July 16, 2015

VIA EMAIL (e-OR1@dol.gov and e-OED@dol.gov)

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments on Department of Labor Proposed Redefinition of “Fiduciary” (RIN 1210-AB32); Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25); and Proposed Amendment to Prohibited Transaction Class Exemption 84-24 (ZRIN 1210-ZA25)

Dear Sir or Madam:

Voya Financial, Inc. (Voya)1 appreciates the opportunity to comment on the recent Department of Labor (the “Department”) proposal to revise the definition of the term “investment advice” under the “fiduciary” definition,” the proposed new Best Interest Contract exemption, and the proposed amendment to Prohibited Transaction Class Exemption 84-24 (collectively, the “Proposal”).2 As one of the leading financial institutions serving the United States retirement markets through multiple channels and services, Voya shares the Department’s concerns regarding the need for retirees across America to receive sound guidance on saving and

1 Voya Financial, Inc. (NYSE: VOYA) is composed of premier retirement, investment and insurance companies serving the financial needs of approximately 13 million individual and institutional customers in the United States. A Fortune 500 company, Voya’s vision is to be America’s Retirement Company™ and its guiding principle is centered on solving the most daunting financial challenge facing Americans today — retirement readiness. Working directly with clients and through a broad group of financial intermediaries, independent producers, affiliated advisers and dedicated sales specialists, Voya provides a comprehensive portfolio of asset accumulation, asset protection and asset distribution products and services. With a dedicated workforce of approximately 6,500 employees and an independent sales force of approximately 2200 registered representatives, Voya is grounded in a clear mission to make a secure financial future possible — one person, one family, one institution at a time.

planning for a more secure retirement. We share the Department’s goal of expanding access to quality retirement planning and asset management for America’s workers and retirees.

One of the biggest challenges in serving defined contribution plans and individual retirement accounts (IRAs) is helping participants and IRA owners understand their needs—whether they be determining proper savings rates, appropriate retirement income levels, diversification and asset allocation, or establishing realistic planning goals—and implementing actions. Through its activities as a recordkeeper, administrator, financial intermediary and investment manager, among others, Voya’s mission is to help millions of participants and owners with these important steps. However, as explained more fully in this letter, while we share the Department’s goals and understand it is the Department’s stated intent to better protect workers and retirees, we are very concerned that the Proposal would likely do the opposite, jeopardizing retirement income, accelerating leakage from retirement plans and limiting participants’ and IRA owners’ access to information. The broad scope of the Proposal, its unduly complicated provisions and its proposed new restrictions on educational information will make it more difficult and costly for service providers to reach and help participants and IRA owners, an outcome that is not in the participants’ and IRA owners’ best interests.

One primary reason is that the Proposal would impose procedural burdens on even very basic communications resulting from recasting many of these communications as ERISA fiduciary “investment advice.” Rather than erecting barriers, the Proposal should facilitate these vital discussions. Otherwise, the combination of burdens in the Proposal as well as the substantial penalties and other legal liabilities that can result from inadvertent fiduciary status may have the unintended effect of decreasing the level of professional assistance and the range of retirement products and services available to many plan participants, particularly terminated plan participants and IRA owners.

Because we expect many other comment letters will focus on numerous aspects of the Proposal, such as the contours of the “investment advice” definition, our submission concentrates on those areas of particular concern to the plans, participants, IRA owners and advisers we serve and with whom we work.

* * * * *

1) The Proposed Broader Scope of Fiduciary Conduct Will Reduce Services Available to Participants and IRA Owners

We believe that the proposed formulation of when a person is rendering “investment advice”—and, thus, is acting as a fiduciary—is too broad and vague. More specifically, an “understanding” that a “recommendation” is “directed to” a plan is too subjective. The proposed formulation is expected to raise more questions than answers in practical application.

Any new rule should include some concept of mutuality of understanding and some degree of tailoring or individualization of the advice; otherwise, the potential for an after-the-fact, open-ended dispute is enormous. As an example, under the Proposal simply providing
investment-related information\(^3\) could be alleged by a recipient to have been investment advice, resulting in disputes and litigation. This is especially a concern with the “specifically directed to” language as it could be construed to include a mailing discussing an investment product addressed to the recipient by name. The upshot may be a narrowing of useful information available to participants, as service providers will not want routine communications and education materials to draw them into being a fiduciary.

In the similar vein, enrolling a new participant in an employer’s retirement plan often involves offering that individual an opportunity to transfer funds from a prior 401(k) plan to a new plan where permitted; this reduces “leakage” from the retirement system and the likelihood of “lost” accounts. The Proposal would likely make these discussions fiduciary advice, requiring an analysis of the prior plan and the current plan to develop specific advice to engage in the transfer. As a consequence, these services would be dramatically reduced or eliminated and the effect—more leakage from retirement plans—would be directly contrary to the Department’s goals and the best interests of plan participants. Such plan-to-plan retirement asset allocation discussions should not be deemed fiduciary advice.

In addition, the Department should clarify that, where a person performs an actuarial, accounting, legal function, or acts as a ministerial service provider merely making participants aware of services, benefits, rights and features available under a plan, the services will not be deemed to be “investment advice” or give rise to fiduciary status.\(^4\)

Finally, we note with concern the potential for additional, costly liabilities in connection with the expansion of the definition of fiduciary. One example is the penalty with respect to IRAs. If a fiduciary under the Proposal makes what amounts to a technical misstep (for example, not complying with all of the aspects of the Best Interest Contract exemption), then the IRA will potentially be subject to disqualification and/or an excise tax. That is unnecessarily punitive to both the adviser and the IRA account holder. We encourage the Department to use its interpretive authority to clarify that technical violations of the new rules will not result in such drastic penalties absent material deficiencies. In addition to the potential punitive tax consequences, the Proposal would subject advisers to significantly greater enforcement and litigation liability than is currently the case with IRAs. Following effectiveness of the Proposal, an adviser working with an IRA customer will now be subject to Internal Revenue Service actions, FINRA actions, SEC actions, class-action liability, and FINRA arbitrations. This panoply of potential liability appears disproportionate to the putative benefits of the Proposal and will very likely have a chilling effect on the amount of advice provided to IRA owners.

\(^3\) For example, information regarding basic asset allocation strategies that do not refer to a person’s specific assets or needs.

\(^4\) Consistent with the approach taken in other contexts, the determining factor should not be the title, but rather the function, being performed. For example, a person may play different roles at different times, such as providing investment advice or financial planning while also practicing as an accountant. While the financial planning or investment advisory services may constitute fiduciary conduct, the accounting services typically should not.
2) The Seller’s Carve-Out Should be Expanded so that All Plans, Participants and IRA Owners can Receive Necessary Information

As currently written, the Seller’s Carve-Out would apply only to certain large plans as defined by asset size or number of participants. However, the logic underlying the Seller’s Carve-Out applies to all plans, regardless of size or number of participants. As the proposing release notes, “[t]he overall purpose of this 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....” Like larger plans, smaller plans benefit from more, not less information; restricting the Seller’s Carve-Out will lead to less information being provided to them.

The conditions of the Seller’s Carve-Out, most notably disclosure that the information provided is not impartial investment advice and that the adviser cannot receive a fee directly from the plan for providing the advice, should be sufficient to put any plan representative or IRA owner on notice that he or she is receiving a sales or marketing pitch. It does not require a sophisticated understanding of financial services to distinguish between sales activity and advice activity where the status is clearly disclosed. The Department wisely included such a carve-out in its 2010 proposal and should retain that concept.5

If the Department does not accept this recommendation to permit adviser choice for all plans, participants and IRA owners, we urge it to consider alternative means of assessing the recipient’s understanding of the information provided by the adviser. The Seller’s Carve-Out not only precludes smaller plans and IRA owners from obtaining timely and important information, but the practical application of a rigid 100-participant threshold would be complicated by participants joining or separating from the plan. Moreover, were a 100-participant threshold employed as a measure for relying on the Seller’s Carve-Out, there are practical challenges of how to handle a plan with close to 100 participants, which may go above and then below the threshold—if this happened, would fiduciary status stop and then start again vis-à-vis the plan? The most logical and practical approach in this case would be that, once a plan hits the 100-participant level,6 it should be able to rely on the Seller’s Carve-Out indefinitely; a sponsor’s sophistication and ability does not diminish if the number of participants in the plan later falls.7 An arbitrary threshold for participant headcount bears no obvious relationship to financial sophistication.

In the event that the Department decides to retain the 100-participant threshold as one possible benchmark, it should also provide plan sponsors with an alternative avenue to rely on the Seller’s Carve-Out. In particular, regardless of the number of participants in a plan, plan sponsors, participants or IRA owners should be able to certify their own expertise or represent that they have retained and been advised by an experienced adviser. This


6 The Department should confirm that, in calculating the number of plan participants, retirees and former employees who are still participants in the plan would be counted.

7 A second, less optimal means of addressing this issue might be to follow the 80/120 rule used for Form 5500 reporting purposes.
The certification approach has proven workable and effective in other contexts, such as the “accredited investor” standard under the federal securities laws.

Finally, the language currently in the Seller’s Carve-Out covers only a sale, purchase, loan or bilateral contract. While this language would encompass most situations, it may leave other interactions somewhat ambiguous, including information provided to a plan sponsor as an integral part of a Request for Proposal (RFP) by a prospective service provider or as part of an on-going service model geared to facilitate the plan sponsor’s fulfilment of its fiduciary responsibilities. As one example, an adviser managing a fixed income portfolio for a plan—for which it clearly accepts fiduciary status—may also provide the plan with information on other topics, such as asset allocation, derivatives or other investment matters. If these additional activities are not specified in the bilateral contract between the plan and the adviser (which they likely would not be), a question could arise as to whether they constitute fiduciary acts (which, under these circumstances, they should not be since they are intended merely as useful additional information for the recipient). For these reasons, the language in the Seller’s Carve-Out should be broadened to cover any services and other interactions with plans where the terms of the carve-out are otherwise met, including, for example, where services are pursuant to a service agreement with a plan sponsor for ministerial services for a reasonable fee to ensure the orderly administration of a plan.

3) Sales and Marketing Activities Are Not Fiduciary Activities, but Rather Essential Information Sources

The proposed definition of “investment advice” is unnecessarily broad, potentially encompassing activities that are clearly marketing or sales in nature—a consequence not intended by either the provider or the recipient of information. Most sales and marketing activities by their nature should not rise to the level of “investment advice” nor be deemed fiduciary actions; simply making consumers and others aware of information is not fiduciary conduct.

As a simple example, if a service provider furnishes sales literature to, and has meetings with, a current client (e.g., a small plan sponsor) describing potential additional services and products, there is ambiguity as to whether these descriptions may be deemed “investment advice,” particularly since the service provider receives compensation from and has a relationship with the client (albeit relating to entirely different services). Likewise, if a service provider discusses the features of its products, the current language in the Proposal could sweep these discussions into “investment advice”—even though both parties understand them to be basic marketing activities. This concern is especially acute for service providers responding to an RFP, since an RFP is literally a request for information about the services and products a provider makes available, and answering questions in the RFP should not constitute fiduciary advice. To find otherwise would defeat the purpose of a plan’s primary means of gathering comparable information with which to make informed decisions, as responses will be generic and guarded in order to avoid inadvertent fiduciary status.

The Department has informally committed to clarifying that activities of this nature will not be deemed “investment advice;” additional clarity and flexibility on this point would be warranted and welcome. One of the Department’s stated concerns is that advisers may advertise
their general availability as a source of trusted adviser, but disclaim fiduciary status in fine print; clear disclosure to the recipient is one way to address this perceived issue, without adding undue complication and unwarranted fiduciary status to the adviser. For example, as noted elsewhere in this comment letter, one possible means of addressing any remaining concerns would be use of a basic disclosure document that clearly informs the recipient that the information is sales material, not investment advice, and that the adviser would be receiving compensation.

4) The Platform Provider Carve-Out Should be Clarified and Expanded to IRAs

The current language in the Proposal arguably extends fiduciary liability to IRA providers offering on-line IRA products with virtually no product or investment selection support provided to an IRA owner, other than to display the investment menu options available for selection by the IRA owner. In essence, the imposition of fiduciary liability in this case may limit the availability of on-line product selection for millions of Americans who wish to self-direct their IRA choices from doing so in the future. Many Americans believe they have sufficient investment expertise and prefer to go to online marketplaces, choose their IRA platform and choose their investment options, without investment advice provided by a third party. These customers generally do not wish to receive any assistance from an IRA provider in selecting to rollover retirement savings into an IRA nor do they wish to confer with anyone regarding investment options available in an IRA product. Importantly, they do not seek to enter into a contractual arrangement with an investment advice provider, nor incur the additional expenses. As discussed elsewhere in this comment letter, we believe that the Proposal will inhibit the provision of investment advice to IRA customers in unnecessary ways.

5) There Must be a Link Between Fees and Advice for Fiduciary Status to Arise

Part of the uncertainty in the fiduciary status of advisers and other service providers under the Proposal results from ambiguity regarding the receipt of fees “incident to the transaction.” In general, if advice or other services are outside the scope of the arrangement for which fees are paid, the conduct should not be considered “investment advice” for purposes of the definition of a fiduciary—fees for unrelated services should not be imputed to the advice.

As a simple example, a service provider receiving fees only for non-fiduciary services should not be deemed a fiduciary because it answers a client’s question that could be viewed as recommending an adviser. Likewise, initial screening of participant calls at a call center that helps identify a participant’s needs better and directs the participant to appropriate services should not be deemed fiduciary advice—there is no fee for the information. Finally, where a personal wealth adviser reviews plan and IRA assets to make recommendations regarding non-retirement assets, there should be no presumption that the review constitutes an implicit recommendation regarding retirement plan assets, especially since any fee for advice does not relate to retirement assets.

For all of these reasons, the Department should clarify that “investment advice” has not been provided until a transaction has been entered into and fees for such advice are received under the arrangement. Discussions that could lead to services for which fees will be
charged are not fiduciary in nature unless such a transaction occurs, because no obligation to pay a fee “incident to the transaction” has been incurred. Further, the Department should clarify how waivers or similar unique situations are handled. For example, an adviser or service provider may waive fees (e.g., under an initial 30-day “try out” period). We submit fiduciary status should attach only after such fees start to accrue or are paid.

6) The Best Interest Contract Exemption Should be Simplified to Ensure it Benefits Participants and IRA Owners

While we appreciate that the Department recognizes the need for an exemption to permit beneficial participant activity that might nonetheless be a prohibited transaction due to the broad scope of the Proposal, the complexities and practical challenges of applying the “Best Interest Contract” (BIC) exemption to day-to-day activities of many financial advisers render it unworkable and would ultimately prove counterproductive. As an example, if an individual calls for basic guidance, under the BIC exemption the adviser would apparently need to avoid any discussion of specific investment alternatives or courses of action, end the call and send the individual a contract before any additional discussions could occur. The individual would not welcome such a drawn-out sequence of steps. Moreover, the individual may be uncomfortable signing a contract when all he or she desires is some basic guidance. Finally, in those cases where the individual is comparison shopping—which is common and which should be encouraged—he or she could experience multiple scenarios such as this, with a corresponding number of contracts that must be signed before actually receiving any specific information or guidance.

The end result may be that many individuals simply eschew seeking basic guidance, instead making decisions on their own or based on friends’ or co-workers’ guidance. Alternatively, individuals may decide simply to pull their money from tax-advantaged retirement vehicles altogether. Neither of these outcomes are the type of result aimed at by the Proposal.

Separately, due to costs and complexities, many advisers will no longer be willing or able to service individual IRAs or small companies that offer their employees IRA retirement vehicles. Alternatively, if an adviser determined to continue serving these accounts and plans, the fees for doing so would rise substantially, due to significantly increased fiduciary exposure, the additional time and resources to provide fiduciary services, and the cost and resources needed to provide the required new disclosures.

It is also not clear how the BIC exemption would address certain clear product differences or structural cost differences between institutional plans and IRAs. For example, the compensation to an adviser with respect to money market funds may be significantly lower than for international equity funds, due in part to the reduced effort involved in keeping abreast of money market fund developments. Likewise, the individualized advice and additional products and services in an IRA compared to a typical 401(k) plan usually cost more—they are different products for different purposes. For example, the BIC exemption does not apply to a rollover recommendation to an IRA managed account, leaving no clear means for an adviser to provide this valuable service. As a result, a recommendation to purchase a particular product or to engage in a rollover to an IRA for a given participant may be prudent and in the participant’s
best interest, but could still be deemed a prohibited transaction for the adviser because of
the fee difference.

Particularly with respect to rollover transactions, the BIC exemption does not provide a
clear blueprint for permitting the adviser to “handle” a rollover for a participant despite its
prudence. These rollovers may arise in a call center, where a participant approaches an adviser,
in enrollment meetings involving 401(k) transfers to new plans, or in other contexts. The BIC
exemption should specifically provide relief for different, and possibly higher, fees charged to
rollover accounts; otherwise, necessary and desirable rollover education assistance will be
curtailed. While the “neutral factors” identified by the Department in the BIC exemption, such
as the time involved in evaluating different types of investments, may be well-intentioned, these
broad, principles-based approaches will not work in practice and at best will frustrate
investors and at worst lead to fewer providers willing to assist them. There are no safe harbors
or guidelines in the exemption to provide clarity, and as a result, advisers and financial
institutions face class action litigation in state court over differing interpretations of the “neutral
factors.”

We appreciated the Department’s clarification that the BIC exemption does not replace,
but is available as an alternative to, previous guidance issued by the Department. Specifically, in
footnote 30 to the BIC exemption proposal, the Department notes the continued availability of
Advisory Opinion 2001-09A (the “SunAmerica” opinion) and the statutory exemptions in
ERISA §408(b)(14) and §408(g). As the Proposal would create a new form of fiduciary advice
regarding rollover recommendations—an activity that was not fiduciary advice when these
alternatives were established—we request that the Department more clearly express its view that
these available BIC exemption alternatives apply with respect to investment recommendations
made in connection with various types of rollovers as well as to advice within a plan or IRA.

Potential Improvements to the Proposed BIC Exemption

There is an overarching need to simplify and streamline the BIC exemption. First,
the proposed sequence of putting a contract in front of a potential customer or caller is
impractical. Our understanding is that the Department recognizes this concern and is considering
different approaches. Rather than requiring a document that must be executed and returned by
potential customers—which will likely not occur in many situations, forestalling an informed
conversation—the Department should consider a more user-friendly form of basic disclosures
that would serve much the same purpose. This disclosure—a customer’s Bill of Rights, if you
will, receipt of which could be acknowledged by the recipient—could set out key disclosures,
terms and the potential conflicts that an adviser faces (if applicable). Such a disclosure
document could be required to be delivered before money is invested or a fee is received.

