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

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D -11933
U.S. Department of Labor
200 Constitution Avenue, N.W.
Suite 400
Washington, DC 20210

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions – Questions 2 through 18 (RIN 1210-AB82)

Dear Sir or Madam:

Wells Fargo & Company and its affiliates ("Wells Fargo") welcome the opportunity to respond to the U.S. Department of Labor's (the "Department") Request for Information ("RFI"), specifically questions two through eighteen concerning marketplace developments, new exemptions and revisions to the rule defining the term "fiduciary" and to existing exemptions granted with the final rule (collectively, the "Rule").

The RFI is a critical component of the Department's reexamination, as directed by the February 3, 2017 Presidential Memorandum, of whether the Rule "may adversely affect the ability of Americans to gain access to retirement information and financial advice."[1] We believe this reexamination of the Rule presents an opportunity to adopt and implement a uniform best interest standard of conduct for the benefit of all retail investors, an effort Wells Fargo has long supported.[2] In particular, we are encouraged by Labor Secretary Alexander Acosta's and Securities and Exchange Commission ("SEC") Chair Jay Clayton's recent agreement "to engage constructively" to develop solutions for the Rule's adverse effects.[3]

We hope the information we, and others, submit in response to the RFI provides the Department with a new factual record to consider the "additional exemption approaches or changes to the Fiduciary Rule" contemplated by the RFI.[4] In this letter, we provide information on how the Rule is impacting the marketplace for retirement services, particularly its impact on investors' access to financial advice and education. We also recommend an alternative exemption and a revised version of the Best Interest Contract ("BIC") Exemption that could result from Department and SEC coordination as well as changes to the definition of "investment advice," its exceptions and other existing prohibited transaction exemptions.

Executive Summary

Americans rely on wealth they accumulate during their working years in all types of accounts, retirement and otherwise, to support their retirement. Evidence shows that people who seek help from a financial professional are best prepared to achieve their financial goals. We believe that any regulation that discourages financial services providers from providing advice – on both the importance of saving and how to invest successfully – will leave many people ill-prepared to address the retirement challenges they will face.

As detailed in our April 17, 2017 comment letter to the Department, developments in the marketplace for retirement savings since the Rule's issuance show the Rule is causing "investors, particularly middle-class savers, [to] receive less individualized retirement education and have fewer choices when preparing for retirement."[5]

Retail investors deserve a best interest standard of conduct when receiving personalized investment advice. Moreover, they expect this standard of conduct to apply to all of their investments, not to a particular account. We have been consistent on this point in our comments to the Department[6] and the SEC [7] since 2010.

We believe the most straightforward path to addressing the effects of the Rule is for the Department to coordinate with the SEC to adopt a uniform best interest standard of conduct based on the Rule's Impartial Conduct Standards. We recommend below two possible ways in which the Department and the SEC could coordinate to achieve this goal:

(1) Create an exemption from the Rule for financial services providers subject to a best interest standard of conduct by another federal regulator, such as the SEC (or Financial Industry Regulatory Authority ("FINRA")), or

(2) Streamline the BIC Exemption such that exemptive relief is based principally on a revised version of the Impartial Conduct Standards.

Both approaches would ensure that retail investors receive the benefits of the best interest standard of conduct when dealing with financial services providers – in both retirement and other accounts. Furthermore, both approaches will result in investors receiving consistent regulatory protections[8] and encourage future marketplace innovations.

Under either approach, the definition of "investment advice" must be narrowed and exceptions from the definition must be broadened to allow investor access to investment education and research as well as to permit sales and marketing activities in the Employee Retirement Income Security Act of 1974 ("ERISA") marketplace. These changes should go beyond those contemplated in the RFI. In addition, we suggest changes to the Rule's BIC Exemption, Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs ("Principal Transactions") Exemption and Prohibited Transaction Exemption 84-24 ("PTE 84-24") that will improve access to retirement savings services.

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Discussion

1. The Changing Marketplace for Retirement Services (Response to Questions 2-4)

The RFI's initial questions focus on marketplace changes resulting from the Rule. The available evidence shows the market for retirement services is already changing in ways that are harming retirement investors' access to retirement information and financial advice. Even previously commonplace exchanges of information about retirement saving are being impacted by the Rule.

As an example, Wells Fargo offers individual retirement accounts ("IRAs") that consist exclusively of certificates of deposit ("CD"). Our customers hold billions of dollars in these typically low balance accounts. Prior to the Rule, a customer could simply interact with personnel at Wells Fargo Community Bank ("Bank") to facilitate the opening of a bank insured deposit IRA or deposit maturing retirement CD assets. Now, in order to avoid the significant liabilities of being deemed a fiduciary under the Rule, Bank branches no longer provide information about how to open a bank deposit IRA or deposit maturing assets. Instead, when a

customer inquires about a bank deposit IRA, they are either directed to an online Bank resource or referred to Wells Fargo Advisors.

The early evidence is that the volume of new bank deposit IRAs and related contribution volumes have declined since this change was made. Other financial services providers went much further and decided after the Rule was published to simply no longer offer bank deposit IRAs. These changes to a previously readily accessible retirement savings product adversely impact retail investors who need help the most: those just starting to save for retirement who may not have large enough balances for brokerage investment products.

Further, Wells Fargo no longer permits bankers to use a digital program designed to engage customers in basic retirement planning conversations and provide them with a savings plan. This program was launched in 2013 and it proved effective in aiding higher levels of saving in both taxable accounts and IRAs. While the program remains available as an online resource, customers are not able to interact with financial professionals and must now resort to using a "do-it-yourself" approach. To date this has been ineffective, as many customers are looking for human interaction to understand their choices.

In addition, the broad scope of the definition of the Rule, without clearly delineated exclusions and exemptions for routine services in the ERISA plan marketplace, has also led to reductions in plan recordkeepers' ability to provide much needed participant educational services. Plan service providers have traditionally been able to provide customized participant-facing educational communications on topics including the benefits of diversification. However, the Rule's provisions capture information directed to a specific recipient or recipients without an exclusion or exception that unequivocally encompasses targeted educational materials. This has hampered the ability of recordkeepers to support these types of services and rendered participant communications less effective.[9]

Since the final version of the Rule was published, Wells Fargo Asset Management has also witnessed resignations by intermediary broker-dealers on over $100 million of assets in Wells Fargo Funds across thousands of retirement accounts. In many cases, the resignations are due to the fact that the intermediary does not want to be associated with low asset level accounts. The accounts then become "orphaned" because they no longer have a broker-of-record attached to the account and, therefore, are "direct to fund" accounts, which are unadvised accounts. In essence, these customers lose access to advice related to such investments altogether.

If the Rule is not revised or rescinded, based on intermediary broker-dealer feedback, we anticipate that considerably more accounts will be orphaned when, or if, the rest of the Rule becomes applicable. We also anticipate that many accounts that would otherwise be opened with low asset levels, including by those just beginning to invest, will not be opened, as financial services providers will be unwilling to take on such small accounts.

