T. Rowe Price®
INVEST WITH CONFIDENCE

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Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
100 Constitutional Ave., N.W.
Washington, D.C. 20210

RE: Improving Investment Advice for Workers and Retirees, ZRIN # 1210-ZA29

Dear Sir or Madam:

This letter provides comments of T. Rowe Price Associates, Inc. and its affiliates (collectively "T. Rowe Price") in response to the proposed class exemption entitled Improving Investment Advice for Workers and Retirees as well as the preamble addressing interpretations of the final rule defining fiduciary-level investment advice under ERISA and Section 4975 of the Internal Revenue Code ("Rule" or "1975 Rule"). We appreciate the opportunity to provide our perspective on the proposed exemption and its preamble.

T. Rowe Price Associates, Inc. serves as investment adviser to the T. Rowe Price family of mutual funds and collective trusts maintained by its affiliate, T. Rowe Price Trust Company. Through mutual funds and collective investment trusts, as well as its sub-advisory and separate account management services, T. Rowe Price provides investment services to retirement plans and accounts of all sizes. T. Rowe Price is the largest provider of actively-managed target date funds[1] and is known for its consistent investment process and strong investment performance at below average cost.[2] Over $510B (42%) of T. Rowe Price's total assets under management of $1.2 trillion as of December 31, 2019 were held in defined contribution retirement plans.

T. Rowe Price companies include a defined contribution plan recordkeeper, registered transfer agents servicing the T. Rowe Price family of mutual funds, a registered-broker dealer, and multiple U.S. registered investment advisers. Through these entities, we provide a variety of services, including financial education and guidance, as well as discretionary and non-discretionary

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[1] The ranking is based on actively managed target date fund assets under management, as reported in Investment News, "10 Things to Know About TDFs" (May 9, 2019 Edition).
[2] As of June 30, 2020, over 59% of all T. Rowe Price mutual funds had outperformed the median fund in their Morningstar peer group median on a 1-year basis, over 64% on a 3-year basis, and over 70% and 75%, respectively, on a 5- and 10-year basis. As of that date, 85% of our mutual funds for individual investors have expense ratios below their Lipper peer category average.

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investment advice. Our services directly reach over 1.3 million retail customers (including more than 900,000 retail retirement customers), 2.25 million participants in plans recordkept by T. Rowe Price, and more than 6,000 retirement plan sponsor fiduciaries.[3]

We support the reinstatement of the 1975 Rule, and we laud the Department's goal of providing a standards-based prohibited transaction class exemption for those seeking to assist plan fiduciaries and retirement investors with investment decisions. We share the Department's view that a well-tailored standards-based exemption can improve access to quality investment assistance for retirement investors and fiduciaries. While we generally support the proposed exemption, we believe that it could be substantially improved with modest changes.

More importantly, however, we are concerned by the preamble to the proposed exemption. We believe that the preamble misinterprets the 1975 Rule in fundamental ways that will deprive retirement investors of important assistance. It is critical for the Department to re-evaluate and revise its preamble before issuing the final exemption. We address concerns with the preamble first, and then offer suggestions for improving the proposed exemption.

Part I. Interpretations in the preamble to the proposed exemption represent novel and unsupported extensions of the 1975 Rule.

The 1975 Rule has benefited from decades of interpretations by the Department and the courts. Several aspects of the Department's preamble represent striking departures from those interpretations that may create unintended consequences, and some are simply inconsistent with the plain meaning of the Rule. Our concerns center on four areas.

1. **Rollover recommendations**

The preamble discards as "incorrect" prior guidance in Advisory Opinion 2005-23A (the "Deseret Letter"). The preamble's discussion reflects a limited understanding of the variety of industry models for distribution guidance, and the nature of the recommendations themselves.

A rollover recommendation emerges from an interaction in which at least two alternatives are likely to receive focus—staying in a workplace retirement plan or rolling over to an IRA. Even if there is a recommendation to rollover, the recommendation may not involve a consideration of investments at all, but could reflect tax or plan rules that make either the plan or IRA more appropriate in light of the individual's goals.[4] Not all rollover recommendations involve a sale.[5]

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[3] Data as of December 31, 2019.
[4] Professionals may recommend IRAs, for example, when a plan restricts an individual to a lump sum distribution, but the individual has current need for only a portion of the amount and wishes the balance to remain tax-deferred.
[5] Some rollovers can be accomplished through an in-kind distribution that requires no sale or purchase of investments.

