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Office of Regulations and Interpretations,
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefit Security Administration
Attn: D-11712 and D-11713

U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: Proposed Definition of the Term "Fiduciary" (RIN 1210-AB32);
Related Proposed Prohibited Transaction Exemptions (ZRIN: 1210-ZA25)

Dear Ladies and Gentlemen:

LPL Financial LLC (LPL) appreciates the opportunity to comment on the Department of Labor's (Department) Proposed Definition of the Term "Fiduciary"; Conflict of Interest Rule–Retirement Investment Advice and the related proposed prohibited transaction exemptions, and proposed amendments to exemptions. We hope that the Department finds our comments helpful, and we look forward to collaborating with the Department to refine the proposals to ensure both that investors are protected, and that access to brokerage products and services is preserved for the many investors who benefit from them.

We support the Department's stated intent to protect investors by requiring financial professionals[1] who provide fiduciary investment advice to retail retirement investors to comply with a fiduciary standard of care. In fact, we and our financial professionals believe that our success depends upon acting in the clients' best interests. This is because our financial professionals' interests are closely aligned with their clients' interests. Specifically, the better a financial professional serves his or her client, the better positioned the client will be to achieve his or her investment objectives, and the more likely the client will be to stay with the financial professional for the long term.

[1] The term "financial professional" is used in this letter to refer generally to individuals who provide financial services, including investor education, financial planning, investment recommendations, trade execution, and investment advice to investors, be they registered investment advisers, registered representatives of a broker-dealer, or representatives of an insurance company, bank, or other financial institution.

We also think it is important that financial institutions[2] and financial professionals address conflicts of interest and disclose fees and compensation in a meaningful way. By doing so, financial institutions and financial professionals help investors to achieve better investment outcomes, and to make informed choices about the types of financial services and financial professionals best suited to helping them achieve their investment objectives.

Our support for the Department's stated intention to protect investors is consistent with our long-time, public support for applying a common fiduciary standard of care to all financial professionals who provide personalized investment advice to retail clients. Notably, in our 2010 comment letter to the Securities and Exchange Commission (SEC) regarding its "Study Regarding Obligations of Brokers, Dealers and Investment Advisers" under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, we stated, "Securities professionals providing the same service to retail customers should be held to the same standard of care and the same best practices. . . . The focus . . . should be consumer protection and enhanced transparency to the retail client."[3]

We believe that the standard of care can and must be adopted in a way that preserves investor choice and access to different investment advice models. In particular, many investors benefit from commission-based brokerage arrangements, and these arrangements should be preserved. We are encouraged that in this proposal, the Department undertook to reflect the many comments it received on the 2010 proposal regarding its potential impact on brokerage arrangements, including by introducing new exemptions intended to "preserve beneficial business models for delivery of investment advice . . . that would broadly permit financial institutions to continue common fee and compensation practices."[4]

We also believe that continued coordination with other financial industry regulators is critical. These regulators, including the SEC, the Financial Industry Regulatory Authority (FINRA), state securities regulators, and state and federal banking and insurance regulators, have developed comprehensive and rigorous regulatory regimes that govern investment products and services, and have developed their own rigorous investor protections—including fiduciary standards of care that are rooted in the common law of trusts and agency. We strongly believe that the rule must be harmonized with other regulatory regimes—particularly in light of the SEC's initiative to develop a uniform fiduciary standard that would apply to personalized advice that broker-dealers and investment advisers provide to retail investors. Doing so will reduce investor confusion and costs, facilitate compliance, and result in better retirement savings and investment outcomes for Americans who may not keep all of their savings in plans subject to the Employee Retirement Income Security Act (ERISA) and individual retirement accounts (IRAs).[5]

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2 The term "financial institution" is intended to apply generally to registered investment advisers, banks, insurance companies, registered broker-dealers, and other entities that employ financial professionals, including as independent contractors.

3 Letter from Stephanie L. Brown, Managing Director, General Counsel, LPL Financial 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).

4 Definition of "Fiduciary"; Conflict of Interest Rule–Retirement Investment Advice; Proposed Rule 80 Fed. Reg. 21,928, at 21,929 (proposed Apr. 20, 2015).

5 *See also*, Exec. Order No. 13563, *Improving Regulation and Regulatory Review* (2011) (stating that 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").

Our comments follow a brief discussion of our unique independent financial professional model, and are focused on showing how the proposed rule may work in practice. To the extent certain aspects of the rule may have consequences we do not believe were intended, such as limiting investor choice and access to brokerage and other services, we propose alternative approaches that may better achieve the Department's goals. We also request that certain elements of the proposal be clarified to help us and our financial professionals better understand, and be able to comply with, the rule's requirements.

I. LPL's Independent Financial Professional Model

LPL is a leader in the financial advice market, and as of March 31, 2015, serves $485 billion in retail assets. LPL is registered with the SEC as both an investment adviser and a broker-dealer. As a dual registrant, in addition to Department regulation with respect to services to retirement investors, we are subject to regulation by the SEC for our investment advisory services, and FINRA, the SEC, and the states for our broker-dealer activities. We provide proprietary technology, comprehensive clearing and compliance services, practice management programs and training, and independent research to more than 14,000 independent financial professionals and over 700 banks and credit unions. LPL has been the nation's largest independent broker-dealer since 1996. Additionally, LPL supports approximately 4,300 financial professionals licensed with insurance companies by providing customized clearing, advisory platforms, and technology solutions. LPL and its affiliates have more than 3,300 employees.

Unlike traditional broker-dealers, whose registered representatives are typically employees of the broker-dealer, our financial professionals are independent contractors and operate their own businesses. LPL's mission is to help financial professionals establish successful businesses through which they can offer independent financial guidance and advice. We support our financial professionals with branding, marketing and promotion, as well as regulatory review and compliance. LPL does not sponsor any proprietary products or sell investments from inventory, and we do not have our own recordkeeping platform for employer-sponsored retirement plans. While we are a registered broker-dealer and custody many of our financial professionals' client assets, a significant portion of client assets are held directly on mutual fund, variable annuity, and other third-party platforms.

Our independent financial professionals build long-term relationships with their clients and communities across the U.S. by guiding them through the complexities of investment decisions, retirement solutions, financial planning, and wealth management. The majority of our financial professionals are small business owners and entrepreneurs, and are primarily located in rural and suburban areas. Operating as small businesses, our financial professionals often form personal and long-standing relationships with their clients and communities.

Our financial professionals support approximately 4.5 million client accounts, approximately 2.4 million of which are IRAs and 48,000 of which are ERISA plans held in brokerage relationships. Together, our financial professionals are responsible for $150.6 billion in brokerage retirement account assets, and $43 billion in ERISA plan assets in brokerage relationships. Thus, a substantial amount of our clients' assets will be affected by the proposed redefinition of fiduciary advice. The rule as proposed will impact the choice of services that investors will receive, and will likely result in significant added costs to our financial professionals' small businesses and our firm. We are committed to working with the Department to refine the proposal to simplify the rule, reduce unnecessary burdens, remove inefficiencies, avoid regulatory conflicts, and preserve investor choice, while ensuring that investors get the protections they deserve.

II. Comments on the Proposed Rule

A. Preserve personal financial services relationships and investor choice.

We believe investors should be free to choose and define their relationships with their financial professionals. This includes choosing: (1) the types and levels of service the financial professional provides—including when the financial professional acts as a fiduciary, (2) how the investor's assets are invested, and (3) how the investor pays their financial professional for financial guidance. Thus, we believe it is important that, in expanding the definition of fiduciary investment advice to encompass a broader range of relationships and activities, the rule preserve: (a) the ability of investors and financial professionals to agree when a fiduciary relationship between them begins and ends, (b) access to the wide range of asset classes in which investors are legally permitted to invest, and (c) current compensation arrangements, including variable commission-based fee arrangements.

We note that, once a financial professional is a fiduciary, he or she would generally be subject to a standard of care under the proposal—whether under ERISA's standard of care, the best interest standard required under the proposed exemptions, or the applicable standards under state and federal law. The applicable standard of care would safeguard investors from investment recommendations and practices that are not in the investor's best interests. Particularly in cases where the additional protections of these standards of care apply, investors should be free to structure and define how their retirement assets will be invested and how their financial professional will be paid.

1. Investors (including retail investors) and financial professionals should be able to agree when their fiduciary relationship begins and ends.

In preserving investor choice, it is critical to permit the investor to define the scope of a financial professional's role, including the capacity (fiduciary or otherwise) in which he or she serves the investor. Under both common law and ERISA, an investor may agree to limit the scope of a fiduciary's duties.[6] We do not believe that the proposed changes to the definition of fiduciary investment advice should change this long-standing approach.

Investors should be able to choose and define the specific services that the financial professional will provide. This should be accomplished with clear disclosures and through a meeting of the minds between the investor and his or her financial professional, including when the financial professional will be acting as the investor's fiduciary and when he or she will not. As long as the investor receives full and fair disclosure of the financial professional's services and the nature of any conflicts of interest, the investor should be able to understand the potential conflicts and agree that the financial

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6 *See* BOGERT'S TRUSTS AND TRUSTEES, § 542 (2014) ("Though strictly construed by the courts, exculpatory clauses have been upheld, subject, however, to certain exceptions based on public policy."); RESTATEMENT (SECOND) OF TRUSTS § 70, cmt. d ("[A] trustee's duties, like trustee powers, may be affected by the terms of the trust."). Similarly, the statutory definition of fiduciary under ERISA provides that a person is a fiduciary only "to the extent that" he or she is acting as such. ERISA § 3(21); *see* DOL Regs. §2509.75-8, Q: FR-16 (stating that the personal liability of a fiduciary is limited to the fiduciary functions that he or she performs with respect to the plan); *Frank Russell Co. v. Wellington Management Co.*, 1998 WL 481230 (3d Cir. 1998) (holding that a corporate management business decision was not subject to ERISA fiduciary duties).

professional is acting in a non-fiduciary capacity.[7] For example, with appropriate and clear disclosure that the person is marketing and not acting as a fiduciary providing impartial advice, a financial professional who is an investor's fiduciary should be able to sell the investor an additional service or product without being deemed a fiduciary and violating the prohibited transaction rules.[8]

As another example, the Department has recognized that a fiduciary and his or her client may limit the scope of the fiduciary's duties by contract, including whether the fiduciary has an ongoing duty to monitor a recommended investment.[9] However, the disclosure obligations under the Best Interest Contract Exemption (BIC Exemption) could be interpreted to require ongoing disclosures even where the financial professional is no longer acting as a fiduciary. We are concerned that this could cause clients to mistakenly believe that the financial professional is still providing fiduciary advice and monitoring the asset, even where he or she did not assume this responsibility. Thus, we recommend that the rule be clarified to provide that the client disclosure obligations stop when the client relationship or contract has been terminated.

We are pleased that the Department has, in its informal comments on the proposed rule, affirmed that financial professionals and investors (including retail investors) would remain able to define when fiduciary relationships begin and end, and we request that this will be confirmed and clarified in the proposed rule. We believe investors benefit from having choices in managing their retirement assets, and that investor choice can be preserved while adopting standards that protect investors.