Wells Fargo Advisors will continue to serve all of our clients investing for retirement, but the service models under which we provide those services will likely evolve under the Rule. We plan to reduce the number of investment products offered for purchase in retirement accounts. In addition, while we currently plan to offer our retail clients a choice between paying for advice on a commission-basis or an asset-based fee, the migration to asset-based fees will likely continue

as we determine the Rule exposes us to excessive risk, especially if class action claims are instituted based on provisions of the BIC and Principal Transactions Exemptions.

As set forth in greater detail in our April 17, 2017 comment letter, other financial services providers plan to avoid the litigation risks posed by the Rule 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.[10] This reduction in investor choice negatively impacts retirement investors and in some cases causes them to lose access to the personalized assistance of a financial professional. In sum, the Insured Retirement Institute estimates that approximately 70 percent of financial professionals will disengage at least some retirement savers because of the Rule.[11]

This trend will have significant adverse effects on retirement investors. We have found, and studies show, that Americans working with a financial professional generally save more,[12] enjoy greater investment returns[13] and have greater wealth at retirement than those who do not work with a financial professional.[14] The benefits retirement investors receive from working with a financial professional far outweigh any savings the Department believes will materialize from the Rule.[15] 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.[16]

In our estimation, the empirical evidence shows the Rule has not struck the appropriate balance between access to investment advice and protecting investors from conflicts of interest and is doing more harm than good. Several independent institutions have reached this same conclusion. According to the Investment Company Institute's calculations, investors could lose $109 billion over 10 years because of the Rule's implementation.[17]

The loss of access to investment advice is mainly attributable to the BIC and Principal Transactions Exemptions' reliance on litigation as their primary enforcement mechanism. The new contractual provisions and warranties required under these exemptions provide significant incentives for third-party plaintiff attorneys to bring new forms of major class-action claims. Compliance with the Rule also requires interpretations of undefined terms and judgments on implementation that will be subject to hind-sight judgements in class actions.

The cost of this litigation will be substantial. For example, the costs of settlements alone, which may well reflect the avoidance of the risk of going to trial rather than the losses to members of the class, are estimated to range from $70 million to $150 million for the industry, or even substantially more.[18] In addition, the exclusions and exceptions from the definition of "investment advice" for non-fiduciary activities, such as sales and marketing, require compliance with detailed factual conditions and disclosures that courts may be unwilling to rule on at the early stages of a lawsuit, which will likely increase defense costs and subject financial services providers to needless discovery. We suggest revisions to the Rule below that would avoid these needless costs.

2. Recommended Alternative Best Interest Exemptions (Response to Questions 4-11)

The Department has acknowledged, "[i]f advisers fully adhere to these requirements [i.e., the Impartial Conduct Standards], affected investors will generally receive the full gains due to the fiduciary rulemaking."[19] Consequently, we believe the Impartial Conduct Standards provide the investor protections sought by the Department and the additional BIC Exemption requirements provide little, if any, additional protection. We believe the jurisdictional issues that led the Department to enforce the BIC Exemption via litigation can best be addressed by coordinating with another agency with direct enforcement powers, such as the SEC, and adopting a version of the Impartial Conduct Standards applicable to all investors. Therefore, we propose exemptive relief below that can form the basis for a uniform best interest standard of conduct.

A. Exemptive Relief Should Not Be Premised on Specific Product and Service Innovations

Any alternative best interest exemption should be standards-based, which will give the exemption the enduring flexibility to promote and adapt to marketplace innovation. Overly prescriptive, product-based exemptive relief creates confusion for both investors and financial services providers. For example, the differing Impartial Conduct Standards under the BIC and Principal Transactions Exemptions can confuse even the most compliant-oriented financial professional. This is particularly true when the financial professional is focused on recommending what is right for the client instead of what exemption is applicable when executing the recommended transaction.

Most importantly, drafting an exemption to mirror the qualities of a current product innovation, such as clean shares or fee-based annuities, may quickly become outdated. One need only look at how fast the industry moved to develop mutual fund "T-shares" to see the need for exemptive relief that can adapt to a dynamic marketplace. While the new T-share class eliminates certain conflicts in mutual fund sales, it will not offer exchange privileges or rights of accumulation, which disadvantages certain investors.[20] The result is that after considerable effort and expense to create T-shares, other financial services providers already appear to be considering the merits of various types of clean shares, which pose their own challenges.[21] For example, broker-dealers and asset managers have different perspectives on the features of this product and, as such, the development and integration of clean shares into product line-ups may still be years away and may vary by firm.

Similarly, fee-based annuities are an imperfect solution. Wells Fargo Advisors was an early distributer of these products, which have been on the market for years. However, they continue to account for only a limited portion of total annuities sales. This is likely due to long-term annuities (e.g., 10, 20 or 30 year products) being more cost-effective when acquired on a commission basis. Further complicating the purchase of fee-based annuities in IRAs is that the fee paid for the annuity cannot be taken from the IRA and must instead be paid from a taxable account.

The limitations in all of these products mean that the marketplace will continue to look for new solutions for retirement investors. This, in itself, is testament to the virtues of standards-

based exemptive relief versus prescriptive exemptive relief. Under the former, the market has the freedom to make improvements, while under the latter, it is resigned to the confines of the exemption.[22]

B. The Standard of Conduct Could Be Harmonized Under an Alternative Best Interest Exemption

Wells Fargo serves 70 million clients or one in every three American households. We hold over $390 billion in IRA assets for over 4 million IRA owners. This makes us the 6th largest IRA provider in the United States. Most of our IRA owners also hold a taxable account with us. Our retail investor clients deserve a best interest standard of conduct when receiving personalized investment advice and they would expect this standard of conduct to apply to their relationship with us, not to a particular account. As SEC Chair Clayton recently remarked, "we're in a position where we could have different standards for the individual investor – that doesn't seem right."[23] We believe Department and SEC coordination could take different forms and still result in a flexible, uniform standard of conduct. Two possible formulations of an exemption that could result from such coordination and still put investors' interests first are:

Create an Exemption for Accounts Subject to a Best Interest Standard

The Department could create an exemption from the Rule for accounts, including IRAs, subject to a best interest standard of conduct for the provision of personalized investment advice under the regulatory jurisdiction of the SEC (or FINRA). The SEC could establish such a best interest standard under its Dodd-Frank Act § 913 mandate or outside of the Act. For example, the SEC could instruct FINRA to amend its Suitability Rule[24] to include a best interest standard that mirrors the elements of the Impartial Conduct Standards (with the minor modifications suggested below).

Revise the BIC Exemption to Permit Adoption of Uniform Impartial Conduct Standards

The Department could coordinate with other regulators such as the SEC to streamline the BIC Exemption such that exemptive relief is based principally on a revised version of the Impartial Conduct Standards. The Department itself has noted that adherence to these standards "helps ensure investment recommendations are not driven by adviser conflicts, but by the best interest of the retirement investor."[25] Such coordination between regulatory agencies (and self-regulatory organizations) to adopt and then enforce a modified version of the Impartial Conduct Standards will mitigate the overlap between regulatory frameworks under the Rule without removing or diluting any the current investor protections.