Second, the point of sale, annual and Website disclosures are far too lengthy and
complex, as well as requiring expense projections that will likely prove inaccurate, confusing
and redundant to a participant or plan. At a minimum, the level of data and detail called for by
these parts of the BIC exemption is daunting and will be expensive for providers to produce,


A simple example of a potential “Bill of Rights” is attached as Exhibit A.

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another factor driving advisers away from serving the small end of the market. From the recipient’s perspective, these disclosures are likely to be of little use and potentially confusing.

Moreover, the Department already requires various fee disclosures for many plan sponsors and plan participants in at least two other documents called for by regulations 404a-5 and 408b-2. Were the proposed new disclosure requirements implemented, some plan fiduciaries might now receive or be directed to multiple different fee disclosure documents. This is costly, unwieldy and unnecessary.

Given the proposed customer’s Bill of Rights or a similar disclosure approach noted above, these types of quantitative disclosures would be unnecessary. In the event the Department views some type of quantitative disclosure to be warranted, however, then a much more effective and economical approach would be a dramatically scaled back and simplified set of disclosures, possibly through revising the scope and/or audience of the 404a-5 and/or 408b-2 disclosure documents noted above—the whole point is to put the potential client on notice of potential conflicts, and to encourage participants and IRA owners to compare available services and investment options, which can be easily done with a simpler, less data-intensive approach. The approach to disclosure in the BIC exemption is not a cost-efficient means of providing useful information regarding investment expenses, and will result in significant costs ultimately borne by the participants and IRA owners. A fee illustration, for example, would make the same point much more efficiently without resorting to speculation about the value of investments ten years into the future.

Finally, the Department should make it clear that advice regarding proprietary products will not be deemed to violate any impartiality standards so long as clear disclosure of the adviser’s compensation is provided to the client before selection. In this regard, the current proposed language in the BIC exemption—most notably, that the investment advice must be “without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity or other party”—is too open-ended and prone to confusion. Many if not most advisers or representatives will, by definition, be most familiar with the products offered by their respective financial institutions and may also benefit indirectly if the institution performs well. The vague language of the proposed BIC exemption invites after-the-fact second-guessing and unwarranted potential litigation exposure. Moreover, it would lead to a narrowing of investment choices since investors could be denied access to an excellent investment fund managed by their adviser’s financial institution, needing instead to have multiple advisers to obtain access to that fund and other desirable investment options.

7) Amended Prohibited Transaction Class Exemption 84-24 Should Include Variable Annuities to Provide Clarity and Consistency for Investors

As a general matter, retirement income products should be treated similarly when they serve the same purpose. When advising a participant needing guaranteed retirement income, the Proposal would require two different exemptive processes (the BIC exemption and Prohibited Transaction Class Exemption 84-24) for advice regarding products that serve the
same financial need. It is not practical or administratively feasible to have the same adviser provide two different answers, payment structures and sets of disclosures regarding products in the same guaranteed income family; the adviser will face unnecessary compliance costs and complexity not to mention how confusing this will be for investors. As such, over time one could imagine an adviser may gravitate to one product or the other mainly for administrative convenience and consistency, a result which is in no one’s interest. Further, some annuity products contain both fixed and variable annuity features, suggesting that a single product might have to rely on two separate exemptions with different conditions and requirements.

Second, as noted above with respect to the BIC exemption, the proposed language in the amended Prohibited Transaction Class Exemption 84-24—that the investment advice must be “without regard to the financial or other interests of the fiduciary, any affiliate or other party”—is too open-ended and prone to confusion. Here, as with the BIC exemption, such language is not needed and will only invite second-guessing and increased potential litigation exposure.

8) The Investment Education Carve-Out Should be Expanded or Interpretive Bulletin 96-1 Should be Retained to Preserve Access to Information

The proposed investment education carve-out seeks to cut back the current investment education safe harbor, set forth in Interpretive Bulletin 96-1, in a very crucial respect—the prohibition on recommendations regarding specific investment products. In the context of investment education, this prohibition is unnecessary and would likely end up harming those very retirement investors it purports to serve.

The current investment education safe harbor has been very successful and, over its almost 20-year life, there have been few if any instances of abuse or problems; rather, the safe harbor has served a very worthwhile and necessary role in providing useful investment information to plan participants. The proposed narrowing of permissible investment education and information that can be provided serves no beneficial purpose for participants, but rather will deprive them of helpful information that can assist them in their retirement planning.

While the most practical approach would be the retention of Interpretive Bulletin 96-1, if the Department determines to proceed with a new investment education carve-out, the language should be modified to make clear that companies and others can provide information regarding specific investment alternatives within asset allocation models and asset classes, while still being able to rely on the carve-out; when accompanied by the disclosures currently called for, plan participants and IRA owners would be adequately protected while still being able to receive this essential information.

9) **Deeming the Provision of Valuation and Pricing Information to be a Fiduciary Act is Unwarranted and Would Harm Participants and IRA Owners by Reducing Market Liquidity and Transparency**

The language in the Proposal regarding valuation and pricing services is too broad, likely leading to confusion and harming plans and their participants. Asset managers and other service providers often provide valuation and pricing information as an accommodation to plan clients; this information is not a recommendation or investment advice, but rather is an ancillary service that helps the client in its day-to-day operations. Similarly, where custodians and pricing services provide valuation and pricing information to clients (including plans), it is done so with the understanding that fiduciary responsibility does not result; this understanding is reflected in both the competitive fees charged as well as the willingness of these service providers to endeavor to assign prices to hard-to-value assets. Finally, on a regular basis, many times a day brokers and other intermediaries provide indicative prices to clients, including pension plans and/or their asset managers, thereby facilitating liquidity for plans and other market participants.

As an example, an asset manager may manage multiple accounts, including several pension plans. The manager is considering disposing of certain relatively illiquid fixed income positions (which do not trade on exchanges or established markets) and contacts several brokers and banks for indicative prices, hoping to gauge market interest and possibly enter into a transaction. Although the pricing or valuation information provided by the brokers and banks may often be in connection with a potential transaction, it is clearly not intended to be "investment advice" or fiduciary conduct. Unfortunately, the current language in the Proposal would cover those services.

There is no record of abuse with respect to these activities; rather, clients—including pension plans—have benefited enormously through more accurate pricing and corresponding market liquidity. Any extension of fiduciary responsibility to these activities will result in many market participants (e.g., asset managers and brokers) being unwilling to provide information to clients regarding asset prices or values. If custodians and pricing services determine to continue providing this information, substantially increased fees will be charged, which will ultimately be borne by clients, including plans and participants; even then, custodians and pricing services may refuse to provide valuation or pricing information on illiquid or hard-to-value assets for fear of fiduciary liability.

Given the absence of abuse in this area, this part of the Proposal should be deleted as unnecessary—it seeks to fix what isn’t broken. However, in the event this concept is retained in the final rule, the language and approach should be modified so that fiduciary status applies only where the parties mutually and affirmatively agree that the service provider is acting as a fiduciary in providing valuation/pricing information to the client. This approach would address those relatively infrequent situations where a plan (or its asset manager) retains a service provider to act essentially as a professional appraiser for assets and would avoid unnecessarily impairing the day-to-day operations and efficiency of the current market structure.

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12 Moreover, to the extent that challenges arise from time-to-time in the valuation or pricing of assets (e.g., due to a lack of a market price, operational error, etc.), the investment industry and its regulators already have well-developed and time-tested procedures and processes designed to address these situations.
10) **Participants and IRA Owners May be Adversely Impacted by an Exemption for Low-Fee Products Since Many High-Quality Products Have Varying Fee Levels**

The Department has asked specifically for comment on whether a streamlined exemption for “high-quality, low-fee” products should be developed. In our view, this approach would raise substantial challenges, set a potentially detrimental precedent and potentially have adverse unforeseen consequences. While costs and fees are important considerations for a fiduciary, neither ERISA nor the Department has generally taken the view that the lowest cost alternative in any situation is necessarily the most prudent course; rather, costs and fees are important components of a broader set of factors that should be considered, such as quality of services, performance, and others. In a publication for plan fiduciaries, the Department instructs that “Fees are just one of several factors fiduciaries need to consider in deciding on service providers and plan investments.”¹³ Similarly, the Department’s regulation interpreting fiduciary investment duties under the statute requires the fiduciary to consider all facts and circumstances the fiduciary “knows or should know” are relevant.¹⁴ Settling on a prescribed set of factors that connote “high-quality” would run counter to the Department’s and plan participants’ long-term goals, what is high-quality for certain participants or at a given point in time may not be so at other times or for other participants. This is particularly true for target date funds; as the Department has noted in its February 2013 publication of “Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries,” there are a number of pertinent factors that must be taken into account to make a proper selection with fees being only one of many.

Finally, this proposed exemption would not eliminate the conflict where an adviser recommends inappropriate funds to garner a payment. If an adviser took advantage of this proposed exemption mainly to receive payments and only recommended “high-quality,” low-fee products, the adviser could still be recommending inappropriate investments.

* * *

In a broader context, we would ask the Department to consider seriously the multiple unintended and potentially detrimental consequences of transforming scores of advisers into fiduciaries and thousands of interactions into newly deemed fiduciary acts. Many of these advisers are small businesses or solo operations. Will they have the financial wherewithal to assume fiduciary responsibility and liability for scores of clients? Will the Proposal force many into accepting fiduciary responsibility without the financial assets or adequate insurance to back it up? Not only the compliance and regulatory costs—noted above—but other costs, such as increased insurance premiums, may likewise be extremely burdensome for many. Further, the

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¹⁴ A fiduciary making investment decisions must give “…appropriate consideration to those facts and circumstances that, given the scope of such fiduciary’s investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved….” 29 C.F.R. §2550.404A-1(b)(1)(i).
expansion of fiduciary status in the Proposal, coupled with current penalties and the litigation exposure for inadvertent breaches, will over time reduce the number of providers willing to service participants and IRA owners. The ultimate consequence will be less information, reduced competition, and a narrower set of investment alternatives for today’s and tomorrow’s retirees.

We appreciate this opportunity to comment on the Proposal and would be happy to answer any questions or provide additional assistance to the Department.

Sincerely,

[Signature]

Charles Nelson
Chief Executive Officer, Retirement

Voya Financial, Inc.
Exhibit A

Customer’s “Bill of Rights”

• As your adviser, [I/we] generally receive compensation for providing services or advice to you.

• In some cases, [I/we] may receive more compensation depending on the product or investment you select, which results in a potential conflict of interest to [me/us]. In particular, these conflicts may include [describe conflict generally or refer to Web page].

• The products that [I/we] may recommend may include proprietary products of [name of financial institution].

• Set forth below is the basic compensation [I/we] will receive from different investment alternatives [I/we] may recommend:

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<tr>
<th>Investment Product</th>
<th>Compensation to Adviser</th>
<th>Affiliate(s) Receiving Compensation</th>
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• You have the right to obtain additional information about the fees associated with any investment product [I/we] may recommend.

• You have the right to ask [me/us] for additional information about the compensation [I/we] or our affiliates will receive for various different investment alternatives you may purchase.

• If you are not comfortable with the advice [I/we] are giving or with the potential conflict(s) [I/we] face, you should not engage in the recommended transaction.

• You can and should comparison shop with different providers.
July 17, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Conflicts of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712 and D-11713

United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Proposed Conflict of Interest Rule and Related Proposals, RIN-1210-AB32

Dear Sir or Madam:

The Financial Industry Regulatory Authority ("FINRA") welcomes the opportunity to comment on the Department's proposed amendments to the definition of "fiduciary" (the "Proposed Fiduciary Definition"), the proposed Best Interest Contract Exemption (the "BICE"), and the proposed Exemption for Principal Transactions in Certain Debt Securities (the "Principal Transaction Exemption") (together, the "Proposal").

FINRA is the independent regulatory authority of the broker-dealer industry, established under the Securities Exchange Act of 1934 and subject to the oversight of the Securities and Exchange Commission ("SEC"). FINRA comprehensively regulates the broker-dealer industry by adopting investor protection rules, examining broker-dealers for compliance with the federal securities laws and rules of FINRA, the SEC and the Municipal Securities Rulemaking Board, and enforcing those rules.

1 See Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice; Proposed Rule, 80 FR 21928 (April 20, 2015).


3 See Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, 80 FR 21989 (April 20, 2015).
In 2014 FINRA conducted 6,800 broker-dealer examinations and took 1,397 disciplinary actions that addressed a wide variety of misconduct. We barred 481 individuals from association with FINRA-regulated firms, suspended 705 individuals from such association, levied more than $132 million in fines, and ordered $32.3 million in restitution to customers.

1. Executive Summary

The Department of Labor has an important responsibility to protect retirement investors. FINRA applauds the Department for raising public awareness about the need to ensure that retirement investors can obtain financial advice without being subject to abusive or predatory sales practices. The Proposal reflects a sincere effort to respond to comments received on the Department’s 2010 proposal. The Department is to be commended for its readiness to engage in a dialogue with regulators, investors, and other interested parties about these issues.

A. FINRA Supports a Best Interest Standard for Broker-Dealers

FINRA has publicly advocated for a fiduciary duty for years and agrees with the Department that all financial intermediaries, including broker-dealers, should be subject to a fiduciary “best interest” standard. A best interest standard would align the interests of intermediaries with those of their customers; better protect investors by providing a more consistent set of obligations across financial service providers; help ensure that intermediaries eliminate or manage conflicts of interest; and help ensure that intermediaries establish an ethical culture throughout their firms.

B. Minimum Criteria for a Best Interest Standard

At a minimum, any best interest standard for intermediaries should meet the following criteria:

- The standard should require financial institutions and their advisers\(^4\) to:
  - act in their customers’ best interest;
  - adopt procedures reasonably designed to detect potential conflicts;
  - eliminate those conflicts of interest whenever possible;
  - adopt written supervisory procedures reasonably designed to ensure that any remaining conflicts, such as differential compensation, do not encourage financial advisers to provide any service or recommend any product that is not in the customer’s best interest;
  - obtain retail customer consent to any conflict of interest related to recommendations or services provided; and
  - provide retail customers with disclosure in plain English concerning recommendations and services provided, the products offered and all related fees and expenses.

\(^4\) The terms “financial institution” and “adviser” will have the same meaning in this letter as in the Proposal.
A best interest standard should apply to both retirement and non-retirement accounts. Most investors consider their investment portfolio to include their assets in Individual Retirement Accounts, employer plan accounts, and non-retirement accounts. This perception is rational because an investment decision should reflect the assets in all of those accounts. Imposing disparate standards on different accounts would confuse investors because it would conflict with their own logical assumption that those accounts will be treated seamlessly within their total investment portfolio.

FINRA respectfully urges that the federal securities laws serve as the foundation of the best interest standard that will apply to broker-dealers. To be successful, the standard must build upon existing principles under the federal securities laws rather than introducing precepts without precedent that will impede the good faith efforts of financial institutions and advisers to comply. The federal securities laws and FINRA rules comprehensively regulate all aspects of a broker-dealer's business. Among the many requirements imposed are the principles that broker-dealers deal fairly with customers, adhere to just and equitable principles of trade, and ensure that recommendations are suitable for customers. Broker-dealers also must establish rigorous systems of compliance and supervision, which are regularly examined by FINRA and the SEC.

Using these existing requirements as the core structure of a best interest standard would reduce the costs of transitioning to a best interest requirement and provide assurance that the core structure will be enforced by the SEC and FINRA. We recognize that imposing a best interest standard requires rulemaking beyond what is presently in place for broker-dealers. We stand ready to work with the Department and the SEC to develop this additional rulemaking.

Sufficient guidance must accompany the best interest standard to ensure that financial institutions and advisers will understand what is expected in order to comply with the best interest standard.

The standard for different intermediaries, especially broker-dealers and investment advisers, must be harmonized. Approximately 87% of all investment adviser representatives are associated with a broker-dealer and many customers hold brokerage and advisory accounts with the same financial institution. The standards for the investment adviser and the broker-dealer businesses must be harmonized to provide consistent investor protection while reflecting the distinctive nature of each business model.

Customers must have the ability to recover losses incurred as a result of a financial institution or adviser's violation of a best interest standard. The Proposal would permit customers to seek recovery of losses through the existing arbitration process or through actions in court.
C. The Proposal Does Not Meet Some Minimum Criteria

The Department should be commended for its efforts to establish a best interest standard. The Proposal, however, does not meet some of the minimum criteria for such a standard. The Proposal does not sufficiently build upon the existing regulatory system under the federal securities laws. The Preamble makes passing reference to the comprehensive, well-established system of regulation that the federal securities laws impose upon broker-dealers under the oversight of the SEC and FINRA. The Proposal does not incorporate existing regulation and introduces new concepts that are fraught with ambiguity. We urge the Department to consider that these ambiguities will frustrate the ability of a financial institution and advisers to comply with the Proposal. These ambiguities will necessitate interpretive guidance on a wide array of issues, which the Preamble does not provide. In some respects the Proposal even conflicts with existing FINRA rules and securities market trading practices.

The Proposal would impose a best interest standard on broker-dealers that differs significantly from the fiduciary standard applicable to investment advisers registered under the federal and state securities laws, and it would impose the best interest standard only on retirement accounts. This fractured approach will confuse retirement investors, financial institutions, and advisers. Below is a depiction of the panoply of regulatory regimes that will apply under the Proposal to different accounts served by the same financial adviser for a single customer.

**Proposed DOL Requirements**

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<th>Customer’s Investment Portfolio</th>
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<td><strong>FINANCIAL ADVISER</strong></td>
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<td>Employer Plan</td>
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Potential to have 6 sets of rules for any product
The confusion illustrated by this graphic could be easily ameliorated if a harmonized best interest standard applied to all of the accounts, retirement and non-retirement, investment and advisory and broker-dealer. The customer and financial adviser could then properly consider the investment portfolio as a whole, subject to a single, harmonized standard.

D. FINRA Recommends Five Fundamental Improvements to the Proposal

If the Department proceeds with the Proposal, FINRA recommends five fundamental improvements.

- First, the Proposal should be amended to clarify the scope and meaning of the best interest standard.

- Second, the Proposal’s treatment of differential compensation should be simplified by offering financial institutions a choice: either adopt stringent procedures that address the conflicts of interest arising from differential compensation, or pay only neutral compensation to advisers.

- Third, the Proposal should be based on existing principles in the federal securities laws and FINRA rules. In doing so, the Department would help remove many of the ambiguities that will frustrate good faith attempts at compliance, would avoid conflict with existing rules, and would better ensure that the Proposal’s objectives are achieved. FINRA stands ready to engage in additional rulemaking to enhance present requirements.

- Fourth, the Department should streamline the BICE and Principal Transaction Exemption (together, the “Prohibited Transaction Exemptions” or “PTEs”) so that they only impose conditions that restrict conflicts of interest, and eliminate the ambiguous conditions that will not meaningfully address those conflicts.

- Finally, the Department should clarify the effects of non-compliance with the Prohibited Transaction Exemptions and the extent that remedies can be defined in the BICE contract.

