Bank of America

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
122 C Street N.W., Suite 400
Washington, DC 20001

RE: *Proposed Definition of the Term "Fiduciary"; Conflicts of Interest Rule – Retirement Advice (RIN 1210-AB32)*
Proposed Best Interest Contract Exemption (ZRIN: 1210-ZA25)
Proposed Class Exemption for Principal Transactions in Certain Debt Securities (ZRIN: 1210-ZA25)
Proposed Amendments to Various Exemptions (ZRIN: 1210-ZA25)

Dear Ladies and Gentleman:

Bank of America[1] appreciates the opportunity to submit this letter in response to the Department of Labor's request for comments on the proposed *Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice*, and the related proposed prohibited transaction exemptions and proposed amendments to prohibited transaction exemptions.[2] We hope that the Department finds our comments helpful and constructive.

Bank of America, through its Merrill Lynch Pierce Fenner & Smith Incorporated subsidiary and its consumer bank, Bank of America, N.A., administers 3.8 million IRA accounts holding $430 billion for a diverse group of retirement investors. Our clients range

[1] Bank of America Corporation is one of the world's largest financial institutions, serving its clients with a full range of banking, investing, asset management and other financial and risk management products and services. It is among the world's leading wealth management companies. Of particular note for purposes of this letter is that Bank of America Corporation and/or its affiliates are registered as both broker-dealers and investment advisers.

[2] Definition of "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice; Proposed Rule (Fiduciary Proposal) 80 Fed. Reg. 21, 928, et seq. (proposed Apr. 20, 2015).

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from small balance savers to ultra high net worth investors, with widely divergent financial circumstances, retirement goals, and investment strategies. Bank of America seeks to meet the needs of these investors with an array of IRA services and products, from self-directed "no advice" brokerage to discretionary investment management, with differing levels of advice, types of investable assets, and fee arrangements. Bank of America also has one of the largest institutional retirement businesses in the United States, providing 401(k) plan administration and related services to more than 34,000 defined contribution plans covering over 3.7 million plan participants, with close to $200 billion in plan assets. In addition, through its Global Banking and Global Markets businesses, Bank of America provides products and services to institutional investors, including pension funds.

Bank of America supports the fundamental objective of the Department's proposed rule: to hold Advisors to a "best interest" standard when they provide personalized investment advice to IRA account holders. While we believe the current draft of the rule overreaches in several important areas, in one respect it does not go far enough: retail investors should get the benefit of an enforceable best interest standard whenever they receive personalized investment advice, whether from broker-dealers or investment advisers and for all accounts, not just IRAs. Bank of America has long supported a "harmonized" best interest standard, with consistent rules for all advisers providing personalized investment advice, to all retail clients, in any account.[3]

We recognize the limits of the Department's jurisdiction and that seamless cooperation among regulators is difficult, particularly when they operate under different statutory regimes. But, the Department, the SEC, FINRA and other regulators must make their standards and rules as consistent as possible in practice. As noted below, we are encouraged by recent examples of regulatory consistency in this area. For example, FINRA's recent guidance on IRA rollover conversations arises out of a "suitability" standard but should satisfy the Department's fiduciary best interest standard as well.[4] We believe the Best Interest Contract exemption could provide a framework for the Department to import existing rules from the SEC, FINRA and other regulators. This approach would bring efficiency and consistency to the best interest project, and facilitate much faster implementation of the rule.

As currently drafted, however, the proposed rule has the potential to create an additional set of requirements that are inconsistent with existing investor protections and

[3] Letter from R. Scott Henderson, Deputy General Counsel, Bank of America to Elizabeth M. Murphy, Sec.'y, U.S. Sec. and Exch. Comm'n (Aug. 30, 2010) (addressing comments on File No. 4-606: Study Regarding Obligations of Brokers, Dealers, and Investment Advisers). We note that the primary "harm" to investors identified by the SEC study was confusion over different standards attached to advice from broker-dealers and investment advisors. Without close coordination among regulators, the proliferation of standards would exacerbate investor confusion.