The creation of either alternative best interest exemption would benefit retirement investors by providing a uniform regulatory framework for retirement and non-retirement accounts without sacrificing or weakening investor protections. The Impartial Conduct Standards that became effective on June 9, 2017 differ significantly from the standard of conduct applicable to investment advisers registered under federal and state securities laws and from FINRA rules applicable to broker-dealers, and they apply only to retirement accounts. This fractured, inefficient approach to regulating investment advice creates investor confusion and

does not benefit and may harm retirement investors, financial services providers and financial professionals.

In addition, both exemptions are less burdensome than the full requirements of the BIC Exemption and would, therefore, greatly reduce the costs of the Rule on investors and financial services providers. Further, enforcement for either alternative would be achieved through current regulatory oversight activities and through established dispute resolution practices for customer grievances. In particular, FINRA rules provide for the resolution of disputes through arbitration,[26] a well-established process that allows investors to seek redress for grievances before a panel with experience in resolving such claims. FINRA rules also ensure investors have the option to join in class action litigation against FINRA members.

C. How to Define a Best Interest Standard of Conduct or Revise the Impartial Conduct Standards for Broad Application

We have agreed in principle with the Impartial Conduct Standards since the Department proposed them in 2015. Any best interest standard should be clear and concise and require financial professionals to (1) provide investment advice in the best interest of their client, (2) charge no more than reasonable compensation and (3) make no materially misleading statements. We have suggested several modifications to the Impartial Conduct Standards in order to better align them with existing regulations, which will ensure consistency and effectively balance investor protection with investor access to individualized investment advice consistent with the historical broker-dealer model. With these goals in mind, we believe that the following are the essential elements of a best interest standard of conduct or the Impartial Conduct Standards:

Duty of Loyalty-

> Investment advice will be provided that is in the best interest of the client. This advice must consider the 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 without regard to the financial or other interest of the financial professional providing the advice.

This formulation of the duty of loyalty retains the "without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice" requirement of Section 913 of the Dodd Frank Act. At the same time, the duty makes clear that financial professionals can recommend a product or service that is in the investor's best interest, whether it is the least expensive option or not, which is critical for its application to broker-dealers.

This approach would also more closely align the duty of loyalty with existing regulations and ensure that transaction-based accounts continue to be viable options for client accounts. The language is taken from 2007 Department guidance that "[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."[27] The language of this duty also borrows from FINRA

Regulatory Notice 12-25 regarding FINRA's Suitability Rule.[28] In this guidance, FINRA provides a list of the appropriate factors to be considered in making a recommendation and to ensure brokers "make only those recommendations that are consistent with the customer's best interests."[29]

Duty of Care-

> An asset will not be recommended if the total amount of compensation anticipated to be received by the financial professional will exceed reasonable compensation (i.e., compensation that is normally charged for similar transactions in the marketplace).

The definition of "reasonable compensation" is derived from a Department Advisory Opinion, stating, "[w]ith 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."[30]

In addition, the definition borrows from FINRA Rule 2121 on *Fair Prices and Commissions*, which states that "[c]harges, if any, for services performed, including, but not limited to, miscellaneous services such as collection of monies due for principal, dividends, or interest; exchange or transfer of securities; appraisals, safe-keeping or custody of securities, and other services shall be reasonable and not unfairly discriminatory among customers."[31] Again, we believe that to the extent practicable, the terms used should be consistent with existing Department guidance and FINRA rules.

Misleading Statements-

> Statements about an asset, fees, material conflicts of interest or other matters relevant to a client's investment decisions will not be misleading.

The Department's current prohibition on misleading statements is an element of the Impartial Conduct Standards with which no financial services provider could reasonably disagree.

D. Disclosure Should Be Part of an Alternative Best Interest Exemption

Plain-English disclosure should be part of any best interest standard of conduct. As set forth below and in our prior comment letters,[32] we continue to believe that the disclosures required under the BIC and Principal Transactions Exemptions will, among other issues, be written to defend financial services providers in litigation as opposed to providing clients with meaningful information. This is a direct result of the threat of class action litigation as the enforcement remedy under the Rule.

In 2013, the SEC sought comment on a general relationship guide akin to Part 2A of Form ADV, the form investment advisers currently provide to advisory clients. We continue to support this proposal and recommend retail investors receive a straightforward disclosure containing a:

- Description of fees and the scope of its services,
- Disclosure of material conflicts of interest,
- Disclosure of proprietary or other limited ranges of products, and
- Disclosure of the circumstances in which principal trades may take place.

Furthermore, retail investors should be informed of the right to obtain complete information about the direct fees currently associated with their investments. In our prior comments, we suggested that this disclosure take a form similar to the current ERISA Section 408(b)(2) disclosure.

E. The January 1, 2018 Applicability Date Should Be Extended to Provide the Department and SEC Time to Act

The need for the Department and the SEC to act expeditiously to coordinate activities regarding a best interest standard of conduct is now more imperative than ever. Retail investors are in the unenviable position of facing multiple regulators, including individual states that have changed, or are contemplating changes to, standards of conduct for investment advice. This gives rise to the possibility of dozens of different standards of conduct, each with their own compliance requirements and market impact. This balkanization of standards of conduct across accounts, products and states is already harming investors as financial services providers have begun limiting the availability of financial advice, products and services – particularly for small balance investors. The increased costs from multiple standards will undoubtedly only exacerbate these trends.

The opportunity to harmonize standards of conduct across accounts is one of the principal reasons why we asked for a twenty-four month extension of the January 1, 2018 applicability date and a twelve month extension of the temporary enforcement policy announced in Field Assistance Bulletin No. 2017-02 beyond the delayed applicability date.[33] Such an extension would allow the Department to work with the SEC to assess how the Rule and related exemptions have harmed retirement investors, might cause further harm in the future and how to address these harms on a coordinated basis.

In fact, both SEC Chair Clayton and Secretary Acosta have informed lawmakers that their agencies will try to coordinate on an investment advice regulation. Secretary Acosta told a Senate Appropriations subcommittee, "[t]he SEC has important expertise and they need to be part of the conversation."[34] Chair Clayton agreed, telling a separate Senate Appropriations subcommittee, "[i]t's not separate. What's happening at the Department of Labor is going to affect the markets we regulate, and vice versa."[35] We agree with both Secretary Acosta and Chair Clayton and believe the only way to achieve this goal is for the Department to extend the January 1, 2018 applicability to facilitate coordination between the two agencies.

3. Issues with the Definition of "Fiduciary" Must also Be Addressed (Response to Questions 14, 15 and 18)

While we have consistently supported a best interest standard of conduct for personalized investment advice, the present definition of "investment advice" casts far too wide of a net.

Specifically, the standard of conduct needs to be limited only to activities that are fiduciary in nature and should expressly exclude communications that can reasonably be viewed as sales or marketing, impersonal investment research and analysis, or educational activities. To ensure access to this information and prevent broad disruptions in the marketplace, we recommend the changes below to the definition of "recommendation" and broader exclusions and exceptions from the definition of "investment advice."