We urge the Department, at a minimum, to adopt these five recommendations in order to ensure that highly-regulated broker-dealers can continue to serve small investors. According to a 2011 study, 98% of IRA accounts with less than $25,000 are commission-based brokerage accounts. Many investors are buy-and-hold customers who pay lower fees -- commissions upon purchase -- than would be paid as an annual percentage of their nest egg.

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5 See Assessment of the impact of the Department of Labor's proposed "fiduciary" definition rule on IRA consumers (Oliver Wyman) (April 2011) at 2.
If the Proposal were adopted as is, many broker-dealers will abandon these small accounts, convert their larger accounts to advisory accounts, and charge them a potentially more lucrative asset-based fee. They will do so largely because of the BICE constraints on differential compensation, the ambiguities in the best interest standard, the lack of clarity concerning various conditions, the costs of compliance, and uncertainty about the consequences of minimal non-compliance.

The Department should not be sanguine about this result. Robo-advice may provide a valuable alternative for some classes of knowledgeable investors, but for many customers robo-advice is a poor substitute for a financial adviser who understands the customer’s needs and guides the customer through market turbulence or life events. And private wealth clients who are converted to advisory accounts may still be subjected to conflicted advice, like the peddling of fee-based IRAs for their ERISA plan assets.

2. The Best Interest Standard Should be Clarified

The BICE and the Principal Transaction Exemption would require that a financial institution and adviser affirmatively agree to provide investment advice that is in the best interest of the retirement investor “without regard to the financial or other interests” of the financial institution, adviser, or other party. This principle, borrowed from Section 913 of Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”), has not been developed under ERISA or the federal securities laws and financial institutions, their advisers and their compliance officers and counsel will be forced to anticipate its intended meaning. One could interpret the principle to prohibit any investment advice that takes into account the compensation that the financial institution or adviser will earn for providing that advice. Since financial institutions and advisers are engaged in a business that will earn compensation for their services, they would not provide investment advice at all if the customer were unwilling to pay the fee. Surely this is not the Department’s intent.

One could alternatively interpret the principle to prohibit the receipt of compensation that varies with an investment recommendation, but this should not be the meaning because the BICE is intended to permit this compensation. A third interpretation might be that the “without regard to” phrase merely elaborates the term “best interest.” Under this interpretation, investment advice may be deemed in the customer’s best interest as long as, among other matters, the amount of compensation earned was not a factor in the recommendation. It is unclear how a financial institution or adviser would demonstrate that the amount of compensation was not a factor in the recommendation.

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6 See BICE Section II(c)(1), 80 FR at 21984, and Principal Transaction Exemption Section II(c)(1), 80 FR at 22002.

7 See Section 913(g), Dodd-Frank Act (authorizing the SEC to require broker-dealers to “act in the best interest of the customer without regard to the financial or other interest of the broker [or] dealer ... providing the advice”).
The “best interest” standard also demands that the financial institution and adviser act prudently. The prudence standard might be interpreted to require the financial institution and adviser to provide ongoing advice to the customer, to alert the customer to market events or other circumstances that may affect the prudence of the customer’s holdings, and to recommend changes to his investments. The BICE Preamble states that, “[t]he terms of the contract, along with other representations, agreements, or understandings between the Adviser, Financial Institution and Retirement Investors, will govern whether the nature of the relationship between the parties is ongoing or not.”

Nevertheless, we understand that ERISA plan fiduciaries must comply with a prudence standard that requires ongoing monitoring of this nature. While some broker-dealers provide different levels of monitoring, most commission-based broker-dealers do not charge for ongoing monitoring of their customers’ accounts. Moreover, the Dodd-Frank Act would not impose such a duty on broker-dealers. Indeed, frequent suggestions to the customer that the portfolio be changed might expose a broker-dealer to allegations that it is churning the account.

Another question is whether “best interest” requires the financial institution and adviser to recommend the investment that is “best” for the customer. Recent remarks suggest that the Department believes that it may. Fiduciaries must use their best judgment when they provide financial advice, and the question of which investment meets that standard in a particular case will depend upon many factors, including the customer’s investment objectives and risk profile, the various components of a specific product, and its risk correlation to other assets in the customer’s portfolio. Reasonable and qualified financial advisers may reach different conclusions about which factors are more significant and which product best meets the criteria that the financial adviser believes are most relevant. Fiduciaries generally are not required to discern or recommend the “best” product among all available for sale nationwide or worldwide. Investment advisers, for example, are required to recommend suitable investments, not the “best” investment available to the customer. A requirement to recommend the “best” product would impose unnecessary and untenable litigation risks on fiduciaries. Such a standard would conflict with the Proposal itself, which permits, and even requires, a

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8 The Principal Transaction Exemption Preamble contains similar language. See BICE Preamble, 80 FR at 21969, and Principal Transaction Exemption Preamble, 80 FR at 21995-21996.

9 See Section 913(g), Dodd-Frank Act (“Nothing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.”).

10 Secretary Perez has stated:

If you’re an adviser operating under a suitability standard, once you narrow the options down to those that are suitable, you can recommend the one that is most lucrative for you – even though that might mean a lower return for the client. Under a best interest standard, you would need to choose the one that is best for the client.

financial institution and adviser only to offer a limited group of investments to their customers. 11

At a minimum, in order to address the ambiguities of the best interest standard, we respectfully recommend that the Department (1) delete the “without regard to” phrase or provide clear guidance on its meaning under as many scenarios as possible, in each PTE, (2) clarify that the best interest standard does not require that a financial institution or adviser prove that they recommended the "best investment", (3) clarify in the rule text that no ongoing duty exists under the prudence standard in the PTEs, and (4) add a new paragraph (g) to Section II of the proposed PTEs:

(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.

This contractual language would indicate to the retirement investor whether the financial institution and adviser will monitor the account. We emphasize, however, that in addition to this suggested language for the contract, the Department should clarify that the “best interest” standard itself does not impose such an ongoing duty.

3. The Approach to Differential Compensation Should be Simplified

The BICE and the Principal Transaction Exemption would require an adviser and financial institution to warrant that they do not use forms of compensation, including “differential compensation,” or other “actions or incentives” that “would tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor.” Both PTEs seem to permit a financial institution to receive differential compensation subject to certain conditions. The BICE appears to permit the payment of differential compensation to advisers if it “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).” 12 The Principal Transaction Exemption also appears to contemplate the payment of differential compensation to advisers, but uses language different than the BICE, which creates confusion. 13

The BICE is made more perplexing by the statement in the Proposal that it contemplates compensation such as trail commissions, 12b-1 fees, and revenue

11 See BICE Section IV(b), 80 FR at 21985-21986 and BICE Section VIII(c), 80 FR at 21987.

12 See BICE Section II(d)(4), 80 FR at 21984.

13 See Principal Transaction Exemption Section II(d)(4), 80 FR at 22002.
sharing.\textsuperscript{14} None of these forms of differential compensation are easily demonstrated to be based upon “neutral factors such as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments.” The treatment of differential compensation paid to advisers is thus complex and confusing.

We respectfully recommend a more straightforward treatment of differential compensation to advisers. The Department should offer financial institutions a choice: either implement stringent procedures to address conflicts of interest from the payment of differential compensation to advisers, in which case differential compensation may be paid to them, or pay advisers only “neutral” compensation without those procedures. The Department should offer this choice for principal and agency transactions, and should provide guidance on the types of stringent procedures that would permit the payment of differential compensation.

We therefore suggest that the Department replace Sections II(d)(2)-(4) in the BICE with the following language, and make conforming changes to the Principal Transaction Exemption (new text is underlined; deleted text is bracketed):

\textbf{(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).

\textbf{(3)} 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.

The procedures that the Department suggests might include those that some broker-dealers have adopted in order help ensure compliance with FINRA rules and the federal securities laws. The procedures suggested by the Department might, for example, require financial institutions to:

\textsuperscript{14} See BICE Preamble, 80 FR at 21967.
• Establish a committee to consider whether new products are appropriate for the firm's customers, especially new products that pay higher compensation.

• Establish a comprehensive system to supervise the recommendations by all advisers.

• Ensure that no adviser participates in any revenue sharing from a “preferred provider,” nor earns more for the sale of a product issued by a “preferred provider” or a proprietary product than for other, comparable products, and that the adviser discloses to customers the payments that the financial institution and its affiliates have received from a preferred provider or for a proprietary product.

• Establish thresholds in the compensation structure that will require increased supervision of advisers that have approached the thresholds.

• Monitor an adviser’s recommendations to determine whether products or services for which the adviser receives higher compensation are being sold improperly.

• Penalize advisers by reducing compensation, based on the receipt of customer complaints or indications that conflicts are not being carefully managed.

• Develop metrics for behavior (e.g., red flags), compare an adviser’s behavior against those metrics, and base compensation in part on them.

The procedures also might include methods to reduce the disparity of compensation among different products -- without imposing a perfectly neutral compensation system:

• Some broker-dealers use “product neutral” compensation grids to reduce incentives for their financial advisers to prefer one type of product over another. Under this system, a financial adviser receives the same percentage of the gross dealer concession (GDC) no matter the product sold. The broker-dealer also may monitor recommendations of its financial advisers to determine whether any tend to be concentrated in high GDC products.

• In the context of mutual fund and variable annuity sales, some broker-dealers use “fee-capping” to reduce incentives for a financial adviser to favor one product family over another for comparable products. For example, a broker-dealer may cap at 4% the GDC for emerging market equity funds. This cap would eliminate incentives for a financial adviser to favor an emerging market equity fund that paid a higher GDC than the 4%.

The Department also suggests policies and procedures that seek similar goals in the BICE Preamble. We would be pleased to work with the Department to develop

15 See BICE Preamble, 80 FR at 21971-21972.
guidance concerning other procedures or to develop FINRA rulemaking that would help the Department achieve these goals. By incorporating existing procedures and FINRA requirements the Department would better ensure that management of conflicts of interest are subject to FINRA examination and enforcement.

By providing financial institutions with a choice of either paying differential compensation to advisers subject to strict procedures, or paying them “neutral” compensation, the Proposal would better ensure that financial institutions may pay their advisers without exposing their customers to major risks from conflicts of interest that arise from differential compensation.


In our experience, financial institutions are best able to develop successful compliance procedures in response to new standards when regulatory expectations are clear and the standards are derived from existing requirements that they understand. Unfortunately, the Proposal establishes principles that employ imprecise terms with little precedent in the federal securities laws or, in many cases, ERISA. In some respects these principles even conflict with FINRA rules. In order to better ensure that financial institutions, their advisers, and their compliance officers and counsel understand the contours of the best interest standard, we respectfully recommend that the Department incorporate well-understood terms and established principles from the federal securities laws and FINRA rules, whenever possible. We provide examples below, and we would be pleased to explore other ways in which these terms and principles can be incorporated into the Proposal.

A. Example: Definition of “Recommendation”

The Proposed Fiduciary Definition would define investment advice to include a “recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property.” The Proposal defines “recommendation” as “a communication that, based on its content, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.” The Preamble requests comment on whether the Department should adopt FINRA’s standards for “recommendation” under FINRA Rule 2111.

Rule 2111 generally requires that a broker-dealer and a financial adviser “have a reasonable basis to believe that a recommended transaction or investment strategy

16 See Proposed Fiduciary Definition § 2510.3-21(a)(1)(i), 80 FR at 21957.

17 See Proposed Fiduciary Definition § 2510.3-21(f)(1), 80 FR at 21960.

18 See Proposed Fiduciary Definition, 80 FR at 21938.
involving a security or securities is suitable for the customer.” The meaning of “recommendation” for purposes of the suitability rule has been developed over decades of guidance and enforcement. The question of whether a recommendation exists in a particular situation depends upon the facts and circumstances, but FINRA has articulated several guiding principles that are relevant to the determination. For instance, a communication’s content, context and manner of presentation are important aspects of the inquiry. An important factor in this regard is whether – given its content, context and presentation – a particular communication reasonably would be viewed as a “call to action” (i.e., a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy). In addition, 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. Furthermore, a series of actions that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate. It makes no difference whether the communication is initiated by a person or a computer software program. Through this guidance, together with myriad published decisions and practical experience with the rule for nearly 80 years, broker-dealers and their financial advisers, compliance officers and counsel generally understand the meaning of this term.

Reliance on these well-established concepts concerning the meaning of “recommendation” would remove the ambiguities that arise from the use of the term in the Proposal. It would better ensure that broker-dealers and their financial advisers, compliance officers and counsel correctly determine when they will be providing investment advice under the new fiduciary standard. Accordingly, FINRA respectfully recommends that the Department incorporate the meaning of “recommendation” from FINRA Rule 2111 into the Proposal.

The proposed amendments to the definition of “fiduciary” also define investment advice to include “a recommendation as to the management of securities or other property.” It is unclear from this language what activities the term “management” is meant to cover. The Preamble more clearly explains that the intent of this provision is to “include advice and recommendations as to the exercise of rights appurtenant to shares of stock (e.g., voting proxies).” We suggest revising this provision to more closely reflect the Department’s intent.

Therefore, we respectfully recommend that the Department revise the definition of “recommendation” in proposed Rule 2510.3-21(f)(1) to read as follows (new text is underlined):

19 See, e.g., FINRA Regulatory Notice 12-25 (May 2012); Regulatory Notice 11-02 (Jan 2011); Notice to Members 01-23 (April 2001).
20 See Proposed Fiduciary Definition § 2510.3-21(a)(1)(ii), 80 FR at 21957.
21 See Proposed Fiduciary Definition, 80 FR at 21939.
(1) (i) “Recommendation” means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.

(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 in Financial Industry Regulatory Authority (FINRA) Rule 2111 (Suitability) or any successor rule, as interpreted by FINRA.

We also recommend amendments to proposed Rule 2510.3-21(a)(1)(ii) concerning the “management” of securities or other property, as follows (new text is underlined; deleted text is bracketed):

(ii) Advice or a recommendation as to the [management of] exercise of rights appurtenant to 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;

B. Example: Suitability Obligation

A suitability standard is imbedded in the fiduciary duty of an investment adviser under the Investment Advisers Act of 1940 and the Proposal implies that it would be an element of the best interest standard. The PTEs thus state that financial institutions and advisers must provide advice that is based on the retirement investor’s “investment objectives, risk tolerance, financial circumstances, and needs” – precisely the type of criteria that determine whether an investment adviser’s recommendation is suitable under the Investment Advisers Act fiduciary duty and whether a broker-dealer’s recommendation is suitable under FINRA Rule 2111.

22 The SEC staff has stated:

As fiduciaries, investment advisers owe their clients a duty to provide only suitable advice. This duty generally requires an investment adviser to determine that the investment advice it gives to a client is suitable for the client, taking into consideration the client's financial situation, investment experience, and investment objectives. Investment Advisers Act Release No. 1406 (March 16, 1994).


23 See BICE Section II(c)(1), 80 FR at 21984, and Principal Transaction Exemption Section II(c)(1), 80 FR at 22002.
We recommend that the Department make explicit its incorporation of a suitability element into the best interest standard. This change would facilitate customer enforcement of the best interest standard in many cases. Often the best interest standard will be violated because the recommended product was illiquid, presented excessive risk, or otherwise was inconsistent with the retirement investor’s financial needs or condition. Including a suitability standard would simplify the customer’s complaint in these cases and would provide adjudicators with a specific, well established basis upon which to find that the financial institution or adviser violated the best interest standard. It also would better ensure that an important element of the best interest standard is subject to FINRA examination and enforcement. While the suitability standard would not be the exclusive set of principles with which a financial institution and adviser would have to comply, it would simplify the inquiry for retirement investors and adjudicators in many cases.

In order to clarify that the Impartial Conduct Standards includes a suitability obligation, we respectfully recommend that the Department revise Section II(c)(1) of the BICE (and make consistent changes to the Principal Transaction Exemption) as follows (new text is underlined):

The Adviser and the Financial Institution affirmatively agree to, and comply with, 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 reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise and that is otherwise suitable 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);

We also recommend conforming changes to the definitions of “Best Interest” in the Proposal.

C.  Example: Projections of Performance

Section III(a)(1) of the BICE would require, prior to the execution of the purchase of a recommended Asset, that an Adviser furnish a chart that provides the total cost to the plan, participant or IRA holder, of investing in the Asset for one, five and ten-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the Adviser and “reasonable assumptions about investment performance, which must be disclosed.” This requirement conflicts with FINRA Rule 2210, which generally prohibits broker-dealers from including projections of performance in communications with the public. Moreover, the meaning of a
“reasonable assumption” about investment performance is unclear. Without standardized methods of calculating the total cost, meaningful comparisons between alternative investments will be impossible.

We respectfully recommend that the Department eliminate the requirement to provide projections of performance as a basis for the estimation of future cost. We suggest that the Department substitute language based upon the instructions to Form N-1A, the SEC’s form for mutual fund registration.24 Item 3 requires a fee table in the registration statement, including an example that is meant to help investors compare the costs of investing in the registered fund with the cost of other funds. This example assumes a $10,000 original investment, a 5% annual return, and redemption of all shares at the end of one, three, five and ten year periods. The example must state that actual costs might be higher or lower.

The hypothetical nature of the example is apparent and the use of a 5% assumed rate of return should not mislead investors into believing that it is a projection of future returns. If the Department were to take a similar approach, then a retirement investor would have information concerning the cost of its investments in dollar amounts without being misled by projections that FINRA Rule 2210 is intended to prevent. Moreover, this approach would build upon existing regulatory requirements, reducing the likelihood of confusion concerning what is expected under this provision.

D. Example: Two-Quote Requirement

Sections III(d) and IV(a)(2) of the Principal Transaction Exemption would require that before each transaction, a retirement investor receive a statement that includes price quotes for the same or a similar debt security from two ready and willing counterparties that are not affiliates of the adviser, apparently in order to demonstrate that best execution was obtained. The market for debt securities can vary significantly depending on the specific fixed income product. For example, some fixed income securities may trade frequently, be highly liquid and have transparent, accessible and firm quotations available, while others do not have public quotations or frequent pricing information available, and may trade infrequently. Some fixed income securities that are less liquid also are highly fungible, meaning that they trade like other, similar securities, and the pricing in these similar securities can be used as a basis for determining prices in the original security.

Given this significant variation in trading characteristics across fixed income securities, FINRA is concerned that a strict application of a minimum quotation requirement is not practical. A specific debt security may not have been traded recently and expected interest rate movements, concerns about credit risk associated with the issuer, or other factors may have affected its value. A reference price for a “similar” debt security may be unavailable. Moreover, the requirement to obtain the two quotes may delay execution of the transaction and could affect the price that the retirement investor eventually pays.

24 See Form N-1A Part A: Information Required in a Prospectus, Item 3.
Rather than applying a minimum quote standard, we respectfully recommend that the Department replace the two quote requirement with a standard that would permit transactions that meet the requirements of FINRA’s best execution rule (Rule 5310). This rule uses a “facts and circumstances” analysis by requiring that a firm dedicate reasonable diligence to ascertain the best market for the security and to buy or sell in such market so that the price to the customer is as favorable as possible under prevailing market conditions. A key determinant in assessing whether a firm has met this reasonable diligence standard is the character of the market for the security itself, which includes an analysis of price, volatility, and relative liquidity.

