary account, or IRA, of investing in the Asset for 1-, 5- and 10-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the Adviser and reasonable assumptions about investment performance that are disclosed~~.

~~The disclosure chart required by this section need not be provided with respect to a subsequent recommendation to purchase the same investment product if the chart was previously provided to the Retirement Investor within the past twelve months and the Total Cost has not materially changed.~~

~~(2)~~

~~(3)~~

~~(3) A statement of the total dollar amount of all compensation received by the Adviser and Financial Institution, directly or indirectly, from any party, as a result of each Asset sold, purchased or held by the Plan, participant or beneficiary account, or IRA during the applicable period.~~[19]

~~(c) *Webpage*.~~

~~(1) The Financial Institution maintains a webpage, freely accessible to the public, which shows the following information:~~

~~(A) The direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate for services provided in connection with each Asset (or, if uniform across a class of Assets, the class of Assets) that a Plan, participant or beneficiary account, or an IRA is able to purchase, hold, or sell through the Adviser or Financial Institution, and that a Plan, participant or beneficiary account, or an IRA has purchased, held, or sold within the last 365 days. The compensation may be expressed as a monetary amount, formula or percentage of the assets involved in the purchase,~~ sale or holding; and

~~(B) The source of the compensation, and how the compensation varies within and among Assets~~.

~~(2) The Financial Institution's webpage provides access to the information in (1)(A) and (B) in a machine readable format.~~[20]

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[19] *See* Wells Fargo July 21 Letter, at App. A, p. 25 (§ II.D.ii.). Alternatively:

(b) *Annual Disclosure*. The Adviser or Financial Institution provides the following written information to the Retirement Investor, annually, within 90~~45~~ days of the end of the applicable year, in a succinct single disclosure:

(1) A list identifying each Asset purchased or sold during the applicable period and the price at which the Asset was purchased or sold;

(2) A statement of the total dollar amount of all fees and expenses paid by the Plan, participant or beneficiary account, or IRA (directly ~~and indirectly~~) with respect to each Asset purchased, held or sold during the applicable period; and

(3) A statement of the total dollar amount of all compensation received by the Adviser and Financial Institution, directly ~~or indirectly~~, from any party, as a result of each Asset sold, purchased or held by the Plan, participant or beneficiary account, or IRA during the applicable period.

[20] *See id*., at p. 26 (§ II.D.iii.). Alternatively:

(c) *Webpage*.

~~(1)~~ The Financial Institution maintains a webpage, freely accessible to the public, which ~~shows the following information~~:

(1~~A~~) Shows a disclosure that meets the requirements of ERISA Section 408(b)(2)~~The direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate for services provided in connection with each Asset (or, if uniform across a class of Assets, the class of Assets) that a Plan, participant or beneficiary account, or an IRA is able to purchase, hold, or sell through the Adviser or Financial Institution, and that a Plan, participant or beneficiary account, or an IRA has purchased, held, or sold within the last 365 days. The compensation may be expressed as a monetary amount, formula or percentage of the assets involved in the purchase, sale or holding~~; and

(2~~B~~) Is updated on a quarterly basis~~The source of the compensation, and how the compensation varies within and among Assets~~.

~~Section IV – Range of Investment Options~~

~~(a) *General*. The Financial Institution offers for purchase, sale or holding, and the Adviser makes available to the Plan, participant or beneficiary account, or IRA for purchase, sale or holding, a range of Assets that is broad enough to enable the Adviser to make recommendations with respect to all of the asset classes reasonably necessary to serve the Best Interests of the Retirement Investor in light of its investment objectives, risk tolerance, and specific financial circumstances.~~

~~(b) *Limited Range of Investment Options*. Section (a) notwithstanding, a Financial Institution may limit the Assets available for purchase, sale or holding based on whether the Assets are Proprietary Products, generate Third Party Payments, or for other reasons, and still rely on the exemption, provided that:~~

~~(1) The Financial Institution makes a specific written finding that the limitations it has placed on the Assets made available to an Adviser for purchase, sale or holding by Plans, participant and beneficiary accounts, and IRAs do not prevent the Adviser from providing advice that is in the Best Interest of the Retirement Investor (i.e., advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party) or otherwise adhering to the Impartial Conduct Standards;~~

~~(2) Any compensation received in connection with a purchase, sale or holding of the Asset by a Plan, participant or beneficiary account, or an IRA, is reasonable in relation to the value of the specific services provided to the Retirement Investor in exchange for the payments and not in excess of the services' fair market value;~~

~~(3) Before giving investment recommendations to Retirement Investors, the Adviser or Financial Institution gives the Retirement Investor clear written notice of the limitations placed on the Assets that the Adviser may offer for purchase, sale or holding by a Plan, participant or beneficiary account, or an IRA. Notice is insufficient if it merely states that the Financial Institution or Adviser "may" limit investment recommendations based on whether the Assets are Proprietary Products or generate Third Party Payments, or for other reasons, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis; and~~

~~(4) The Adviser notifies the Retirement Investor if the Adviser does not recommend a sufficiently broad range of Assets to meet the Retirement Investor's needs.~~

~~(c) ERISA plan participants and beneficiaries. Some Advisers and Financial Institutions provide advice to participants in ERISA-covered participant directed individual account Plans in which the menu of investment options is selected by an Independent Plan fiduciary. In such cases, provided the Adviser and Financial Institution did not provide investment advice to the Plan fiduciary regarding the composition of the menu, the Adviser and Financial Institution do not have to comply with Section IV(a)-(c) in connection with their advice to individual participants and beneficiaries on the selection of Assets from the menu provided. This exception~~

~~(2)~~

~~is not available for advice with respect to investments within open brokerage windows or otherwise outside the Plan's designated investment options.~~[21]

Section III~~V~~ – Disclosure to the Department and Recordkeeping

(a) *EBSA Disclosure*. Before receiving compensation in reliance on the exemption in Section I, the Financial Institution notifies the Department of Labor of the intention to rely on this class exemption. The notice will remain in effect until revoked in writing by the Financial Institution. The notice need not identify any Plan or IRA.