[4] FINRA Regulatory Notice 13-45, "Rollovers to Individual Retirement Accounts", (December 2013). We believe that the final Rule should acknowledge that FINRA's guidance on this point contains all the elements required to meet a "best interest" standard. Similarly, we support the Department's adoption of FINRA's guidance on "recommendation," including NASD NTM 01-23 and FINRA RNs 12-55, 12-25, and 11-02.

likely to increase investors' costs, limit their choices, and cause them greater confusion. We have three major concerns about the rule in its current form:

- It would eliminate whole categories of investments that many investors want and need to meet their retirements goals;
- Many of its requirements – notably, in the Best Interest Contract exemption – would be unworkable in practice, highly burdensome and expensive, and of little or no benefit to retirement investors; and,
- As a consequence, it would cause Advisor firms to exit the commission brokerage business, depriving investors of a choice about how to pay for investment advice, and effectively reducing the availability and increasing the costs of personalized investment advice.

We believe that the Department can resolve all of these concerns and still meet our shared objective of promoting and protecting retirement savings through an enforceable best interest standard.

1. <u>The Rule Should Preserve Investors' Choices</u>

The BIC Exemption and the Principal Transactions Exemption effectively prohibit investments in many types of assets that our clients want and need to meet their investment objectives. The Department states that the assets "needed to build a basic diversified portfolio" would still be available, including assets that are "relatively transparent and liquid".[5] But, "basic" portfolios are not sufficient to meet many investors' retirement goals, especially investors with substantial net worth.

Although we do not agree that only "liquid" assets can be appropriate investments for retirement, we note that the proposed exemptions would exclude a number of them. For example, the BIC Exemption's definition of "Assets" excludes listed equity options, which trade on highly liquid and transparent markets, and which are important tools to diversify the risks of concentrated equity portfolios. The Principal Trading Exemption permits only three types of bonds and excludes assets which typically trade on a principal basis such as brokered certificates of deposit, preferred shares, and equity and debt new issues -- all typically transparent and liquid assets, which may have an important role in some clients' diversified portfolios.

We recognize these types of investments are not for everyone, but they are right for some investors. Existing regulatory requirements and internal policies, procedures and resources are already in place to ensure that these and other complex products are recommended only to appropriate investors for appropriate purposes; those protections

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[5] *Id.* at 21,967

would be enhanced by a "best interest" standard for advice. Eliminating these investment choices would be extremely disruptive to significant numbers of our clients.

Bank of America believes that returning to a static "legal list" approach to permissible investments would be a mistake, significantly reducing client choice while simultaneously causing client confusion (clients could purchase "impermissible" assets in their non-retirement accounts) and stifling product innovation.[6] Assets covered under the BIC and Principal Trading exemptions should include *any* asset or security an investor is otherwise legally permitted to hold in a taxable account.

We understand the Department intends to preserve investors' choices about the nature and extent of advice they receive (e.g., investment education; or transaction based recommendations about purchasing, selling, and holding a security; or ongoing investment management and account monitoring), and how to pay for that advice (e.g., transaction based commissions; or ongoing asset-based fees).[7] We believe the language of the proposed rule should be clarified or amended on these points, including explicit authorization of differential compensation arrangements. See our suggested revisions in the Appendix.

2. The Best Interest Contract Exemption Should Be Streamlined.

Bank of America believes the Best Interest Contract exemption, in concept, could provide a framework for establishing a fiduciary standard of care for the benefit of retail investors while preserving client choice and enhancing existing regulatory protections. As currently drafted, however, the complicated and detailed requirements of the Best Interest Contract exemption are unworkable in practice, and would impose unacceptable burdens on Advisor firms with few or no-offsetting benefits to retail investors.

Requiring strict compliance with the DOL's proposed detailed, complex, and sometimes ambiguous rules creates too much uncertainty and risk. Failure to meet the requirements of an exemption – even if inadvertent, technical, and resulting in nominal or no harm to a beneficiary – could have severe consequences for Advisor firms.[8] Even absent material harm to investors, it is all but certain that the plaintiffs' class action bar will seek to exploit any technical violation or perceived ambiguity against Advisors trying to operate within

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[6] For example, exchange-traded funds were introduced in 1993, almost twenty years after ERISA's enactment and could not have been included in a circa 1974 "legal list." Since 2005, the US ETF market has grown from $300 million to nearly $2 trillion AUM, and the number of funds has grown from 204 to 1,411. 2015 Investment Company Fact Book.

[7] Id. at 21.964

[8] The penalties for engaging in a prohibited transaction under ERISA and the Code include forfeiting compensation and payment to the IRS of punitive excise taxes.

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the exemptions. This would not meaningfully benefit investors, who have adequate recourse against Advisors for non-technical breaches of investor protection standards.