A. The Rule Should Not Capture Information Sharing that Is Not Individualized Investment Advice

The Rule should not capture routine sales and marketing activities or impersonal investment research and analysis when there is no mutual understanding between the parties that such activities or information are intended to constitute individualized investment advice. This could be accomplished in part by narrowing the scope of recommendations included in the definition of "investment advice" under paragraph (a)(2). We suggest the following changes:

> (a)(2) With respect to the investment advice…the recommendation is made either directly or indirectly (e.g., through or together with any affiliate) by a person who:
>
> (i) Expressly ~~R~~represents or acknowledges that it is acting as a fiduciary within the meaning of the Act or the Code;
>
> (ii) Renders the advice pursuant to a mutual ~~written or verbal~~ agreement, arrangement, or understanding that the advice is individually tailored to and based on the particular investment needs of the advice recipient; or
>
> (iii) Directs ~~the~~ individually tailored advice, other than the information and materials set forth in paragraphs (b)(2)(i) through (v) of this section, to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

Paragraph (b)(2)(v) is a new exclusion for sales and marketing activities and impersonal investment research and analysis, which is discussed below. In sum, these changes address the requirement that a recommendation be individualized to be deemed "investment advice." This would be consistent with the FINRA definition of a "recommendation," which the Department stated it intended to follow[36] and considers the extent to which a communication is individually tailored to the customer.[37] These changes also ensure that the nature of the investment advice relationship is demonstrably intentional for both parties, while providing a much broader definition of "investment advice" than what existed under the old five-part test.

In addition to narrowing the scope of paragraph (a)(2), the Department should clarify that information sharing that is not intended to be individually-tailored investment advice, including routine sales and marketing activities and impersonal research and educational information and materials in the ERISA marketplace, is not a "recommendation" by adding a new paragraph (b)(2)(v):

> (b)(2)(v) *General sales, marketing and research.* Furnishing or making available to a plan fiduciary of a plan or IRA information and materials in a marketing or sales

> capacity, or providing impersonal research, analysis or educational information and materials, where there can be no reasonable expectation on the part of such plan fiduciary that such person is acting in a position of trust or confidence (e.g., wholesale and institutional sales activities, impersonal investment analysis or research). Whether a plan fiduciary may have a reasonable expectation that the person is acting in a position of trust or confidence is based on the relevant facts and circumstances, including the individualized nature of the information and materials provided, the reliance placed on such information or materials by the plan fiduciary, and any contemporaneous disclosures provided to the plan fiduciary. No single factor will be determinative; however, a recipient will be deemed not to have such a reasonable expectation if the person contemporaneously makes a clear and prominent disclosure, verbally or in writing, to the plan fiduciary to the effect that the person is providing the information and materials in its marketing or sales capacity (or is only providing impersonal research or educational information), the person is not endeavoring to provide impartial investment advice or to give advice in a fiduciary capacity under ERISA or the Code in connection with the information and materials provided, and the person has a financial interest in the transaction. The presence or inclusion of a participant or beneficiary of the plan or an IRA owner in such a communication will not cause such communication to be considered a recommendation, as long as the person providing the information knows or reasonably believes that the plan fiduciary is acting as a plan fiduciary with responsibility for exercising independent judgment in making a fiduciary recommendation to such participant or beneficiary of the plan or IRA owner (the person may rely on written representations from the plan fiduciary) and the other conditions of this paragraph are satisfied.

The Department stated that it intended to "avoid…burdening activities that do not implicate relationships of trust."[38] This new paragraph (b)(2)(v) achieves that aim, as the routine sales and marketing activities and impersonal research and analysis described therein cannot reasonably be viewed as implicating a relationship of trust.

In addition, as discussed in our April 17, 2017 comment letter,[39] without the type of clarification provided in paragraph (b)(2)(v), the Rule will effectively prohibit ERISA plan recordkeepers from proactively introducing products and services to plan fiduciaries for their consideration, even when there is no mutual understanding between the parties that such sales or marketing activities constitute investment advice. This is particularly true of products and services sold or marketed to plans that have less than $50 million in assets and, thus, do not qualify for exception for "Transactions with independent fiduciaries with financial expertise" ("Independent Fiduciary Exception").[40] In the past, plan fiduciaries have often relied on recordkeepers for information about retirement industry trends and best practices, including strategies for influencing participant behavior through different types of plan design and product offerings. Without this kind of flexibility, plan fiduciaries, and particularly smaller plan fiduciaries, will be disadvantaged because the Rule will prevent recordkeepers from being able to provide this level of support, including being unable to introduce new products and services.

B. The Independent Fiduciary Exception Should Be Broadened

The detailed conditions of the Independent Fiduciary Exception in paragraph (c)(1) have resulted in significant disruption to routine sales and marketing activities in the ERISA marketplace and should be broadened and streamlined. Foremost, the Independent Fiduciary Exception is too narrow because of the $50 million threshold in paragraph (c)(1)(i)(E). This prevents smaller plan fiduciaries, which have less than $50 million in assets and no institutional adviser, from accessing certain products and services. The $50 million threshold is arbitrary and should simply be eliminated. In the alternative, any threshold should be consistent with accredited investor status for ERISA plans under the Securities Act of 1933 and, therefore, reduced to $5 million.[41]

In our experience, there has also been significant inconsistency in the way financial intermediaries and plan fiduciaries have approached written representations under the Independent Fiduciary Exception. In some cases, plan fiduciaries or their third party advisers who meet the conditions of the Independent Fiduciary Exception have refused to provide any written representations because of concerns that they could incur additional fiduciary liability. This has created uncertainty for financial services companies and their plan clients. Furthermore, the detailed compliance requirements are not necessary for institutional research and wholesale activities between sophisticated financial intermediaries. The independence requirement also improperly excludes ordinary institutional research and wholesale services that are provided among affiliated financial intermediaries.

These issues could be addressed by simplifying the Independent Fiduciary Exception as set forth below. In addition, a streamlined version of the Independent Fiduciary Exception should be available for transactions between the types of financial intermediaries identified in paragraphs (c)(1)(i)(A) through (c)(1)(i)(D), including for transactions between affiliated financial services providers. Moreover, as all of the types of entities identified in paragraph (c)(1)(i) can be presumed capable of evaluating investment risks independently, paragraph (c)(1)(ii) should be removed.

As such, the Independent Fiduciary Exception should be modified as follows:

> (c)(1) Transactions with independent fiduciaries with financial expertise—The provision of any advice by a person…to a fiduciary of the plan or IRA…who is independent of the person providing the advice…if, prior to entering into the transaction the person providing the advice satisfies the requirements of this paragraph (c)(1).
>
> (i) The person knows or reasonably believes that the independent fiduciary of the plan or IRA is:
>
> (A) A bank…;
>
> (B) An insurance carrier…;
>
> (C) An investment adviser…;
>
> (D) A broker-dealer…;

(E) Any ~~independent~~ plan fiduciary that holds, or has under management or control, total assets of at least ~~$50~~ $5 million (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(i));

(ii) The person: ~~knows or reasonably believes that the independent fiduciary of the plan or IRA is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(ii));~~

(~~iii~~A) ~~The person f~~Fairly informs the independent fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and fairly informs the independent fiduciary ~~of the existence and nature of the person's financial interests~~ that the person has a financial interest in the transaction;

(~~iv~~B) ~~The person k~~Knows or reasonably believes that the independent fiduciary of the plan or IRA is a fiduciary under ERISA or the Code, or both, with respect to the transaction and is responsible for exercising independent judgment in evaluating the transaction (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(~~i~~ii)(B)); and

(~~v~~C) ~~The person d~~Does not receive a fee or other compensation directly from the plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner for the provision of investment advice (as opposed to other services) in connection with the transaction.