2. Investors (including retail investors) should be able to choose to invest their retirement accounts in any asset they are otherwise legally permitted to hold.

In light of the investor protections afforded by the proposed best interest standard of care, we believe the definition of assets permitted under the proposed BIC Exemption should be expanded to include any asset or security investors are otherwise legally permitted to hold or purchase. We understand that the proposed rule was intended to provide relief for the assets "needed to build a basic diversified portfolio," while limiting exemptive relief to those assets that are "relatively transparent and liquid."[10] We are concerned that this limitation will prevent many investors from being able to use investment strategies in brokerage retirement accounts that are helpful to achieving their investment objectives and retirement savings goals. We provide several examples below.

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7 *See* Amendments to Form ADV, Investment Advisers Act Release No. 2711 (Mar. 3, 2008), 73 Fed. Reg. 13958 (Mar. 14, 2008) ("[I]investors have the responsibility, based on disclosure they receive, for selecting their own advisers, negotiating their own fee arrangements, and evaluating their advisers' conflicts. Therefore, it is critical that clients and prospective clients receive sufficient information about the adviser and its personnel to permit them to make an informed decision about whether to engage an adviser, and having engaged the adviser, how to manage that relationship.").

8 This analysis is supported by the Department's regulations under section 408(b)(2) of ERISA. Specifically, in Example 7, the Department states that a fiduciary to a plan who is a president of a bank that proposes to provide administrative services to the plan for a fee, would not be viewed as self-dealing where he or she does not take part in the other fiduciaries' decision to hire the bank. DOL Reg. § 2550.408b-2(f), Example 7.

9 80 Fed. Reg. at 21,969 (the best interest standard "does not mandate an ongoing or long-term advisory relationship, but rather leaves that to the parties. The terms of the contract . . . will govern whether the nature of the relationship between the parties is ongoing or not.").

10 *Id*. at 21,967.

- ***Alternative investments are appropriate for many investors covered under the BIC Exemption.*** Some non-participant directed plans with fewer than 100 participants, and many IRAs, hold substantial assets and are managed or held by sophisticated investors who are well-informed about investment products, strategies, and risks. For example, many professionals, such as doctors, accountants, and lawyers, establish plans, such as cash balance plans, that are not participant-directed and cover fewer than 100 participants, but hold tens of millions of dollars in assets. Further, some IRAs are held by persons who satisfy the asset or income requirements to qualify as "accredited investors" under the federal securities laws. These plans and accounts are legally permitted to hold alternative investments, and may benefit from investment strategies that include them. We understand that the Department believes such strategies may be available by investing in a registered fund that holds underlying investments in alternatives, but we note that investing in this way adds layers of costs and complexities, and limits investor choice.[11]

- ***Investors recognize tax benefits by holding certain assets in their retirement accounts.*** Some investments, such as certain private funds that invest in real estate and non-traded real estate investment trusts, produce income that would be taxable if held in a taxable account. Holding these investments in a retirement account enables an investor to defer tax until the income is withdrawn from the account. Tax deferral allows investors to save and invest more income for retirement.

- ***Investors who are saving for retirement may benefit from holding investments that are not liquid.*** Retirement investors generally invest for the long-term, and retirement assets grow when they are held for the long term. Moreover, managing portfolio volatility is critical to achieving long-term investment objectives. Illiquid investment products can be helpful both in helping investors maintain long-term holdings and in managing volatility, and thus are appropriate to accomplishing many retirement investors' goals.

  In general, illiquid products are structured to compensate investors for sacrificing liquidity. This compensation, known as the "illiquidity premium", can come in the form of higher income, risk-adjusted returns, or overall return premiums over equivalent liquid asset benchmarks. These products can often be instrumental in lowering the overall volatility of a portfolio. Further, they can add more discipline to the investment approach because the investor is forced to realize the full return potential of the asset, rather than liquidating it before all of the returns are realized. This helps to address the problems of frequent trading and premature withdrawals, which have been shown to result in smaller retirement nest eggs. Because of this, we do not believe that holding illiquid assets in brokerage accounts is inherently harmful to all retirement investors.

  Moreover, we note that it appears that the proposed rule has excluded from coverage other asset types that are relatively liquid and transparent.

- ***Investors should be able to receive assistance with any asset held in their account as of the applicability date of the rule.*** Many investors currently hold assets that would not be covered under the BIC Exemption's proposed transition relief. This will result in investors holding assets not covered by the BIC Exemption in their accounts, and thus will effectively terminate

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11 *Id.*

investors' access to assistance and education with respect to these assets. This would be harmful to investors.

The examples above are not exclusive and we believe there are currently other assets that are excluded from the BIC Exemption that benefit investors, and additional assets may be developed in the future. Because retail investors have many different investment objectives and financial circumstances, we suggest that assets covered under the BIC Exemption should include any asset or security an investor is otherwise legally permitted to hold in his or her taxable accounts (e.g., non-traded business development companies, non-traded REITs, private equity funds, hedge funds, structured products, and municipal securities). This will both facilitate investor choice, and also ensure that the exemption can flexibly adapt to cover new investment products that are developed in the future.

The requirement that financial institutions (and their registered representatives) contractually agree to act in the client's best interest should offer sufficient protection so that the proposed rule does not need to define which assets can and cannot be included in a retirement account, particularly where the financial institution has reasonable policies and procedures in place to protect investors with respect to particular asset classes. Moreover, federal and state laws and financial institutions' policies and procedures already limit and impose specific requirements on investments in many products to mitigate investor risk. We have included information on these limits and requirements in an appendix to this comment letter for select examples of assets that appear to be excluded from the BIC Exemption.

Further, we request that the rule clarify that the proposed definition of fiduciary investment advice does not apply to any assets held in a client's account as of the applicability date of any final rule, unless a financial professional or financial institution recommends making additional purchases of the same assets. Doing so would address our aforementioned concerns regarding clients holding or selling assets in their accounts that are not covered under the BIC Exemption after the applicability date.

In addition to the restrictions on assets under the BIC Exemption, we note that the Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption) offers relief for principal transactions involving a limited set of debt securities, and does not cover some securities commonly held in retirement accounts and traded on a principal basis, such as structured products. Similar to under the BIC Exemption, investors would have the protection of the best interest standard of care and federal and state law, and financial institution's policies and procedures regarding principal trading. Therefore, we request that the assets that may be traded on a principal basis under the Principal Transactions Exemption not be limited.

3. Investors should be able to choose to compensate financial professionals through variable commission arrangements.

As noted above, we appreciate the Department's statement that it intends the proposed BIC Exemption to permit common fee and compensation models for broker-dealers and financial professionals who become fiduciaries under the rule. We believe that this is an important goal, particularly because many investors benefit from commission-based fee arrangements. Specifically, investors may benefit financially by paying commissions instead of an asset-based fee for the following reasons:[12]

[12] *See* K. Damato, "3 Reasons to Pay Commissions, Not Fees, to a Financial Adviser," THE WALL STREET JOURNAL (Feb. 18, 2015), *available at* http://blogs.wsj.com/totalreturn/2015/02/18/3-reasons-to-pay-commissions-not-fees-to-a-financial-adviser/. Congress recognized the benefits of commission-based fees by showing its intent to preserve such

- ***Commissions can be less expensive than fee-only advice.*** This is particularly true for investors who do not trade very often. In this case, an investor's investment expenses may be less if he or she pays a commission for purchasing a security than they would be if the investor pays an annual account fee that is based on a percentage of the account's assets.

  The SEC and FINRA have recognized that commission-based fees may result in lower expenses for some investors.[13] In fact, the SEC's Office of Compliance Inspections and Examinations (OCIE) has included in its examination priorities for both 2014 and 2015 a review of sales practices related to advisory accounts and potential "reverse churning", reflecting concerns that certain advisory accounts lacking trading activity are not the appropriate vehicles for certain investors.[14] We believe the rule may make brokerage accounts less accessible to retirement investors, which would limit choice and could cause investors to pay more by investing through advisory accounts.

- ***Some investors cannot access fee-only advice.*** Many financial professionals establish account minimums for fee-only advice because of the higher level of service they offer fee-only clients. Higher service levels, including such services as ongoing portfolio monitoring and rebalancing, and more frequent meetings and consultations to discuss client investment objectives and financial circumstances, come with higher costs and expenses for the financial professional, including higher demands on the financial professional's time and resources. A financial professional may balance these costs against the benefits of providing services to clients with small account balances. In some cases, the financial professional may make a business decision not to service these small accounts because the costs and increased liability exposure may outweigh any potential revenue.

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arrangements under section 913 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

13 *See, e.g.*, Staff of the U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers, at 152 (Jan. 2011) (stating that investors may face increased costs if the broker-dealer exclusion were eliminated, such as where commission-based accounts would incur lower costs compared to fee-based accounts due to infrequent trading); NASD Notice to Members 03-68, Fee-Based Compensation (Nov. 2003) (reminding members that fee-based accounts must be appropriate for customers, considering among other things the cost of the accounts compared to alternative fee structures available, such as commission-based accounts); Report of the Committee on Compensation Practices (Apr. 10, 1995), available at https://www.sec.gov/news/studies/bkrcomp.txt (noting commenters' views that fee-based accounts can pose higher costs for small and low-activity accounts); Office of Investor Education and Advocacy, SEC, Investor Bulletin: How Fees and Expenses Affect Your Investment Portfolio (Feb. 1, 2014), available at http://www.sec.gov/oiea/Article/ib_fees_expenses.pdf (demonstrating how fees can impact investments over time); *see also* Oliver Wyman, OLIVER WYMAN REPORT: ASSESSMENT OF THE IMPACT OF THE DEPARTMENT OF LABOR'S PROPOSED "FIDUCIARY" DEFINITION RULE ON IRA CONSUMERS (Apr. 12, 2011), at 21 (stating that "investors would pay an average of 73% to 196% more in direct costs in a fee-based advisory model").

14 SEC, National Exam Program, Office of Compliance Inspections and Examinations, "Examination Priorities for 2015" (Jan. 13, 2015), *available at* http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf; SEC, National Exam Program, Office of Compliance Inspections and Examinations, "Examination Priorities for 2015" (Jan. 9, 2014), *available at* http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2014.pdf. *See also* FINRA, "Conflicts of Interest" (Oct. 2013), at 29 ("Depending on the circumstances, fee-based accounts may be preferable for customers with a fair amount of trading activity or desire for active account monitoring and ongoing advice. Commission-based accounts may be more cost effective or appropriate for customers with low trading activity.").