Rule 5310 also addresses instances in which there is limited quotation or pricing information available. The rule requires a broker-dealer to have written policies and procedures that address how the firm will determine the best inter-dealer market for such a security in the absence of pricing information or multiple quotations and to document its compliance with those policies and procedures. For example, a firm would be expected to analyze pricing information based on other data, such as previous trades in the security, to determine whether the price to the customer is as favorable as possible under prevailing market conditions. If pricing information related to that security is unavailable, a firm may also consider previous trades in a similar security, if that security and those previous trades constitute a reliable basis for comparison. Although a firm should generally seek out other sources of pricing information or potential liquidity when little or none is otherwise available, which may include obtaining quotations from other sources (e.g., other firms with which the broker-dealer previously has traded in the security), in other instances obtaining quotations from multiple sources could adversely affect execution quality due to delays in execution or other factors.

Accordingly, we suggest that Section III(d) be amended to add the following sentence to the end of this section:

An Adviser or Financial Institution will not be required to obtain price quotes from two ready and willing counterparties that are not Affiliates provided that the purchase or sale of the Debt Security complies with the requirements of FINRA Rule 5310 (Best Execution and Interpositioning) or any successor rule, as interpreted by FINRA.

E. Example: Disclosure of Markups and Markdowns

Section IV(a)(2) and Section IV(b) of the Principal Transaction Exemption would require pre-transaction and confirmation disclosure of the markup, markdown or other payment to the adviser, financial institution or affiliate in connection with the principal transaction. Broker-dealers already are subject to FINRA’s markup policy under Rule 2121, which prohibits a broker-dealer from entering into a transaction with a customer “at any price not reasonably related to the current market price of the security.” Moreover, FINRA

25 In 1994 the SEC solicited comment on a proposal to require mark-up and mark-down disclosure on the customer confirmation for riskless principal transactions. The proposal was not adopted and the federal
recently solicited comment on a related initiative that would bring additional pricing transparency to customers through the customer confirmation.\footnote{See FINRA Regulatory Notice 14-52 (November 17, 2014).}

We respectfully recommend that the requirement for disclosure of markups and markdowns be deleted from Section IV(a)(2) and Section IV(b) and that the following language be added to Section IV as a separate condition:

\begin{quote}
Markups and Markdowns. The Adviser and Financial Institution comply with the 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.
\end{quote}

We also suggest addition of the following at the end of the first sentence in Section IV(a)(2):

\begin{quote}
(if applicable).
\end{quote}

\textbf{F. Example: Definition of “Reasonable Compensation”}

The BICE would require the financial institution and adviser to affirmatively agree that it will not recommend an investment if the total amount of compensation anticipated to be received in connection with the purchase, sale or holding of the investment “will exceed reasonable compensation in relation to the total services” provided to the retirement investor.\footnote{See BICE Section II(c)(2), 80 FR at 21984.} The Principal Transaction Exemption would require that the purchase or sales price of debt securities not be “unreasonable under the circumstances.”\footnote{See Principal Transaction Exemption Section II(c)(2), 80 FR at 22002.} The meaning of “reasonable” or “unreasonable” compensation for purposes of these provisions is unclear. For example, the Department has not stated whether a broker-dealer may consider the compensation that is normally charged in the broker-dealer industry for similar transactions in determining whether compensation is “reasonable.” Even if such a comparison is permissible, the parameters of the comparison are undefined. Which products would provide the basis for comparison? The comparison may be particularly difficult when analyzing the reasonableness of compensation related to a “hold” recommendation.

We respectfully recommend that the Department incorporate existing FINRA rules that are familiar to broker-dealers, their advisers, and their compliance officers and counsel. NASD Rule 2830(d) imposes specific caps concerning investment company securities that broker-dealers may sell. Since mutual funds are commonly found in IRA accounts
and employer plans, reliance on these caps would best ensure that the compensation received by financial institutions and advisers is reasonable. FINRA Rule 2121 requires broker-dealers to charge only fair prices and commissions. FINRA Rule 2122 requires broker-dealers to impose only reasonable charges for their services.

We respectfully recommend that the Department add the following language to the end of Section II(c)(2) of the BICE and the Principal Transaction Exemption:

provided that an Adviser or Financial Institution will be deemed to have complied with this condition if the recommendation complies with FINRA rules concerning the reasonableness, type and amount of compensation or fees, as interpreted by FINRA.

5. The PTEs Should be Streamlined to Address Specific Conflicts

FINRA respectfully recommends that the Department ensure that the conditions in the BICE and the Principal Transaction Exemption address the conflicts of interest presented by differential compensation and principal transactions, and that the Department eliminate those conditions that will not incrementally strengthen the PTEs by mitigating those conflicts in a meaningful way. The PTEs are designed to permit, subject to conditions, legitimate business activities that otherwise would constitute prohibited transactions under ERISA or the Internal Revenue Code. Some conditions would not incrementally mitigate the conflicts of interest given the other conditions in the PTEs. Moreover, these unnecessary conditions often employ terms with imprecise meanings that will be difficult for financial institutions, compliance officers and advisers to interpret without extensive guidance from the Department.

For example, the BICE would require a financial institution to maintain a public webpage that discloses material compensation “payable” to the financial institution, its advisers and affiliates for services in connection with each retirement asset, the source of compensation, and how it varies among assets. Much of this information would not be useful even to a customer of the financial institution, who will not hire most of the firm’s advisers and who may not purchase many of the assets that are listed. Disclosure of this nature would not meaningful reduce, mitigate or eliminate any of the conflicts that arise from the payment of differential compensation given the existing requirements of the BICE.

Similarly, the limitation of permitted assets seems unjustified for the full range of retirement investors. We agree that conflicts of interest can arise with respect to the differential compensation paid for the sale of some products. Nevertheless, these conflicts should be addressed through the policies and procedures and other conditions of the PTEs, not by limiting the choice of investments available to all retirement investors. As a final example, the BICE and the Principal Transaction Exemption would require a financial institution and adviser to affirmatively warrant that they and their affiliates “will comply with all applicable federal and state laws regarding the rendering of 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.29 Compliance with the law by a financial institution or adviser is a reasonable expectation, but it need not be related to the conflict of interest that arises from the receipt of differential compensation or from principal transactions.

While these conditions do not address the conflicts of interest, they do create ambiguity. The Department will be called upon to answer a host of interpretative questions. What types of compensation is “material” and “payable”? What types of laws are the subject of the warranty? When does a law regard the rendering of investment advice? Must the warranty to one customer cover violations of laws applicable to the investment advice provided to other customers?

FINRA respectfully recommends that the Department streamline the PTEs by eliminating those conditions that do not incrementally address the conflicts of interest at issue in a meaningful fashion. By way of example, we recommend that the Department eliminate Section II(d)(1) of the BICE and the Principal Transaction Exemption, Section III(c) of the BICE, and the limitation on permitted assets.30 We would be pleased to discuss proposed changes concerning the other conditions that create ambiguity without meaningfully addressing the conflicts of interest.

6. The Effects of Non-Compliance and the Remedies Should be Clarified

Financial institutions and advisers may avoid relying on the PTEs if the effects of non-compliance, even for minor infractions, are ambiguous. Moreover, it is unclear whether the parties to the BICE contract may designate the remedies that will be available in the case of a breach.

A. Effects of Non-Compliance

The consequences of non-compliance with the PTEs are unclear. The BICE Preamble, for example, states that “the exemption is not conditioned on compliance with” the warranties concerning compliance with law and adoption of policies and procedures.31 We are uncertain, however, whether the BICE or the Principal Transaction Exemption

29 See BICE Section II(d)(1), 80 FR at 21984, and Principal Transaction Exemption Section II(d)(1), 80 FR at 22002.

30 If the Department determines to retain Section II(d)(1), then at a minimum the Department should clarify that this warranty only covers compliance with applicable federal and state laws as they apply to the retirement investor that is a party to the contract, as follows:

(1) The Adviser, Financial Institution and Affiliates will comply with all applicable federal and state laws regarding the rendering of investment advice to the Retirement Investor, the purchase, sales and holding of the Retirement Investor’s Asset, and the payment of compensation related to the purchase, sale and holding of [the] such Asset;

Similar changes would have to be made to Section II(d)(1) of the Principal Transaction Exemption.

31 See BICE Preamble, 80 FR at 21970.
are conditioned on the warranty concerning differential compensation and other arrangements that would tend to encourage recommendations that are not in the customer’s best interest. The Preamble implies that this warranty is considered to be part of the “policies and procedures” warranty, in which case the exemption might not be conditioned on compliance with that warranty. On the other hand, the warranty itself states that it “does not prevent” the financial institution from paying advisers differential compensation that is neutral. This language implies that failure to comply with the terms of the warranty would “prevent” the financial institution from paying differential compensation, apparently because it would constitute a prohibited transaction under ERISA.

Moreover, it is possible that a financial institution or adviser operating in good faith that fails to meet a specific requirement would be deemed to have engaged in a prohibited transaction in violation of ERISA. We respectfully recommend that the Department clarify that the receipt of differential compensation by a financial institution or adviser or the execution of a principal transaction that failed to comply (1) with all aspects of the warranties or to provide all of the disclosures required by the BICE and the Principal Transaction Exemption or (2) in an insignificant way with a condition of a PTE, would not by itself constitute a prohibited transaction in violation of ERISA. For example, the Department could add a new provision to the BICE and the Principal Transaction Exemption that provides:

Notwithstanding any other provision to the contrary, the availability of this exemption is not conditioned upon compliance with the warranties required by Section II(d) or providing the disclosures in Section II(e) and 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.

We also recommend that the Department provide guidance on the types of failures that would be considered insignificant. They might include the following (to the extent that the Department determines to adopt the relevant conditions):

• Minor errors in transaction or annual disclosure, including errors in calculating total costs;
• Inadvertent exclusion of an asset from the annual list required to be provided to each retirement investor; and
• Inadvertent problems with the required webpage disclosure, such as unavailability of the webpage for a period of time for technical reasons.

32 See BICE Preamble, 80 FR at 21970-21971.

33 See BICE Section II(d)(4), 80 FR at 21984.
B. Remedies

The BICE would establish a private right of action for breach of contract, without indicating what remedies should be made available to the customer. Could the financial institution include a liquidated damages provision in the contract, limiting the amount of recovery available to the customer? Could the customer demand rescission rights for the securities that have been sold, in which case the contract would effectively constitute a “put” or a guarantee on all transactions that it covers? We respectfully recommend that the Department clarify how much latitude the financial institution and the customer have in drafting provisions in the contract related to the available remedies and damages for breach of contract. We suggest that financial institutions should not be permitted to include a provision for liquidated damages, but that they should be allowed to preclude a right of rescission. The Department could revise Section II(f)(2) of the BICE to read as follows (new text is underlined):

(f) Prohibited Contractual Provisions. The written contract shall not contain the following:

* * *

(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 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 met the best interest standard at the time of the recommendation and the return that the investor actually earned, and to preclude the right to rescind any transaction the rescission of which is not otherwise contemplated by federal law.

* * *

Thank you again for the opportunity to comment on the Proposal. FINRA would be pleased to discuss any of our comments in this letter or other issues related to the Proposal, at the convenience of the Department staff.

Sincerely,

Marcia E. Augur
Senior Vice President and Corporate Secretary

cc: The Honorable Thomas E. Perez, Secretary of Labor
U.S. CHAMBER OF COMMERCE

July 17, 2015

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

Re: Definition of the Term “Fiduciary” (RIN 1210-AB32); Best Interest Contract Exemption (ZRIN 1210-ZA25), Amendment of PTE 84-24 (ZRIN 1210-ZA25), Amendment of PTE 77-4 (ZRIN 1210-ZA25)

To Whom It May Concern:

The U.S. Chamber of Commerce (“Chamber”) is the world’s largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. We appreciate the opportunity to comment on the U.S. Department of Labor’s (“DOL” or the “Department”) regulatory package published on April 20, 2015 expanding the definition of fiduciary investment advice and proposing new or amended prohibited transaction class exemptions. Specifically, we offer comments on the proposed regulation (the “Proposal”) redefining the term “fiduciary” with respect to the provision of investment advice under ERISA §3(21)(A)(ii),\(^1\) the proposed prohibited transaction class exemption “Best Interest Contract Exemption” (“BICE”),\(^2\) the proposed amendment to prohibited transaction class exemption 84-24 (“PTE 84-24”),\(^3\) and the proposed amendment to prohibited transaction class exemption 77-4 (“PTE 77-4”).\(^4\)

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\(^1\) 80 Fed. Reg. 21,928 (Apr. 20, 2015)
\(^2\) Id at 21,960.
\(^3\) Id at 22,010.
\(^4\) Id at 22,035.
We share the Department’s goal of ensuring ERISA plans, ERISA plan participants and beneficiaries, and Individual Retirement Account (“IRA”) owners receive quality financial advice. Indeed, most of our members are sponsors of retirement plans for their employees, a responsibility our members take very seriously. It is therefore vitally important that our private retirement system, from employer-provided plans to IRAs, protects the interests of our employees and their families, and provides them the means to retire with the dignity that comes with financial security.

Unfortunately, the Department has chosen an approach that is unduly complicated and wrought with serious defects for this regulatory initiative. Indeed, the result is an unworkable rule that ultimately harms American investors and retirees. Given the significant implications that this rulemaking will have, we urge the Department, should it continue with this initiative, to work with everyone involved to correct the numerous defects and unintended consequences. Due to the complexity of this rulemaking and its potential for serious harm to American workers and retirees if done incorrectly, we recommend the Department can best do this by engaging in a negotiated rulemaking process as provided in Federal administrative law exactly for these kinds of situations. Congress didn’t create negotiated rulemaking because it wanted more meetings—it created negotiated rulemaking to ensure complex Federal regulations work as they are intended, and that all affected voices are heard. Here, negotiated rulemaking would ensure that working Americans have more and better retirement advice instead of fewer and more costly choices.

**Executive Summary**

Our more than 3 million member businesses maintain a long-held commitment to providing voluntary benefits that support the welfare of their workers. Workers, retirees and their families need access to workplace and individual retirement plans, as well as quality, affordable investment advice to help them save for retirement. However, it is much more difficult for smaller businesses to offer retirement plans. As a result, it is vitally important to ensure that the regulations governing retirement plans preserve the choices available to small businesses in structuring plans and services, and do not increase their already significant regulatory burden.
Unfortunately, rather than expanding access to quality advice and encouraging small plan formation, the Department’s Proposal will make it more difficult for America’s workers and retirees to access retirement plans, to receive quality investment advice, to receive useful educational information about their plans and investments, and to move their retirement assets freely between employer-provided plans and IRAs. Indeed, there is a substantial risk that at least some workers and retirees won’t have access to advice at all, and the Proposal’s additional restrictions on educational information serve to compound that risk. Accordingly, in our comment letter we address a number of serious fundamental and technical concerns with the Proposal, including the following issues:

- **The Rule is Technically Flawed and Simply Does Not Work as Proposed**—In addition to the many policy concerns and unintended consequences the Chamber finds in the Proposal, it is technically flawed as well. The Best Interest Contract Exemption, one of the central pieces of the regulatory package, simply does not work in practice—it cannot be complied with in its current form.

- **The One-Size-Fits-All Rule Actually Prohibits Advisors from Acting in Your Best Interest in Some Cases**—The Proposal makes it harder for participants and IRA owners to get investment education information, to get assistance in rolling over their previous employer plans into their new employer plans, and to get advice about investments not on the “approved” list of asset types and classes. The Proposal prevents advisors from discussing certain investments and options even when they might be in your best interest.

- **The Proposal Discriminates Against Small Businesses and Individuals**—The Proposal discriminates against small businesses, workers and IRA owners by subjecting them to the full costs and restrictions of the rule, denying them choice in what kind of financial advisors they work with, while giving large business retirement plans the choice to comply with the new rules or not. Small businesses, and low and middle income Americans, need the most help in
saving for retirement, but this rule only allows big businesses to have a full range of choices and options.

- **The Proposal Increases Costs and Reduces Access to Advice for Workers**—By significantly increasing the legal and financial risks facing advisors, the effect of the Proposal will be to make investment advice and education more expensive, less readily available, and more generic, even as workers and retirees need more affordable, more accessible and more specific advice and education.

- **The Department's Own Estimates Show that Lack of Access to Advice Costs Workers $100 Billion Every Year, and the Proposal Will Make Things Worse**—Lack of access to advice has a cost. In 2011, the Department wrote that the prohibited transaction rules—the same rules that this Proposal would apply even more broadly—were one of the reasons many participants and IRA owners did not receive investment advice, costing them about $100 billion in investment losses every year. These losses are far greater than the Department’s dubious estimates of the costs of advisor conflicts. The cure is making the patient sick.

- **The Department Lacks Legal Authority for Elements of the Proposal**—The Proposal seeks indirectly through prohibited transaction exemptions to impose legal liabilities and conduct standards that DOL lacks the authority to impose directly. This jurisdictional land-grab is contrary to the law’s intent.

- **The Labor Department Should Not Be the Primary Regulator for Financial Advice**—The Department should not attempt to supersede the financial regulations developed over decades by Congress, the SEC, FINRA, State securities regulators, the State Insurance Commissioners, and Federal and State banking regulators, and try to replace their decades of experience and long-standing policies with a new, untested, one-size-fits-all Federal regulation that tells people what kind of retirement advisor they may have. The lack of a coordinated approach will leave workers, investors and retirees with diverging
standards that create more confusion. A better approach would be to have all interested regulators work together to avoid these unintended consequences.

- **Impossible to Comply with Changes in Just Eight Months**—The scope of change implemented by the Proposal is so vast, and the requirements it puts in place so onerous, that it is impossible to comply with the new rules in the mere eight months the Department proposes between publication and effective date. We believe it will take several years and hundreds of millions of dollars just in information technology changes to comply.

- **The Comment Period Does Not Allow the Public a Meaningful Opportunity to Respond**—The Department spent nearly four years working behind closed doors to develop the most radical overhaul of financial advice in 40 years—we had only 90 days to try to predict its effects and respond. This denies plan participants and IRA owners a meaningful opportunity to understand and comment on the rule. If the Department is to move forward, it should be through negotiated rulemaking to ensure we help, not hurt, working Americans.

As the comments below explain in more detail, the Chamber and its members believe that the Proposal and its associated prohibited transaction exemptions not only fail to protect workers, but will actually prevent them from receiving the advice they need. What’s more, the Proposal as written simply cannot work—it has technical defects as well as negative policy defects.