(iii) A person identified in paragraphs (c)(1)(i)(A) through (D) above will be deemed to have complied with this paragraph (c)(1) for any transaction with another person identified in paragraphs (c)(1)(i)(A) through (D) above, whether or not such other person is independent of the person, provided that the person fairly informs the recipient that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity under ERISA or the Code, in connection with the transaction.

In sum, these changes properly recognize the legitimate distinction between "investment advice" and the marketing and sales of products and service to plan fiduciaries as well as ordinary institutional research provided to affiliated financial intermediaries, and eliminate unnecessary compliance requirements for other categories of experienced financial intermediaries, such as banks, investment advisers and broker-dealers.

C. The "Platform Provider" and "Selection Monitoring and Assistance" Provisions Should Be Expanded

If the arbitrary $50 million threshold is not removed (or lowered) in the Independent Fiduciary Exception, the provisions for "Platform providers" and "Selection and monitoring assistance" in paragraphs (b)(2)(i) and (ii), respectively, must be expanded. First, paragraph (b)(2)(i) is expressly limited to investment alternatives. The Department has confirmed in sub-

regulatory guidance that "[t]he concept of a platform for a 401(k) plan generally includes available investment alternatives along with a bundle of recordkeeping and other services."[42] The Department should revise paragraph (b)(2)(i) of the Rule to conform to this guidance.[43]

In addition, paragraph (b)(2)(ii) is limited to responsive communications. As such there is no apparent flexibility for recordkeepers to proactively introduce and describe particular products or services that are available on their platform. A recordkeeper should not have to disclose a comprehensive listing of its entire platform offering and then require the plan fiduciary to request more information about specific products and services before being able to provide more information.

To ensure that plan fiduciaries have access to information about available products and services, we recommend making the following changes to paragraphs (b)(2)(i) and (b)(2)(ii):

> (b)(2)(i) *Platform providers.* Marketing or making available to a plan fiduciary of a plan, without regard to the individualized needs of the plan, its participants, or beneficiaries 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, as well as a bundle of recordkeeping and related services, including managed account products and advisory programs, provided the plan fiduciary is independent of the person who markets or makes available the platform or similar mechanism, and 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.~~ A plan participant or beneficiary or relative of either shall not be considered a plan fiduciary for purposes of this paragraph.~~
>
> (b)(2)(ii) *Selection and monitoring assistance.* In connection with the activities described in paragraph (b)(2)(i) of this section with respect to a plan,
>
> > (A) Identifying investment alternatives or services that meet objective criteria ~~specified by the plan fiduciary~~ (e.g., stated parameters concerning expense ratios, size of fund, type of asset or asset class, ~~or~~ credit quality, type of investment vehicle or service, or management style or strategy), provided that the person identifying the investment alternatives or services discloses in writing whether the person has a financial interest in any of the identified investment alternatives or services, and if so the precise nature of such interest;
> >
> > (B) In response to a request for information, request for proposal, or similar solicitation by or on behalf of the plan, identifying a limited or sample set of investment alternatives and related services based on only the size of the employer or plan, the current investment alternatives designated under the plan, the current services available under the plan, or ~~both~~any combination of these or other objective factors, provided that the response is in writing and discloses whether the person identifying the limited or sample set of investment alternatives and related services has a financial interest in any of the alternatives and related services, and if so the precise nature of such interest; ~~or~~

(C) Providing information and materials that describe the terms or features of available products and services, provided that the person identifying the products or services discloses in writing whether the person has a financial interest in any of the identified investment products or services, and if so the precise nature of such interest;

(D) Providing information and materials that describe changes to the investment alternatives and related products and services available through the platform or similar mechanism described in paragraph (b)(2)(i) of this section, provided that 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; or

(~~C~~E) Providing objective financial data and comparisons with independent benchmarks to the plan fiduciary.

D. The Rule Should Retain Access to Education, Including about Rollovers

We commented at length on the Rule's unwarranted limitations on investment education in our July and September 2015 and April 2017 comment letters.[44] Our September 2015 comment letter to the Department also contained red-lined edits to the proposed carve-out for investment education.[45] Rather than repeat all of the comments contained in our prior letters, we ask that the Department consider them incorporated here.

In sum, the "Investment Education" exclusion in paragraph (b)(2)(iv) should be modified as follows:

- The prohibition on providing investment examples in asset allocation models is unwarranted.[46] 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 without being considered a fiduciary, so long as the recommendation of a particular investment is not made. This change would align the investment education exclusion with the FINRA definition of a "recommendation," which permits investment examples.[47]

- Flexibility should 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 to incorporate the principles of FINRA Regulatory Notice 13-45 into the investment education carve-out.[48] Notice 13-45 imposes a standard of conduct 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, without imposing an unnecessary fiduciary standard which would serve to hinder such conversations.

- Furthermore, the Department should clarify via sub-regulatory guidance or changes to the Rule that investment education materials will not become "investment advice" simply because they are directed to specific recipients based on objective information about

those recipients. Prior to the Rule, plan fiduciaries often asked their recordkeeper to send mailers reminding participants of the benefits of diversification or encouraging them to increase their contribution levels and direct those mailings only to those participants who are improperly allocated or have contribution rates below a certain threshold.[49] Without Department guidance or changes to the Rule, recordkeepers are unlikely to provide these educational communications on a targeted basis, even at the direction of a plan fiduciary, as they may be viewed as "investment advice."

E. Communications about Making Contributions to a Plan <u>or IRA Should Not Be Subject to a Fiduciary Standard</u>

The RFI asks whether recommendations to make or increase contributions to a plan or IRA should be expressly excluded from the definition of "investment advice" or permitted under a streamlined exemption. In our view, such communications are investment education under paragraph (b)(2)(iv)(A) as they describe "the benefits of increasing plan or IRA contributions" and, therefore, exemptive relief is unnecessary because they are not "investment advice."[50] We applaud the Department for confirming this understanding through its recent sub-regulatory guidance[51] and urge the Department to clarify through further guidance that other types of targeted communications are also not "investment advice."

The Department has acknowledged that "private-sector, employer-sponsored retirement plans, such as 401(k) plans, and IRAs, are critical to the retirement security of most U.S. workers."[52] The amount that individuals contribute to plans and IRAs has a profound impact on their accumulation of retirement savings,[53] but it is not the sole factor influencing retirement savings. Another critical factor is proper asset allocation.[54] As such, treating communications regarding diversification, risk tolerance, periodic rebalancing, and methods and strategies for managing assets in retirement as "investment advice" will have an adverse effect on retirement investors because it would effectively discourage plan fiduciaries and their service providers from providing them.[55] Therefore, we believe the Department must provide similar guidance on targeted communications regarding these important topics.