Certainly, the preamble's assumptions about rollover recommendations display a focus on a narrow set of interactions that do not typify all rollover recommendations.[6]

There are other reasons to continue adherence to the interpretation in Advisory Opinion 2005-23A. A recommendation to stay in plan does not fall within the ambit of a permissible topic of advice, because the 1975 Rule does not trigger fiduciary status based on a recommendation to "hold" securities.[7] If one looks through the distribution recommendation to the underlying securities transaction (as the preamble proposes to do for rollover recommendations), a recommendation to "stay in plan" is nothing more than a recommendation to "hold" securities. Under the 1975 Rule, such a recommendation would not trigger fiduciary status even if other prongs of the 1975 Rule were met. If the Department continues to view rollover recommendations as fiduciary-level advice interactions (assuming other prongs of the five-part test are met), then it will create an asymmetric rule under which the categorization of a single interaction—e.g., a distribution conversation—as fiduciary or not will depend on the outcome of the conversation. Further, the categorization of rollover recommendations as potential triggers for fiduciary status will create uncertainty as to whether other types of distribution guidance (such as a recommendation to take a hardship distribution to satisfy an emergency need for funds, or a recommendation to take a required minimum distribution[8]) would be potential fiduciary interactions. The "disguised sale" logic used to conclude that a rollover recommendation can be fiduciary-level advice simply brings into scope too many interactions that the Department has not traditionally viewed as fiduciary-level interactions.

There are additional potentially troubling ramifications of the preamble's analysis of rollover recommendations. If a rollover recommendation is always a disguised "sell" recommendation, then a recommendation to join a plan or increase contributions may be a disguised "buy" recommendation. The implications of such a position are substantial as it is common for plan sponsors and service providers to encourage plan participation, reminding individuals that the most

[6] The preamble assumes that all rollover recommendations are made by firms that will receive revenue from the IRA. 85 Fed. Reg. at 40839 ("A firm that recommends a rollover to a Retirement Investor can generally expect to earn transaction-based compensation such as commissions, or an ongoing advisory fee from the IRA…") The preamble also assumes that rollover recommendations are accompanied by investment recommendations or recommendations that will impact investment return. ("Moreover, a distribution recommendation commonly involves either advice to change specific investments in the Plan or to change fees and services directly affecting the return on those investments.")

[7] The 2016 Rule specifically included recommendations to "hold" among interactions that could trigger fiduciary status. The 1975 Rule lacks such language. *Compare* Regulation Best Interest governing broker-dealers' interactions with retail customers, 84 Fed. Reg. at 33341, 33491 (SEC interprets a rule with broader language—governing "recommendations of any security transaction or investment strategy involving securities"—to cover "hold" recommendations as well as "buy" or "sell" recommendations).

[8] In discussions of the 2016 Rule, the Department took the view that a recommendation to take a required minimum distribution was "tax advice," and not investment advice. This suggests that one should look to the objective intent behind the interaction. If true, then a recommendation to take a rollover distribution from a plan, unrelated to any proposed future investment, might similarly be described as tax advice, especially if the recommendation was based on structural attributes of the plan or IRA (such as the inability to take a partial withdrawal) that made one format more appropriate for the individual. If the Department intends objective intent to govern the characterization, we urge discussion of that in the preamble to the final exemption.

important step they can take towards future financial security is participation. Recommending specific contribution rates, and periodic increases in contribution rates, is also commonplace today. Making that type of communication more difficult will deprive individuals of important, oft-repeated and targeted messages about the importance of saving for retirement.

Should the Department opt to finalize its rejection of Advisory Opinion 2005-23A, it is important that the Department clarify the rules on non-rollover distribution guidance. Further, the Department should address the guardrails for providing savings and participation guidance with sensitivity to the impact on plan participation and retirement savings. In addition, the revision should be made effective prospectively only. For some time, well-intentioned firms and individuals structured their conduct on the basis of Advisory Opinion 2005-23A. They should not now be subject to a challenge by the Department or private litigants on the grounds that the Advisory Opinion never represented the correct interpretation of the law.