- ***Some financial professionals only offer commission-based fee arrangements.*** An investor may have a relationship with, and trust a financial professional who offers only commission-based fee arrangements. In this case, the financial professional's business model may be structured as commission only because of the clients he or she serves, and the services he or she offers.
- ***Some investors prefer to pay commissions.*** Some investors want to pay only for investment assistance they actually use. In a fee-only arrangement, the financial professional is paid a fee for investment assistance regardless of whether the investor acts on the advice. Some investors want to manage their own assets and ask for help only with respect to particular investments, or they want to pay only when they agree with and follow a financial professional's recommendation to buy or sell a security ("pay-as-you-go").
- ***Proposal may cause broker-dealers to be deemed investment advisers.*** The proposed requirement of a written contract in the BIC Exemption may cause broker-dealers to be deemed investment advisers under the Investment Advisers Act (Advisers Act). As the Department is aware, in 2007, the SEC proposed an interpretive rule under the Advisers Act that would have established the principle that broker-dealers that separately contract to provide advisory services would be deemed to provide investment advice that is not "solely incidental" to their business as a broker-dealer, and thus could not avail themselves of the broker-dealer exclusion from the definition of investment adviser in Section 202(a)(11)(C) of the Advisers Act.[15] Although it is unclear as to whether the SEC would view the contractual requirements of the BIC Exemption by themselves as such a separately contracted provision for advisory services, lack of express guidance, this issue raises the risk that traditional brokerage services provided under the BIC Exemption would no longer meet the broker-dealer exclusion. Broker-dealers would be unlikely to rely on the BIC Exemption if it were to cause them to be required to register as investment advisers and be subject to investment adviser regulation when they are otherwise providing advice that would be considered incidental to their roles as broker-dealers. Ultimately, clients would likely incur higher costs or face restrictions on choices if broker-dealers are forced to incur the additional costs of investment adviser status; this appears to be inconsistent with the regulatory structure currently in place for broker-dealers under the securities laws.

Though we believe that the Department appreciates the many benefits of, and reasons why an investor may choose, a commission-based fee arrangement, and that this concern led the Department to propose the BIC Exemption, we are concerned that aspects of the proposed rule, including conditions of the BIC Exemption, will make commission-based fee arrangements more difficult if the rule is finalized as proposed. Specifically, we are concerned that the proposed rule does not provide enough meaningful guidance as to how financial institutions could comply with the impartial conduct standards and continue to receive variable commissions based on investment recommendations, and what policies

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15 *See* Interpretive Rule under the Advisers Act Affecting Broker-Dealers, Advisers Act Release No. 2652 (Sept. 24, 2007), 72 Fed. Reg. 55,126, 55,131 (Sept. 28, 2007); *see also* Certain Broker-Dealers Deemed Not to Be Investment Advisers, Exchange Act Release No. 51523, Advisers Act Release No. 2376 (Apr. 12, 2005), 70 Fed. Reg. 20,424 (Apr. 19, 2005) (establishing the principal in a prior rule adopted by the SEC, Rule 202(a)(11)-1 under the Advisers Act). Rule 202(a)(11)-1 subsequently was vacated on other grounds by the D.C. Circuit Court of Appeals. *See Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 488, 493 (D.C. Cir. 2007) (holding that the SEC exceeded its authority in promulgating the final rule by relying on Section 202(a)(11)(F) of the Advisers Act (now 202(a)(11)(H)) to establish a new, broader exemption for broker-dealers).

and procedures a financial institution could adopt to "ensure that individual Advisers adhere to the Impartial Conduct Standards," other than policies and procedures that would effectively eliminate variable commission-based fee arrangements. Further, as discussed later in this letter, we are concerned that some of the BIC Exemption's conditions are very challenging to comply with as proposed.

The BIC Exemption's impartial conduct standards require that financial institutions and financial professionals act in the "best interest" of investors to be eligible for relief under the exemption. Under this standard, the financial institution and financial professionals must act "*without regard to* the financial *or other interests* of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party."[16] Though the preamble indicates that this standard is based on the stringent duty of loyalty under ERISA, the phrases "without regard to" and "other interests" could be interpreted even more strictly to preclude financial professionals and institutions from acting in any relationship in which they may be compensated or receive even non-pecuniary benefits.[17] As such, we suggest that the proposed best interest standard be revised to remove the clause beginning "without regard to" and to replace it with language that would require that the financial professional put the investor's interests ahead of his or her own pecuniary interests and the pecuniary interests of the financial institution. Moreover, ERISA's duties of care and loyalty under section 404 and the strict liability provisions of the prohibited transaction rules under section 406 have long been analyzed as separate obligations. As such, a violation of one does not always result in a violation of the other. Importantly, if a fiduciary complies with a prohibited transaction exemption, the fiduciary may technically act under a conflict of interest, such as by using an affiliated broker under Prohibited Transaction Exemption 86-128, or by investing client assets in deposits of an affiliated bank under ERISA section 408(b)(4). However, the fiduciary must still comply with ERISA's duties of care and loyalty under section 404, so that the investment must be prudent and solely in the investor's interests.

Including ERISA-like duties of care and loyalty under the best interest standard as a condition of the prohibited transaction exemptions combines two obligations that Congress designed to be separate under the statute. Specifically, the impartial conduct standards blend the ERISA section 404 duties of care and loyalty with the proscriptive rules against self-dealing under ERISA section 406. Though the Department states that it intends the BIC Exemption to preserve commission-based fee arrangements, it is unclear in practice how a financial institution could continue to receive variable commissions when the BIC Exemption appears to prohibit any consideration of an institution's financial or other interests in an investment recommendation.

Further, the BIC Exemption requires financial institutions to warrant that they have adopted policies and procedures to "mitigate the impact of material conflicts of interest . . . and ensure that individual Advisers adhere to the Impartial Conduct Standards."[18] The proposal's five examples of how a financial institution could satisfy this requirement identify only a small subset of situations where variable commissions appear to be permitted.

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16 80 Fed. Reg. at 21,987 (emphases added).

17 29 U.S.C. § 1104(A)(1). This duty requires fiduciaries to act "solely in the interests" of the plan and its participants, and has been strictly interpreted to require fiduciaries to act with "complete and undivided loyalty to the beneficiaries of the trust," and with an "eye single to the interests of the participants and beneficiaries." *Donovan v. Bierwirth*, 680 F.2d 263, 3 EBC 1417 (2d Cir. 1982); *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629, 1 EBC 1898 (W.D. Wis. 1979).

18 80 Fed. Reg. at 21,970.

Specifically, two of the examples are essentially level-fee structures,[19] and one is based on independent computer models. A fourth option would require fee differences to be based on "neutral factors," and the fifth option would require any fee differences to align the financial professional's interests with those of his or her client. Given the lack of guidance and subjective nature of these latter two standards, it is unclear how either standard could be administered and supervised in practice. We also do not believe that the proposed rule provides sufficient guidance on how either example would support a financial professional receiving different commission amounts in many common scenarios, such as in the common case of different mutual fund companies offering different commissions for funds offering similar investment strategies, or where variable annuity providers pay different commissions for their products.

Finally, as discussed in more detail below, certain conditions of the BIC Exemption will be challenging to comply with as proposed. If these conditions are not changed, we believe that financial institutions will have difficulty building and operating successful compliance programs under the BIC Exemption. We request clarification of the requirements of the impartial conduct standards and meaningful guidance on how they can be satisfied in the context of common variable commission arrangements. We specifically request confirmation that variable commission arrangements may continue in their current form under the BIC Exemption, so long as (1) the contract is subject to a best interest standard, (2) compensation arrangements and related material conflicts are disclosed to investors in a meaningful way, and (3) no more than reasonable compensation is received. This is essential to ensuring that investors can access commission-based services, and that they have options when choosing their financial professional and how the professional will be compensated.

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The remainder of our comments focuses on technical aspects of the proposed rule and exemptions.

B. Recommendations regarding the definition of investment advice and the carve-outs.

Our comments in this section address technical aspects of the proposed definition of investment advice and the proposed carve-outs from fiduciary status.

1. *Confirm that selling services and products to investors, including retail investors, does not create a fiduciary relationship.*

We are concerned that the proposed definition of fiduciary investment advice is susceptible to broad interpretations that could encompass virtually every communication with an investor. Our specific concern is that financial professionals will not know when their fiduciary relationships start and stop. Because fiduciaries are subject to high standards of conduct and significant liability for breaches of duty, it is important that a financial professional and investor know when they are or are not entering into, or operating within, a fiduciary relationship.

The rule should provide guidance and clarification regarding how and when the fiduciary relationship commences under the proposal. Specifically, we request guidance that more clearly defines the terms "understanding," "specifically directed to" and "recommendation" under the proposal.

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19 One example would permit asset-based compensation that does not vary based on investment types, and the other would permit the financial institution to offset additional compensation received against a level fee for services. *Id.* at 21,971.

Drawing well-defined lines around fiduciary status is particularly critical in the context of selling products and services to investors. The courts and the Department have long drawn a common-sense distinction between *sales pitches* and fiduciary investment advice.[20] This distinction should remain under the proposed rule. For example, it should be clear that a financial institution's response to a request for proposals (RFP) is not a fiduciary recommendation, even if its response includes potential portfolio allocations that identify specific investments. Though the Department has provided a helpful carve-out for sales to certain institutional investors, this carve-out, by its terms, is not available for retail investors.

Although we understand that the Department may be concerned that retail investors may be confused as to when a financial professional is acting as a fiduciary, we believe that within the paradigm of self-directed investment accounts, the retail investor must be trusted to understand that the financial professional is not providing fiduciary investment advice when the financial professional clearly and consistently discloses its capacity and conflicts in the transaction. We also believe that important information is conveyed to potential investors as part of marketing services that helps investors make informed decisions about the type of assistance (e.g., financial planning, investment education, brokerage, or advisory) they need to help achieve their goals, and which financial professional and financial institution they want to hire. We are concerned that the lack of clarity regarding whether sales and marketing activities could inadvertently render a financial professional a fiduciary may inhibit these conversations.

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[20] *See Farm King Supply, Inc. v. Edward D. Jones & Co.*, 884 F.2d 288 (7th Cir. 1989); *Am. Fed'n of Unions, Local 102 v. Equitable Life Assurance Soc'y*, 841 F.2d 658 (5th Cir. 1988) (noting that an insurance company does not become an ERISA fiduciary where it simply urges the purchase of products); *see also Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 911-12 (7th Cir. 2013) (confirming that a provider of annuities does not become an ERISA fiduciary solely because it selects both funds and their share classes for a menu of investment options offered to 401(k) plan customers); *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009) (citing *Farm King* and finding that a company does not become a fiduciary "merely [by] playing a role or furnishing professional advice" in the selection of funds), *reh'g denied*, 569 F.3d 708 (7th Cir. 2009), *cert. denied*, No. 09-447 (Jan. 19, 2010); *Golden Star, Inc. v. Mass Mut. Life Ins. Co.*, 3:11-cv-30235-PBS (D. Mass. May 20, 2014) (finding that a service provider was a not a fiduciary where it acted only in a ministerial fashion with respect to the plan menu, and did not exercise its authority to delete or substitute the mutual funds offered to the plan without either providing any notice of changes or opportunity to reject them, or allowing the plan to engage a different service provider in the event of a rejection); *Santomenno v. John Hancock Life Ins. Co. (U.S.A.)*, 56 Employee Ben. Cas. 1131 (D.N.J. 2013) (holding that a plan service provider was not an ERISA fiduciary with respect to its fees where the fees were negotiated at arm's length and the fees were fully disclosed, and that it was not a fiduciary with respect to its selection as an investment option of a particular fund that paid revenue sharing because it did not have the ultimate authority to determine which investments were included in the plan); *Zang v. Paychex, Inc.*, 728 F. Supp. 2d 261, 270 (W.D.N.Y. 2010) (citing *Hecker* and holding that a plan service provider that offered a menu of investment options to a 401(k) plan was not a fiduciary because the plan had ultimate authority to reject any changes to the menu); *Columbia Air Services Inc. v. Fidelity Mgt. Trust Co.*, 2008 U.S. Dist. LEXIS 76999 (D. Mass. Sept. 30, 2008) (citing *Hecker* and following its analysis); *Dupree v. Prudential Ins. Co. of Am.*, WL 2263892 (S.D. Fla. 2007) (finding "it is well settled" that an insurer that performs fiduciary functions for a plan is not a fiduciary when it sells insurance products and services to the plan, and that the insurer is free to contract with a plan on an arm's length basis that does not implicate ERISA's fiduciary standards); *Fechter v. Connecticut Gen. Life Ins. Co.*, 800 F. Supp. 182 (E.D. Pa. 1992) (noting that courts refuse to impose fiduciary obligations on insurance companies that merely sell their products or services to pension plans and do not assume decision-making control over the administration or disposition of plan assets, and that insurance companies do not become fiduciaries when simply urging the purchase of their products).