**Overview**

As the Department correctly notes, there have been significant changes in the retirement industry since the current regulation was promulgated in 1975. At that time, defined benefit pension plans dominated the retirement landscape, and most plans retained professional investment managers to manage retirement assets. Now, defined contribution plans such as 401(k) plans are the most common type of employer-provided retirement savings vehicle, and participants must make decisions
regarding the investment of their retirement savings. The Department is correct that plan participants need more and better investment advice than ever before, and no one disputes that plan participants and IRA owners should be protected from unscrupulous financial intermediaries and advisors.

It is precisely because these issues are so important that we write to express our concern that the Proposal, as currently constituted, undermines these goals. Rather than expanding access to quality advice and encouraging small plan formation, the Proposal will make it more difficult for America’s workers and retirees to access retirement plans, to receive quality investment advice, to receive useful educational information about their plans and investments, and to move their retirement assets freely between employer-provided plans and IRAs. Indeed, there is a substantial risk that at least some workers and retirees won’t have access to advice at all—the Proposal’s additional restrictions on educational information serve to compound that risk.

By making almost all financial intermediaries ERISA fiduciaries (thus significantly increasing their legal and financial risk), the Department’s proposal will make investment advice and education:

- More expensive—advisors must obtain new insurance coverage, face new litigation risks in state courts, reform their business operations, and charge fees commensurate with these risks and costs;

- Less readily available—some portion of advisors will not find it commercially feasible to continue to offer services to small plans and IRAs; and

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5 We are not expressing a negative view of defined contribution plans—the shift to defined contribution plans has resulted in greater access to workplace retirement savings as such plans allow businesses that could not easily offer a defined benefit plan to provide meaningful retirement benefits to their employees.
More generic—restrictions on educational information and risks of inadvertent fiduciary status will encourage more advisors to provide only basic, written materials in order to control their legal and financial exposure.

Moreover, the scope of the proposed regulatory changes is sure to create uncertainty and significantly increase compliance costs—costs that are ultimately borne by retirement plans and their participants. Therefore, while the Department seeks to help Americans save for retirement, we believe the Proposal will reduce employees’ savings and interfere with their ability to receive quality investment advice.

Our comments address both fundamental issues we believe require the Department to reevaluate its approach, as well as specific concerns regarding particular items in the Proposal and the associated proposed exemptions. On behalf of our members, we look forward to working with the Department to address these policy and practical issues to better help Americans save for retirement.

About Us

The Chamber’s members range in size from mom-and-pop shops and local chambers to leading industry associations and large corporations. More than 96% of the Chamber’s members are small businesses with 100 or fewer employees, and 70% of our small business members have ten or fewer employees. Accordingly, the Chamber is particularly cognizant of the problems facing small businesses, as well as the business community at large.

Besides representing a significant portion of the American business community in terms of employee count, the Chamber also represents a wide spectrum of

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businesses in terms of industry types and location. Every major classification of United States business—from manufacturing and retailing to entertainment and finance—is represented by the Chamber. The Chamber’s positions on national issues are developed by a cross-section of members who serve on committees, subcommittees, and task forces. More than 1,000 businesspersons participate in this process. Accordingly, our comments are informed by the real-world experience of our member employers and their employees.

American businesses of every size maintain a long-held commitment to providing voluntary benefits that support the welfare of their workers. However, it is much more difficult for smaller business to offer retirement plans. As a result, it is vitally important to ensure that the regulations governing such plans preserve the choices available to them in structuring plans and services, as well as reducing the cost-burden of such regulation. The private employer-provided retirement system has contributed significantly to the retirement needs of millions of seniors and current workers. The Chamber and its members are committed to continuing the success of the system and ensuring the long-term retirement security of Americans.

**Overview of Fundamental Concerns**

We address a variety of specific issues and recommended changes to the Proposal below. In addition to these specific issues, the Chamber has several fundamental concerns with the Department’s effort. We are not questioning the Department’s goals—we share your desire to ensure the protection of our employer plans and their employees and retirees. We do, however, question whether the Department is the proper entity to make unilateral changes in this area, and we question the Department’s methods and regulatory process. We are very concerned that the process employed here will not result in outcomes that benefit America’s employers, workers and retirees, but will instead result in unintended consequences making it harder—and in some cases, impossible—for them to get vitally needed education and advice.
• The Department of Labor Is Not the Proper Agency to Make Unilateral Changes of this Magnitude that Have Far-Reaching Effects Beyond Employee Benefit Plans

We are concerned that the Proposal makes fundamental changes to the regulation of financial markets that are beyond the scope of the Department of Labor’s primary authority, which is the regulation of private sector, employer-provided benefit plans. While the Department seeks to use interpretive authority over the prohibited transaction rules in Internal Revenue Code §4975 (asserted pursuant to Reorganization Plan No. 4 of 1978) to act alone in regulating the conduct of financial advisors to IRAs, we believe these issues properly should be addressed by other Federal agencies and regulatory organizations, such as the Securities and Exchange Commission (the “SEC”) and the Financial Industry Regulatory Authority (“FINRA”), or by Congress. By acting alone, the Department seeks to substitute its judgment for those other regulatory entities and Congress, a decision that we strongly believe will lead to many negative consequences for our employer members and their employees. For example, we recently outlined our concerns regarding the Proposal’s likely unintended effect on small businesses and small business plans in our report “Locked Out of Retirement: The Threat to Small Business Retirement Savings.” We attach that document to this letter and ask that it be included in the record.

In the Proposal, the Department proposes to do nothing less than make itself the primary regulator of how investments are provided to ERISA plans and IRAs that collectively hold approximately $16 trillion in assets. It is nearly impossible to overstate the significance of these changes. In one fell swoop, the Department would

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7 The Proposal’s scope includes not just IRAs, but other tax vehicles subject to IRC §4975, including Health Savings Accounts (HSAs), Archer Medical Savings Accounts, Coverdell Education Savings Accounts, and Individual Retirement Annuities. Advice regarding investments in these accounts is subject to the same issues as IRAs.


supersede numerous regulations and enforcement policies governing the conduct of financial advisors, insurance agents, bank trust officials and consultants developed over decades by the SEC, FINRA, state securities regulators, the State Insurance Commissioners, and Federal and State banking regulators, replacing their decades of experience and long-standing policies with a new, one-size-fits-all Federal regulation dictating what kind of advisors are available to plans and IRA owners, how such advisors should be paid, and in most cases, the process by which such advisors develop their advice. The resulting abrupt change will affect our employer members and their employees by limiting their choices in operating their retirement plans and IRAs, shifting them into fee arrangements they did not bargain for, and reducing their access to vital educational information they need to make informed decisions.

In so doing, the Department acts as if it is filling a void, as if these Federal and State regulations don’t exist, and as if there are fundamental flaws in the financial markets that only the Department can address. The Preambles to the Proposal and the associated prohibited transaction exemptions explaining the Department’s justification for its actions frequently omit any mention of these extensive Federal and State regulations, giving the impression that workers and retirees simply are unprotected under current Federal and State rules. The reality is that these markets are already highly regulated, and those regulators actively are addressing these concerns. For example, the SEC just launched the “…multi-year Retirement-Targeted Industry Reviews and Examinations (ReTIRE) Initiative” in which SEC staff will examine areas including advisor conflicts of interest, the basis for recommendations, supervision and compliance controls, and marketing and disclosure

10 As a legal matter, the Proposal would not replace these other laws and regulations, but would simultaneously apply with them. This would effectively supersede many, but would actually conflict with others.

11 See, e.g., Comments in the Preamble to the BICE exemption, “In the absence of fiduciary status, the providers of investment advice are neither subject to ERISA’s fundamental fiduciary standards, nor accountable for imprudent, disloyal, or tainted advice under ERISA or the Code, no matter how egregious the misconduct or how substantial the losses.” By limiting the references to ERISA and the Code, the Department ignores and does not mention applicable SEC regulations and enforcement efforts, FINRA guidance and enforcement efforts, State insurance laws and regulations, and other financial conduct regulations that would not permit advisors to engage in “egregious misconduct.” 80 Fed. Reg. 21,960 at 21,962-21,963 (Apr. 20, 2015).
concerns. In another example, FINRA’s 2015 examination priorities includes conflicts of interest and IRA rollover advice, examinations building on FINRA’s detailed guidance addressing advisor conduct in assessing the suitability of rollover recommendations.

As another example, the Proposal’s impact on state insurance regulation raises questions regarding interaction with the McCarran-Ferguson Act, at least to the extent that the Proposal affects IRAs holding insurance products and other investments sold or recommended by insurance agents. Disclosures to insurance customers, the services that can be provided by insurance agents and insurance companies, fee structures for insurance products and compensation paid to insurance agents are all regulated by the States as part of the “business of insurance.” The McCarran-Ferguson Act requires an express Congressional directive for any Federal regulator to regulate the “business of insurance.” Without an express and clear Congressional mandate, State insurance laws, rather than Federal law, govern the business of insurance. In the Proposal, the Department not only ignores the role of state insurance regulators in providing consumer protections, but it also fails to explain what express Congressional directive authorizes the Department to regulate these insurance matters and impose contradictory regulatory requirements.

- The Department’s Regulatory Process Does Not Offer a Meaningful Opportunity to Understand and Comment on the Vast Scope of the Proposal’s Changes—A Regulation of this Significance Requires Negotiated Rulemaking

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15 15 USC § 1011 et seq.
The Department isn’t filling a void—it is attempting to supplant the efforts of Federal and State regulators, and the considered policies they made over decades informed by Congress and the State legislatures. Indeed, Congress has amended ERISA numerous times over the past 40 years, and in so doing implicitly ratifying its original decision to leave financial regulation to financial regulators, rather than the Department. The political processes that created the extensive regulations governing financial markets and financial advisors, agents and other service providers were developed over time with the full involvement of all parties in open and robust political debates. By contrast, the Department has worked behind closed doors for four years to develop an entirely new regulatory regime, and the affected employers, workers and retirees, along with Congress, the States, and the regulated community, have only 90 days in which to evaluate and comment on the magnitude and impact of these changes.

Though the Chamber appreciates the Department’s decision to grant a fifteen-day extension to the public comment period initially set to expire on July 5, 2015—a mere seventy-five days after the proposal’s release—we consider ninety days to be an inadequate time to allow the public to fully consider the Proposed Rule and associated exemptions and to assess its potential impact on our nation’s $16 trillion voluntary retirement system. Nevertheless, we recognize the importance of responding during the notice-and-comment period, and we write to share the comments that members were able to provide during the designated comment period. The Chamber anticipates providing additional comments regarding the proposal as our members deem necessary.

Rather than continuing in this back and forth manner, the Department should enter into negotiated rulemaking with all interested parties. We recognize that as

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16 Negotiated rulemaking has been used successfully on other retirement issues. For example, the Pension Benefit Guarantee Corporation (PBGC) used negotiated rulemaking to substantially revise regulations pertaining to reportable events. Those regulations were originally adopted on September 17, 1980. 45 Fed. Reg. 61,615 (September 17, 1980). In 1984, minimal changes were made to the regulations. 49 Fed. Reg. 22,472 (May 30, 1984). However, in 1996 substantial revisions were made through a negotiated rulemaking process. The process included a negotiated rulemaking committee consisting of representatives of employers, participants, pension practitioners, and the PBGC. 61 Fed. Reg. 63,988 (Dec. 2, 1996). The negotiated rulemaking was so successful that when the final reportable event
times change, so do the needs and concerns of interested parties. Therefore, it is often necessary to review and change rules accordingly. However, we do not believe that unilateral changes are in the best interest of any party. The agency has not provided a compelling rationale for these radical changes. As such, it is difficult to meaningfully comment on the specific changes without knowing the reasoning or basis for the proposed changes. Through the process of negotiated rulemaking, however, the Department would be able to provide further explanation and all interested parties will be able to provide specific feedback and comment.

One is hard put to imagine a process that is less well-suited towards making fundamental reforms of financial markets that properly ensure considered input from all stakeholders, including assessing economic impact; understanding and mitigating unintended consequences; and providing for robust and open discussion than the path the Department has chosen. We are strongly concerned that this regulatory process does not provide the public a meaningful opportunity to comment. Consequently, we recommend that the Department enter into the negotiated rulemaking process to ensure that the rules are changed in the most beneficial manner possible and without creating unnecessary administrative and financial burdens.

- The Department Improperly Attempts to Impose Through the Best Interest Contract Exemption Conduct Standards and Legal Liabilities Contrary to the Law

The Department appears to be exceeding its regulatory authority in very significant ways. As our member employers well understand, the prohibited transaction rules in ERISA apply in arbitrary ways. The value of a transaction, its inherent benefit to a plan or a participant, does not determine whether it is

rules were issued in December 1996, Vice President Al Gore’s National Performance Review awarded a Hammer Award to PBGC for the agency’s use of negotiated rulemaking. 1996 PBGC Annual Report http://www.pbgc.gov/docs/1996_annual_report.pdf Through that process, all interested parties were able to weigh in and express their needs and concerns. As a result, the regulations were accepted by all parties.
permitted—the structure of the arrangement does. This is why Congress granted the Department limited authority under ERISA §408(a) to promulgate exemptions to the prohibited transaction rules that allow useful and necessary transactions to proceed under certain specified conditions despite being otherwise prohibited by the general rules.

A common example of this problem for our member employers’ plans is rehiring service providers who provide excellent services. A service provider to a plan becomes a “party in interest,” and the general prohibited transaction rule does not permit the plan fiduciary to hire a service provider who is a party in interest to the plan. Consequently, the general rule prohibits rehiring a service provider. This result obviously doesn’t make sense, so Congress passed an exemption, which the Department further modified by regulation, permitting a service provider to be rehired as long as the arrangement is “reasonable” and certain disclosures are provided.

We provide this common example to illustrate what will happen under the Proposal to many advisors. As will be discussed in more detail below, the Proposal would result in advisors who act in the best interests of their participants or IRA owners when giving advice, yet would still be subject to prohibited transaction rules that would make such advice illegal. In other words, advisors may be prevented from providing advice even though the advice is in the best interest of the plan, participant or IRA owner. To permit such advice, which the Proposal would otherwise make illegal, the Department proposes using its exemptive authority to permit certain arrangements through BICE. The problem is that the conditions in BICE exceed the Department’s authority.

BICE would impose on IRA advisors a standard of care that Congress expressly did not choose to require of IRAs when it created them. Further, BICE would supplant

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17 The Chamber issued a white paper on this issue on February 20, 2015 entitled “Using PTEs to Define a Fiduciary Under ERISA: Threading the Needle with a Piece of Rope” available at https://www.uschamber.com/report/using-ptes-define-fiduciary-under-erisa-threading-needle-piece-rope. We attach that document to this letter and ask that it be included in the record.
the legal remedies Congress carefully crafted to protect ERISA participants by introducing new legal liabilities for breach of contract and violation of warranties in BICE.

There is no question that the Department has no statutory authority to impose a standard of care on IRA advisors directly. Similarly, there is no question that the Department has no direct authority to replace ERISA’s statutory remedies. Instead, the Department seeks to do so indirectly, through conditions in BICE, presumably on the grounds that utilizing BICE is a “voluntary” decision by an advisor not directly mandated by the Department. We do not believe that the Department can impose conditions in an exemption that directly conflict with the structure of the law, and we do not believe that adoption of those limitations by advisors is “voluntary” as their alternative is being pushed out of their businesses by the effects of the Proposal. This is not a minor concern. Because the Proposal makes nearly all advisors fiduciaries for purposes of the prohibited transaction rules, and thus unable to receive fees that vary from one investment to another, a functioning exemption is critical to the structure of the regulatory package. Without an exemption with the proper legal foundation, many rollovers and other valuable transactions are effectively prohibited by the broad scope of the Proposal, ultimately preventing participants and IRA owners from getting needed services. The Chamber will be offering extensive comments on these and other legal issues in a separate joint letter with the Chamber’s Institute for Legal Reform.

- **The Proposal’s Overly Broad Scope Will Make it Harder for Plans and Individuals to Access Education and Advice by Reducing Choices Available to Them, Increasing the Roughly $100 Billion Per Year in**

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18 Reorganization Plan No. 4 of 1978 also does not transfer to the Department the Secretary of the Treasury’s statutory authority to enforce the prohibited transaction rules in §4975—such authority is expressly reserved to the Treasury Department in §102 and §105 of the Reorganization Plan.

Losses the Department Previously Estimated Workers and Retirees Suffer Due to Lack of Access to Advice

The Chamber is very concerned that rather than ensuring greater availability of quality advice, the Proposal will reduce the availability of vitally needed educational services and personalized investment assistance to low and middle-income individuals and small businesses.

Lack of access to investment information and advice has a real cost to workers and retirees. In 2011, the Department itself calculated that plan participants and IRA owners suffered roughly $100 billion in investment losses each year, due at least in part to ERISA’s prohibited transaction rules preventing access to professional investment advice.20 We note that this 2011 estimate of the cost of no advice by the Department is greater than the Proposal’s estimate of the cost of “conflicted” advice the Department seeks to address. (The Chamber is separately submitting comments on the economic analysis associated with the Proposal that raise significant questions about the validity of the “conflicted” advice estimates). As the Department’s 2011 estimate attributed these losses from lack of advice at least in part to the very rules the Department seeks to expand in the Proposal, we are very concerned that an unintended consequence of the Proposal would be further increases in losses due to lack of access to advice and education.

Further, by increasing regulatory pressure to adopt fee-based rather than transaction-based accounts, the Department may inadvertently increase costs for many IRAs and small business plans that benefit from transaction-based pricing. The SEC has targeted enforcement efforts on so-called “reverse churning” in which fee-

20 See, The Preamble to the final regulation implementing the Pension Protection Act investment advice provisions, 76 FR 66,151-66,153 (October 25, 2011) (the retirement income security of America’s workers increasingly depends on their investment decisions. Unfortunately, there is evidence that many participants of these retirement accounts often make costly investment errors due to flawed information or reasoning...Financial losses (including foregone earnings) from such mistakes likely amounted to more than $114 billion in 2010... Such mistakes and consequent losses historically can be attributed at least in part to provisions of the Employee Retirement Income Security Act of 1974 that effectively preclude a variety of arrangements whereby financial professionals might otherwise provide retirement plan participants with expert investment advice.) [Emphasis added].
based accounts are used to make investors pay more for services than they would have paid in transaction-based accounts—indeed, such inappropriate use of fee-based accounts is an SEC examination priority for 2015.21

While the Department has noted that the Proposal technically does not prohibit transaction-based accounts, or technically eliminate commissions and other forms of payment often associated with these accounts, the administrative difficulty presented in trying to achieve level fees in such accounts may be tantamount to a prohibition for many small business plans and individual accounts.22 Our diverse members understand that there is no “one-size-fits-all” solution that is right for every plan, participant or IRA—our members, and their workers, retirees and their families, want choices that allow retirement plans and individuals to select the financial service providers that are correct for their individual situations.

Specific Comments Regarding the Proposed Expanded Definition of Fiduciary Advice

In addition to our broad concerns expressed above, we are offering comments on specific issues presented by the Proposal. In the event the Department proceeds to a final rule on a substantially similar basis as the Proposal, we urge the Department to consider these issues to address the existing problems and ambiguities in the Proposal.