~~(b) *Data Request*. The Financial Institution maintains the data that is subject to request pursuant to Section IX in a manner that is accessible for examination by the Department for six (6) years from the date of the transaction subject to relief hereunder. No party, other than the Financial Institution responsible for complying with this paragraph (b), will be subject to the taxes imposed by Code section 4975(a) and (b), if applicable, if the data is not maintained or not available for examination as required by paragraph (b).~~[22]

(b~~c~~) *Recordkeeping*. The Financial Institution maintains for a period of six (6) years, in a manner that is accessible for examination, the records necessary to enable the persons described in paragraph (c~~d~~) of this Section to determine whether the conditions of this exemption have been met, except that:

(1) If such records are lost or destroyed, due to circumstances beyond the control of the Financial Institution, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party, other than the Financial Institution responsible for complying with this paragraph (c), will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or are not available for examination as required by paragraph (c~~d~~), below.

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[21] Wells Fargo July 21 Letter, at App. A, p. 28 (§ II.F). Alternatively:

Section IV – Range of Investment Options

~~(a)~~

~~(b)~~

~~(1)~~

~~(2)~~

~~(3)~~ Before giving investment recommendations to Retirement Investors, the Adviser or Financial Institution gives the Retirement Investor clear written notice of the limitations placed on the Assets that the Adviser may offer for purchase, sale or holding by a Plan, participant or beneficiary account, or an IRA. ~~Notice is insufficient if it merely states that the Financial Institution or Adviser "may" limit investment recommendations based on whether the Assets are Proprietary Products or generate Third Party Payments, or for other reasons, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis; and~~

~~(4)~~

~~(c)~~

[22] *See infra* note 30.

(c~~d~~)

(1) Except as provided in paragraph (c~~d~~)(2) of this Section, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in paragraph (b~~c~~) of this Section are unconditionally available at their customary location for examination during normal business hours by:

(A) Any authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of a Plan that engaged in a purchase, sale or holding of an Asset described in this exemption, or any authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by a Plan described in paragraph (d)(1)(B), or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of a Plan described in paragraph (B), IRA owner, or the authorized representative of such participant, beneficiary or owner; and

(2) None of the persons described in paragraph (c~~d~~)(1)(B)-(D) of this Section are authorized to examine privileged trade secrets or privileged commercial or financial information, of the Financial Institution, or information identifying other individuals.

(3) Should the Financial Institution refuse to disclose information on the basis that the information is exempt from disclosure, the Financial Institution must, by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

Section IV~~VI~~ – Insurance and Annuity Contract Exemption

(a) *In general*. In addition to prohibiting fiduciaries from receiving compensation from third parties and compensation that varies on the basis of the fiduciaries' investment advice, ERISA and the Internal Revenue Code prohibit the purchase by a Plan, participant or beneficiary account, or IRA of an insurance or annuity product from an insurance company that is a service provider to the Plan or IRA. This exemption permits a Plan, participant or beneficiary account, or IRA to purchase an Asset that is an insurance or annuity contract in accordance with an Adviser's advice, from a Financial Institution that is an insurance company and that is a service provider to the Plan or IRA. This exemption is provided because purchases of insurance and annuity products are often prohibited purchases and sales involving insurance companies that have a pre-existing party in interest relationship to the Plan or IRA.

(b) *Covered transaction*. The restrictions of ERISA section 406(a)(1)(A) and (D), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) and (D), shall not apply to a fiduciary's causing the purchase of an Asset that is an insurance or annuity contract by a non-participant-directed Plan subject to Title I of ERISA that has fewer than 100 participants, participant or beneficiary account, or IRA, from a Financial Institution that is an insurance company and that is a party in interest or disqualified person, if:

(1) The transaction is effected by the insurance company in the ordinary course of its business as an insurance company;

(2) The combined total of all fees and compensation received by the insurance company and any Affiliate is not in excess of R~~r~~easonable C~~c~~ompensation under the circumstances;

(3) The purchase is for cash only; and

(4) The terms of the purchase are at least as favorable to the Plan, participant or beneficiary account, or IRA as the terms generally available in an arm's length transaction with an unrelated party.

(c) *Exclusion*: The exemption in this Section VI does not apply if 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 and Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) 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.

Section V~~VII~~ – Exemption for Pre-Existing Transactions

(a) *In general*. ERISA and the Internal Revenue Code prohibit Advisers, Financial Institutions and their Affiliates and Related Entities from receiving variable or third-party compensation as a result of the Adviser's and Financial Institution's advice to a Plan, participant or beneficiary, or IRA owner. Some Advisers and Financial Institutions did not consider themselves fiduciaries within the meaning of 29 CFR section 2510-3.21 before the applicability date of the amendment to 29 CFR section 2510-3.21 (the Applicability Date). Other Advisers and Financial Institutions entered into transactions involving Plans, participant or beneficiary accounts, or IRAs before the Applicability Date, in accordance with the terms of a prohibited transaction exemption that has since been amended. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities, to receive compensation, such as 12b-1 fees, in connection with the purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or an IRA, as a result of the Adviser's and Financial Institution's advice, that occurred prior to the Applicability Date, as described and limited below.

(b) *Covered transaction*. Subject to the applicable conditions described below, the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F), shall not apply to 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 opened before the Applicability Date ~~if:~~

~~(1) The compensation is not excluded pursuant to Section I(c) of the Best Interest Contract Exemption;~~

~~(2) The compensation is received pursuant to an agreement, arrangement or understanding that was entered into prior to the Applicability Date;~~

~~(3) The Adviser and Financial Institution do not provide additional advice to the Plan regarding the purchase, sale or holding of the Asset after the Applicability Date; and~~

~~(4) The purchase or sale of the Asset was not a non-exempt prohibited transaction pursuant to ERISA section 406 and Code section 4975 on the date it occurred~~.[23]

Section VI~~VIII~~ – Definitions

For purposes of these exemptions:

(a) "Adviser" means an individual who:

(1) Is a fiduciary of a Plan or IRA solely by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B), or both, and the applicable regulations, with respect to the Assets involved in the transaction;

(2) Is an employee, independent contractor, agent, or registered representative of a Financial Institution; and

(3) Satisfies the applicable federal and state regulatory and licensing requirements of insurance, banking, and securities laws with respect to the covered transaction.

(b) "Affiliate" of an Adviser or Financial Institution means –

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution. For this purpose, "control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, employee, agent, registered representative, relative (as defined in ERISA section 3(15)), member of family (as defined in Code section 4975(e)(6)) of, or partner in, the Adviser or Financial Institution; and

(3) Any corporation or partnership of which the Adviser or Financial Institution is an officer, director or employee or in which the Adviser or Financial Institution is a partner.