We therefore request clarification that a financial professional will not be a fiduciary when selling products or services to a retail investor where it is clear from the circumstances that the financial professional is selling or marketing products and services and not acting as a fiduciary.[21]

Preserving the distinction between marketing and sales pitches and fiduciary advice is essential to ensuring that many valuable conversations between investors and financial professionals can continue. For example, if the distinction is not preserved, a financial professional may be reluctant to discuss his or her services and products, and to offer investors the information they need to decide whether or not to hire the financial professional to provide investment services.

We note that many financial institutions and financial professionals, including LPL and its financial professionals, enter into written contracts with investors that define the scope of services, including the effective date of the services arrangement. We suggest that the rule clarify that, for financial institutions and financial professionals that have client agreements defining the scope of services, fiduciary status will not apply until an investor enters into an agreement to hire the financial institution or financial professional to provide fiduciary investment advice. Doing so would clarify that financial institutions and financial professionals can market services without being deemed to be fiduciaries.

2. *Clarify the scope of the term "recommendation" to be consistent with FINRA guidance.*

Under the proposed definition of fiduciary investment advice, a person may be a fiduciary if the person provides a "recommendation" as to the advisability of certain transactions.[22] The proposed rule defines "recommendation" as "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."[23] We are concerned that this definition could be broadly interpreted to include almost any communication about investment products and services, as well as distribution options.

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[21] Please note that the SEC took a similar approach that acknowledged the investor's ability to understand the differences between a brokerage account and an advisory account when it adopted Rule 202(a)(11)-1 under the Advisers Act. That rule, which was later vacated by the D.C. Circuit Court of Appeals on other grounds, allowed broker-dealers to make available fee-based brokerage accounts without subjecting them to the Advisers Act. *See* Certain Broker-Dealers Deemed Not to Be Investment Advisers, Exchange Act Release No. 51523, Investment Advisers Act Release No. 2376 (Apr. 12, 2005), 70 Fed. Reg. 20,424 (Apr. 19, 2005); *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 488, 493 (D.C. Cir. 2007) (holding that the SEC exceeded its authority in promulgating the final rule by relying on Section 202(a)(11)(F) of the Advisers Act (now Section 202(a)(11)(H)) to establish a new, broader exemption for broker-dealers). Among other things, broker-dealers relying on the rule were required to include the following prominent statement in advertisements and account agreements: "Your account is a brokerage account and not an advisory account. Our interests may not always be the same as yours. Please ask us questions to make sure you understand your rights and our obligations to you, including the extent of our obligations to disclose conflicts of interest and to act in your best interest. We are paid both by you and, sometimes, by people who compensate us based on what you buy. Therefore, our profits, and our salespersons' compensation, may vary by product and over time." In a subsequent no-action letter, the SEC staff contemplated and provided a process for shifting from an advisory relationship to a brokerage relationship, stating that where a dually registered broker-dealer/investment adviser seeks to terminate an advisory relationship and assume a brokerage relationship, "[d]isclosure by a broker to a customer should be sufficient to enable the client to reasonably understand that the broker-dealer/ investment adviser is removing itself from a position of trust and confidence with its client." *See* Securities Industry Ass'n, SEC Staff No-Action Letter (pub. avail. Dec. 16, 2005).

[22] 80 Fed. Reg. at 21,957.

[23] *Id.* at 21,960.

The Department has requested comment on whether it should adopt some or all of the standards FINRA has developed for determining whether a communication should be viewed as a recommendation for purposes of FINRA's Rule 2111 suitability requirements.[24] We would support this approach because FINRA's numerous regulatory notices, together with litigated decisions,[25] provide greater clarity on when an investor could reasonably conclude that a communication would trigger an advice relationship (i.e., when it is individualized). Adopting FINRA's guidance would better harmonize the various regulatory regimes with which financial institutions and financial professionals must comply.

3. Revise the proposed carve-out for investor education to permit educational materials to identify particular funds and investments.

We appreciate the Department's proposal to include a specific carve-out from the definition of fiduciary investment advice for investment education that is largely based on the Department's guidance under Interpretive Bulletin 96-1. We also think it is helpful that the Department has clarified that its guidance on investment education applies not just to communications with plan participants, but also to those with plan fiduciaries and IRA account owners.

Nonetheless, we believe it also is essential that financial professionals be allowed to identify specific investment options in educational materials without taking the risk that doing so will be viewed as a fiduciary recommendation. For example, the proposed rule would appear to permit educational materials to provide information about available investment options, and to provide model asset allocations. However, it seems that both types of information cannot be provided together. Thus, a financial professional could tell a plan participant how to allocate his or her account among various asset classes, but could not tell the participant which investment options available from the plan's menu fall within the asset classes. For example, a financial professional could provide an investor with a model asset allocation suggesting allocations of 40% to intermediate term bonds, 20% to large cap value, 20% to small cap value, and 20% to international. However, the financial professional could not tell the investor which investment options available from a plan's investment lineup, or from a platform of investments available through an IRA, match each of these asset classes. This restriction would require the participant to make this determination alone in order to implement the asset allocation.

We are concerned that adding this extra step for participants will needlessly slow the investment process, and make it more likely that the participant will not make investment elections that appropriately allocate his or her account assets, thus undermining the benefits of investor education. We note that many of our financial professionals offer free or low-cost access to helpful investor education tools that identify specific investment products. If these tools are deemed to result in fiduciary recommendations, we are concerned that financial professionals will be unwilling to assume

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[24] *Id.* at 21,938.

[25] *See* FINRA, Suitability: Additional Guidance on FINRA's New Suitability Rule, Regulatory Notice 12-25 (May 2012); FINRA, Know Your Customer and Suitability: New Implementation Date for and Additional Guidance on the Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations, Regulatory Notice 11-02 (Jan. 2011); NASD, Online Suitability: Suitability Rule and Online Communications, Notice to Members 01-23 (Apr. 2001); *see also Michael Frederick Siegel*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459, at *21 (Oct. 6, 2008) (finding a recommendation under the facts and circumstances), *aff'd in relevant part*, 592 F.3d 147 (D.C. Cir.), *cert. denied*, 2010 U.S. LEXIS 4340 (2010); *DBCC v. Kunz*, No. C3A960029, 1999 NASD Discip. LEXIS 20, at *63 (NAC July 7, 1999) (finding that the mere distribution of offering material was not in and of itself enough to constitute a recommendation), *aff'd*, 55 S.E.C. 551, 2002 SEC LEXIS 104 (2002).

the increased risk of being deemed a fiduciary, and that investors will lose access to these valuable services. This will particularly affect the ability of our financial professionals to provide meaningful guidance to participants during plan sponsor meetings that are intended to encourage savings and investment in the plans.

We suggest that the rule continue to treat materials that identify specific investment products as non-fiduciary investment education as currently provided under Interpretive Bulletin 96-1. We also request that the rule confirm that a financial professional can provide objective information about investment options and services, such as fund fact sheets, summary prospectuses, and Form ADV Part 2 brochures, without risk of being viewed as a fiduciary.

4. Clarify that a fiduciary can provide investor education about distributions and rollover options in accordance with FINRA Regulatory Notice 13-45.

The proposed rule would include recommendations to distribute plan assets, including recommendations to roll over assets to an IRA, as fiduciary recommendations. This would supersede the Department's prior guidance in Advisory Opinion 2005-23A (Deseret Letter) that such recommendations would not be fiduciary. Many financial institutions, including LPL, have relied on the Deseret Letter in structuring their services with respect to plan distributions, and have also relied on guidance from other regulators, including FINRA Regulatory Notice 13-45, "Rollovers to Individual Retirement Accounts" (Notice 13-45). Notice 13-45 draws a distinction between recommendations with respect to plan distributions, which it says are subject to FINRA's suitability standards, and investor education.

In view of the Deseret letter and FINRA guidance, LPL has adopted policies and procedures that facilitate our financial professionals' ability to provide educational information to plan participants who are eligible for plan distributions. In particular, we have developed materials that provide participants with information about their four basic distribution options (i.e., keep savings in the current plan, transfer savings to a new plan, roll over savings to an IRA, or take a cash distribution). These materials, which are based upon the factors FINRA outlined in Notice 13-45, include a discussion of the factors that participants need to weigh and consider in making their own decisions about where to keep their retirement savings, including tax consequences, fees and expenses, available services, conflicts of interest, distribution options, investment options, creditor protections, and other factors.

In light of our initiatives to provide participants with helpful education about plan distribution options, we appreciate that the Department has proposed to expand its prior guidance on investor education to include education about distributions and rollovers. Because reversing the Department's guidance in the Deseret Letter could require financial institutions to substantially change and restructure their services with respect to distributions, we think it is critical that the rule further clarify the types of conversations about rollovers and distributions that would be viewed as educational, rather than fiduciary. We specifically request that the rule confirm that financial professionals can provide investor education in accordance with FINRA guidance distinguishing recommendations from education, and explicitly permit financial institutions to provide information on the factors described in Notice 13-45 without being deemed to be fiduciaries, so long as the financial professional clearly notifies the participant that he or she is not acting as a fiduciary or a representative or agent of the plan.

C. Recommendations regarding the Best Interest Contract Exemption.

As noted above, we appreciate the Department's intention to provide a flexible exemption to preserve certain current compensation practices, while at the same time offering enhanced investor protections. In addition to the concerns we discussed above about whether the BIC Exemption could provide relief for variable commission arrangements, we have a number of comments regarding technical aspects of complying with the proposed exemption, which we discuss below.

1. Exemptive relief should not be conditioned upon satisfying the subjective impartial conduct standards.

We appreciate the Department's intention to provide financial institutions with flexibility through the new "principles based" approach to prohibited transactions exemptions. However, we are concerned that the principles-based approach will require subjective facts and circumstances analyses that will make it hard for financial institutions to know whether the exemptions' conditions have been fully satisfied without a final determination by a trier of fact. We are further concerned that it will be difficult to document compliance with the subjective impartial conduct standards, which is essential in being able to prove that an exemption's conditions were satisfied and that no prohibited transaction occurred. Thus, we do not think requiring compliance with the impartial conduct standards is appropriate as a condition of the exemptions.