- The Seller’s Carve-Out Should Not Discriminate Against Small Plans, Participants and IRAs—It Should Be Broadened to Permit All Plans and IRAs the Same Choices as Large Plans, Just as the Department Originally Recognized in 2010


22 As discussed in more detail below, it does not appear that the proposed Best Interest Contract Exemption provides realistic alternatives to level fees in most cases, resulting in a general level-fee requirement for most advisors.
As an organization representing millions of small business, we understand the hurdles facing them in offering employee benefits to their workers. In our voluntary system, Federal regulators should be reducing the impediments to forming plans. Unfortunately, the Proposal does the opposite—not only would it reduce the choices relating to retirement plan advisors for small businesses and place the full regulatory burden of the Proposal on small plans, but it specifically discriminates against small plans by allowing large plans to retain the ability to choose their advisors and payment structures as they wish. This is especially inappropriate given that small plan fiduciaries and large plan fiduciaries share the same legal obligations to their plans. The exclusion of plan participants and IRA owners is similarly discriminatory—as discussed above, smaller accounts may be better served with transactional fees than asset-based fees, and would benefit from choosing the advisors with whom they wish to work on the terms of their choice.

The Department properly recognized and preserved this important distinction in the 2010 version of the proposed regulation by providing an exclusion from fiduciary status for those selling products in which there was no reasonable expectation of a fiduciary relationship, making that option available to all retirement plans, plan participants and IRA owners. 23

There is a fundamental difference in actions, expectations and obligations regarding the sellers of products and the providers of ERISA fiduciary advice. Where circumstances, viewed objectively, create expectations that the person providing an investment recommendation will act in accordance with the ERISA fiduciary standard of “an eye single” to participants, it is appropriate to include those circumstances in the functional definition of conduct giving rise to ERISA fiduciary status. 24 Unfortunately, the Proposal goes too far and encompasses circumstances where there is no reasonable expectation of fiduciary trust and confidence. A specific example is in the sale of proprietary products, where many of our members are concerned the Proposal seeks to create a fiduciary relationship that is simply

inapposite. Our members offer a wide range of proprietary products such as insurance, mutual funds, annuities and bank products. These products have been developed to meet the needs of a wide range of customers, many of whom are middle to lower income investors who might not be served by more expensive investment advisors. The companies who offer proprietary products and their representatives do not hold themselves out as independent advisors on the entire universe of potential investment products. By refusing to recognize the difference between sales and advice, the Proposal ignores the history of financial services regulation, and the fundamental purpose of different legal obligations, licenses and training for insurance agents, broker dealers, registered representatives, registered investment advisors, bank trust officials and other financial professionals.

We also take issue with incorporating into the definition of ERISA investment advice recommendation principles developed by the Financial Industry Regulatory Authority (“FINRA”) for purposes of imposing a supervisory structure over sales practices. FINRA’s threshold for conduct requiring supervisory oversight was designed to establish governance over sales practices. But selling is not an investment advice function, and does not create an objectively reasonable expectation of fiduciary-level trust and confidence. Individuals as well as plan fiduciaries—no matter their level of investment sophistication—understand sales. Those who sell products, especially firms who sell proprietary products and management services, should not be held to a fiduciary standard that potentially requires them to either remain silent or sell a competitor’s product.

The Department’s rationale for changing its 2010 position appear to be its belief that small plans and individuals do not understand sales activity, while large plans are sophisticated purchasers of financial services who do. We disagree on both points—first, that small plans and individuals don’t understand the difference between sales and advice, and second, that status as a large plan fiduciary is a valid proxy for financial sophistication. The validity of this rationale is demonstrably false, and does not justify discriminatory treatment.
There is simply no basis to assume that a plan fiduciary to a plan with 110 participants is financially sophisticated simply because the plan is a “large” plan. More importantly, plan size is immaterial to the legal duties and obligations of the plan fiduciary—all plan fiduciaries have the same legal standard of care, and have a duty to the participants and beneficiaries to properly administer the plan. Regardless of plan size, they need choice and flexibility to select the kind of advisors that best serve their needs. If the Department’s assumptions regarding size and sophistication were true, then the Department should have extended the same logic to participants and IRA owners. A participant or an IRA owner with a large balance should, by the Department’s logic, be allowed choice while a small balance account should not. There is no rational basis for eliminating choice for all participants and all IRA owners while retaining it for large plans.

Finally, and most importantly, it does not require a high level of financial sophistication to understand that a discussion is a sales discussion if it follows a basic disclosure that an advisor is selling a proprietary financial product, that the advisor is paid to sell the product, and the advisor is not providing fiduciary advice. This disclosure, similar to that the Department requires in the large plan carve out, is readily understandable to any recipient. The assumption that small plans, participants and IRA owners cannot understand the difference between sales and advice does not match the real world experience of our members and their employees. The Department can protect participants, IRA owners and small plans with the same kind of disclosures that it requires of large plans under the large plan carve out, but without eliminating their right to choose the services and products that best fit their needs.

The Department should retain the seller’s exemption from its 2010 proposal, but couple that exclusion with simple, clear disclosure. This would preserve choice while providing the information necessary for plans, participants and IRA owners to make informed decisions.
• Plans and Participants Must Know When a Fiduciary Relationship is
Established in Order to Properly Evaluate the Information They
Receive—the Proposal’s New and Vague Terms Will Result in Greater
Confusion for Plans and Participants, Not Less.

It is essential that the establishment of a fiduciary relationship be clear and
unambiguous. The expectations of plans, participants and IRA owners regarding the
advice they receive cannot be met if it is not clear to everyone involved that fiduciary
advice is being provided. Indeed, this was one of the reasons the Department
originally proposed the rule in 2010—the Department determined that the current
regulation did not provide sufficient clarity for its investigators to prove when an
advisor was a fiduciary.25

Unfortunately, other aspects of the Proposal introduce new ambiguity by
removing important terms and introducing new and vague terms that remove
certainty in the relationship.

For example, the Proposal removes the requirement of the current regulation
that fiduciary advice is provided pursuant to a “mutual understanding.” The retention
of this concept is critical. A mutual intent to enter into an arrangement is a basic
element that must be present in any relationship as significant as fiduciary advice. A
participant needs to know whether he or she is receiving fiduciary advice in order to
properly assess the recommendation received. The advisor needs to know that his or
her actions establish an advice relationship in order to properly advise the participants,
and to comply with regulatory requirements affecting everything from how a
recommendation is developed, to how the advisor is paid, to what insurance the
advisor needs to have, to whether a prohibited transaction exists for which an
exemption is needed. To protect the interests of plans, participants and IRA owners,
there must be a mutual understanding that fiduciary advice is being provided.

Another significant concern is the Proposal’s alternative to “individualized” advice—advice “specifically directed to” the recipient. A new and undefined term in the Proposal, it is not clear from the regulatory text when something is “specifically directed to” a participant. This is not a minor ambiguity, but a major source of potential confusion. Is a letter addressed to a participant or IRA owner offering a financial product for sale “specifically directed to” that person because it was addressed to that person by name? Should the named recipient of that offering have a reasonable expectation that this is a fiduciary recommendation being made because there is an “understanding” that the recommendation for that financial product was “specifically directed to” the person? Should that reasonable expectation be different if the letter was addressed to the person by name from an existing non-fiduciary service provider to his or her plan rather than by an entity or person with whom the participant had no prior dealings? Participants and IRA owners need to know when they are receiving fiduciary advice and when they are not—no one’s best interests are served when neither party is certain whether fiduciary advice is being given.

Fiduciary status cannot turn on such casual notions as how a letter is addressed—the Department should retain the requirement of a mutual understanding, and should retain the “individualized” standard. The new term “specifically directed to” should be removed from any final regulation in order to prevent confusion by plans, participants and IRA owners.

**Fiduciary Advice Regarding Rollovers and Distributions Must Be Clarified to Resolve Ambiguities about How and When Advice is Given and To Address Unintended Consequences, Such as Inhibiting Efforts to Combat “Leakage”**

By reversing the Department’s previous position that rollover advice is not fiduciary advice, the Proposal creates a series of new questions and concerns for plan sponsors, participants and IRA owners.
First, the broad language would appear to make all rollover and distribution advice fiduciary in nature, including not just plan to IRA rollovers, but IRA to IRA, IRA to plan, and plan to plan transfers. This will significantly inhibit the enrollment activities of plans and plan service providers. For example, many plan enrollment processes for new employees recommend the consolidation of various retirement accounts in the new employer’s plan to prevent so-called “leakage” from qualified plan accounts. Because such advice would now be fiduciary advice, an advisor or company employee could no longer recommend consolidating an account from an IRA or prior plan into the new employer’s plan without conducting a prudent fiduciary analysis of the prior employer’s plan. Given the time, expense and risk associated with such a review, new employees likely will no longer be encouraged to consolidate their accounts, an outcome that appears to be counter to the Department’s goals.

A significant amount of leakage is the direct result of workers “cashing out” of their retirement accounts when changing jobs. A 2011 study by AON Hewitt found that 42% of workers who terminated from employment in 2010 “took a cash distribution...29% left assets in the plan and 29% rolled assets over to a qualified plan. The cashout behavior of terminated employees was greatly influenced by their plan balance, age, and gender.”\(^\text{26}\) Another study estimated that reducing access to financial service providers upon job termination could “increase annual cash outs of retirement savings by an additional $20 – 32 billion...these withdrawals could reduce the ultimate retirement savings of affected individuals by 20 to 40 percent.”\(^\text{27}\) Second, the Proposal offers no additional clarity on whether and under what circumstances a recommendation for a rollover may also be a prohibited transaction. Prior guidance from the Department indicated only that a rollover from the plan recommended by an advisor who is a fiduciary to the plan “may” constitute a prohibited transaction.\(^\text{28}\)

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\(^{27}\) “Access to Call Centers and Broker Dealers and Their Effects on Retirement Savings,” Quantria Strategies, April 9, 2014, at 4.

\(^{28}\) See, Advisory Opinion 2005-23A.
It is also not clear from the proposal whether a prohibited transaction would arise if an advisor recommended a rollover to a participant with whom the advisor had no other connection. The Department should clarify whether and why a prohibited transaction would arise in connection with rollover advice. The prohibited transaction concern is very real due to the structural cost differences between plans and IRAs unrelated to any conflict of interest. Most IRAs are likely to be more expensive than most plans for a simple reason—an IRA offering individualized advice and specialized products and services is fundamentally different than a typical plan serving as an institutional accumulation vehicle with no individual advice and a limited investment menu. The increased IRA cost may be prudent and in the best interest of the participant, but may still present a prohibited transaction to the advisor depending on the circumstances.

Even where there is not necessarily any increased cost, such as a rollover on an equal cost basis, it is not clear whether there is a prohibited transaction under the Proposal. It is also not clear whether a plan to plan rollover gives rise to a prohibited transaction, because the advisor receives no compensation from the prior plan, but does in connection with the current plan. Without clear answers to these issues, we cannot evaluate the full impact of the Proposal, as we do not know when an exemption is needed, or which exemption to apply.

The Proposal should also clarify that following participant direction to set up and operate an IRA is not fiduciary advice—responding to participant inquiries about the availability of rollover services and costs likewise should not be fiduciary advice. We are also very concerned that it is not clear how the broad scope of the Proposal would apply in a participant call center, where discussing a participant’s distribution options, including the provider’s ability to provide rollover services, could be considered advice rather than education under the Proposal. Any fiduciary obligation in connection with a rollover retained in the final rule must have a clearly defined beginning and end point in order to allow service providers to discuss information with participants.
The Education Carve Out Replacing IB 96-1 Will Prevent Plan Education Efforts from Continuing to Successfully Help Participants by Redefining Asset Allocation Models Referencing the Plan’s Investment Options as Fiduciary Advice

Interpretive Bulletin 96-1 ("IB 96-1") has been an essential tool for plans to help participants make informed investment decisions. We note the Proposal builds on this success by expressly permitting education to be provided to plans and IRAs as well as participants. We also believe the expansion of IB 96-1 to include education about retirement income needs, risks and strategies is an important step forward.

However, we are very concerned that the Proposal’s redefinition of asset allocation models that reference the plan’s investment options as fiduciary advice will significantly disrupt plan sponsor efforts to educate their employees and retirees about their investment options. Many plan sponsors encourage their employees to maximize their retirement savings by taking advantage of written and computerized investment education materials customized to their plan, often made available by plan service providers. In almost all cases, these materials provide information about the specific investment options in which plan participants may invest their savings.

Many Chamber members, for example, offer computerized investment models that help participants decide which of the offered funds or vehicles they will invest in by using historic data to demonstrate how their assets might have performed over time in specific funds. Other Chamber members offer plan participants the opportunity to have their investment elections tailored to their investment needs, based on factors such as their current age, target retirement age, and risk tolerance. In other cases, intermediaries help plan participants by reviewing their investment elections to help ensure that participants have selected investments that are appropriately diverse and that match their retirement goals. While plan fiduciaries prepare educational materials for their participants in some cases, many Chamber members outsource investment education to trusted third parties.

29 29 CFR §2509.96-1
The Proposal would upend these attempts to provide investment education, because any party who provides participants with information about specific investment options available in a plan, or information about how they might choose to invest in those options would likely be deemed an investment advisor—and thus an ERISA fiduciary. This represents a sea change from plan sponsors’ current understanding of the “education vs. advice” rules, which allow plans and their service providers to make available such information on a non-fiduciary basis. Under the Proposal, in order to avoid ERISA fiduciary status, plan fiduciaries and investment educators would likely limit their discussions to generic information about asset classes, types of investments, investment expenses, and the like. Not only is this information only minimally helpful, it represents a disservice to retirement plan investors who may not fully understand how the available investments fit into each asset class, and is bound to result in decreased returns in employer-sponsored plan accounts.

The Department provided no evidence that model portfolios have been abused by advisors or have otherwise caused harm to participants during the nearly 20 years IB 96-1 has been available for use. The Preamble merely states that the Department agreed with certain comments to the 2010 proposal that model asset allocations “can be indistinguishable to the average retirement investor from individualized recommendations, regardless of caveats.”

Removing a proven tool to help participants make better investment decisions should require more than a general concern that the disclosures in IB 96-1 may not be clear enough. We recommend that the Department expand the education “carve-out” in any final rule by retaining the provisions of IB 96-1, but adding to them the application of the guidance to plans and IRAs, and discussions of retirement income needs. Forcing participants to “connect the dots” and determine which plan investments match model portfolio asset classes does nothing but decrease the utility of education by making it more difficult for participants to make informed decisions.

We also believe that there are technical drafting errors in the education provision. In Section (b)(6)(ii) of the Proposal, the Department provides that, if certain requirements are met, a person does not become an ERISA fiduciary, but is providing non-fiduciary education, if that person provides or makes available certain information.\footnote{See, 80 Fed. Reg. 21,958.} Unfortunately, that subsection is stated in the conjunctive, such that a person providing investment education has actually provided fiduciary investment advice unless the curriculum constitutes “Information and materials on financial, investment and retirement matters that do not address [certain specific investments and alternatives] and informs [the individual] about (A) general financial concepts . . .; (B) historic differences in rates of return between asset classes . . .; (C) effects of inflation; (D) estimating future retirement income needs; (E) determining investment time horizons; (F) assessing risk tolerance; (G) retirement-related risks . . .; and (H) general methods and strategies for managing assets in retirement . . . including those offered outside the plan or IRA. [Emphasis added]”\footnote{Id.}

By writing this subsection in the conjunctive, all of the listed material must be provided in all investment education materials. Thus, under a strict reading of the Proposal, an individual would be providing fiduciary investment advice, not education, if such individual, for example, omitted information on general methods and strategies for managing retirement assets offered outside the plan. Similarly, an individual would also be an ERISA fiduciary if he or she omitted information about determining investment time horizons from educational materials.

While we do not believe this was the Department’s intent, the language creates confusion for plan sponsors who oversee the delivery of investment education and retirement plan investment advisers offering such education. To confirm that investment education is not required to be an “all-or-nothing” affair, the Department should reframe this subsection to clarify that any or all of the information or materials may be offered as part of a plan sponsor’s investment education curriculum.
• The Platform Carve Out Should Be Revised to Permit Customization of Platforms—A Platform Provider Must, of Necessity, Take Into Account the Individual Needs of the Plan to Respond to Questions and Requests, and Such Responses Are Not and Should Not Be Fiduciary Advice

Many Chamber members use plan platform providers who offer a selection of investment options to their clients as part of their services. Under the current rule, offering these options does not make platform providers ERISA fiduciaries. Indeed, the Department has argued on several occasions that constructing and offering a platform of investment options available to plans is not a fiduciary act. 33 This is rational, because plan fiduciaries, not the platform providers, are responsible for selecting which (if any) of the available options are available for use by plan participants, and plan fiduciaries are also responsible for ongoing monitoring to ensure the prudence of offering those investment options.

However, the “carve-out” for platform providers in Section (b)(3) of the Proposed Regulation is too narrow, because it would make platform providers ERISA fiduciaries if they individualize investment options based on the needs of a plan, its participants, or beneficiaries. 34 It is virtually impossible for a platform provider to respond to the plan without individualizing the response in some manner, but this individualization should not make these responses fiduciary advice under any reasonable interpretation. Plan fiduciaries often ask extensive questions about the platforms, required funds, discretionary funds, share classes, fees, alternative fee arrangements, investment options and other relevant characteristics of the platforms and the investment options in order to carry out their fiduciary duty to prudently select the service provider and investments.

Because platform providers would be deemed ERISA fiduciaries under the Proposal, providers’ compliance costs would increase, which would, in turn, increase plan administration costs and result in lower investment returns or higher direct


34 Id., 80 Fed. Reg. 21,957.
expenses for participants. The Department should expand the plan platform carve-out to ensure that platform providers are not deemed ERISA fiduciaries merely because they offer investment options that are tailored to the needs of a plan, its participants, or its beneficiaries. The Department should also clarify that an annuity contract is a platform.

- **The Employer Carve Out Should Be Modified to Ensure That Employees Are Not Fiduciaries Regardless of Whether Advice is Provided to a “Plan Fiduciary” or Another Employee**

The Chamber notes that the Department recognized the broad definition of fiduciary in the Proposal could result in employees becoming inadvertent fiduciaries. The “carve-out” in Section (b)(2) of the Proposal would exempt from ERISA fiduciary status plan sponsor employees who provide investment advice to “a plan fiduciary” if the employee receives no more than the normal compensation earned for work performed for the plan sponsor. However, the Proposed Regulation does not address customary practices regarding plan administration, such as:

- When an employee (i.e., a human resources manager) provides investment recommendations (such as rollover information) to another employee;

- When an employee explains to another employee (or retiree) the costs and benefits associated with maintaining his or her savings in an employer’s plan, encourages participation in the plan, and recommends consolidating other accounts into the plan; or

- When an employee provides advice to another employee, who then, in turn, passes that advice to the plan fiduciary (an investment committee, for example).