(c) An "Asset," for purposes of this exemption, means securities or other property ~~includes only the following investment products: bank deposits, certificates of deposit (CDs), shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a~~

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[23] *See* Wells Fargo July 21 Letter, at App. A, p. 28 (§ II.G). Alternatively:

Section VII – Exemption for Pre-Existing Transactions

(a) [*stet*]

(b) *Covered transaction*. Subject to the applicable conditions described below, the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F), shall not apply to 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 securities or other property ~~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 if:

(1) [*stet*]

(2) [*stet*]

~~(3)~~

(3~~4~~) The purchase or sale of the securities or other property ~~an Asset~~ was not a non-exempt prohibited transaction pursuant to ERISA section 406 and Code section 4975 on the date it occurred.

~~registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(l) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts, guaranteed investment contracts, and equity securities within the meaning of 17 CFR section 230.405 that are exchange-traded securities within the meaning of 17 CFR 242.600. Excluded from this definition is any equity security that is a security future or a put, call, straddle, or other option or privilege of buying an equity security from or selling an equity security to another without being bound to do so~~.[24]

(d) Investment advice is in the "Best Interest" of the Retirement Investor when the Adviser and Financial Institution providing the advice consider the Retirement Investor's investment profile as well as product- or strategy-related factors in addition to cost, such as the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions ~~act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party~~.[25]

(e) "Financial Institution" means the entity that employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 USC 80b-1 et seq.) or under the laws of the state in which the adviser maintains its principal office and place of business;

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[24] *See* Wells Fargo July 21 Letter, at App. A, pp 22-23 (§ II.C.i. and ii.). Alternatively, as discussed in our July 21st and September 24th comment letters, the permitted list of investments should be expanded to include other investments that investors make in IRAs, including, for example, limited partnerships, hedge funds, private equity funds, covered calls and over-the-counter equity securities, and should be updated frequently to include future product innovations. In addition, we have recommended, in the event the Department chooses to retain any narrow definition of "Asset," the definition not apply to retirement investors who can be designated as an "Accredited Investor." *Id*. at pp 23-24 (§ II.C.iv.). In Appendix B to this letter, we recommended that "Accredited Investor" be defined as "any person who comes within the categories defined under Rule 501(a) of Regulation D of the Securities Act of 1933 or any applicable state law." *See* App. B, at p. 14 (§ 2510.3-21 (f)(9)).

[25] *See id*., at pp 21-22 (§ II.B.iii.); IRI at 40-41; Correspondence from Lisa J. Bleier, Managing Director, Federal Government Relations and Associate General Counsel, Securities Industry and Financial Markets Association, to Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* ZRIN: 1210-ZA25; PTE Application D-11712 (July 20, 2015) ("SIFMA BICE Letter"), at 18, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00506.pdf. Alternatively:

(d) Investment advice is in the "Best Interest" of the Retirement Investor when the Adviser and Financial Institution (i) provides advice with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and (ii) solely in the interest of the Retirement Investor, in each case as such standards are interpreted under Section 404 of ERISA~~providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor , without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party~~.

See TIAA-CREF Letter, at 35; *see also supra* note 6.

(2) A bank or similar financial institution supervised by the United States or state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 USC 1813(b)(1)), but only if the advice resulting in the compensation is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by federal or state banking authorities;

(3) An insurance company qualified to do business under the laws of a state, provided that such insurance company:

(A) Has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended,

(B) Has undergone and shall continue to undergo an examination by an Independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state's insurance commissioner within the preceding 5 years, and

(C) Is domiciled in a state whose law requires that actuarial review of reserves be conducted annually by an Independent firm of actuaries and reported to the appropriate regulatory authority; or

(4) A broker or dealer registered under the Securities Exchange Act of 1934 (15 USC 78a et seq.).

(f) "Independent" means a person that:

(1) Is not the Adviser, the Financial Institution or any Affiliate relying on the exemption,

(2) Does not receive compensation or other consideration for his or her own account from the Adviser, the Financial Institution or Affiliate; and

(3) Does not have a relationship to or an interest in the Adviser, the Financial Institution or Affiliate that might affect the exercise of the person's best judgment in connection with transactions described in this exemption.

(g) "Individual Retirement Account" or "IRA" means any trust, account or annuity described in Code section 4975(e)(1)(B) through (C~~F~~), including, for example, an individual retirement account described in section 408(a) of the Code ~~and a health savings account described in section 223(d) of the Code~~.[26]

(h) A "Material Conflict of Interest" exists when an Adviser or Financial Institution has a financial interest that, from the perspective of a reasonable person,[27] could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding an Asset.

(i) "Plan" means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code.

(j) "Proprietary Product" means a product that is managed by the Financial Institution or any of its Affiliates.

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[26] *See* Wells Fargo July 21 Letter, at App. A, pp 12-14 (§§ I.F.i. and ii.). This change to the definition of "Individual Retirement Account" or "IRA" was also made in Appendices B and D to this letter.

[27] *See* SIFMA BICE Letter, at 19.

(k) "Reasonable Compensation" means compensation that is normally charged for similar transactions. [28]

(l~~k~~) "Related Entity" means any entity other than an Affiliate in which the Adviser or Financial Institution has an interest which may affect the exercise of its best judgment as a fiduciary.

(m~~l~~) "Retirement Investor" means –

(1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution,

(2) The beneficial owner of an IRA acting on behalf of the IRA, or

(3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof), of a ~~non-participant-directed~~ Plan subject to Title I of ERISA ~~that has fewer than 100 participants~~[29], to the extent it acts as a fiduciary with authority to make investment decisions for the Plan.

(n~~m~~) "Third-Party Payments" mean sales charges when not paid directly by the Plan, participant or beneficiary account, or IRA, 12b-1 fees and other payments paid to the Financial Institution or an Affiliate or Related Entity by a third party as a result of the purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or IRA.