Engaging in a non-exempt prohibited transaction can result in severe penalties, including undoing the transaction, forfeiture of compensation, payment of excise taxes, and reputational damage. Moreover, financial institutions are required to report non-exempt prohibited transactions to the Internal Revenue Service. Further, the Department has stated that investors will have a private right of action under the BIC and Principal Transactions Exemptions. This may result in increased litigation risk, including potential class action liability.

Subjective standards, such as the best interest standard, are based on facts and circumstances. Though this gives financial institutions and their professionals flexibility in complying with the exemptions, it also exposes them to potential strict liability risk and damages based upon a subjective standard that can be challenged years after the event. Also, it is unclear who will make the determination that the impartial conduct standards have been satisfied should the actions of a financial institution or professional be questioned.

We are concerned that requiring actual compliance with these standards as a condition of the exemptions will create significant uncertainty for financial institutions, resulting in hesitancy about relying upon the exemptions when structuring their investment products and services. Alternatively, we suggest that, similar to the approach the Department proposed with respect to the warranties required under the BIC Exemption, the exemption be revised to require the financial institution to contractually agree to the impartial conduct standards, but not to require actual adherence to the standards as a condition of the exemption. Thus, a breach of the impartial conduct standards would give rise to breach of contract claims, but would not by itself cause a non-exempt prohibited transaction. In such circumstances, the financial institution would be responsible for losses and damages resulting from the contractual breach, but not strict liability. This would protect investors by allowing them to enforce a provision against the financial institution, and permit the financial institution to have greater certainty with respect to compliance with the prohibited transaction rules.

2. Clarify the proposed BIC Exemption to cover services.

The proposed BIC Exemption would cover receipt of compensation for "services provided in connection with a purchase, sale or holding" of an asset as a result of a financial institution's advice. It is unclear based on the proposed language, whether the BIC Exemption covers advice regarding services. For example, it is unclear whether the BIC Exemption would cover a financial professional's receipt of a referral fee for recommending a third-party investment adviser to provide fiduciary investment management services to a plan or IRA.[26] We request revision of the proposed language to clarify that the BIC Exemption covers compensation received in connection with advice related to services.

In this regard, we also suggest that the rule clarify how a financial institution may address financial professional conflicts of interest related to advice on services. Specifically, as discussed above, we request clarification that financial institutions and financial professionals may receive variable compensation in connection with their advice under the BIC Exemption. Further, we request consideration of how the BIC Exemption disclosure requirements would work in the context of services recommendations. For example, it is unclear how a financial institution would estimate an assumed rate of return for the transaction disclosure for an investment manager who would provide a customized asset allocation among various investment options. In such a case, the financial institution is not recommending a transaction but an investment manager, and the financial institution will not know specifically how the investment manager will invest the client's portfolio.

3. Expand the definition of "Retirement Investor".

As proposed, the BIC Exemption covers compensation received in connection with advice to plan participants, beneficial owners of IRAs, and fiduciaries of non-participant directed plans with fewer than 100 participants, but not to fiduciaries of participant-directed plans or plans with more than 100 participants. The BIC Exemption should be revised to expand the definition of "Retirement Investor" so that a broader class of plans is eligible for relief under the exemption. First, we believe the BIC Exemption should be available to cover all plans, regardless of the number of participants. We are concerned that financial institutions will have difficulty establishing and monitoring the 100-participant threshold for plans on a day-to-day basis, and developing systems and processes to establish and monitor participant counts will be costly and time consuming. Broker-dealer firms who provide services for plans on third-party recordkeeping platforms typically do not have ready access to current participant numbers, and would need to build connectivity with third-party platforms to obtain this information on a daily basis in order to monitor them. We are also concerned about how a financial institution would be able to change its compliance procedures where it relied on the BIC Exemption with respect to an account that later becomes ineligible to be covered because the number of participants has increased to over 100. We understand that the Department established the 100-

[26] We note that referral fee arrangements are already subject to robust disclosure requirements and other investor safeguards under the Advisers Act. Specifically, Advisers Act Rule 206(4)-3 makes it unlawful for an investment adviser that is registered or required to be registered under the Advisers Act to pay a cash fee, directly or indirectly, for client referrals unless the payments are made in compliance with specified conditions. In proposing the rule, the SEC concluded that, "with appropriate regulatory safeguards, the payment of cash referral fees can be permitted consistent with the protection of investors." Thus, the rule establishes a number of conditions, including extensive disclosure and supervision requirements, that are intended to protect investors from any conflicts of interest that may arise as a result of an adviser's referral fee arrangement.

participant threshold under the BIC Exemption to align with the same threshold under the seller's carve-out, but we are uncertain how a financial institution would be able to qualify for relief under the seller's carve-out given that the BIC Exemption requires an affirmative representation that the financial institution and financial professional are acting as a fiduciaries to the investor. Thus, we recommend revision of the BIC Exemption to cover any employee benefit plan, regardless of the number of participants.

Second, the BIC Exemption should be available when providing advice to fiduciaries of participant-directed plans. Fiduciaries of these plans often turn to broker-dealers for assistance in setting up the investment options to be made available to plan participants through a plan's investment menu. These plans, which are often sponsored by small businesses, recognize the benefits to their employees of providing access to retirement savings vehicles, but do not have the financial resources to engage a full-service investment adviser or consultant to help in setting up the plan's investment menu and to provide ongoing monitoring services.

We are concerned that, if the BIC Exemption is not available when providing advice to such plans, the ultimate result will be to limit the availability of any investment assistance to fiduciaries of small participant-directed plans. This result is contrary to the goals of improving the ability of all Americans to save for retirement. Moreover, we do not understand why the rule would cover advice to fiduciaries to small non-participant directed plans, but not to fiduciaries to small participant directed plans, particularly where there is no proposed relief for such plans under the seller's carve-out.

We understand that relief may be available with respect to plans that are not covered within the BIC Exemption under the carve-outs from the investment advice definition, but these carve-outs would not cover all communications or all plans. For example, we understand that the platform carve-out and investment education carve-outs may cover certain communications with fiduciaries to participant-directed plans. However, neither carve-out would appear to cover a fiduciary recommendation of a specific investment product to be included on the plan's menu. The result would seem to be that most, if not all, assistance to fiduciaries to small participant directed plans could both be fiduciary and ineligible for relief under a prohibited transaction exemption. We do not believe that this is the intended result.

Further, precluding financial institutions and financial professionals from relief for advice to these plans under the BIC Exemption would require the financial institution to develop separate compliance procedures for advice to fiduciaries of participant-directed plans. Instead, financial institutions should have the option of relying upon the BIC Exemption for any client. We also think it is important to cover the broad range of accounts that are plans under section 4975 of the Internal Revenue Code, but that are not subject to ERISA. This would be consistent with the Department's goal of more broadly extending fiduciary standards to communications with retail investors.

4. Streamline the contract requirements.

The logistics of executing a three-party agreement prior to a recommendation presents significant challenges. We outline these challenges and provide suggestions for streamlining the process below.

First, for current clients as of the applicability date, we and other industry members will need to build systems to identify which clients may be subject to the BIC Exemption. In many cases, we may not have data or records needed to make this determination, and we may need to request information from tens of thousands of clients. Second, we will need to print, mail, receive, process, and retain executed contracts from current clients. As we noted above, LPL has approximately 2.4 million retirement brokerage clients. If we do not receive an executed contract by the applicability date, it would appear that we would no longer be able to provide assistance with respect to the investor's account, which would harm our clients and potentially leave them without valuable assistance with respect to assets they purchased prior to the effective date of the rule.

Therefore, we would suggest revision of the contract requirement to permit financial institutions to unilaterally amend current client agreements to provide the contractual terms required under the BIC Exemption, and to provide clients with notice of the amendment through use of a negative consent letter. If a client does not want to continue the relationship, the client could then inform the financial institution that he or she would like to terminate the agreement. If the client does not respond to the letter, the amended client agreement would be valid and enforceable against the financial institution. This negative consent approach would accomplish the Department's goal of giving investors contractual rights and making them aware of these rights, without the extra steps and costs of requiring the investors to sign and return an agreement.[27]

Second, requiring a signed agreement *before* a recommendation is given to a new client would be very challenging. As proposed, the BIC Exemption would require investors to enter into a written agreement with the financial institution and financial professional *before* a recommendation can be discussed (which includes the potential investment products and services to be made available if the financial professional is hired). Investors will not want to sign a contract with a financial institution prior to deciding to hire it. This requirement will be disruptive to the investor's process of learning about what a financial institution has to offer, and may result in fewer investors receiving any investment advice. It may also discourage investors from exploring their financial institution options, knowing this contract requirement will be involved with each institution they contact. We recommend revision of the BIC Exemption to permit the contract to be signed upon account opening.

Third, we believe that it is unnecessary for both the financial professional and the financial institution to be parties to the contract and that this requirement creates needless complications and inefficiencies. It could take significant time to have a new agreement executed by the new financial professional and the financial institution and investor. During this time, investment assistance would be unavailable. Similar issues will arise where a team of financial professionals serves an investor's account, as the members of the team will change over time. Finally, in cases where a financial professional leaves a financial institution (e.g., by retiring), but the investor remains and is assigned to a new financial professional, a new tri-party contract will have to be executed before the new financial professional can speak to the investor, thereby disrupting the provision of advice to the investor. We recommend

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27 We understand the Department has expressed concerns that not all customers actually receive mail from financial institutions. Broker-dealer firms are subject to Rule 17ad-17 under the Securities Exchange Act of 1934, which obligates firms to search for lost security-holders. Broker-dealer firms have policies and procedures under this rule to help confirm whether mail is received, including monitoring and following up on correspondence that is returned from a customer's address in their files. We believe these practices mitigate the risk that a customer would not receive notice of the amendment to his or her contract. Moreover, the Department has approved the negative consent approach in several advisory opinions and prohibited transaction exemptions. *See* DOL Adv. Op. 97-16A (May 22, 1997) (approving negative consent to change platform of mutual funds and increased shareholder servicing and distribution fees); DOL Adv. Op. 2005-10A (May 11, 2005) (approving negative consent to increase investment management fees); DOL Information Letter to Robert S. Plotkin, the Assistant Director of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System (Aug. 1, 1986) (approving negative consent to change fee for sweep services); PTE 2012-11 (Delaware Charter Guarantee & Trust d/b/a Principal Trust Company), 77 Fed. Reg. 32,673 (2012) (negative consent to fee increases and investment by a collective fund in additional affiliated funds); PTE 2010-26 (PNC Financial Services Group, Inc.), 75 Fed. Reg. 56,564 (2010) (negative consent to fee increases).

revision of the proposed BIC Exemption to permit financial institutions to execute contracts on behalf of all of the financial professionals who may provide recommendations to the investor, so long as the contract is enforceable against the financial institution and the financial professional.