2. Regular basis

In connection with rollovers, the preamble announces a new prism for assessing satisfaction of the "regular basis" prong of the Rule. First, the preamble suggests that a different, separate advisory relationship can make a point-in-time recommendation a fiduciary interaction. Such a statement ignores the premise that formal advisory relationships can have well-described limits that cabin the types of services the adviser will provide. In such circumstances, a separate point-in-time recommendation cannot automatically be deemed to satisfy the "regular basis" prong of the rule.

Second, the preamble asserts that a rollover recommendation might meet the regular basis prong of the Rule if it is the first interaction in a series of interactions.[9] This interpretation is also not defensible. Absent a pre-existing mutual agreement, arrangement or understanding to provide advice on a regular basis, a recommendation cannot meet the regular basis prong of the rule if it is the first such interaction, and thus by itself cannot meet the standard of defining a special relationship of trust and confidence as required by the Fifth Circuit in *Chamber of Commerce of the United States v. U.S. Department of Labor*, 885 F.3d 360, 376 (5th Cir. 2018). Whether there will be future recommendation interactions can often not be known with certainty at the point of the first interaction. The 1975 Rule has long been interpreted to give the recommendation provider control over whether the interaction would be fiduciary in nature, and thus whether compliance with a prohibited transaction exemption might be required. To the extent the preamble stands for a "time will tell" measure for determining whether an interaction was fiduciary, it is an unsustainable interpretation.[10] The Department should clarify that a rollover recommendation (or any other initial point-in-time recommendation) will satisfy the regular basis prong and give rise

[9] 85 Fed. Reg. 40839-40.
[10] *See Chamber of Commerce*, 885 F.3d at 382, fn. 15 (fiduciary status requires a relationship of trust and confidence at the time a recommendation is made).

to fiduciary status only in those circumstances where parties previously have established an advisory relationship,[11] and the recommendation is part of that relationship.

In a similar vein, the preamble, in footnote 40, asserts that a solicitor can provide an initial isolated recommendation to rollover and become a fiduciary under the 1975 Rule when the firm on whose behalf it acted cements an ongoing advisory relationship with the same client.[12] The footnote is problematic in that it appears to assume a transitive property of investment recommendations, whereby Firm A's single interaction is tainted by Firm B's future, ongoing advisory relationship with an individual, resulting in Firm A being deemed to have a fiduciary relationship with Firm B's advisory client. Such an interpretation of fiduciary status for the provider of a point-in-time recommendation does not comport with the 1975 Rule and does not describe a special relationship of trust and confidence. *See Chamber of Commerce,* 885 F. 3d at 376.

It is particularly important to define the regular basis prong clearly for firms like T. Rowe Price that have both registered broker-dealer and registered investment adviser affiliates servicing the same audience, whether retail investors, participants or plan fiduciaries. In firms like ours, it is possible for the broker-dealer to make a point-in-time recommendation that is not part of any ongoing relationship at that time, and the affiliated registered investment adviser to have subsequent fiduciary interactions with the same client pursuant to a well-defined engagement. It is not inevitable that the broker-dealer, even though affiliated with the registered investment adviser, would know *at the time of the initial point-in-time recommendation* that the subsequent relationship would develop. The mere fact of affiliation should not be a factor in determining whether the regular basis prong has been met. In such a circumstance, there should be no assumption that the initial interaction retroactively can become fiduciary in nature merely because an affiliate later forms an intentional advisory relationship.

The preamble (and the relevant footnote) should be revised to recognize the ability of fiduciaries to limit the scope of their obligation and to clarify that the existence of a fiduciary relationship is based on the conduct of the parties to the interaction at the time of the interaction.

3. Mutual Understanding

The preamble asserts that written statements disclaiming a mutual understanding or forbidding reliance will not be determinative of whether the "mutual understanding" prong will be met, although such statements will be considered.[13] Such an interpretation is inconsistent with the plain language of the Rule which requires mutuality, *i.e.*, that both the recommendation provider and the recommendation recipient share an understanding as to the purpose of the interaction. A standard requiring mutuality of understanding cannot be met when one party has, in writing, denied

[11] The preamble suggests that it is sufficient if the parties have established a "new relationship," 85 Fed. Reg. 40840, and does not clarify that the relationship must be intended as an advisory relationship and that the recommendation must be understood to be a part of that advisory relationship.
[12] 85 Fed. Reg. 40840 note 40.
[13] 85 Fed. Reg. 40840.

that intent. The preamble provides no analysis of the 1975 Rule text or other legal precedent supporting its assertion.