F. Confirm Section 4975(d)(4) of the Internal Revenue Code Permits <u>Banks to Advise Its Customers on IRA Investments and Rollovers</u>

The Department could easily eliminate the issues faced by customers in our Bank branches by confirming that banks may continue to rely on Section 4975(d)(4) of the Internal Revenue Code. Section 4975(d)(4) permits a bank to advise its customers on IRA investments and rollovers without implicating the Rule, so long as the IRA is designed to invest exclusively in the bank's deposits, such as a CD IRA.[56] We ask the Department to confirm that Section 4974(d)(4) exempts a bank to operate bank deposit IRAs. There is no reason to prevent investors from accessing information about opening a CD IRA or similar program in a bank.

Formalizing that banks deposit IRAs can be exempted under section 4975(d)(4) would be an important factor in helping to alleviate some of the negative customer impacts that have resulted from risk mitigation efforts that are intended to reduce the possibility of a banker inadvertently acting as a fiduciary when helping a customer. In the alternative, the Rule should

be amended to ensure that communications about contributions to such accounts are non-fiduciary.

4. If the BIC Exemption Is Retained, It Must Be Revised (Response to Questions 5, 6 and 13)

Should the Department decide not to propose new exemptions to the Rule, the BIC Exemption must be revised. For the reasons detailed below, such revisions are necessary to avoid a sharp increase in costs for retirement investors and disruption of the financial services industry in general. Specifically, the private right of action and neutral factors requirement should both be eliminated. In addition, the disclosure requirements imposed by the Rule are unnecessary, costly and contradictory to the Department's prior conclusions on the issue.

A. The BIC Exemption's Private Right of Action and Warranties Should Be Eliminated

As discussed above, the litigation exposure created by the BIC Exemption has led financial services providers to limit the products and services available to retirement investors. As the Department believes the Impartial Conduct Standards provide investors with the "full gains due to the fiduciary rulemaking,"[57] any benefit to investors provided through the contract requirement is far offset by the substantial costs that it will create by way of litigation and limits to products and services. Instead, eliminating the private right of action would increase access to advice, expand the variety of products and services available to investors and keep prices lower for consumers. The ability of investors to seek redress through current regulatory oversight activities and through established dispute resolution practices for customer grievances should the Impartial Conduct Standards be violated is sufficiently protective.

At a minimum, the BIC Exemptions' warranties should be eliminated. These warranties give rise to significant risk and uncertainty for financial services providers without any reciprocal benefit for retirement investors. Essentially, these warranties take a promise to investors to act in their best interest and turn them into an explicit, contractual guarantee. While acting in the best interest of the client is an objective shared by both financial services providers and the Department, making such a warranty subjects the provider to excessive liability.

Eliminating the warranties should also include eliminating the neutral factors requirement. As explained in detail in our April 17, 2017 comment letter,[58] attempting to align a product's commissions with neutral factors, such as the difference in time and analysis needed to provide advice about the product, has presented a challenge for financial services providers. Accordingly, the standards for aligning a product's compensation with such considerations will necessarily be set in hindsight by litigation, and, specifically, class action litigation, on the basis of varying expert witness and consultant opinions. These litigation risks have led financial services providers to either avoid neutral factors analysis altogether by shifting their clients to fee-based relationships, which may carry higher costs to the customer, or to limit available products and services.[59]

B. Additional Disclosure Requirements Are <u>Unnecessary and Would Prove Ineffective</u>

As set forth above, we support the need for effective disclosures as part of a best interest standard of conduct. However, the Department's choice to create entirely new disclosures in the BIC and Principal Transactions Exemptions is at odds with its own conclusions. As the Department itself notes, "[d]isclosure alone has proven ineffective to mitigate conflicts in advice. … Indeed, some research suggests that even if disclosure about conflicts could be made simple and clear, it could be ineffective—or even harmful."[60]

We agree that disclosure alone does not sufficiently help investors to make more informed decisions. While disclosures create more transparency in the client relationship, disclosures by themselves do not help the client be more informed about financial decisions. In particular, given the construct of the BIC and Principal Transactions Exemptions, the disclosures required under the exemptions are likely to include complicated language aimed at anticipating defenses in class action cases rather than the "clear and prominent" information called for in the Rule.[61]

For these reasons, we see no benefit to adding another layer to the ubiquity of disclosures already required by the Department and other regulators. Instead, as discussed herein in Section (2)(D), we continue to encourage the Department to leverage disclosures such as those disclosures provided under ERISA Section 408(b)(2) and Form ADV.[62] Furthermore, additional disclosures required at the time of each transaction are unnecessary and a significant part of the cost estimates for the rule, which the Department grossly underestimated.[63]

C. <u>Broaden the Availability of the BIC Exemption</u>

The BIC Exemption should be available to all plans, regardless of account size. If the BIC Exemption provides sufficient protections for retail investors, there is no reason why its protections should be unavailable to a sophisticated investor who elects to use it. In addition, the BIC Exemption should be available for in-house plans of financial services providers. As the current Rule is drafted, the BIC Exemption is not available where a financial services provider or advisor is a named fiduciary or plan administrator to an ERISA-covered retirement plan. This means that employees of financial services providers may have less access to retirement services and products. There is no reasonable basis for the distinction.[64]

5. The Principals Transaction Exemption Should Be Broadened (Response to Question 12)

As set forth in our prior comments, the present limitation on principal trading will not benefit retirement investors[65] and the imposition of the Impartial Conduct Standards from the Principal Transactions Exemption is sufficiently protective. Trading as principal has the potential to benefit customers through enhanced liquidity, expanded investment choices and better execution of trades. This has made the Principal Transactions Exemption's prohibition on principally trading certain assets disadvantageous for our retirement investor clients. Specifically, the inability of clients to purchase taxable municipal bonds from Wells Fargo's

inventory is causing them to access other broker-dealer inventories, and usually results in them paying more for lower quality paper.

In our prior comments, we recommended that 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") of Advisers Act.[66] By its terms, Rule 206(3)-3T expired on December 31, 2016, but financial services providers, including Wells Fargo Advisors, have applied for, and received on an individual basis, exemption orders granting continued use of the relief.[67] The individual firm exemptions did not apply to securities issued or underwritten by the financial services provider or an affiliate.[68] There is no comparable underwriting conflict of interest for municipal, foreign and high-yield debt and as such, we see no reason why the Principal Transactions Exemption should include a more restrictive asset list than Rule 206(3)-3T.

Furthermore, we note that "sufficiently liquid" is simply another measure of a debt security's quality and the requirement should be eliminated. Alternatively, the Department should provide a definition for the term "sufficiently liquid." Measuring "liquidity" in the absence of a definition is an entirely subjective inquiry and for any individual security may change suddenly, which means that objective policies to ensure compliance with the exemption cannot be drafted.

6. All Annuities Should Be Covered Under a Single Exemption (Response to Question 17)

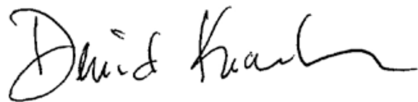
All annuities should be offered under a single exemption. Prior to the Rule, financial services providers did not apply a different standard of conduct to different types of annuities. For example, Wells Fargo Advisors has a single set of policies and procedures concerning annuities, including steps for evaluating whether an annuity is an appropriate investment for a client and related disclosures. Yet, the Rule treats different types of annuities differently by only permitting the sale of fixed annuities under PTE 84-24, while requiring other types of annuities, such as variable and index annuities, to be sold under the BIC Exemption.