~~**Section IX – Data Request**~~

~~Upon request by the Department, a Financial Institution that relies on the exemption in Section I shall provide, within a reasonable time, but in no event longer than six (6) months, after receipt of the request, the following information for the preceding six (6) year period:~~

~~(a) *Inflows*. At the Financial Institution level, for each Asset purchased, for each quarter:~~

~~(1) The aggregate number and identity of shares/units bought;~~

~~(2) The aggregate dollar amount invested and the cost to the Plan, participant or beneficiary account, or IRA associated with the purchase;~~

~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the purchase of each Asset disaggregated by source; and~~

~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(b) *Outflows*. At the Financial Institution level for each Asset sold, for each quarter:~~

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[28] *See* Wells Fargo July 21 Letter, at App. A, pp 18-19 (§ I.B.i.); *see also* Dep't of Labor, Advisory Opinion No. 2002-08A, letter from Louis Campagna, Chief, Division of Fiduciary Interpretations, Office of Regulations and Interpretations to Michael A. Crabtree, Esq., Central Pension Fund of the International Union of Operating Engineers and Participating Employers (Aug. 20, 2002) ("With regard to the selection of service providers under ERISA…the responsible plan fiduciary must engage in an objective process designed to elicit information necessary to assess the qualifications of the provider, the quality of services offered, and the reasonableness of the fees charged in light of the services provided."), *available at*: http://www.dol.gov/ebsa/regs/AOs/ao2002-08a.html; FINRA, Rule 2121, *Fair Prices and Commissions, available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11539; FINRA, Rule 2122, *Charges for Services Performed, available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11764.

[29] *See supra* note 1.

~~(1) The aggregate number of and identity of shares/units sold;~~

~~(2) The aggregate dollar amount received and the cost to the Plan, participant or beneficiary account, or IRA, associated with the sale;~~

~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the sale of each Asset disaggregated by source; and~~

~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(c) *Holdings*. At the Financial Institution level for each Asset held at any time during each quarter:~~

~~(1) The aggregate number and identity of shares/units held at the end of such quarter;~~

~~(2) The aggregate cost incurred by the Plan, participant or beneficiary account, or IRA, during such quarter in connection with the holdings;~~

~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the holding of each Asset during such quarter for each Asset disaggregated by source; and~~

~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(d) *Returns*. At the Retirement Investor level:~~

~~(1) The identity of the Adviser;~~

~~(2) The beginning-of-quarter value of the Retirement Investor's Portfolio;~~

~~(3) The end-of-quarter value of the Retirement Investor's Portfolio; and~~

~~(4) Each external cash flow to or from the Retirement Investor's Portfolio during the quarter and the date on which it occurred.~~

~~For purposes of this subparagraph (d), "Portfolio" means the Retirement Investor's combined holding of assets held in a Plan account or IRA advised by the Adviser.~~

~~(e) *Public Disclosure*. The Department reserves the right to publicly disclose information provided by the Financial Institution pursuant to subparagraph (d). If publicly disclosed, such information would be aggregated at the Adviser level, and the Department would not disclose any individually identifiable financial information regarding Retirement Investor accounts.~~ [30]

[30] Wells Fargo July 21 Letter, at App. A, pp 27 (§ II.D.iv.).

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Appendix C

~~Appendix I Financial Institution ABC – Website Disclosure Model Form~~

~~Type of Investment~~	~~Provider, Name, sub-type~~	~~Transactional~~			~~Ongoing~~			~~Affiliate~~	~~Special Rules~~
		~~Charges To investor~~	~~Compensation To firm~~	~~Compensation To adviser~~	~~Charges To investor~~	~~Compensation To firm~~	~~Compensation To adviser~~		
~~NonProprietary Mutual Fund (Load Fund)~~	~~XYZ MF Large Cap Fund, Class A Class B Class C~~	~~[•]% sales load as applicable~~	~~[•]% dealer concession~~	~~[•]% of transactional fee Extent considered in annual bonus~~	~~[•]% expense ratio~~	~~[•]% 12b-1 fee, revenue sharing (paid by fund/ affiliate)~~	~~[•]% of ongoing fees Extent considered in annual bonus~~	~~N/A~~	~~Breakpoints (as applicable) Contingent deferred shares charge (as applicable)~~
~~Proprietary Mutual Fund (No load)~~	~~ABC MF Large Cap Fund~~	~~No upfront charge~~	~~N/A~~	~~N/A~~	~~[•]% expense ratio~~	~~[•]% asset-based annual fee for shareholder servicing (paid by fund/ affiliate)~~	~~[•]% of ongoing fees Extent considered in annual bonus~~	~~[•]% asset-based investment advisory fee paid by fund to affiliate of Financial Institution~~	~~N/A~~
~~Equities, ETFs, Fixed Income~~		~~$[•] commission per transaction~~	~~$[•] commission per transaction~~	~~[•]% of commission Extent considered in annual bonus~~	~~N/A~~	~~N/A~~	~~N/A Extent considered in annual bonus~~	~~N/A~~	~~N/A~~
~~Annuities (Fixed and Variable)~~	~~Insurance Company A~~	~~No upfront charge on amount invested~~	~~$[•] commission (paid by insurer)~~	~~[•]% of commission Extent considered in annual bonus~~	~~[•]% M&E fee~~ ~~[•]% underlying expense ratio~~	~~$[•] Ongoing trailing commission (paid by underlying investment providers)~~	~~[•]% of ongoing fees Extent considered in annual bonus~~	~~N/A~~	~~Surrender charge~~

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Appendix C

~~Appendix II Financial Institution XZY - Transaction Disclosure Model Chart~~

	~~Your investment~~	~~Total cost of your investment if held for:~~		
		~~1 year~~	~~5 years~~	~~10 years~~
~~Asset 1~~ ~~Asset 2~~ ~~Asset 3~~ ~~Fees~~				
~~Total~~				

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Appendix D

WELLS FARGO'S RECOMMENDED CHANGES TO PROPOSED CLASS EXEMPTION FOR PRINCIPAL TRANSACTIONS IN CERTAIN DEBT SECURITIES BETWEEN INVESTMENT ADVICE FIDUCIARIES AND EMPLOYEE BENEFIT PLANS AND IRAS

Section I – Exemption

(a) *In general*. ERISA and the Internal Revenue Code prohibit fiduciary advisers to employee benefit plans (Plans) and individual retirement plans (IRAs) from self-dealing, including receiving compensation that varies based on their investment recommendations. ERISA and the Code also prohibit fiduciaries from engaging in securities purchases and sales with Plans or IRAs on behalf of their own accounts (Principal Transactions). This exemption permits certain persons who provide investment advice to Retirement Investors (i.e., fiduciaries of Plans, Plan participants or beneficiaries, or IRA owners) to engage in certain Principal Transactions as described below.