As noted, the 1975 Rule functions to give those providing recommendations the power to determine whether the interaction was fiduciary or not by requiring a "mutual understanding." This is appropriate, given the importance of allowing potential fiduciaries the ability to shape their conduct to avoid prohibited transactions or comply with exemptions. Asserting that formal written disclaimers are not effective deprives firms and individuals of the ability to shape their conduct to accept or disclaim fiduciary status. The preamble should not impose constraints on the power of self-determination embedded in the 1975 Rule.

4. Primary Basis

The Department's preamble asserts that whenever a professional makes an individualized recommendation, "the parties should reasonably understand that the advice will serve as at least a primary basis for decision."[14] This statement is misinformed at best, and at worst, attempts to remove one of the five prongs from the 1975 Rule. One-time recommendations from professionals do not automatically create relationships of trust and confidence. Such interactions can be part of a retirement investor's exploration of options. One might call Firm A, Firm B and Firm C, all of whom are happy to provide a recommendation to the caller about his or her retirement plan or account. The individual may consider these inputs and may choose one of the options or none at all, or may implement an action through one of the firms or some fourth firm. The mere fact that the recommendation provider was a financial professional and the recipient an individual does not support the Department's hypothesis that any one of the interactions was intended to serve as a primary basis for decision. Nor can all of the interactions meet the primary basis test.[15] So long as the "primary basis" prong continues to exist in the Rule, presumptions cannot dispense with the necessity to satisfy that requirement. Accordingly, the Department should clarify that the question of whether the primary basis prong has been met will be judged by the totality of circumstances, and not inferred from the status of one party to the interaction.

5. Conclusion

We believe that the preamble's interpretations of the Rule function as *de facto* modifications of the Rule without a notice-and-comment process. We urge the Department to re-evaluate. Interpretations that extend the Rule beyond traditional understandings can have unintended consequences. If the Department interprets the Rule to broaden the circumstances in which interactions become fiduciary-level advice and simultaneously lessens the ability of a firm to shape its conduct to accept or avoid fiduciary status, more firms will retreat from providing tailored education and guidance that may be helpful to individual and plan sponsor fiduciary decisions for

[14] 85 Fed. Reg. at 40840.
[15] The word "primary" is often understood to mean first in rank, importance or value. Using that ordinary understanding, there is no basis to assume that multiple recommendations can each meet the primary basis prong when a retirement investor has received multiple recommendations from different sources about the same topic.

fear of unintended consequences.[16] In light of increased focus on standards of conduct by primary regulators of broker-dealers, federally registered investment advisers and insurance companies and their agents, such an effort by the Department may not improve the quality of interactions, but may instead result in depriving retirement plan fiduciaries, participants and retirement investors of useful help.

Part II. The proposed exemption has flaws that, if addressed, could result in a far more effective and useable exemption promoting quality investment assistance for individuals and plan fiduciaries.

The proposed exemption's conditions and requirements unnecessarily limit its usefulness and should be revised to avoid these pitfalls. Without changes, the exemption is less likely to have significant impact and may not fulfill the goal of improving access to investment assistance. In addition, we believe that the exemption needs to be clarified to specify that compliance regimes mandated by certain securities laws or self-regulatory organization rules can meet the requirements of the exemption. Our specific comments follow.

1. **Requiring acknowledgment of fiduciary status is unwise.**

The exemption's requirement that fiduciary status be acknowledged substantially limits the exemption's usefulness because (a) it does not address those whose conduct is in the gray area between investment advice and guidance, and (b) it may create confusion for retail investors when the firm providing the recommendation is a broker-dealer.

ERISA's fiduciary status has long been a functional test based on facts and circumstances of the interaction. As a result, the question of whether someone has become a fiduciary in the context of providing investment advice is sometimes difficult to judge, as exemplified by the robust debates over where the line should be drawn during the past decade. This ambiguity, paired with a strict prohibited transaction regime applicable only to those who cross the line, results in a hesitation to provide investment assistance that comes too close to the line. This hesitation has underserved retirement investors and plan fiduciaries alike, by imposing a barrier to investment assistance.