5. Simplify the transaction, annual, and website disclosures.

We support the Department's efforts to foster transparent and meaningful disclosures regarding fees and compensation that financial institutions receive in connection with services to ERISA plans and IRAs. However, we are concerned that some of the technical requirements of the proposed disclosure conditions of the BIC Exemption would be very challenging to implement in practice, and would raise other concerns and expose the financial institution to prohibited transactions for inadvertent and *de minimis* errors. Specifically:

- ***The disclosures require information that is held by a third party.*** We may not have ready access to certain information required to be disclosed under the annual, transaction, and website disclosures. This is particularly the case where one of our financial professional's client accounts is held on a third-party's mutual fund or brokerage platform. In this case, we may not have ready access to all of the information about assets purchased and sold, fee information, or information regarding compensation earned with respect to those assets that is needed for the annual, transaction, and website disclosures. Broker-dealers would have to build the systems to coordinate with third parties to determine the assets purchased, sold, or held in the last 365 days, as needed for the website disclosure. Because broker-dealers are not currently required to maintain certain of this information, broker-dealers, as well as the third parties in possession of the information, would need to develop technology and systems, and incur the related costs, to transmit, maintain, and accurately report this information.

- ***The transaction disclosure requires certain assumptions that may mislead investors.*** The transaction disclosure requires assumptions regarding rates of return and expenses that could mislead investors regarding actual rates of return and expenses. It is very difficult to estimate a future rate of return for a particular investment option, and there is not sufficient guidance regarding how this may be accomplished. Indeed, both the SEC and FINRA have provided guidance in multiple contexts regarding the use of assumed rates of return; one of the unifying themes of this guidance is that, as stated in FINRA Rule 2210(d)(1)(F), "Communications may not predict or project performance, [or] imply that past performance will recur . . . ." Indeed, in its comment letter on the proposed rule, FINRA stated that the performance projection requirements would conflict with FINRA Rule 2210.[28]

  We are also concerned that expense estimates may be misleading because investment providers may change the fees and expenses associated with particular investment options at any time, and the proposed rule does not permit costs to be estimated or based upon reasonable assumptions. Moreover, changes to expenses will need to be continuously updated, which could result in investors receiving outdated or erroneous information, given that the disclosures will need to be ready to be furnished at any time. Finally, we note that some investment options and products raise particular challenges when assuming rates of return and expenses. For example, how would estimated expenses and assumed rates of return be calculated for a

[28] Letter from Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA to Employee Benefits Security Administration (July 17, 2015), at 14-15 [hereinafter, *FINRA Comment Letter*].

managed account that would be customized to an investor's objectives and financial circumstances?

- ***The transaction disclosure may disrupt trading efficiency.*** The requirement to provide a detailed transaction disclosure prior to executing a purchase will frequently slow the investment process, and could cause investors to miss investment opportunities, particularly when making market sensitive trades, such as in individual equities or fixed income. Investors already have access to numerous disclosures regarding investment expenses, including summary prospectuses for registered funds, prospectuses for variable annuities, and trade confirmations. Adding yet another disclosure is concerning in any market, and is particularly concerning in volatile markets and in situations where a financial professional makes a recommendation at a time when there is little time to execute the transaction, such as near the close of a trading day, or at the end of the year when an investor needs to take a required minimum distribution from his or her IRA to avoid an excise tax. We are concerned that a broker-dealer may not be able to meet its best execution obligations under the proposed rule.[29]

  In addition, we are concerned about situations where the disclosure is provided, but the investor does not execute the transaction immediately (or on the same day with respect to mutual fund shares). In those situations, the information provided may become stale (such as pricing information) before the investor returns to confirm and allow the financial institution to execute the transaction. In order to fulfill its disclosure obligations under the BIC Exemption, it appears that the financial professional could need to provide this information again, slowing down the process even further.

- ***The transaction disclosure will be extremely costly and presents practical issues.*** To comply with this requirement, financial institutions would have to build a new technology system that is tailored to these requirements and that can quickly provide the required information for any potential investment. The costs to build such systems would be significant. In addition, there are other practical issues that the rule has not addressed. For example, it appears that the proposed rule does not reflect how this disclosure would be provided in different scenarios, such as when a retirement investor is working with a financial professional over the telephone or when accessing investment information through an interactive website. Similarly, the proposal does not provide any guidance on how financial institutions should attribute certain revenue (e.g., revenue sharing, payments for shelf space), which is often attributed to a wide range of investors beyond retirement investors, and to purchases of mutual funds by retirement investors. Nor does the proposal permit any assumptions (other than rates of return), such as with regard to how costs may change over time. We also note that, in 2005, the SEC proposed

[29] Under the antifraud provisions of the federal securities laws and under FINRA rules, including FINRA Rule 5310, broker-dealers have a duty to seek to obtain best execution of customer orders. *See, e.g., Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 269-270 (3d Cir.); *Certain Market Making Activities on Nasdaq*, Exchange Act Release No. 40900 (Jan. 11, 1999) (citing Sinclair v. SEC, 444 F.2d 399 (2d. Cir. 1971). *See also Order Execution Obligations*, Exchange Act Release No. 37619A (Sept. 6, 1996), ("Order Handling Rules Release"). Specifically, FINRA Rule 5310 requires broker-dealers to use reasonable diligence to ascertain the best market for a security and to buy or sell the security in that market so that the price to the customer is as favorable as possible under market conditions. We are concerned that delays resulting from the transaction disclosure requirements may interfere with broker-dealer's ability to obtain best execution under certain circumstances. We note that FINRA has raised similar concerns in its comments regarding the proposed Principal Transaction Exemption. FINRA Comment Letter at 17.

point-of-sale disclosure requirements for mutual funds, variable annuities, and 529 plans that have not yet been finalized.[30]

- ***The website disclosure may raise privacy and competitive concerns.*** It appears that the website disclosure would require disclosure of compensation payable to individual financial professionals with respect to particular investment options. We believe that this may raise issues under applicable state privacy laws, and request clarification that compliance with the website disclosure requirements would not violate other applicable law. We are also concerned that some financial professionals may choose not to provide services to retirement accounts rather than have elements of their compensation posted on a public website. Moreover, the website disclosure may also have the effect of requiring financial institutions to make proprietary information publicly available. This may have a negative effect on competition in the financial marketplace. To address these concerns, we suggest that the website disclosure requirements be revised to permit the use of ranges and to make clear that individual financial professionals do not need to be identified.

The Department asked for comments on whether a short and direct, plain-English, consumer-warning disclosure would be effective and less costly than the proposed transaction disclosure.[31] We believe it would. This would particularly be the case where it is accompanied with (1) a disclosure similar to those required under ERISA section 408(b)(2) in shorter form, either in the contract, or at account opening that describes the services provided, material conflicts, the range of compensation that may be received, and (2) a post-transaction disclosure on a confirmation pursuant to the requirements of Rule 10b-10, or an annual disclosure of commissions. We also believe that such a short-form, plain-English disclosure would effectively convey to investors the importance of considering the expenses and fees associated with investment options.

We are concerned that retail investors already receive a large quantity of information and disclosures about investments, and that providing additional information of marginal utility may cause investors not to make investment decisions, or to make bad investment decisions.[32] Though we agree with the Department that investors should have clear and accurate information about the cost of investments, we note that for many products this information is currently available in disclosures that are generally required by the SEC or other regulators, such as summary prospectuses of mutual funds, prospectuses for variable annuities, and fund fact sheets for bank collective funds. Further, information about fees

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[30] *See, e.g.*, Point of Sale Disclosure Requirements and Confirmation Requirements for Transactions in Mutual Funds, College Savings Plans, and Certain Other Securities, and Amendments to the Registration Form for Mutual Funds, Securities Act Release No. 8544, Exchange Act Release No. 51274, Investment Company Act Release No. 26778 (Feb. 28, 2005), 70 Fed. Reg. 10,521 (Mar. 4, 2005) (to be codified at 17 C.F.R. pts. 239, 240, and 274).

[31] Specifically, the Department has asked for comments on an alternative to the transaction disclosure that is described in the preamble as a "'cigarette warning'-style disclosure", such as a statement reading: "Investors are urged to check loads, management fees, revenue sharing, commissions, and other charges before investing in any financial product. These fees may significantly reduce the amount you are able to invest over time and may also determine your adviser's take-home pay. If these fees are not reported in marketing materials or made apparent by your investment adviser, don't forget to ask about them." 80 Fed. Reg. at 21,974.

[32] *See* Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 73 Fed. Reg. 43,014, 43,016 (proposed July 23, 2008) (noting that "information that is too detailed may overwhelm participants"); The ERISA Industry Committee, Letter to Office of Regulations and Interpretations, Employee Benefits Security Administration re: Fee Disclosure RFI (July 19, 2007); L. Boselovic, "New Regulations to Make 401(k) Quarterly Statements Even Longer," Pittsburgh Post-Gazette, (Aug. 30, 2012).

and expenses is also available in the participant fee disclosures required under the regulations under ERISA section 404(a)(5), the service provider fee disclosures required under ERISA section 408(b)(2), and through the Form 5500 annual report. We are concerned that the three additional disclosures required under the proposed BIC exemption will just add more to the large amount of information investors already receive. We remain committed to working with the Department and other regulators to streamline this information to make it meaningful to and useable for investors.

For example, rather than the detailed cost disclosures, we believe the rule could require a financial institution to provide at account opening a consumer warning and a short form disclosure that includes the following information:

- The role of the financial institution (e.g., "What is the Role of a Broker?")
- The legal standards that apply to brokers (e.g., "What Standards Apply to a Broker?")
- The broker's material conflicts of interest related to compensation (e.g., "How May Brokers' Compensation Affect Their Recommendations and How Do Brokers Address Conflicts of Interest?")
- Ranges of commissions and other compensation for the products that the financial professional may recommend in a table (see below).
- Alternatives to brokerage relationships (e.g., "What Alternatives Are There To a Brokerage Relationship?")

The disclosure document could contain a table that lists each investment type a financial institution may recommend, e.g., mutual fund, equity, variable annuity, and bond. For each investment type, the table would set out the range of commissions or trails that a financial institution can receive (as a percentage or a dollar amount), the timing of such compensation (e.g., upfront or ongoing), and whether the compensation is direct or indirect. Below is an example of such a table.

Investment	**Timing (Upfront or Ongoing)**	**Range (% or $)**	**Direct/Indirect**
Mutual Fund			
Equity			
Bond			
Variable Annuity			

A summary of other types of compensation the financial institution or financial professional may receive would be included as well. We believe such a document would streamline the disclosures under the rule, giving investors the information that is important to them in an easy to understand format.

6. Propose a streamlined way to correct inadvertent violations of the exemption's conditions.

The proposed BIC Exemption includes many technical and detailed disclosure and other requirements that present numerous opportunities for inadvertent errors. For example, the transaction disclosure and annual disclosure will require the financial institution to obtain detailed information from thousands of product sponsors about costs and expenses, and to assume an estimated rate of return for each product. It is possible that some of this information will not be entered correctly in the financial institution's systems or will be outdated, and that, as a result, the transaction disclosures provided to many clients will contain errors leading to mis-information upon which decisions may be based. Where these errors are administrative and inadvertent, and the financial institution has acted in good faith, the financial institution should not automatically lose the exemption and be deemed to have engaged in a prohibited transaction. Moreover, in light of the Department's principles-based approach to the BIC Exemption's conditions, particularly with respect to the subjective impartial conduct standards, we suggest adoption of a principles-based approach to the penalties and corrections that could apply if the exemption's conditions are not satisfied. Specifically, penalties or corrections should be commensurate with the severity of the infraction, and not result in strict liability.