(b) *Exemption for Certain Principal Transactions*. This exemption permits an Adviser or Financial Institution to engage in the purchase or sale of a ~~Debt~~ Security[1] in a Principal Transaction with a Plan, participant or beneficiary account, or IRA, and receive a markup, mark-down or other payment for themselves or any Affiliate, as a result of the Adviser's and Financial Institution's advice. As detailed below, parties seeking to rely on the exemption must ~~contractually~~ acknowledge fiduciary status, agree to adhere to Impartial Conduct Standards in rendering advice, disclose Material Conflicts of Interest associated with Principal Transactions and obtain the prospective ~~written~~ consent of the Plan or IRA; ~~warrant that they have adopted policies and procedures designed to mitigate the dangers posed by Material Conflicts of Interest~~; disclose important information about the cost of the security in the Principal Transaction and retain certain records. This exemption provides relief from ERISA section 406(a)(1)(A) and (D) and section 406(b)(1) and (2), and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), and (E). The Adviser and Financial Institution must comply with the conditions of Sections II-V.

(c) *Scope of this exemption*: This exemption does not apply if:

(1) The Adviser:

(i) exercises any discretionary authority or discretionary control respecting management of the assets of the Plan or IRA involved in the transaction or exercises

We have not endeavored to rewrite the entire Proposed Class Exemption for Principal Transactions in Certain Debt Securities Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs ("Principal Transaction Exemption"). Instead, our changes are focused on sections where we understood the Department may be flexible and where we believe alterations in any final exemption are required. The revisions we offer herein also incorporate changes to the text of the Principal Transaction Exemption recommended by other commenters. Our citations to the comments of other parties are not an endorsement of their past or future comments beyond what we have specifically included.

[1] *See* Correspondence from David M. Carroll, Senior Executive Vice President, Wealth, Brokerage & Retirement, Wells Fargo & Company, to John J. Canary, Director, Office of Regulations and Interpretations, Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25] (July 21, 2015) ("Wells Fargo July 21 Letter"), at App. A, p. 30 (§ III.A.), *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00647.pdf.

any discretionary authority or control respecting management or the disposition of the assets; or

(ii) has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA; or

(2) 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 (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide investment advice to the plan by a fiduciary who is not Independent.

(d) *Good faith*. Notwithstanding any other provision to the contrary, the failure to comply with any term, condition or requirement of this exemption will not result in the loss of the exemption if the failure to comply was insignificant and a good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements.[2]

Section II – Contract, Impartial Conduct, and Other Requirements

(a) *Contract*. Prior to engaging in the Principal Transaction for which relief is sought under Section I, either the Adviser or~~and~~ Financial Institution with primary responsibility for oversight of the Adviser, as appropriate, provide an enforceable agreement (under applicable law) to ~~enter into a written contract with~~ the Retirement Investor, acting on behalf of the Plan, participant or beneficiary account, or IRA, that incorporates the terms required by Section II(b)-(d~~e~~).[3]

(b) *Fiduciary*. The agreement ~~written contract~~ [4]affirmatively states that the Adviser and Financial Institution are fiduciaries under ERISA or the Code, or both, with respect to any investment recommendation to the Retirement Investor regarding Principal Transactions.

(c) *Impartial Conduct Standards*. The Adviser and Financial Institution affirmatively agree to~~, and comply with,~~[5] the following:

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[2] *See* Wells Fargo July 21 Letter, at App. A, p. 33 (§ IV); Correspondence from Marcia E. Asquith, Senior Vice President and Corporate Secretary, Financial Industry Regulatory Authority, to Office of Regulations and Interpretations and Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Proposed Conflict of Interest Rule and Related Proposals, RIN 1210-AB32 (July 17, 2015) ("FINRA Letter"), at 20, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00405.pdf.

[3] *See* Wells Fargo July 21 Letter, at App. A, pp 15-18 (§ II.A.); FINRA, Regulatory Notice 12-55, *Suitability* (Dec. 2012), at 2 (FAQ 6(a)), *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p197435.pdf.

[4] *See supra* note 3.

[5] *See* Correspondence from Catherine J. Weatherford, President and Chief Executive Officer, Insured Retirement Institute, to Office of Regulations and Interpretations and Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, RIN 1210-AB32; Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters, ZRIN 1210-ZA25; Proposed Best Interest Contract Exemption, ZRIN 1210-ZA25 (July 21, 2015) ("IRI Letter"), at 43, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00626.pdf.

(1) When providing investment advice to a Retirement Investor regarding the Principal Transaction, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (i.e., advice that considers Retirement Investor's investment profile as well as product- or strategy-related factors in addition to cost, such as the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions ~~reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate or other party~~[6]);

(2) The Adviser and Financial Institution will not enter into a Principal Transaction with the Plan, participant or beneficiary account, or IRA if the purchase or sales price of the ~~Debt~~ Security[7] (including the mark-up or mark-down) is unreasonable under the circumstances; and

(3) The Adviser's and Financial Institution's statements about the ~~Debt~~ Security,[8] fees, Material Conflicts of Interest, the Principal Transaction, and any other matters relevant to a Retirement Investor's investment decision in the ~~Debt~~ Security[9], are not misleading.

~~(d) *Warranty*. The Adviser and Financial Institution affirmatively warrant the following:~~

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[6] *See* Wells Fargo July 21 Letter, at App. A, pp 18-20 (§ II.B.i.); FINRA, Regulatory Notice 12-25, *Suitability* (May 2012), at 3 (FAQ 1), *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p126431.pdf; Dep't of Labor, Employee Benefits Security Admin., *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 72 Fed. Reg. 70988, at 70993 (proposed Dec. 13, 2007) (to be codified at 29 C.F.R. pt. 2550). Alternatively:

(1) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (i.e., (i) provide advice with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and (ii) solely in the interest of the Retirement Investor, in each case as such standards are interpreted under Section 404 of ERISA ~~that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party~~);

See Correspondence from Edward Van Dolsen, Executive Vice President, President of Retirement and Individual Financial Services, TIAA CREF Financial Services, to Office of Regulations and Interpretations, Employee Benefits Security Admin., Dep't of Labor, *regarding* Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Advice; Proposed Rule (RIN 1210-AB32), Proposed Best Interest Contract Exemption (ZRIN: 1210-ZA25), Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption 84-24 (ZRIN: 1210-ZA25), Proposed Amendment to Prohibited Transaction Exemption 75-1 (ZRIN: 1210-ZA25), Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption 86-128 (ZRIN 1210-ZA25) (July 20, 2015) ("TIAA-CREF Letter"), at 35, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00540.pdf; *see infra* note 28.