The Department's exemption has the power to meaningfully address the problem of access, but the requirement of fiduciary acknowledgement causes the exemption to fall short of the mark. The reason for this is straightforward. If firms are not clear about whether their conduct will cross the line but are nonetheless willing to satisfy the exemption and act in accordance with a fiduciary standard even if they are not technical fiduciaries, that should be sufficient protection against conflicts of interest. But such firms may be unwilling to subject themselves after the fact to lawsuits based on a status they did not in fact occupy under ERISA or any other law. Further, the acknowledgement itself might be a material misstatement, were a court later to find that the conduct did not actually constitute fiduciary conduct for purposes of the Rule. It is important to

[16] The proposed exemption, while potentially helpful, is not sufficiently broad to remove this concern.

note that the 1975 Rule, unlike the invalidated 2016 Rule, does not confer fiduciary status solely on the basis of an acknowledgment of such status.

There is another flaw with the fiduciary acknowledgment. Broker-dealers providing advice to retail investors are not fiduciaries for purposes of securities laws. One of the important goals of the Regulation Best Interest guidance package,[17] including the Form CRS Rule issued by the Securities and Exchange Commission (SEC), is avoidance of investor confusion. The Form CRS rule requires that broker-dealers and registered investment advisers alert retail investors to the nature of the relationship in simple, clear terms. Requiring a broker-dealer to acknowledge fiduciary status while simultaneously occupying a non-fiduciary status under securities laws does not aid investor clarity,[18] and defeats the purpose of the Form CRS Rule.[19] Further, the acknowledgment is unnecessary if the recommendation provider is prepared to act in accordance with fiduciary standards regardless of actual legal status. This requirement should be eliminated.

2. **Limiting the exemption to those who provide non-discretionary investment advice unnecessarily limits the usefulness of the exemption.**

The group for which acknowledgment of fiduciary status would not pose an issue—ERISA Section 3(38) fiduciaries—are not included among those who can use the proposed standards-based exemption. Today, discretionary fiduciaries like T. Rowe Price with various types of proprietary investment vehicles must sometimes employ a pastiche of exemptions, each with its own quirks, to provide discretionary investment management services. If a standards-based exemption can provide sufficient protection against conflicts arising out of nondiscretionary investment advice provided by Section 3(21) fiduciaries, there is no reason to bar its use by Section 3(38) fiduciaries. The exemption should be expanded accordingly.

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[17] The package, also known as the Standards of Conduct Rulemaking, governs broker-dealer interactions with retail investors, and includes Regulation Best Interest, establishing a standard of care for broker-dealers in these interactions and associated controls, 84 Fed. Reg. 33318, the Form CRS Rule requiring broker-dealers and registered investment advisers to provide simple disclosures to retail investors about the nature of the relationship, 84 Fed. Reg. 33492, as well as an interpretation of what is meant by "solely incidental" with respect to broker-dealers' exclusion from registration as an adviser, 84 Fed. Reg. 33681, , and an interpretation of the Investment Advisers Act of 1940 confirming that registered investment advisers serve as fiduciaries to their clients. 84 Fed. Reg. 33669.

[18] The preamble's interpretation of the standard of care, unless revised, may make the exemption unworkable for broker-dealers. The preamble suggests that the recommendation of certain investments of "unusual complexity and risk" may trigger an obligation to monitor. The suggestion is sufficiently vague that it may cause serious questions about limits of the suggested "obligation." While broker-dealers can undertake limited monitoring without triggering registration as an adviser, the power to monitor is limited by the requirement that advice be solely incidental to broker-dealer activities. The proposed exemption would be problematic for broker-dealers serving retail investors in another respect. Like the proposed exemption, Regulation Best prohibits material misstatements. Because broker-dealers are not fiduciaries under securities law principles, any disclosure acknowledging fiduciary status would need to explain the distinction between securities laws and ERISA principles, substantially complicating the disclosure for retail investors.

[19] In the Form CRS Rule, the SEC specifically rejected any use of the term "fiduciary" on the grounds that many investors did not understand its meaning or had never heard the word. 84 Fed. Reg. at 33532.