The BIC Exemption presents a number of challenges for financial professionals when recommending annuities. Foremost among these challenges is the neutral factors requirement, which may prohibit duration based pricing (e.g. charging different prices for a five-year versus an eight-year annuity). The result is that retirement investors, who commonly use annuities in their IRAs as a source of regular income, may pay more for a particular annuity than they did prior to the Rule. We recommended above that the Department eliminate the neutral factors requirement. In doing so, the Department would make the BIC Exemption viable exemptive relief for annuities sales. In the alternative, all annuities should be offered under the version of PTE 84-24 in existence prior to 2016.

Conclusion

We have long sought through our many meetings with and letters to the Department to be a constructive partner in developing a best interest standard of conduct. 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 Kowach
Head of Wells Fargo Advisors
Wells Fargo & Company

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[1] The February 3, 2017 *Fiduciary Duty Rule* 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. 82 Fed. Reg. 9675 (Feb. 7, 2017).
[2] *See*, *e.g.*, Correspondence from Joseph Ready, Executive Vice President of Wells Fargo Institutional Retirement and Trust to the Office of Regulations and Interpretations, Employee Benefits Securities Admin. ("EBSA"), Dep't of Labor ("DOL"), *regarding* RIN 1210-AB32, Definition of Fiduciary Proposed Rule (Feb. 3, 2011) ("Wells Fargo 2011 Letter to DOL"); 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 2013 Letter to SEC"), at 2-7, *available at:* https://www.sec.gov/comments/4-606/4606-3127.pdf.; 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, DOL, *regarding* Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25] (July 21, 2015) ("Wells Fargo July 2015 Letter to DOL"), 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; 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, DOL, *regarding* Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25] (Sept. 24, 2015) ("Wells Fargo Sept. 2015 Letter to DOL"), 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; and Correspondence from David M. Carroll, Head of Wealth and Investment Management, Wells Fargo, to Office of Regulations and Interpretations, EBSA, DOL, *regarding* Reexamination of Definition of the Term "Fiduciary" and Related Exemptions (RIN 1210-AB79) (April 17, 2017) ("Wells Fargo Apr. 2017 Letter to DOL"), at 1-2 and 6-7, *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01378.pdf.
[3] *See* Alexander Acosta, "Deregulators Must Follow the Law, So Regulators Will Too," Wall St. J. (May 23, 2017), at A19, *available at* https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029.
[4] 82 Fed. Reg. 31,278, at 31,279 (July 6, 2017).
[5] *See* Wells Fargo July 2015 to DOL at Letter, at 2.
[6] *See*, *e.g.*, Wells Fargo 2011 Letter to DOL; Wells Fargo July 2015 Letter to DOL, at 2-3; Wells Fargo Sept. 2015 Letter to DOL, at 2-3; Wells Fargo Apr. 2017 Letter to DOL, at 1-2 and 6-7.
[7] *See*, *e.g.*, Wells Fargo 2013 Letter to SEC, at 2-7.
[8] As many as six different standards of conduct already apply to investment advice provided by the same financial advisor for a single customer. These different standards of care are based on whether a financial advisor provides investment advice concerning assets in (1) an employer plan, (2) an IRA or (3) a taxable account. Each of the three account types is then subject to different standards of care based on whether the account is serviced by (1) a broker-dealer or (2) an investment adviser. *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, DOL, *regarding* Proposed Conflict of Interest Rule and Related Proposals, RIN 1210-AB32 (July 17, 2015), at 4, *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00405.pdf.
[9] *See*, *e.g.*, Correspondence from Stephen M. Saxon, Groom Law Group, to Office of Regulations and Interpretations, EBSA, DOL *regarding* Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; RIN 1210-AB79 (Apr. 17, 2017), at 4, *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01400.pdf.
[10] *See* Wells Fargo Apr. 2017 Letter to DOL, at 3-4.
[11] *See*, *e.g.*, Correspondence from Catherine J. Weatherford, President & CEO, Insured Retirement Institute, to Office of Regulations and Interpretations and Office of Exemption Determinations, EBSA, DOL *regarding* Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Best Interest

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Contract Exemption (Prohibited Transaction Exemption 2016-01); Prohibited Transaction Exemption 84-24 RIN 1210-AB79 (Apr. 17, 2017), at 15, *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01413.pdf (New studies have shown that more than 70 percent of financial professionals will disengage from retirement savers with less than $300,000 in investable assets because of the Fiduciary Rule.).

[12] *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.").

[13] *See*, *e.g.*, David Blanchett and Paul Kaplan, *Alpha, Beta, and Now…Gamma*, Morningstar Investment Management (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.).

[14] *See*, *e.g.*, *The Role of Financial Advisors in the US Retirement Market*, Oliver Wyman (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.).

[15] *Compare, Regulating Advice Markets: Definition of the Term "Fiduciary" Conflicts of Interest- Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions*, DOL (Apr. 2016) ("DOL 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, Help in Defined Contribution Plans: 2006 through 2012*, Aon Hewitt (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.").

[16] *See*, *e.g.*, Oliver Wyman 2015 Study, at 16-34.

[17] Correspondence from Brian Reid, Chief Economist, and David W. Blass, General Counsel, Investment Company Institute, to Office of Regulations and Interpretations, EBSA, DOL (Mar. 17, 2017), at 5, *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01073.pdf.

[18]*See* Michael Wong, "The Costs of Fiduciary Rule Underestimated," Morningstar (Feb. 19, 2017), *available at*: http://news.morningstar.com/articlenet/article.aspx?id=793268.

[19] 82 Fed. Reg. 16,902, at 16,906 (April 7, 2017).

[20] Dan Jamieson, "American Funds, Others, Back Off T Shares as B-D's Face DOL Uncertainty," Financial Advisor (June 16, 2017), *available at*: http://www.fa-mag.com/news/industry-struggles-with-mutual-fund-pay-under-dol-rule-33304.html.

[21] Daisy Maxey, "'Clean Shares' Get a Boost From Fiduciary Rule," Wall St. J. (May 26, 2017), *available at*: https://www.wsj.com/articles/clean-shares-get-a-boost-from-fiduciary-rule-1495808073.

[22] The SEC's standards for investment advisors and FINRA rules for broker-dealers can evolve with the marketplace. For example, since the first domestically offered exchange traded fund (ETF) was created in the 1990s, both the SEC and FINRA have provided consumer educational materials on investing in ETFs and have monitored ETF investments as part of examinations. This means that when a product like clean shares eventually comes to market, the SEC and FINRA will undoubtedly readily adapt to ensure that the best interests of retail investors are protected with respect to the unique risks they pose.

[23] "Clayton, Piwowar Criticize DOL Fiduciary Rule," Thomson Reuters (July 27, 2017), *available at*: https://tax.thomsonreuters.com/media-resources/news-media-resources/checkpoint-news/daily-newsstand/clayton-piwowar-criticize-dol-fiduciary-rule/.

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

[25] *See* 82 Fed. Reg. at 16,903.

[26] *See*, *e.g.*, FINRA, Rule 12200, *Arbitration Under Arbitration Agreement or the Rules of FINRA*.