[7] *See supra* note 1.

[8] *See id*.

[9] *See id*.

~~(1) The Adviser, Financial Institution and Affiliates will comply with all applicable federal and state laws regarding the rendering of the investment advice and the purchase and sale of the Debt Security;~~

~~(2) The Financial Institution has adopted written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest and to ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c);~~

~~(3) In formulating its policies and procedures, the Financial Institution has specifically identified Material Conflicts of Interest and adopted measures to prevent the Material Conflicts of Interest from causing violations of the Impartial Conduct Standards set forth in Section II(c); and~~

~~(4) Neither the Financial Institution nor (to the best of its knowledge) any Affiliate uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differentiated compensation or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations regarding Principal Transactions that are not in the Best Interest of the Retirement Investor.~~ [10]

(d~~e~~) *Principal Transaction Disclosures*. The agreement ~~written contract~~ [11] must specifically:

(1) Set forth in writing

(i) the circumstances under which the Adviser and Financial Institution may engage in Principal Transactions with the Plan, participant or beneficiary account, or IRA and

---

[10] *See* Wells Fargo July 21 Letter, at App. A, pp 27-28 (§ II.E.). Alternatively:

(d) *Conditions* ~~*Warranties*~~. As a condition of this exemption, ~~T~~the Adviser and Financial Institution affirmatively agree to ~~warrant~~ the following:

~~(1)~~

(1~~2~~) The Financial Institution has adopted written policies and procedures reasonably designed to identify and mitigate ~~the impact of~~ Material Conflicts of Interest and ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c);

~~(3)~~

~~(4)~~

(2) If the Financial Institution or (to the best of its knowledge) any Affiliate or Related Entity pays any form of compensation to Advisers that varies based on the Assets that they recommend, including payouts based upon commissions, trail commissions or 12b-1 fees, ticket charge discounts, awards, or product contests, and not solely on neutral factors such as the difference in time and analysis necessary to provide prudent advice, then the written policies and procedures described in paragraph (2) must be reasonably designed to ensure that such Advisers only make recommendations that are in the Best Interest of the Retirement Investor. These policies and procedures must include procedures to mitigate, to the extent practical, the effects of these forms of compensation on an Adviser's choice of Asset, to supervise the recommendations made by those Advisers, to promptly detect possible recommendations that may not be in the Best Interest of the Retirement Investor, and to take prompt and appropriate action concerning any recommendation that is found to have not been in the Best Interest of the Retirement Investor.

See FINRA Letter, at 9.

[11] *See supra* note 3.

(ii) identify and disclose the Material Conflicts of Interest associated with Principal Transactions, which for registered investment advisers, could be made via Form ADV;[12]

(2) Document the Retirement Investor's affirmative written consent, on a prospective basis, to Principal Transactions between the Adviser or Financial Institution and the Plan, participant or beneficiary account, or IRA; and

(3) Inform the Retirement Investor

(i) that the consent set forth in Section II(d~~e~~)(2) is terminable at will by the Retirement Investor at any time, without penalty to the Plan or IRA, and

(ii) of the right to obtain complete information about ~~all~~ the fees and other payments currently associated with its investments.

(e~~f~~) *Prohibited Contractual Provisions*. The agreement ~~written contract~~ [13]shall not contain the following:

(1) Exculpatory provisions disclaiming or otherwise limiting liability of the Adviser or Financial Institution for a violation of the agreement ~~contract~~'s[14] terms; and

(2) A provision under which the Plan, IRA or the Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution, or agrees to an amount representing liquidated damages for breach of the contract; provided that the parties may agree to limit damages to an amount equal to the return an investor would have earned from an investment that was in the Best Interests of the Retirement Investor at the time of the recommendation and the return that the Retirement Investor actually earned, and to preclude the right to rescind any transaction the rescission of which is not otherwise contemplated by federal law.[15]

(g) *Monitoring*. The contract describes whether or not the Adviser and Financial Institution will monitor the Retirement Investor's investments and alert the Retirement Investor to any recommended change to those investments, and if so, the frequency with which the monitoring will occur and the reasons for which the customer will be alerted.[16]

Section III – General Conditions

(a) An Adviser or Financial Institution shall be deemed in compliance with the provisions of this exemption when the Adviser or Financial Institution directly or indirectly, acting as principal for its own account, sells to or purchases from an Retirement Investor any Security if:

(1) The Adviser or Financial Institution exercises no "investment discretion" (as such term is defined in section 3(a)(35) of the Securities Exchange Act of 1934 (Exchange Act)

[12] *See* Wells Fargo July 21 Letter, at App. A, p. 24 (§ II.D.).

[13] *See supra* note 3.

[14] *See id*.

[15] *See* FINRA Letter, at 21.

[16] *See id*., at 8.

(15 U.S.C. 78c(a)(35))), except investment discretion granted by the Retirement Investor on a temporary or limited basis, with respect to the Retirement Investor's account;

(2) Neither the Adviser, Financial Institution nor any person controlling, controlled by, or under common control with the Adviser or Financial Institution is the issuer of, or, at the time of the sale, an underwriter (as defined in section 202(a)(20) of the Investment Advisers Act of 1940 (Advisers Act) (15 U.S.C. 80b-2(a)(20))) of, the security; except that the Adviser or Financial Institution or a person controlling, controlled by, or under common control with the Adviser or Financial Institution may be an underwriter of an Investment Grade Debt Security;

(3) The Retirement Investor has executed the consent set forth in Section II(d)(2);

(4) The Adviser or Financial Institution, prior to the execution of each principal transaction informs the Retirement Investor as set forth in Section II(d)(3); and

(5) Each written disclosure required by this section includes a conspicuous, plain English statement that the Retirement Investor may revoke the written the consent set forth in Section II(d)(2) without penalty at any time by written notice to the investment adviser.