D. Comments regarding the Principal Transactions Exemption.

Many of our comments raised with respect to the BIC Exemption discussed above would also apply to the Principal Transactions Exemption, including the disclosure requirements, impartial conduct standards, timing of the transaction disclosure, and need for a way to correct inadvertent errors. We also noted above that we believe the rule should expand relief for a broader range of debt securities, including structured products. Our additional comments on the Principal Transactions Exemption follow below.

In general, we believe that the proposed requirements with respect to transactional disclosures are unnecessarily restrictive and will present several practical impediments to complying with the requirements. Further, the confirmation disclosure requirements present significant operational burdens.

1. Allow more flexibility in disclosing information to an investor prior to engaging in a principal transaction.

As proposed, a financial professional must, *prior* to engaging in a principal transaction, inform the investor that "the purchase or sale of the Debt Security will be executed as a Principal Transaction." In addition, the proposed Principal Transactions Exemption requires the financial institution to disclose, *prior* to engaging in a principal transaction, any available pricing information, including the two quotes from a ready and willing counterparty, as well as the mark-up or mark-down or other payment that will be charged to the investor.

We believe brokerage practices should be disclosed to investors. We are concerned that requiring investor consent, at order acceptance, to the precise manner in which a trade will be executed will be unnecessarily restrictive in practice, and will reduce trading efficiency. Among the practical concerns regarding this approach are potential difficulties re-engaging the investor to obtain final consent from potential price movements subsequent to obtaining the initial consent. Further, finding two prices will not always be possible and may add time to the transaction, including additional time needed to determine which securities are similar securities and whether pricing information is available. We question the utility of this requirement in light of a broker-dealer's best execution and fair pricing obligations, as well as with regard to the potential confusion providing this information to retirement investors may cause. Those retirement investors who are concerned about comparable pricing could access information through FINRA's Trade Reporting and Compliance Engine (TRACE) system, with respect to corporate debt, and the MSRB's Electronic Municipal Market Access website (EMMA), with respect to municipal securities.

Particularly, in light of the fact that the Principal Transactions Exemption imposes a best interest standard of care on fiduciaries who seek to comply with it, we recommend that the rule not require affirmative consent to the specific terms of a principal transaction, but rather allow an investor to provide oral consent to a principal transaction generally, and then allow the financial institution to determine whether to execute a trade as principal. Specifically, the proposed requirement should be revised to require the financial professional or financial institution to provide, orally or in writing: "A statement that the purchase or sale of the Debt Security may be executed as a principal transaction between the financial professional or financial institution and the plan, participant or beneficiary account, or IRA." Further, the price at which the transaction will be executed should not be required prior to the completion of the transaction. Under such an approach, the financial professional and financial institution would remain subject to the best interest standard of care, as well as to obligations under the federal securities laws, which provide adequate protections addressing principal trading in various circumstances.

In addition to enhancing our ability to effectively serve investors, this approach may also minimize compliance burdens, as it is consistent with the approach taken by the SEC in Temporary Rule 206(3)-3T under the Advisers Act. As you know, that rule, which applies to dually-registered investment advisers and broker-dealers with respect to non-discretionary accounts, requires only that an investment adviser that may engage in a principal trade inform the client "of the capacity in which it may act with respect to such transaction." The SEC recognized, in adopting this approach, "that in many instances the adviser may not know whether a particular transaction will be effected on a principal basis."[33] In addition, FINRA already requires public disclosure of pricing information for corporate debt securities through its TRACE system (and the MSRB requires such disclosure for municipal securities through its EMMA website).

2. Mark-up and mark-down disclosures.

The rule requires disclosure of the mark-up or mark-down prior to obtaining consent to a principal transaction and again on the confirmation. This is a topic on which FINRA and the MSRB have focused. For example, fair mark-ups and pricing are addressed in FINRA Rule 2121. In addition, the MSRB and FINRA requested comments on proposed rule changes that would require broker-dealers to disclose the difference between a reference price and the price to the client for same-day, "retail-sized" riskless principal transactions.[34] These disclosures would serve as an indication of the mark-up or mark-down in those transactions. These proposals are related to the SEC's increased focus on price transparency in the debt markets.[35] In its comment letter regarding the Department's rule proposal, FINRA recommends that the rule's requirement for disclosure of mark-ups and mark-downs be deleted, and that instead the rule require compliance with FINRA Rule 2121 and any FINRA rules that require the disclosure of pricing information related to principal transactions.[36]

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[33] *See* Temporary Rule Regarding Principal Trades with Certain Advisory Clients, Investment Advisers Act Release No. 2653 (Sept. 24, 2007), 72 Fed. Reg. 55,022, 55,028 (Sept. 28, 2007).

[34] *See* MSRB, Request for Comment on Draft Rule Amendments to Require Dealers to Provide Pricing Reference Information on Retail Customer Confirmations, Regulatory Notice 2014-20 (Nov. 17, 2014); FINRA, Pricing Disclosure in the Fixed Income Markets: FINRA Requests Comment on a Proposed Rule Requiring Confirmation Disclosure of Pricing Information in Fixed Income Securities Transactions, Regulatory Notice 14-52 (Nov. 2014).

[35] *See* SEC, REPORT ON THE MUNICIPAL SECURITIES MARKETS (July 31, 2012), *available at* https://www.sec.gov/news/studies/2012/munireport073112.pdf.

[36] Letter from Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA to Employee Benefits Security Administration (July 17, 2015), at 16-17.

If the Department determines that the rule must require additional disclosure regarding mark-ups and mark-downs, we recommend an alternative that would be less challenging operationally and costly to build. Rather than requiring disclosure of the specific mark-up or mark-down, the Department could require disclosure of the maximum mark-up or mark-down percentage that a financial institution permits for particular types of securities and a general phone number that would reach an individual at the financial institution who can provide more information. This type of disclosure would facilitate investor education and understanding without imposing operational challenges that otherwise would be present.

F. More than eight months is needed to comply with the rule.

The rule is proposed to become applicable eight months after it is final. We are concerned that this is not enough time for us to implement and comply with the rule as written. Among numerous other changes, complying with the rule as proposed will require us to:

- Design, build, and test a website that must be updated quarterly.
- Design, build, and test systems and compliance procedures needed to satisfy the tri-party contract required under the new exemptions.
- Design, build, integrate, and test systems needed to collect data from LPL and third parties, process data and report data in real time to satisfy the point-of-sale and annual disclosure requirements under the BIC Exemption and the Principal Transactions Exemption. We note that each of these requirements will require us to develop separate systems. For the transaction disclosure, we will need to develop a system that allows the financial professional to input the specific investment information so the system can identify and incorporate the costs, apply the expected rate of return information, and print that information for, or compile it in another manner that can be transmitted to, the client. The annual disclosure will require a separate system to track each asset purchased and sold by a retirement investor in a calendar year, calculate the fees and expenses paid by the retirement investor, and determine the total amount of all direct and indirect compensation received for each asset.
- Repaper and obtain client signatures for current clients who will need to be covered under the BIC Exemption.
- Develop systems to identify and block assets that are not covered under the BIC exemption, and to inform current clients that we will no longer be able to provide advice to them on these assets as of the applicability date, and to ensure that third parties that directly hold client assets have done so as well.
- Redesign our client on-boarding policies, procedures and systems.
- Revise our compliance and supervision procedures and systems, including for exemptions we currently rely upon that the Department has proposed to change.

The Department has requested input regarding the rule's implementation period. We are concerned that, without additional time beyond the eight months, implementing the rule will significantly disrupt investors' experiences with our financial professionals, and that our financial professionals may not have enough time to fully understand and comply with the rule. In fact, we estimated that it could require at least thirty-six months to fully implement the requirements. We would suggest that the

Department consider implementing the rule in phases and would welcome further discussion with the Department regarding the specific ways in which a phased implementation may be accomplished.

G. The costs of complying with the rule may have been substantially underestimated.

We would encourage the Department to reconsider its cost analysis and to take into account estimates provided by others commenting on the proposed rule. We believe that important factors may have been omitted from the Department's cost analysis, including potential costs associated with changes to current business models and resulting costs to clients. We believe that it is important that the rulemaking process be informed by an accurate and comprehensive cost analysis, and so we urge the Department to review and consider information and analyses it receives regarding its cost analysis.

* * * * *

Thank you for considering our comments on the proposed rule. We note that the Department has requested comments on 99 technical issues in the proposal. Given time constraints, we have not addressed many of the Department's questions in this letter, but we strongly believe that it is important that these questions, as well as many other technical questions the proposal raises, be answered, considered, and reflected in any final rule. We would be happy to supplement this letter with additional information or to further discuss the implications of the proposal with the Department.

The technical issues that remain to be resolved are numerous, and this rule, which has the potential to affect $17.6 trillion in retirement assets in the United States, will have a significant impact upon financial institutions, financial professionals, small businesses, plans, and IRAs, and more broadly on the capital markets and the national economy. LPL is dedicated to ensuring that its financial professionals have the tools and resources they need to best serve their clients and to help their clients achieve their retirement goals and other investment objectives. As we stated at the outset, we believe that all financial professionals should act in their clients' best interests and that compensation and conflicts should be disclosed and addressed in meaningful ways. Nevertheless, we also believe that investors should be free to make choices about the services and products that they will use to achieve their goals, and that the benefits of any new regulation must be carefully weighed against its costs. We are concerned that if the rule is finalized as proposed, it may limit many beneficial services our financial professionals are currently able to provide to retirement investors.

As such, we would strongly recommend that the Department issue another proposed rule prior to issuing a final regulation. At a minimum, we would recommend that the Department issue a discussion draft of the final rule and hold focus group meetings with plan sponsors, fiduciaries, investors, financial institutions, and financial professionals before the rule is finalized. We look forward to collaborating with the Department on refining the proposal.

Sincerely,

David P. Berg

David P. Bergers

Appendix A: Highlights of Investor Protections under Federal and State Law and LPL's Current Policies and Procedures Regarding Certain Assets

The table below highlights investor protections under federal and state law and under LPL's policies and procedures for certain assets. These assets are examples of assets that may be excluded from the Best Interest Contract and Principal Transaction Exemptions. For purposes of this appendix, we assume that none of the investments are registered under the Investment Company Act of 1940 (Investment Company Act).