3. There is no reason to prohibit the use of the exemption by those providing "robo advice."

The prohibition on use of the exemption by those providing "robo advice" is an unnecessary limitation. Today, robo advice can be provided using the exemption of ERISA Section 408(g), but there is no prohibition on such advice being provided under other available statutory or regulatory exemptions. The Department has provided no convincing reason why potential conflicts associated with advice generated and delivered solely by technology could not be addressed by the safeguards in the proposed exemption, when it has conceded that the same advice, generated by technology but delivered through human interaction (so-called "hybrid advice"), could be governed by the exemption. The exemption should be broadened to include those providing advice through solely electronic mechanisms.

We assume that the Department intends satisfaction of the proposed exemption to be sufficient for hybrid advice, without further adherence to any other exemption. There is no reason to require compliance with two separate exemptions. Clarification of that point would be helpful.

4. There is no reason to impose special documentation requirements on rollover recommendations.

A standards-based exemption has the virtue of insuring that anyone entitled to its protection has acted in accordance with an ERISA fiduciary standard. As a result, there is no reason for special documentation requirements on rollover recommendations. The burden of implementing systems to create and store special documentation concerning rollovers is unnecessary, and may work against retirement investors' interests by discouraging firms otherwise willing to meet ERISA fiduciary standards from providing that type of service. This requirement should be removed.

5. The Department should clarify that satisfaction of compliance regimes mandated by Financial Industry Regulatory Authority (FINRA) or the SEC, as applicable, should be sufficient to meet the requirements for disclosure, maintenance of policies and procedures and retrospective review.

The exemption's requirement that material conflicts be disclosed, and that compliance policies and procedures be established and reviewed annually appears to have borrowed heavily from similar rules governing broker-dealers and federally registered investment advisers. *See, e.g.*, Regulation Best Interest, 84 Fed. Reg. 33318 (requiring broker-dealers serving retail investors to disclose material conflicts and adopt compliance policies and procedures), FINRA Rules 3110, 3120 and 3130 (requiring broker-dealers to have supervision, supervisory controls and annual reviews of supervisory processes), 17 C.F.R. §§ 279.1 and 275.204-3 (requiring investment advisers to deliver a brochure to current and prospective clients concerning the information required by Part 2 of Form ADV, including certain conflicts of interest), the SEC's Interpretative Release on registered investment adviser duties, 84 Fed. Reg. 33669 (requiring investment advisers to eliminate or make full and fair disclosure of all conflicts of interest) and 17 C.F.R. § 275.206(4)-7 (requiring investment advisers to conduct annual compliance reviews of the adequacy of policies and procedures designed to prevent violations of law). These requirements are generally well aligned with those of the proposed exemption, but they have slightly different features. For example, a registered investment adviser must designate a chief compliance officer to be responsible for the policies and procedures covered by the annual review, but the review need not be signed by the CEO of the organization.

There is little utility in creation of a duplicative, substantially similar disclosure and compliance regime. Accordingly, we urge the Department to clarify that broker-dealers and federally registered investment advisers that comply with FINRA and SEC rules, as applicable, governing disclosure of conflicts, compliance policies and annual reviews have satisfied these requirements of the exemption.

6. The exemption should be revised to limit access to records related to the advice.

The proposed exemption grants access to records concerning advice to a broad group of plan fiduciaries, employee organizations and contributing employers. Especially with respect to investment advice provided to individuals, this information is likely to contain sensitive personal financial information that is not appropriate for such broad dissemination. Broad access does not materially further compliance, so long as the advice recipient itself has access. The Department should revise the exemption to more carefully address privacy interests.

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We appreciate the chance to provide input on the proposed exemption. We are heartened that the Department recognizes the importance of providing a streamlined, standards-based exemption, and we encourage changes that will increase the exemption's utility. Nonetheless, we urge the Department to review carefully the areas of interpretation in the preamble that stray from the 1975 Rule or that otherwise depart from defining relationships of trust and confidence. By carefully interpreting the 1975 Rule, we are confident that the Department can create an environment in which fiduciaries, plan participants and individual retirement investors receive the help they need, while insuring that financial firms and investment professionals remain true to fiduciary principles during interactions marking special relationships of trust and confidence.

Sincerely yours,

Margaret Raymond

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