(b) This section shall not be construed as relieving in any way an Adviser or Financial Institution from acting in the Best Interests of a Retirement Investor, including fulfilling the duty with respect to the best price and execution, which for broker-dealers includes the requirements of FINRA Rule 5310 (Best Execution and Interposition) or any successor rule, as interpreted by FINRA, and Municipal Securities Rulemaking Board (MSRB) Rule G-18 (Best Execution) or any successor rule, as interpreted by MSRB,[17] for the particular transaction for the Retirement Investor; nor shall it relieve such person or persons from any obligation comply with:

(1) any law making it unlawful to employ any device, scheme, or artifice to defraud any client or prospective Retirement Investor;

(2) any law making it unlawful to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective Retirement Investor; or

(3) any other applicable provisions of the federal securities laws.

~~(a) *Debt Security*. The Debt Security being purchased or sold:~~

~~(1) Was not issued by the Financial Institution or any Affiliate;~~

~~(2) Is not purchased by the Plan, participant or beneficiary account, or IRA in an underwriting or underwriting syndicate in which the Financial Institution or any Affiliate is the underwriter or a member;~~

~~(3) Possesses no greater than a moderate credit risk; and~~

~~(4) Is sufficiently liquid that the Debt Security could be sold at or near its fair market value within a reasonably short period of time.~~

~~(b) *Arrangement*. The Principal Transaction is not part of an agreement, arrangement, or understanding designed to evade compliance with ERISA or the Code, or to otherwise impact the value of the Debt Security.~~

[17] *See id.*, at 16.

~~(c) *Cash*. The purchase or sale of the Debt Security is for cash.~~

~~(d) *Pricing*. The purchase or sale of the Debt Security is executed at a price that:~~

~~(1) The Adviser and Financial Institution reasonably believe is at least as favorable to the Plan, participant or beneficiary account, or IRA than the price available to the Plan, participant or beneficiary account, or IRA in a transaction that is not a Principal Transaction; and~~

~~(2) Is at least as favorable to the Plan, participant or beneficiary account, or IRA as the contemporaneous price for the Debt Security, or a similar security if a price is not available with respect to the same Debt Security, offered by two ready and willing counterparties that are not Affiliates.~~

~~When comparing the price offered by the counterparties referred to in (2), the Adviser and Financial Institution may take into account a commission as part of the resulting price to the Plan, participant or beneficiary account, or IRA, as compared to the price of the Debt Security, including any mark-up or mark-down.~~[18]

Section IV – Disclosure Requirements

(a) *Pre-Transaction Disclosure*. Prior to engaging in the Principal Transaction, the Adviser or Financial Institution provides the following, orally or in writing, to the Retirement Investor:

(1) A statement that the purchase or sale of the ~~Debt~~ Security[19] will be executed as a Principal Transaction between the Adviser or Financial Institution and the Plan, participant or beneficiary account, or IRA; and

(2) Any available pricing information regarding the ~~Debt~~ Security[20]~~, including the two quotes obtained pursuant to Section III(d). The mark-up or mark-down or other payment that will be charged also must be disclosed~~.[21]

(b) *Confirmation*. The Financial Institution provides a written confirmation of the Principal Transaction in accordance with Rule 10b-10 under the ~~Securities~~ Exchange Act ~~of 1934 that also includes disclosure of the mark-up, mark-down, or other payment to the Adviser, Financial Institution or Affiliate in connection with the Principal Transaction~~.[22]

(c) *Annual Disclosure*. The Adviser or Financial Institution provides the following written information to the Retirement Investor, annually, within 90~~45~~ days of the end of the applicable year, in a single disclosure:

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[18] *See* Wells Fargo July 21 Letter, at App. A, p. 30 (§ III.B.); SEC, Rule 206(3)-3T, Investment Advisers Act of 1940, *Temporary Rule for Principal Trades with Certain Advisory Clients* (codified at 17 C.F.R. pt. 275.206(3)-3T), at Parts (a) and (b).

[19] *See supra* note 1.

[20] *See id*.

[21] *See* Wells Fargo July 21 Letter, at App. A, p. 31 (§ III.C.); 17 C.F.R. pt. 275.206(3)-3T(a)(4).

[22] *See* Wells Fargo July 21 Letter, at App. A, p. 31 (§ III.C. and D.); 17 C.F.R. pt. 275.206(3)-3T(a)(5).

(1) A list identifying each Principal Transaction engaged in during the applicable period~~, the prevailing market price at which the Debt Security was purchased or sold, and the applicable mark-up or mark-down or other payment for each Debt Security~~[23]; and

(2) A statement that the consent required pursuant to Section II(e)(2) is terminable at will, without penalty to the Plan or IRA.

(d) *Upon Request*. Upon the Retirement Investor's reasonable request, prior to or following the completion of a Principal Transaction, the Adviser or Financial Institution must provide the Retirement Investor with reasonably available[24] additional information in its possession[25] regarding the ~~Debt~~ Security[26] and its purchase or sale; provided that such request may not relate to a Principal Transaction that was executed more than six (6) years from the date of the request.

(e) *Markups and Markdowns*. The Adviser and Financial Institution comply with markup policy of FINRA Rule 2121 or any successor rule and to any applicable FINRA rules concerning the disclosure of pricing information related to principal transactions, as interpreted by FINRA.[27]

Section V – Recordkeeping

(a) The Financial Institution maintains for a period of six (6) years from the date of each Principal Transaction the records necessary to enable the persons described in Section V(b) to determine whether the conditions of this exemption have been met, except that:

(1) If such records are lost or destroyed, due to circumstances beyond the control of the Financial Institution, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party other than the Financial Institution that is engaging in the Principal Transaction shall be subject to the civil penalty that may be assessed under ERISA section 502(i) or to the taxes imposed by Code sections 4975(a) and (b) if the records are not maintained or are not available for examination as required by Section V(b).

(b)

(1) Except as provided in Section V(b)(2) and notwithstanding any provisions of ERISA sections 504(a)(2) and 504(b), the records referred to in Section V(a) are unconditionally available at their customary location for examination during normal business hours by:

(i) any duly authorized employee or representative of the Department or the Internal Revenue Service;

[23] *See* Wells Fargo July 21 Letter, at App. A, pp 31-32 (§ III.C. and D.); 17 C.F.R. pt. 275.206(3)-3T(a)(6).