We believe Advisor firms would ultimately decide not to accept the burden – and litigation risks – of strict compliance with the exemptions' detailed requirements. Instead, we believe the likely consequence of imposing these requirements would be to drive Advisor firms out of the commission brokerage business entirely with respect to IRAs. Investors would lose the option of paying for advice on a per transaction basis, and would be forced into either a self-directed account with no personalized advice, or into a fee-based advisory relationship with potentially higher costs.

Accordingly, Bank of America recommends eliminating the various disclosure, warranty, recordkeeping, and related sections of the proposed exemption entirely, and streamlining the Impartial Contract Standards of the Best Interest Contract exemption to mandate four enforceable promises by Advisors and Advisor firms to investors with respect to their IRAs:

Best Interest. Advisor firms would agree that when they provide personalized investment advice and recommendations about whether to transfer 401(k) assets to an IRA, or to purchase, sell, or hold securities or other assets in an IRA, their advice and recommendations will be prudent and in the client's best interest. This means the Advisor firm will provide investment advice and make recommendations with care, skill, prudence and diligence, and taking into account the client's particular financial circumstances, liquidity needs, goals, time horizon, and tolerance for risk. It also means that, although the Advisors will receive compensation for services, including compensation from third parties, the Advisors will put the client's interests first, ahead of the interests of the individual Financial Advisor, the Advisor firm and its affiliates, or any third party.

Conflicts of Interest. The Advisor firm would agree to disclose to the client material conflicts of interest with respect to the Advisor's investment advice and recommendations to purchase, sell or hold securities or other assets in an IRA.

Fees. The Advisor firm would agree that the amounts charged for its services will be fair and reasonable, and that the fees for the products recommended will be fair and reasonable. And, the Advisor would agree to disclose to the client the fees for its services and the fees for the products it recommends.

Policies and Procedures. Finally, the Advisor firm would represent that it has established policies and procedures, including supervisory procedures, that are reasonably designed so that: a) investment advice and recommendations are in the client's best interest; b) material conflicts of interest are disclosed; c) the costs and fees charged are fair and reasonable; and, d) the Advisor firm complies with the laws and regulations that apply to an IRA.

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We believe that this streamlined BIC standard can be incorporated as representations into the account opening process on a "notice" basis,[9] and bind the Advisor and the Advisor firm at an appropriate stage of the client relationship without the need for a client signature. A similar notice based approval could be used with respect to existing clients.

To the extent the Department believes the Best Interest Contract exemption requires more detailed standards, we urge the Department to explicitly import relevant rules and guidance from other regulators.[10] For example, with respect to the Best Interest component, the Department should explicitly permit firms to follow FINRA Regulatory Notice 13-45 when discussing rollovers from employer plans into IRA account, and should adopt FINRA's distinction between "education" and "recommendation." With respect to disclosure of material conflicts of interest, the Department should incorporate the requirements of the SEC's Form ADV. With respect to fees, we believe the Department should incorporate FINRA guidance regarding fair pricing and markups (Rule 2121), charges for services performed (Rule 2122), and best execution (Rule 5310), and SEC Rule 10b-10 with regard to fee disclosures, or fee and compensation disclosures similar to those under Section 408(b)(2) of ERISA. We believe this approach would reduce costs and increase efficiency, improve compliance, and result in better outcomes for investors.[11]

3. <u>The Seller's Carve-Out for Institutional Accounts Should Be Consistent with FINRA's Standards</u>

The Department asked for comments on whether the plan size limitations and $100 million asset requirement are appropriate conditions for the Seller's carve out for institutional accounts. We believe an appropriate standard would be to include "institutional accounts" as defined in FINRA Rule 4512(c) as an additional type of sophisticated investor in the carve-out. Accordingly, we suggest the Department consider expanding the seller's carve-out to include employee benefit plan accounts that are managed by an independent plan fiduciary who has responsibility for managing at least $50 million in assets or who is a bank, savings and loan association, insurance company or a state or SEC registered investment adviser. (<u>See</u> our suggested language in the Appendix). Including such FINRA institutional accounts in the seller's carve-out would better harmonize the Department proposal with current FINRA standards for investor sophistication, and would be consistent with other Department standards of sophistication,

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[9] As currently proposed, the Best Interest Contract Exemptions requirement that the client sign the contract before the Advisor makes a recommendation would be unnatural for clients, and unlike any of their other commercial experiences.