The conversations between employees regarding the employer’s retirement plan should not give rise to fiduciary status for those employees. A literal reading of the Proposal would result in the first employee being an ERISA fiduciary in each instance, because the employee provided the investment “advice” directly to another employee or through an intermediary employee, not directly to the plan fiduciary. We do not believe this was the Department’s intent, and urge that any final rule clarify that no plan sponsor employee becomes an ERISA fiduciary merely because he or she provides advice directly to another employee or indirectly to a plan fiduciary concerning the investment or management of plan assets.

- **Recommendations of Investment Advisors and Managers Should Only Be Fiduciary Advice if Provided as a Specific Service for a Direct Fee**

The Proposal clarifies that a recommendation of a fiduciary providing investment recommendations, rollover recommendations or valuations is itself potentially fiduciary advice. Under Section (a)(1) of the Proposal, such advice would have to be provided for “a fee or other compensation, whether direct or indirect.”

Our members are concerned that a literal reading of the Proposal could result in a service provider receiving its regular fee for existing services becoming an inadvertent fiduciary by offering its opinion about other service providers. For example, a third party administrator (“TPA”) might be asked by the plan fiduciary if the TPA “knows any good advisors.” The TPA is not charging a fee for responding to this question, and its ordinary fees for regular services should not be considered indirect compensation in connection with answering the plan fiduciary’s question. This is a fundamentally different situation than a plan fiduciary specifically engaging a consultant to recommend investment managers for a sleeve of assets in a defined benefit plan.

We are also concerned that a broad reading of the Proposal might treat the offering of investment advice services by the advisor as the advisor recommending itself. This outcome would result in a prohibited transaction for merely offering a fiduciary service. We urge the Department to clarify that offering fiduciary services to
plans, participants or IRA owners is not itself a fiduciary recommendation or, therefore, a prohibited transaction.

We urge the Department to limit fiduciary status to recommendations regarding fiduciary advisors, managers or valuation entities provided as a specific fiduciary service for a direct fee.

- **The Proposal’s Exclusion for Certain Valuations Is Too Narrow, and May Make Fiduciaries of Service Providers Performing Ordinary Functions for the Plan or IRA, Increasing Costs Ultimately Borne by Participants and IRA Owners**

While the Proposal excludes from fiduciary advice ESOP share valuations, valuations provided to collective investment vehicles utilized by multiple unrelated plans, and valuations made solely for certain legally-mandated reporting and disclosure purposes, it does not clearly exclude many common valuations that platform providers and other financial intermediaries must engage in on a daily basis in the ordinary course of providing services to their clients. These administrative valuations are necessary for the regular operation of plans and IRAs, are well outside the scope of those activities generally considered to involve an exercise of discretion, and thus should not be considered fiduciary in nature.

The Proposal’s treatment of valuations implicates (at least) two separate but highly interrelated concerns. The first is the ambiguity of the Proposal’s language, which provides that the furnishing of a statement “similar” to an appraisal or fairness opinion constitutes fiduciary advice. This is a highly subjective reference, and depending on context, could possibly be interpreted as including any number of verbal or written communications as to the value of securities or other property. For purposes of investment transactions, as well as facilitating ordinary plan/IRA transactions such as plan loans and distributions, platform providers, trustees and other financial vendors provide a myriad of communications that, at least in part, must reference the value of plan and IRA assets.
With this in view, the second concern is that these vendors must routinely rely on market quotations and similar calculations made by unrelated third parties, over which they have no control. Of course, while reliance on an investment fund’s published NAV, market valuations as to the securities in an investment account, and similar figures is both consistent with industry practice and generally reliable, these types of calculations are nonetheless subject to occasional human errors. Where a fiduciary relies upon third party information in carrying out its duties, current guidance from the Department imposes upon the fiduciary duties of prudent selection and monitoring of the third party. But to the extent that providing administrative and similar “valuations” could be deemed a fiduciary activity, the platform provider or other vendor has no practical ability to select the source of its information or ensure its veracity in many cases. For example, while the Proposal carves out securities valuations provided to an investment fund, it does not clearly exempt communications to a plan sponsor or IRA owner regarding the value of shares or units of the fund itself. A platform provider or similar vendor cannot be expected to act as a de facto auditor or guarantor of, for example, an unaffiliated investment provider’s valuation practices.

We suspect that this is not, in fact, the Department’s intent. However, the Chamber regards the Proposal’s treatment of valuations as a microcosm of the problems with the Department’s approach in a more general sense – that is, its broad scope creates potential liabilities and landmines for financial intermediaries, but carves out relief only for a few intricately-tailored situations it has identified. With regard to valuations, there are innumerable scenarios in which a platform provider or other financial vendor may make written or verbal communications or representations as to the value of securities and other property in the ordinary course of its business, and where there traditionally has been no expectation that the fiduciary rules are implicated.

Rather than simply excluding certain narrow valuations from fiduciary coverage, we recommend the Department take the inverse approach and instead include as fiduciary valuations only specifically identified valuation activities the Department has found to be problematic or at risk of abuse in its enforcement
efforts, and which involve situations where the provider has been engaged to furnish an appraisal or fairness opinion as a distinct matter, rather than merely as an activity ancillary to general transactions.

- **The Department Should Not Attempt to Exclude from Fiduciary Advice Recommendations for “Low-Fee” Investments**

  The Proposal requests comment regarding whether a simplified exemption should be available for an advisor recommending the “low-fee” option within an asset class. We object to this concept. While cost is a relevant factor in evaluating the prudence of an investment, it should not be the primary or sole consideration regarding whether a recommendation is fiduciary advice.

  This request is not well-grounded: First, simply because an investment has low fees does not mean it is a “good” investment, suitable for the participant, prudent for the participant, or in the participant’s best interest. Most sensible investors would not favor a cheap investment over a more expensive one that yields a better “net of fees” return, and that is just to isolate two variables among many. When viewed from even this narrow standpoint, a “low-fee” exemption is no more logical than a “highest net returns” exemption, which the Department ostensibly has no interest in considering. As the Department has noted in other contexts, fees are simply one factor in a prudent investment decision process, not the determinative factor. For example, in its educational publication for plan fiduciaries, “Meeting Your Fiduciary Responsibilities,” the Department directly instructs fiduciaries that, “Fees are just one of several factors fiduciaries need to consider in deciding on service providers and plan investments.”36 More critically, the Department’s regulation regarding fiduciary investment duties demands that all facts and circumstances the fiduciary “knows or should know” are relevant must be given appropriate consideration.37


37 A fiduciary making investment decisions must give “…appropriate consideration to those facts and circumstances that, given the scope of such fiduciary’s investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved…” 29 CFR §2550.404a-1(b)(1)(6).
focus on fees turns decades of guidance and painstakingly-evolved fiduciary practice on its head.

A separate simplified exemption predicated on nothing more than the fees associated with an offering would incent plan fiduciaries to act contrary to their fiduciary duties by disregarding all facts and circumstances other than fees, including all service and quality considerations, and the role that the investment is intended to play in the overall plan or IRA portfolio. That is, it would likely simply replace one potential conflict of interest with another. And, it would inevitably trespass on the enforcement interests of the SEC and FINRA by providing a clear financial incentive (avoiding fiduciary liability, compliance with the conditions of other exemptions, etc.) to recommend the use of cheap investments regardless of whether such recommendations would be consistent with their fiduciary duties under the Investment Advisers Act (for RIAs) or suitability requirements (for broker-dealers).

Moreover, while we recognize that the Department has only requested comments on this concept, actually putting such an exemption into practice would be unworkable in the real world. For example, how does one define a “high quality” low-fee investment, in light of innumerable differences in services, liquidity, stability of the offering organization, etc.? How does one define “low-fee”? What if an investment vehicle has a multi-tier fee structure such that the total fee may be influenced by gains or subsequent additions? How would investment fees within a group variable annuity structure be compared to other products? The practical issues are endless.

Likely having recognized the futility (and danger) of such an approach, other regulators with far more expertise as to the financial markets, including the SEC and FINRA, have not attempted to recognize any class of investments that are purportedly such “safe and well-performing bargain buys” such that recommending them does not require the ordinary standard of care to be observed. Granting an exemption for “low-fee” investments would be a significant departure from the
Department’s traditional role of promoting sound fiduciary processes and ensuring that fiduciaries and plan participants are provided with the information they need to make informed decisions for their own individual circumstances. The Department has neither the expertise nor the authority to make such policy decisions. The Chamber recognizes that there is no “one-size-fits-all” answer to the investment question for ERISA plans, participants and IRA owners, and we urge the Department to recognize the same and act accordingly.

• Responding to an RFP Should Not Be Fiduciary Advice

Often in response to a Request for Proposal (RFP) or similar request, plans will ask service providers to discuss the investments available to the plan or to otherwise describe their services in ways that could be construed under a broad reading of the Proposal to provide fiduciary advice. The Department should clarify that a recommendation made in the context of responding to an RFP issued by, or on behalf of, the plan sponsor should not be considered fiduciary in nature.

While, as discussed above, the Proposal does recognize a carve-out for platform providers, it is limited to the marketing of platforms “without regard to the individualized needs of the plan…” This suggests that no meaningful discussion of individualized services or investments may take place without becoming a fiduciary. However, when marketing its services to the plan, the platform provider quite likely must discuss how its services would meet the individual needs of the plan outlined in the RFP. The seller’s carve-out provides relief, but it is not available for small plans. A broad reading of the rule suggests that providers would probably be able to respond to large plan RFPs and speak freely as to how their abilities would satisfy the plan’s needs, but most providers would not be able to recommend their services to small plans in the same way without the risk of becoming fiduciaries.

We will not repeat our concerns about the discriminatory effect on small plans of the limited seller’s carve out. However, we will point out that, despite the Department’s stated goal of balancing investor protections with preserving ordinary business norms, the Proposal offers no avenue whatsoever for a party
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"recommending" many services to a small plan to escape fiduciary status, regardless of how clearly or fervently that party might disclose that he or she is acting in sales capacity.

If service providers, particularly in the small plan space, are unable to have meaningful discussions with plan fiduciaries about individualized services and investment issues in response to an RFP, they can be expected to respond to RFPs with only the most boilerplate documents. This will frustrate the Department’s intention by making it much more difficult for small plan sponsors to make prudent choices as to providers.

Many of our member employers are small plan sponsors who take their fiduciary obligations very seriously, and are certainly qualified to distinguish between fiduciary advice and sales interactions. And there is hardly a more clear case of a “sales interaction” than a candidate’s response to an RFP, where it has been specifically requested to “pitch” its business. We would point out that, even under the seller’s carve-out, the precise contours of relief where a vendor “sells itself” via an RFP response are not well-defined. Accordingly, the Chamber requests that the Department consider adding a clear, objective exclusion from fiduciary advice for any provider responding to an RFP or similar request.

- The Proposal Should Not Apply To Insurance Contract Sales to Welfare Benefit Plans.

The Proposed Regulation should not apply to insurance contract sales to welfare benefit plans such as dental, disability and group life insurance plans. While the Proposal is clearly directed at, and applicable to ERISA retirement plans, plan participants, and IRAs, the Proposal does not appear to analyze or even consider sales to welfare benefit plans. This is evidenced by the Department’s economic impact study which was exclusively devoted to retirement plans and IRAs, but did not consider or even mention welfare benefit plans. In light of the fact that the practical need or application of this proposed rule to welfare benefit plans and their fiduciaries was never analyzed or considered, the Chamber asks the Department to clarify that
insurance contract sales to or through welfare benefit plans are outside the scope of the Proposal.

It should also be noted that the fee arrangements, marketing practices, sales and distribution, and types of products used by financial companies for sales to welfare plans are fundamentally different from those used in the pension plan market and therefore warrant different treatment and requirements. To readily apply the Proposal to sales to welfare benefit plans without any type of study or analysis, and without considering welfare benefit plans in the Department’s economic impact study, could result in unintended negative consequences to welfare benefit plans, and to participants and beneficiaries. This could include limiting the types and availability of insurance products sold to welfare benefit plans, as well as increased administrative and insurance product costs passed on to those plans and participants. Any proposed regulation should not even be considered without a comprehensive analysis and a thorough economic impact study by the Department. Many of these plans and arrangements are fairly complex, and it would require a significant amount of time and resources for the Department to appropriately consider the impact on these plans, products and arrangements.

We appreciate statements by Department officials in meetings with various groups, including the Chamber, that the Department did not intend to cover these contracts issued to welfare benefit plans in the scope of the Proposal. However, to ensure there is no confusion, and to prevent potential future litigation on what may be perceived as an ambiguity, we request that any final rule expressly exclude such contracts.

- **The Proposal Should Apply the New Fiduciary Standard Prospectively—Current Advice Relationships Should Be Converted Upon Renewal, Not in Mid-Term**

Plans, participants and IRA owners have entered into millions of agreements with advisors. The Proposal would drastically affect every one of those contracts, denying plans, participants and IRA owners the benefits of the agreements they made.
We question the legality of retroactively invalidating the terms of such existing contracts, all of which were legally negotiated and executed in a manner fully consistent with Federal and State laws. On the effective date of any final rule, the new fiduciary definition should be applicable only to new arrangements entered into on or after that date. It should not apply to existing arrangements until they are renewed.

BICE currently provides in Section VII(b)(3) that eligible existing arrangements are exempted from a prohibited transaction only so long as no additional advice is provided after the effective date. This provision does a disservice to participants and IRA owners. First, in many cases, customers have paid an initial sales charge for which they purchased advice to be provided over the term of the agreement. The BICE provision deprives these IRA owners or participants of advice for which they have already paid—if they require additional advice after the effective date of any final rule, they will be forced to adopt a new agreement. Second, it creates an incentive for advisors to refrain from offering advice to existing arrangements—in other words, it creates a new potential conflict of interest. Clearly, this is not in the best interest of the participant or IRA owner.

Further, it makes no sense to address existing relationships through BICE. The limited definition of “asset” in BICE would result in the application of the transition rule based on an asset-by-asset basis, rather than on an account-by-account basis. The same existing account could hold assets covered by BICE and assets not covered—how would the transition rule apply to that account? Further, existing arrangements are not prohibited transactions requiring a retroactive exemption—they are legal and valid contracts appropriately providing investment services under existing law. If the Department changes the regulations in a final rule, it should address the transition between the current legal standard and the new legal standard in the language establishing the effective date of the new standard. Specifically, any final rule should state that the new standard is effective for all arrangements entered into or renewed after the effective date.
Specific Comments Regarding the Proposed Best Interest Contract Exemption

The Chamber is very concerned that the Proposal creates new prohibited transactions for which the BICE proposed class exemption appears to be the only available exemption. As we discussed above, we are concerned about the negative impact of the Proposal on services and investments available to small plans, and the exclusion of advice to plans under BICE is another aspect of that concern. While BICE does apply to IRA owners, it is not clear how BICE applies to SEP and SIMPLE IRA plans offered by an employer. Further, as discussed above, we believe some of the conditions proposed in BICE exceed the Department’s regulatory authority. Most significantly, we are concerned that BICE simply does not work as proposed, as the conditions are impractical and expose advisors to significant legal liabilities despite good faith efforts to comply. The Department may intend BICE to be a flexible exemption to ERISA’s prohibited transaction rules that preserves a wide range of business practices, and it rhetorically supports a “best interest” standard which protects retirement investors while accommodating the business objectives of firms providing investment advice.38 As proposed, however, the exemption is flawed in concept and unworkable in practice. If the Department seeks to implement a standards-based exemption, it should eliminate the many conditions and instead articulate a broad “best interest” principle and safe harbor.

In addition to these major concerns, there are many additional reasons that BICE is not a practical solution serving the needs of participants and IRA owners. If a BICE agreement must be signed before any meaningful discussions can occur with a participant or IRA owner, the process of getting and signing necessary paperwork will be cumbersome and will disincent some participants to get needed advice. There should be no need for any paperwork until a transaction involving the advice will take place, and BICE should provide retroactive relief regarding the discussions leading up to the transaction. The BICE agreement also does not take into account that some

38 In this regard, we believe the Department should clarify that putting the clients’ interests first satisfies the requirement to act “without regard” to an adviser’s or firm’s compensation. Such a change would avoid any potential confusion as to the ability of a for-profit firm to meet the standard.
IRA providers directly contract with the IRA owner—the advisor doesn’t have an agreement with the IRA owner.

- **The Required Warranties and Representations are Subjective and Will Unnecessarily Expose Advisors and Financial Institutions to Litigation Risk—Resulting in Higher Costs and Fewer Advisor Choices for Participants and IRA Owners—Unless Safe Harbors or Objective Standards Are Provided.**

The Chamber is extremely concerned about the contractual and warranty provisions in BICE, and the chilling effect they are likely to have on the availability of advice to participants and IRA owners, due to concerns over potential liability. A principles-based approach results in ambiguity as to whether the conditions of the exemption are met, and would result in class action lawsuits in state courts over these ambiguities. Our objections encompass both the Department’s general approach as to the exemption, as well as certain particulars.

As noted previously, Congress excluded IRAs from ERISA entirely. For ERISA plan participants, Congress established a specific set of remedies within ERISA to address grievances, which have been held in many contexts (and by courts in all Federal circuits) to preempt state law causes of action. In short, there was no intent by Congress that the Department impose conduct standards with respect to IRAs, or that it supplant ERISA remedies in the plan context, and in fact, the Department would be prohibited from doing either one directly.

The Chamber is alarmed that the Department’s approach to these jurisdictional limitations appears to one of be simple circumvention through sleight of hand. In particular, having abruptly decreed through the Proposal that long-standing industry practices as to IRA advisor compensation would become illegal in a convoluted and roundabout fashion (that is, through interpreting the prohibited transaction rules in the Code), the Department then purports to offer “relief” through BICE that would be conditioned upon forced liability exposure under state laws. We will not repeat our
earlier concerns about regulatory overreach – rather, our intention is to provide background as to specific objections regarding the Department’s approach.

Specifically, the contractual and warranty provisions of BICE make juries in all fifty states the Department’s de facto “policemen” to enforce a fiduciary-like conduct standard for IRAs—a standard for which the Department has no authority in the first place. This is not to impugn the state courts in any way, but merely to point out that advisors would become subject to new and untold theories of liability under State laws, separate and apart from the well-established and considered rules and conduct standards issued by regulators and Federal agencies having expertise and traditional involvement with the regulation of advisors, such as the SEC and FINRA. Advisors could be haled into any State court in which an IRA owner resides to respond to an individual or class action claim, irrespective of whether their conduct satisfied their obligations under SEC and FINRA rules.