[24] *See* Correspondence from Lisa J. Bleier, Managing Director, Federal Government Relations and Associate General Counsel, Securities Industry and Financial Markets Association, to Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* ZRIN: 1210-ZA25 (July 20, 2015) ("SIFMA Principal Transaction Letter"), at 37, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00506.pdf.

[25] *See* SIFMA Principal Transaction Letter, at 37.

[26] *See supra* note 1.

[27] *See* FINRA Letter, at 17.

(ii) any fiduciary of the Plan or IRA that was a party to a Principal Transaction described in this exemption, or any duly authorized employee or representative of such fiduciary;

(iii) any employer of participants and beneficiaries and any employee organization whose members are covered by the Plan, or any authorized employee or representative of these entities; and

(iv) any participant or beneficiary of the Plan, or the beneficial owner of an IRA.

(2) None of the persons described in subparagraph (1)(ii) through (iv) are authorized to examine trade secrets of the Financial Institution, or commercial or financial information which is privileged or confidential; and

(3) Should the Financial Institution refuse to disclose information on the basis that such information is exempt from disclosure, the Financial Institution must by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

Section VI – Definitions

(a) "Adviser" means an individual who:

(1) Is a fiduciary of a Plan or IRA solely by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B), or both, and the applicable regulations, with respect to the Assets involved in the transaction;

(2) Is an employee, independent contractor, agent, or registered representative of a Financial Institution; and

(3) Satisfies the applicable banking, and securities laws with respect to the covered transaction.

(b) "Affiliate" of an Adviser or Financial Institution mean:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution. For this purpose, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, employee, relative (as defined in ERISA section 3(15)) or member of family (as defined in Code section 4975(e)(6)), agent or registered representative of, or partner in the Adviser or Financial Institution; and

(3) Any corporation or partnership of which the Adviser or Financial Institution is an officer, director, or employee, or in which the Adviser or Financial Institution is a partner.

(c) Investment advice is in the "Best Interest" of the Retirement Investor when the Adviser and Financial Institution providing the advice consider the Retirement Investor's investment profile as well as product- or strategy-related factors in addition to cost, such as the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions ~~act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, or other party~~.[28]

(d) "~~Debt~~ Security" means ~~a "debt security"~~ any security available to be purchased in an IRA~~as defined in Rule 10b-10(d)(4) of the Exchange Act that is:~~

~~(1) U.S. dollar denominated, issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933;~~

~~(2) An "Agency Debt Security" as defined in FINRA Rule 6710(l) or its successor; or~~

~~(3) A "U.S. Treasury Security" as defined in FINRA Rule 6710(p) or its successor~~.[29]

(e) "Financial Institution" means the entity that

(i) employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative, and

(ii) customarily purchases or sells ~~Debt~~ Securities[30] for its own account in the ordinary course of its business, and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 USC 80b-1 et seq.) or under the laws of the state in which the adviser maintains its principal office and place of business;

(2) A bank or similar financial institution supervised by the United States or state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 USC 1813(b)(1))), but only if the advice resulting in the compensation is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by federal or state banking authorities; and

[28] *See* Wells Fargo July 21 Letter, at App. A, pp 21-22 (§ II.B.iii.); IRI at 40-41; Correspondence from Lisa J. Bleier, Managing Director, Federal Government Relations and Associate General Counsel, Securities Industry and Financial Markets Association, to Office of Exemption Determinations, Employee Benefits Security Admin., Dep't of Labor, *regarding* ZRIN: 1210-ZA25; PTE Application D-11712 (July 20, 2015) ("SIFMA BICE Letter"), at 18, *available at*: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00506.pdf. Alternatively:

(d) Investment advice is in the "Best Interest" of the Retirement Investor when the Adviser and Financial Institution (i) provides advice with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and (ii) solely in the interest of the Retirement Investor, in each case as such standards are interpreted under Section 404 of ERISA~~providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor , without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party~~.

TIAA-CREF Letter, at 35; *see supra* note 6.

[29] *See supra* note 1; *see also* 5 U.S.C. § 77b(a)(1).

[30] *See supra* note 1.

(3) A broker or dealer registered under the Securities Exchange Act of 1934 (15 USC 78a et seq.).

(f) "Independent" means a person that:

(1) Is not the Adviser or Financial Institution or an Affiliate;

(2) Does not receive compensation or other consideration for his or her own account from the Adviser, Financial Institution or an Affiliate; and

(3) Does not have a relationship to or an interest in the Adviser, Financial Institution or an Affiliate that might affect the exercise of the person's best judgment in connection with transactions described in this exemption.

(g) "Individual Retirement Account" or "IRA" means any trust, account or annuity described in Code section 4975(e)(1)(B) through (C~~F~~), including, for example, an individual retirement account described in Code section 408(a) ~~and a health savings account described in section 223(d) of the Code~~.[31]

(h) "Investment Grade Debt Security" means a non-convertible debt security that, at the time of sale, is rated in one of the four highest rating categories of at least two nationally recognized statistical rating organizations (as defined in section 3(a)(62) of the Exchange Act (15 U.S.C. 78c(a)(62))).[32]

(i~~h~~) A "Material Conflict of Interest" exists when an Adviser or Financial Institution has a financial interest that, from the perspective of a reasonable person,[33] could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding Principal Transactions.

(j~~i~~) "Plan" means an employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(k~~j~~)) "Principal Transaction" means a purchase or sale of a ~~Debt~~ Security[34] where an Adviser or Financial Institution is purchasing from or selling to a Plan, participant or beneficiary account, or IRA on behalf of the Financial Institution's own account 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.

(l~~k~~) "Retirement Investor" means:

(1) a fiduciary of a non-participant directed Plan subject to Title I of ERISA with authority to make investment decisions for the Plan;

(2) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution; or

(3) The beneficial owner of an IRA acting on behalf of the IRA.

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[31] *See* Wells Fargo July 21 Letter, at App. A, pp 12-14 (§§ I.F.i. and ii.). This change to the definition of "Individual Retirement Account" or "IRA" was also made in Appendices B and C.

[32] *See id.*, at p. 30 (§ III.A.); 17 C.F.R. pt. 275.206(3)-3T(c).

[33] *See* SIFMA BICE Letter, at 19.

[34] *See supra* note 1.