[10] We recognize the Department may be reluctant directly to incorporate the guidance of other regulators. An approach to consider would be to incorporate specific guidance in effect on the rule's effective date, to be updated through the Department's issuance of interpretive bulletins or other notice.

[11] *See also*, Exec. Order No. 13563, *Improving Regulation and Regulatory Review* (2011) (each agency must "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations"). We also believe a streamlined Best Interest Contract exemption which incorporates and enhances existing regulatory requirements might encourage Advisor firms voluntarily to extend a best interest standard for advice beyond IRAs.

such as the "qualified professional asset manager" (QPAM) definition under Prohibited Transaction Exemption 84-14 and the "in-house asset manager" (INHAM) definition under Prohibited Transaction Exemption 96-23. We also ask the Department to clarify the language of the seller's carve-out to cover services. (See our suggested changes in of the Appendix).

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Bank of America appreciates and supports the Department's efforts to produce a workable and effective best interest standard for personalized investment advice to retail investors. We believe the current proposal demonstrates substantial progress and reflects the Department's open communication with interested parties over the last five years. We hope that we will continue to have opportunities to work with the Department to further refine and improve this proposal for the benefit of retail investors.

Sincerely,

R. Scott Henderson

R. Scott Henderson

cc: John W. Thiel
Andrew M. Sieg

Bank of America

APPENDIX

To the extent the Department determines to issue specific rules with respect to compensation or the Seller's carve-out for institutional accounts, we suggest that the Department consider the following changes to specific sections of the Fiduciary Proposal and Exemptions in order to eliminate ambiguity in interpretation, or to avoid difficulties in implementing the Exemptions themselves.

With respect to payment of differential compensations the Fiduciary proposal should include the following language:

> "The Financial Institution or its Affiliate and Related Entities may compensate their Advisers relating to investment advice specifically directed to Plans, participant or beneficiary accounts, or IRAs. To the extent that the compensation is paid as differential compensation, such compensation shall be deemed to have met the Best Interest standard if the Financial Institution or its Affiliate and Related Entities (i) establish policies and procedures reasonably designed to mitigate and manage the risks relating to commission-based advice, (ii) establish a governance process for compensation practices relating to commission-based advice, (iii) establish reasonably designed supervisory procedures regarding commission-based advice and compensation practices, (iv) provide adequate disclosure to account owners of commissions charged and other compensation received (e.g., compliance with SEC Rule 10b-10), and (v) establish reasonably designed policies and procedures and supervisory systems to comply with FINRA guidance on the fairness of prices and commissions (e.g., Rules 2121 and 2122)."

- With respect to the Exemption for Pre-Existing Transactions in Section VII of the BIC Exemption, sub-section b(3) should read as follows:

  "The Adviser and Financial Institution do provide additional advice to the Plan regarding the purchase, sale or holding of the Asset after the Applicability Date and in accordance with the Best Interest Contract Exemption."

- With respect to including FINRA defined "institutional accounts" in the seller's carve-out and clarifying that it covers services, we suggest revising Section 2510.3-21(b)(1)(i)(A) of the Fiduciary Proposal to read as follows:

  "Counterparties or service providers to the plan – (i) Counterparty or service provider transactions with plan fiduciary with financial expertise.(A) In such person's capacity as counterparty or service provider (or representative of a counterparty or service provider) to an employee benefit plan (as described in section 3(3) of the Act) the person provides advice to a plan fiduciary who is independent of such person, with respect to an arm's length service arrangement,

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sale, purchase, loan or bilateral contract between the plan and person (each a "transaction") (or with respect to a proposal to enter into a transaction), if prior to or in connection with providing the advice with respect to the transaction the person satisfies the requirements of either paragraph (b)(1)(i)(B) or (C) of this section."

We suggest revising the language of Section 2510.3-21(b)(1)(i)(C)(1) of the Fiduciary Proposal to read as follows:

"(1) Knows or reasonably believes that the independent plan fiduciary (i) has responsibility for managing at least $50 million in assets, or (ii) is a bank, savings and loan association, insurance company, or an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions) (for purposes of this paragraph (b)(1)(i)(C), a person may rely on representations from the independent plan fiduciary regarding the value of assets under management or its status as a bank, savings and loan association, insurance company, or registered investment adviser;"

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