While the Chamber is concerned that the Department’s course of action effectively would strip away much of the enforcement authority from the agencies most qualified to provide it, the problem is further exacerbated by the lack of objective guidelines in the exemption. While the Chamber understands the Department’s motivation in applying a principles-based approach, BICE represents a radical departure from the objective, common-sense framework observed with respect to all other class exemptions. At a high level, the principles-based approach of BICE simply does not work where a good faith effort to make a representation or warranty is inherently subjective and exposes the advisor and financial institution to a State-law based class action over its interpretation of the subjective requirement. Accordingly, the Department should either provide objective standards for compliance, or establish clear safe harbors for a range of conduct permitted under BICE.

For example, while BICE permits variable compensation related to the “neutral factor” of the amount of time involved in recommending one type of investment over another, this determination is inherently subjective. The financial institution and advisor could be exposed to a class action lawsuit disputing the amount of time they determined was an appropriate for the fee differential, absent a safe harbor in BICE.
This type of subjective consideration is simply unworkable in practical terms. And this is only one example – other highly subjective requirements under BICE, upon which State court interpretations could differ enormously (and regardless of SEC and FINRA standards), include the financial institution’s warranty as to its policies and procedures to mitigate conflicts of interest, and contractual representations that compensation will not exceed a “reasonable” level. If the market for financial assistance to small plans, participants and IRA holders is to be protected (as to both availability and reasonable cost), compliance with BICE needs to be predicated on objective factors, not guesswork.

- **The Limitations on Eligible Assets are Unnecessary Given the General Level Fee Requirement and Serve Only to Restrict Choices for IRA holders.**

   BICE relief is not available for advice regarding asset classes and investments not listed under the definition of “asset,” or for discretionary advice. The Chamber believes that asset class limitations are inappropriate for several reasons.

   To begin with, and for reasons previously stated, the Chamber does not believe it is within the Department’s proper scope of authority to actively exclude plans, participants and IRA holders from access to advice about certain investment products, while permitting access to others, based upon the Department’s own preferences. Due to the breadth of the proposal, BICE is likely the only avenue available for many transactions, and it should therefore offer adequate flexibility to permit plan participants and IRA owners to invest in whatever products they deem desirable for their own personal needs and goals. We recognize, of course, that many granted exemptions are limited to certain types of investment vehicles – for example, there are several exemptions available only to mutual funds, or to insurance products. But these exemptions are intended to address specific and narrow issues to ensure these products are available to plans and participants, not to prevent access to them. BICE’s limitations exclude entire asset classes and types of investment vehicles even where they are offered by unaffiliated third parties, and thus are in no way different than the investments on the “approved list.”
Given the structure of BICE, the advisor can have no incentive with regard to any particular asset class and thus there is no rationale for restricting investments in any asset classes otherwise open to plans and IRAs. And again, there is no legal basis or rationale for the Department to seek to limit the available investments in plans and IRAs beyond those permitted by law. In fact, the narrow application of the asset definition is BICE is exactly contrary to the Department’s stated intentions in crafting the exemption. In the Preamble to BICE, the Department writes, “Rather than create a set of highly prescriptive transaction-specific exemptions...the proposed exemption would flexibly accommodate a wide range of current business practices...The Department has [taken] a standards-based approach...”39 The asset definition, by contrast, applies rigidly with no flexibility—an asset is either on the list, or not.

This list-based approach also undermines the Department’s consistent position of nearly 40 years that it rejected the old-fashioned trust law standard of “legal lists” to embrace modern portfolio theory. In adopting its regulations governing the prudent investment process, the Department wrote that it,”...does not consider it appropriate to include in the regulation any list of investments, classes of investments, or investment techniques...no such list could be complete; moreover, the Department does not intend to create or suggest a ‘legal list’ of investments for plan fiduciaries.”40 In effect, through the asset definition in BICE, the Department is substituting its own judgment—on a one-size-fits-all basis—for the professional, impartial, and individualized decisions of financial advisors.

Likewise, by excluding discretionary asset management altogether, the BICE agreement may make it impossible for rollovers to managed accounts to take place, where such rollovers are prohibited transactions despite being prudent and in the best interest of the participants and IRA owners. Thousands of investors prefer professionally managed accounts to non-discretionary advice arrangements, and the need to preserve their availability to select these services is of paramount importance.

39 80 Fed. Reg. at 21,961
40 44 Fed. Reg. 31,639 (June 1, 1979).
We are frankly perplexed by the Department’s position on this issue—an advisor utilizing BICE could not discuss an asset not on the list no matter how much doing so might be in the best interest of his or her clients. Does the Department see the inherent contradiction in a rule that purports to prevent conflicts that could cause an advisor to act against your best interest while simultaneously prohibiting the advisor from acting in your best interest? For these reasons, we recommend that any final exemption should apply without regard to asset class limitations, and that reasonable exemptive relief for discretionary account management be included.

However, if the Department retains this narrow view of permissible assets, it must include on the list a number of important investments. In the Preamble to BICE, the Department indicates that it selected assets that are “commonly purchased” by retirement plans and IRAs, and suggested the listed assets should contribute to a “basic diversified portfolio” with investments that are “relatively transparent and liquid,” though it did not require a “ready market price” for inclusion. Among the assets types that should be considered for inclusion on this basis (this is not a complete list) are publicly registered, non-listed real estate investment trusts (“NL REITs”), publicly registered, non-listed business development companies (“NL BDCs”), other direct placement products and discretionary managed accounts. These currently hold billions in retirement assets, contribute to a diversified portfolio, and are relatively transparent and liquid.

- **BICE Disclosures Are Too Expensive and Difficult to Achieve for Many Service Arrangements, and Likely Conflict with Securities Laws**

The prospective and retrospective disclosures in BICE require data to be collected, provided and manipulated in ways that, in a number of instances, simply will not be possible depending on the arrangements between plans and service

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41 80 Fed. Reg. 21,968
42 Id.
43 See, Comment letters from the Investment Program Association (“IPA”) and the PNLR Council of the National Association of Real Estate Investment Trusts (“NAREIT”) for additional data and investment information about NL REITs and their role in IRAs.
providers. We are also concerned that the disclosures would require the projection of future investment performance to calculate future investment costs for fee-based advisors in ways that are not permitted under securities laws and regulations.

Specifically, while we do not intend to summarize all of the data collection, manipulation, disclosure and recordkeeping responsibilities that would be imposed under BICE, the astonishing and unprecedented scale of these disclosures will certainly result in massive information technology and compliance costs that will ultimately be passed through to plan participants and IRA owners. Whatever value may be provided through enhanced disclosures can be achieved through far less expensive means—rather than the most efficient approach, the Department here has proposed what may be the least efficient approach. Moreover, the Chamber is deeply concerned that this level of administrative complication and expense will invariably discriminate against smaller and “Main Street” advisors that simply cannot comply with the requirements as they do not control the data involved. The Chamber counts among its membership many advisors of all different sizes, and we support a level playing field. Further, these Main Street advisors serve many of our small business members’ plans, and increases in cost or reductions in services do not serve the interests of these plans and participants.

Demonstrating our concern that the Department has not sufficiently coordinated its efforts with the SEC and other regulations, we believe that the requirement to project future costs on the basis of reasonable return expectations likely conflicts with certain securities laws. The practice of projecting investment returns is not permitted in many other contexts precisely because it can be misleading and unreliable. Projecting investment returns, particularly over the long-term, is speculative, and lends itself to potential abuse. Further, the cost projections based upon the return projections, particularly those made ten years into the future, will likewise be speculative and inaccurate, calling into question what value they provide.

For all these reasons, instead of numerous, complex and expensive individualized disclosures, we recommend that the final exemption allow for more generalized disclosures regarding provider fees and costs, such as meaningful
information about the impact of fees on retirement accounts. For example, a sample illustration of the effect of fees over time would provide the same value for most participants and IRA owners as prospective disclosures without imposing inaccurate projection risks and significant costs ultimately borne by these participants and IRA owners. On balance, we do not believe that those participants and IRA owners who evaluate the fees and costs associated with their retirement accounts (who, of course, are the only individuals who will benefit from any disclosure) will derive materially more value from lengthy and complicated disclosure documents, website reports, etc. than they would from simple, example-based disclosures. It seems even more likely that they would not derive enough additional value to justify the costs of the proposed exemption.

- **BICE Unreasonably Restricts Limited Investment Menus and Proprietary Products**

  While BICE recognizes that some IRA providers utilize exclusive arrangements with agents or employees to distribute only proprietary products and limited investment options, it may not be possible for some of these providers to safely make the findings necessary to permit these arrangements under the current terms of the proposed exemption. For example, if a bank offered only IRAs investing in CDs and Money Market accounts, BICE may effectively prevent that bank from offering rollovers at all if it needs relief from the prohibited transaction rules. The ambiguity is whether, despite its ability to adhere to BICE otherwise, and despite the IRA owner’s desire to use the bank for the rollover, the sole fact that the bank only offers such a limited menu (while other institutions offer more choices) means that it could not conclude that its recommendations would satisfy the “best interest” and “sole interest” requirements. We do not believe this is a logical or sensible result, as presumably almost all institutions will have some such limitations to a greater or lesser degree.

  The exemption should be clarified to ensure that, subject to the institution’s obligations to disclose the nature of limitations on the range of products and/or services offered, the IRA owner could still select the institution, and the institution
would not lose its eligibility to rely on BICE where the remaining requirements can be satisfied, solely on the basis of limited and/or proprietary products.

- **Compensation Limitations and Benefits for Insurance Agent Statutory Employees**

  Many of our member insurers have long employed agents who are statutory employees. Such employees typically earn health and other employee benefits based on certain minimum production thresholds. However, the broad compensation limits in BICE could arguably affect the employee benefits of statutory employees.

  The Department must specifically amend BICE to permit statutory employees to receive employee benefits by excluding those benefits from the compensation limits. The employee benefits earned by statutory employees do not incent agents with respect to any particular transaction. Retirement benefits are unrealized until many years in the future, and the value of welfare benefits are uncertain, depending on unpredictable future events. These plan benefits are simply different in kind and should be treated as such.

  One of the Department’s fundamental responsibilities is to expand the availability of employee benefits to workers. We do not believe the Department intended to deprive these employees of their benefits, and we do not believe these common and long-standing employment relationships are the kind of conflicts the Department intended to address in the Proposal and in BICE.

**Specific Comments Regarding the Proposed Amendment to PTE 84-24**

The Chamber is concerned that the Department’s proposed amendment to PTE 84-24 will unnecessarily disrupt efforts to provide annuity products to IRA owners and plans. Though the Department seeks to distinguish individual variable annuities as securitized products to be made available under BICE from other annuity products made available under PTE 84-24, this separation makes no sense, given that all of these products provide guaranteed income. An IRA owner needs to be able to
compare guaranteed income options on an “apples to apples” basis, but the effect of the amendment to PTE 84-24 is the he or she will get different disclosures that are not readily comparable for what appear to him or her to be similar products. Rather than making advisors operate under two very different exemptive regimes with two very different compliance processes that will serve only to confuse individuals, the Department should allow all products to be provided under PTE 84-24.

- The Amendments to PTE 84-24 Are Unwarranted and Will Unnecessarily Complicate the Provision of Annuity Products to the Detriment of Plans and IRA Owners

PTCE 84-24 currently provides an exemption for certain prohibited transactions that occur when plans or IRAs purchase an annuity product. The exemption permits a company that is a party in interest to a plan or IRA to sell annuity products to those retirement plans, and for salespeople, brokers, and consultants that are parties in interest or fiduciaries with respect to plans or IRAs to receive a commission. The exemption requires disclosure to the plan or IRA of the relationship of the salesperson, broker, or consultant to the company, and the sales commission to be paid pursuant to the sale. The exemption also requires disclosure and a description of any charges, fees, discounts, penalties or adjustments which may be imposed under the annuity contract in connection with the purchase, holding, exchange, termination or sale of the contract. The exemption prohibits the company, salesperson, broker and consultant from holding certain fiduciary positions regarding the plan or IRA, such as being authorized in writing to have discretionary authority and control over plan or IRA assets. Prior to the execution of the sale of an annuity product, and after all the required disclosures have been made, a fiduciary independent of the company, salesperson, broker, or consultant must acknowledge in writing receipt of the disclosed information, and approve the transaction on behalf of the plan or IRA.
The exemption, and the predecessor exemption it expanded and replaced, has been in effect since 1977, and has been effectively utilized since then by sellers and purchasers of annuity products.\textsuperscript{44} PTE 84-24 provides a significant amount of protection, information and disclosures to purchasers of annuity products, and is one of the most comprehensive and effectively utilized PTEs. The Chamber is not aware of any annuity customer complaints or concerns regarding the utilization and application of PTE 84-24, or of any inquiries or investigations into PTE 84-24 abuses. Despite this, the Department is proposing significant, unwarranted changes to PTE 84-24.

Specifically, the Chamber objects to the proposal to remove purchase of IRAs or variable annuities within IRAs from PTE 84-24, and to have these annuity sales covered exclusively under BICE. All annuities have been covered under PTE 84-24 since 1977. The changes brought about by the proposed amendment will create a significant amount of confusion and uncertainty in the annuity sales marketplace for plan sponsors, plan fiduciaries, IRA holders as well as salespeople, brokers and consultants who have always relied on one exemption to cover all annuity product sales.

The Chamber sees no rationale or justification for the Department to require that annuity products use two separate and distinct exemptions. Thus, the Chamber requests removal of Section I(b) of the exemption which states that PTE 84-24 should not apply to the purchase by an IRA of a variable annuity contract or another annuity contract that is a security under the securities law. There is no justification or rationale for treating annuity products differently, whether or not the annuity is deemed a security. For example, there are annuity products that contain both fixed and variable annuity features,\textsuperscript{45} and it makes no sense for this product to have to rely on two separate exemptions with different conditions and requirements.

\textsuperscript{44} PTE 84-24 amended and superseded PTE 77-9, expanding its scope.

\textsuperscript{45} See, IRS PLRs 201519001 and 201515001.
The Department is well aware of the importance of annuity products for the attainment of retirement security by plan participants and IRA holders, and the importance of annuity products offering a lifetime income option. Therefore, any proposal that could hinder annuity purchases and cause confusion by requiring annuity products to use different exemptions, with different requirements and conditions, is unwarranted.

The Department is also proposing to amend PTE 84-24 by adding Section II, the “Impartial Conduct Standard.” Again, it’s our position that PTE 84-24 has been utilized effectively since 1977 and has provided significant and sufficient protections to annuity product purchasers, and does not need to be changed. The “Impartial Conduct Standard” standard is, in essence, the ERISA prudent man standard. There is no reason to apply a slightly different formulation of the ERISA standard in PTE 84-24 because the fiduciaries to these plans must already comply with the ERISA prudence standard. Adding the Impartial Conduct Standard both confuses the applicable standard of care by using slightly different words and creates a prohibited transaction for a fiduciary breach. This is not what Congress intended—a fiduciary breach does not automatically trigger a prohibited transaction in most other ERISA contexts. We believe the approach best protective of the interests of annuity consumers is to remove the Impartial Conduct Standard in light of the ERISA fiduciary standard already applicable. Alternatively, we request that the Department explicitly and exclusively reference the prudent man standard in ERISA §404(a)(1)(B) in lieu of the alternative formulation.

- The Department Should Clarify Certain Ambiguities in PTE 84-24

The Chamber believes the new terms in the proposed amendment raise questions about how the exemption would apply in practice. For example, the proposal would replace the term “sales commission” with “Insurance Commission,” which is the sales commission paid by the insurer or an affiliate to the agent, broker or consultant for effecting the sale of an annuity contract, including renewal fees and
trailers, but not revenue sharing payments, administrative fees or marketing payments, or payments from parties other than the insurer and affiliates.

The current PTE 84-24 “sales commission” disclosure definition has been in effect since 1977, and was drafted to take into account common commission and compensation payment practices. The Chamber requests further guidance and clarification on the definition of “Insurance Commission”.

For example, some commissions are paid as overrides or gross dealer concessions to someone that oversees the agent working directly with the customer. These are often not referred to as “commissions” and are management payments for overseeing the purchase or sale of the annuity—are they addressed by the definition change? Further, as discussed above, some insurers have salespeople that are statutory law employees who receive employee benefits and other compensation separate from the “commission” received. The Chamber seeks clarification that these payment practices can continue and do not require disclosure as “insurance commissions.” Also regarding Insurance Commissions, PTE 84-24 permits the purchase with plan assets of an annuity contract from the insurer, even if the insurer is a party in interest to the plan. The Chamber seeks confirmation that 84-24 continues to cover the sale of the insurer’s proprietary products.

**Specific Comments Regarding the Proposed Amendment to PTE 77-4**

The Department’s proposed amendment of PTE 77-4 would, among other things, clarify that the exemption applies to non-discretionary advice. However, the proposed amendment did not adopt a provision modifying the affirmative consent requirement when fees in the recommended investments change. The Department has commonly waived this affirmative consent requirement in subsequent individual exemptions addressing fees and other matters in favor of “negative consent” where notice of a change is provided but the plan is deemed to have consented by not
responding to the notice.\textsuperscript{46} We ask that the Department acknowledge this change made in individual exemptions, and use the opportunity to modify the class exemption accordingly. The affirmative consent requirement is unreasonable, and negative consent has been increasingly used by the Department in circumstances where affirmative consent is not practical.

\textbf{The Eight Month Implementation Period Is Unreasonable and Impossible—It Must Be Significantly Extended}

As the Department notes in the Proposal, making applicable the requirements of any final rule eight months after publication of a final rule would be challenging. It would not simply be challenging—the reality is that it would be impossible. In particular, the significant information technology systems changes that will be required to meet the many conditions — if modified in workable way — of BICE and other parts of any final rule would require significantly more than eight months. As the Department is well aware, modifying or implementing new IT systems is a long and tenuous process. Not only is there a bidding process, but once a contractor is identified, several other phases are required to seamlessly integrate the new requirements, including systems design, implementation, testing and finalization. The Department’s own implementation of the EFAST2 system required roughly three years for the existing system to be modified and fully functional to accept electronic filings. Therefore, given the magnitude of changes of the Proposal, we respectfully request that DOL extend the implementation timeframe for the entire rule, including all exemptions, to three years. Providing any less time, would force service providers to rush through implementation and risk failing to comply with new requirements.

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Conclusion

As 90 days is not enough time to fully understand and address the ramifications of a regulatory package of this magnitude, we hope to work with the Department to determine how best to protect workers and retirees going forward. We ask that the record remain open for additional comments following the expiration of the formal comment period, and that the Department agrees to consider such additional comments as it receives.

For all of the reasons stated above, we are very concerned that the Proposal will not achieve the Department’s goals of better protecting workers and retirees, but will instead make it harder for our members and their employees to access financial advice. Changes are essential if a final rule and any final exemptions are to be promulgated.

The Chamber would appreciate the opportunity to discuss these comments in more detail at the Department’s convenience, and we thank you for the opportunity to comment on this very significant rulemaking.

Sincerely,

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President  
Center for Capital Markets Competiveness

Randal Johnson  
Senior Vice President  
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