[27] *See, e.g.*, DOL, EBSA, *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 72 Fed. Reg. 70,988, at 70,993 (proposed Dec. 13, 2007) (to be codified at 29 C.F.R. pt. 2550).

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[28] *See supra* note 24.
[29] *See* FINRA, Regulatory Notice 12-25, *Suitability* (May 2012), at 3 (FAQ 1).
[30] DOL, 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), *available at*: http://www.dol.gov/ebsa/regs/AOs/ao2002-08a.html.
[31] FINRA, Rule 2121, *Fair Prices and Commissions*.
[32] Wells Fargo July 2015 Letter to DOL, at 3-4 and App. A, at 24-29, 31; Wells Fargo Sept. 2015 Letter to DOL, at 3 and App. B and C; Wells Fargo Apr. 2017 Letter to DOL, at 10.
[33] Correspondence from David Kowach, Head of Wells Fargo Advisors, Wells Fargo, to Office of Exemption Determinations, EBSA, DOL, *regarding* Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions – Extending January 1, 2018 Applicability Date (RIN 1210-AB82) (July 21, 2017) , *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00258.pdf.
[34] "SEC Moving Forward on Fiduciary Rule, Clayton Says," Think Advisor (June 27, 2017), *available at*: http://www.thinkadvisor.com/2017/06/27/sec-moving-forward-on-fiduciary-rule-clayton-says.
[35] *Id*.
[36] See, e.g., 81 Fed. Reg. 20,946, at 20,972 (Apr. 8, 2016) ("The final rule mirrors the FINRA guidance in stating that the more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation.").
[37] *See* FINRA, Regulatory Notice 11-2, *Know Your Customer and Suitability* (Jan. 2011), at 3.
[38] See 81 Fed. Reg. at 20,950.
[39] Wells Fargo Apr. 2017 Letter to DOL, at 11.
[40] In this respect, the provisions of the Rule addressing "Selection and monitoring assistance" are also far too limited because they only allow recordkeepers to be responsive to inquiries made by plan fiduciaries.
[41] *See* 17 C.F.R. § 230.501(a)(1) (defining "accredited investor" to include "any employee benefit plan within the meaning of [ERISA]…if the employee benefit plan has total assets in excess of $5,000,000").
[42] DOL, EBSA, *Conflict of Interest FAQs (Part II – Rule)* (Jan. 2017), at Q35, *available at*: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf.
[43] We also believe the last sentence of paragraph (b)(2)(i) is unnecessary because of the definition of "plan fiduciary" in paragraph (g)(7) and should be removed.
[44] *See* Wells Fargo July 2015 Letter to DOL, App. A at 9-11; Wells Fargo Sept. 2015 Letter to DOL, App B at 7-11; Wells Fargo Apr. 2017 Letter to DOL, at 8-9, 10.
[45] *See* Wells Fargo Sept. 2015 Letter to DOL, App B at 7-11.
[46] 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.
[47] *See supra* note 29 at 7 (FAQ 8).
[48] Wells Fargo July 2015 Letter to DOL, at 12, n.21; Wells Fargo Sept. 2015Letter to DOL, at 2 and App. B, at 10-11.
[49] A recent study supports the effectiveness of such targeted communications. "Best Practices for Participant Communications Analyzed in Study," Plansponsor (Apr. 27, 2017), *available at*: http://www.plansponsor.com/Best-Practices-for-Participant-Communications-Analyzed-by-Study/.
[50] Furthermore, nothing in the preamble to the Rule suggests that such communications were intended to be considered "investment advice" and the Department's Regulatory Impact Analysis did not identify such communications as an area of potential conflicts that the Department sought to regulate.
[51] DOL, EBSA*, Conflict of Interest FAQs (408b-2 Disclosure Transition Period, Recommendations to Increase Contributions and Plan Participation)* (Aug. 2017), at Q2, *available at*: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period-2.pdf.
[52] 81 Fed. Reg. at 20,949.
[53] *See*, *e.g.*, Employee Benefit Research Institute, EBRI Issue Brief No. 426 (Sept. 8, 2016), at 7, *available at*: https://www.ebri.org/pdf/briefspdf/EBRI_IB_426.Sept16.Consist-Ks.pdf (noting that new contributions are one of three major factors affecting changes in plan participant account balances and that "a contribution of a given dollar amount produces a larger growth rate when added to a smaller account than it would if added to a larger one).

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[54] *See, e.g.*, Employee Benefit Research Institute, EBRI Issue Brief No. 436 (Aug. 3, 2017), at 10, 13, *available at*: https://www.ebri.org/pdf/briefspdf/EBRI_IB_436_K-update.3Aug17.pdf.

[55] As discussed above, plan fiduciaries rely primarily, if not exclusively, on their recordkeepers to prepare and distribute participant-facing educational communications about contribution levels and to respond to participant questions about contributions via call centers. In our experience, plan fiduciaries do not want their plan's recordkeeper to be considered a fiduciary in these circumstances because they generally want to avoid co-fiduciary liability. *See* 81 Fed. Reg. at 20,965. As a result, treating these types of communications as investment advice, even under the terms of an exemption, would likely mean that recordkeepers would no longer be able to provide such communications.

[56] *See*, *e.g.*, Correspondence Timothy E. Keehan, Vice President & Senior Counsel to Joe Canary, Director, Office of Regulations and Interpretations, EBSA, DOL, *regarding*: Fiduciary Rule Examination – RIN 1210-AB79 (Mar. 15, 2017) at Attach., *Department of Labor (DOL) Fiduciary Rule: Exemption for Bank IRA Deposit Programs*, Morgan, Lewis & Bockius LLP, *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00937.pdf.

[57] 82 Fed. Reg. at 16,906.

[58] Wells Fargo Apr. 2017 Letter to DOL, at 9.

[59] *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. 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.

[60] 81 Fed. Reg. 21,002, at 21,062 (Apr. 8, 2016).

[61] *See*, *e.g.*, *id*., at 21,046.

[62] *See supra* note 32.

[63] *See* DOL RIA, at 223 (The RIA estimated that large firms such as Wells Fargo would spend less than $15 million to comply with the Rule. 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.).

[64] In connection with ERISA's prohibited transaction exemptions, Congress clearly recognized that it would be against "normal business practice" for a financial institution to be required to obtain products or services from its competitors. *See, e.g.*, H.R. Conf. Rep. 93-1280, 1974 U.S.C.C.A.N. 5038, at 5094.

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

[66] *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).

[67] SEC, *In the matter of Wells Fargo Advisors, LLC, et al*., Order Under Section 206A of the Investment Advisers Act of 1940 Granting an Exemption from the Written Disclosure and Consent Requirements of Section 206(3) of the Advisers Act (Dec. 28, 2016), *available at*: https://www.sec.gov/rules/ia/2016/ia-4598.pdf; SEC, Release No. IA-4581; File No. 803-00234, Wells Fargo Advisors, LLC and Wells Fargo Advisors Financial Network, LLC; Notice of Application (Dec. 1, 2016) ("WFA 206(3) Application"), *available at*: https://www.sec.gov/rules/ia/2016/ia-4581.pdf.

[68] WFA 206(3) Application, at 3.