Asset	Federal Securities Laws	State Laws	Highlights from LPL's Current Policies and Procedures
Non-Traded REITs	• Generally registered under the Securities Act of 1933 (Securities Act) • Generally subject to disclosure obligations under the Securities Act and the Securities Exchange Act of 1934 (Exchange Act) • Sales subject to antifraud provisions and FINRA rules[1] • FINRA Rule 2340 and Regulatory Notice 15-02 establish requirements for account statement valuations of non-traded REITS • FINRA Regulatory Notice 12-03 provides guidance to member firms regarding the heightened supervision	• Subject to state registration requirements; many states have modeled those requirements on the North American Securities Administrators Association (NASAA) Statement of Policy Regarding Real Estate Investment Trusts, including prospectus delivery; may impose limitations related to liquid net worth, income levels and allocation limits that clients residing within that state must meet in order to invest in an offering • Broker-dealers subject to state registration requirements, business conduct rules related to unethical and	• LPL performs due diligence on a product before deciding whether to add it to the list of products approved for sale by LPL's financial professionals • After the due diligence process, alternative investment products are escalated to LPL's Product Review Committee (PRC) for discussion and potential approval for sale by financial professionals; the PRC generally considers what disclosures, suitability considerations, supervision, and training may be needed • LPL financial professionals and

[1] *See generally* Sections 9(a), 10(b), and 15(c) of the Securities Exchange Act of 1934 ("Exchange Act"); Section 17(a) of the Securities Act; FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade); FINRA Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices); FINRA Rule 2111 (Suitability); FINRA Rule 2210 (Communications with the Public); FINRA Rule 2121 (Fair Prices and Commissions); FINRA Rule 2122 (Charges for Services Performed); FINRA Rule 2210 (Communications with the Public); FINRA Rule 2262 (Disclosure of Control Relationship with Issuer); FINRA Rule 2310 (Direct Participation Programs); FINRA Rule 3110 (Supervision); FINRA Rule 3120 (Supervisory Control System); FINRA Rule 3130 (Annual Certification of Compliance and Supervisory Procedures); FINRA Rule 3220 (Influencing or Rewarding Employees of Others); FINRA Rule 3270 (Outside Business Activities of Registered Persons); FINRA Rule 5120 (Offering Members' Securities); FINRA Rule 5310 (Best Execution and Interpositioning); FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders).

Asset	Federal Securities Laws	State Laws	Highlights from LPL's Current Policies and Procedures
	requirements for complex products, such as suitability obligations and training of registered representatives (*see also* NASD Notice to Members 03-71; NASD Notice to Members 05-26) • FINRA Regulatory Notice 13-18 provides guidance on communications with the public about non-traded REITs • SEC and FINRA conduct examinations of broker-dealers for compliance with the federal securities laws and FINRA rules, and can bring enforcement actions for violations thereof	fraudulent practices, and state anti-fraud provisions with respect to the sale of securities • States conduct examinations of broker-dealers for compliance with applicable state laws and regulations and can bring enforcement actions for unethical and fraudulent conduct	principals (supervisors) must complete training about this product type before selling it or supervising transactions involving it • Principals perform risk-based supervision of the sales activities of financial professionals • LPL sets guidelines for the percent of liquid net worth that may be invested in this product. LPL guidelines vary by liquid net worth, age, investment objective, and current alternative investment holdings.
Non-Traded Business Development Companies (non-traded BDCs)	• Type of closed-end fund that may elect to be regulated as a BDC under the Investment Company Act • Subject to disclosure obligations under the Securities Act (if registered under the Securities Act), Exchange Act, and Investment Company Act (if regulated under the Investment Company Act), including, for example, requirements related to portfolio composition and prospectus delivery • If regulated under the Investment Company Act, subject to certain affiliated transaction rules • Subject to corporate governance and	• Non-traded BDCs are subject to state registration requirements; many states have modeled those requirements on the NASAA Omnibus Guidelines, including prospectus delivery; states may impose limitations related to liquid net worth, income levels and allocation limits that clients residing within that state must meet in order to invest in an offering • Broker-dealers subject to state registration requirements, business conduct rules related to unethical and fraudulent practices, and state anti-fraud provisions with respect to the sale of securities	• LPL performs due diligence on a product before deciding whether to add it to the list of products approved for sale by LPL's financial professionals • After the due diligence process, alternative investment products are escalated to LPL's PRC for discussion and potential approval for sale by financial professionals; the PRC generally considers what disclosures, suitability considerations, supervision, and training may be needed • LPL financial professionals and principals (supervisors) must

Asset	Federal Securities Laws	State Laws	Highlights from LPL's Current Policies and Procedures
	other provisions of the Sarbanes-Oxley Act of 2002 and the Investment Company Act (if regulated under the Investment Company Act) • Subject to rules of the securities exchange if the non-traded BDC is listed • Sales subject to antifraud provisions and FINRA rules[1] • FINRA Rules 2310 establishes requirements for all non-traded BDCs, and FINRA Rule 5123 establishes special requirements for non-listed BDCs • SEC and FINRA conduct examinations of broker-dealers for compliance with the federal securities laws and FINRA rules, and can bring enforcement actions for violations thereof • FINRA Regulatory Notice 12-03 provides guidance to member firms regarding the heightened supervision requirements for complex products, such as suitability obligations and training of registered representatives (*see also* NASD Notice to Members 03-71; NASD Notice to Members 05-26)	• States conduct examinations of broker-dealers for compliance with applicable state laws and regulations and can bring enforcement actions for unethical and fraudulent conduct	complete training about this product type before selling it or supervising transactions involving it • Principals perform risk-based supervision of the sales activities of financial professionals • LPL sets guidelines for the percent of liquid net worth that may be invested in this product. LPL guidelines vary by liquid net worth, age, investment objective, and current alternative investment holdings.

Asset	Federal Securities Laws	State Laws	Highlights from LPL's Current Policies and Procedures
Private Equity Funds & Hedge Funds	• Generally only available to accredited investors, as defined in Rule 501 of Regulation D of the Securities Act of 1933 • Investment advisers to private equity and hedge funds generally required to register with the SEC; may also be required to register as commodity pool operators with the CFTC and National Futures Association • Investment advisers subject to fiduciary duty and must disclose material conflicts of interest • Sales of private equity and hedge funds are subject to antifraud provisions and FINRA rules[1] • NASD Notice to Members 03-07 addresses sales practice issues when selling hedge fund interests • FINRA Rule 5123 requires broker-dealers selling a security in a private placement to file a copy of the offering document with FINRA (see also FINRA Regulatory Notice 12-40) • FINRA Regulatory Notice 10-22 provides guidance regarding broker-dealers' obligations to conduct reasonable due diligence related to offerings of private placements • SEC conducts examinations of broker-dealers and investment	• State registration may be required for investment advisers to private equity funds with assets under management less than $150 million • Investment adviser representative registration may be required • States retain authority to investigate and bring enforcement actions with respect to fraud or deceit against an investment adviser or person associated with an investment adviser • Regulation D does not preempt state anti-fraud provisions	• LPL performs due diligence on a product before deciding whether to add it to the list of products approved for sale by LPL's financial professionals • After the due diligence process, alternative investment products are escalated to LPL's Product Review Committee PRC for discussion and potential approval for sale by financial professionals; the PRC generally considers what disclosures, suitability considerations, supervision, and training may be needed • LPL financial professionals and principals (supervisors) must complete training about this product type before selling it or supervising transactions involving it • Principals perform risk-based supervision of the sales activities of financial professionals • LPL sets guidelines for the percent of liquid net worth that may be invested in this product. LPL guidelines vary by liquid net worth, age, investment objective, and current alternative investment holdings.

Asset	Federal Securities Laws	State Laws	Highlights from LPL's Current Policies and Procedures
	advisers to private equity and hedge funds for compliance with the federal securities and can bring enforcement actions for violations thereof • The SEC and CFTC require filing of Form PF and Form CPO-QPR, respectively		
Structured Products	• Registered under the Securities Act • Subject to disclosure obligations under the Securities Act and the Exchange Act • Sales subject to antifraud provisions and FINRA rules[1] • NASD Notice to Members 05-59 and FINRA Regulatory Notice 09-73 address sales practice obligations in recommending structured products • FINRA Regulatory Notice 12-03 provides guidance to member firms regarding the heightened supervision requirements for complex products, such as suitability obligations and training of registered representatives (*see also* NASD Notice to Members 03-71; NASD Notice to Members 05-26) • SEC and FINRA conduct examinations of broker-dealers for compliance with the federal securities laws and FINRA rules, and can bring enforcement actions for violations thereof	• Subject to state registration requirements; some states, in approving registration of a product, impose limitations related to liquid net worth, income levels and allocation limits that clients residing within that state must meet in order to invest in an offering • Many states have modeled registration requirements on the NASAA Statement of Policy Regarding Registration of Asset-Backed Securities, including prospectus delivery • Broker-dealers subject to state registration requirements, business conduct rules related to unethical and fraudulent practices, and state anti-fraud provisions with respect to the sale of securities • States conduct examinations of broker-dealers for compliance with applicable state laws and regulations and can bring enforcement actions for unethical and fraudulent conduct	• LPL performs due diligence on issuers and structures before deciding whether to add them to the list of products approved for sale by LPL's financial professionals • After the due diligence process, new and novel products are escalated to the PRC for discussion and potential approval for sale by financial professionals; the PRC generally considers what disclosures, suitability considerations, supervision, and training may be needed • LPL financial professionals and principals (supervisors) must complete training about this product type before selling it or supervising transactions involving it • Principals perform risk-based supervision of the sales activities of financial professionals

Asset	Federal Securities Laws	State Laws	Highlights from LPL's Current Policies and Procedures
Municipal Securities	• Antifraud provisions prohibit misleading statements or omissions in official statements and ongoing disclosure • Rule 15c2-12 under the Exchange Act imposes requirements on underwriters regarding initial and ongoing disclosure • MSRB rules establish disclosure, sales practice, and other requirements for broker-dealers and municipal securities dealers[2] • SEC and FINRA conduct examinations for compliance with the federal securities laws and MSRB rules, and can bring enforcement actions for violations thereof	• Exempt from registration under state law, except for the offer and sale of a security within the state in which the issuer of the security is located • Broker-dealers subject to state registration requirements, business conduct rules related to unethical and fraudulent practices, and state anti-fraud provisions with respect to the sale of securities • States conduct examinations of broker-dealers for compliance with applicable state laws and regulations and can bring enforcement actions for unethical and fraudulent conduct	• LPL has established policies and procedures reasonably designed to ensure that fixed income transactions are executed at the best available price based on a reasonable relationship to the prevailing market price of the same or a similar security • The policies and procedures include fair pricing and best execution guidelines that LPL's traders must use in buying and selling fixed income securities for customers • Principals perform risk-based supervision of the sales activities of financial professionals

[2] *See generally* MSRB Rule G-10 (Delivery of Investor Brochure); MSRB Rule G-11 (Primary Offering Practices); MSRB Rule G-13 (Quotations Relating to Municipal Securities); MSRB Rule G-14 (Reports of Sales or Purchases); MSRB Rule G-17 (Conduct of Municipal Securities and Municipal Advisory Activities); MSRB Rule G-19 (Suitability of Recommendations and Transactions); MSRB Rule G-20 (Gifts, Gratuities and Non-Cash Compensation); MSRB Rule G-21 (Advertising); MSRB Rule G-22 (Control Relationships); MSRB Rule G-30 (Prices and Commissions); MSRB Rule G-32 (Disclosures in Connection with Primary Offerings); MSRB Rule G-43 (Broker's Brokers); MSRB Rule G-45 (Reporting of Information on Municipal Fund Securities); MSRB Rule G-47 (Time of Trade Disclosure).