Wells Fargo & Company
420 Montgomery Street
San Francisco, California 94104
wellsfargo.com

July 21, 2015

***Via* e-mail to e-ORI@dol.gov and e-OED@dol.gov**

Mr. John J. Canary, Director
Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25]

Dear Mr. Canary:

Wells Fargo & Company, and its affiliates, ("Wells Fargo") welcomes the opportunity to comment on the U.S. Department of Labor's (the "Department") proposals regarding the definition of the term "fiduciary," new prohibited transaction exemptions and amendments to existing exemptions (collectively, the "Proposal").[1] We hope that our comments are helpful to the Department as it assesses the potential impacts of the Proposal on retirement plans and their participants.

Who We Are and Whom We Serve

Wells Fargo is committed to providing individuals and their families with the advice and guidance they need to plan and save for retirement. We supported the Department's core 2010 "best interest" standard of care concepts[2] and the Securities and Exchange Commission's (the "SEC" or the "Commission") exploration of a uniform standard of care under the Federal Securities Laws,[3] and we remain supportive today of a "best interest" standard of care for clients. We welcome the Department's continued focus on this important issue and intend to be a collaborative partner with the Department as this dialogue continues.

Wells Fargo serves 70 million clients or one in every three American households. We hold over $390 billion in individual retirement account ("IRA") assets for over 4 million IRA owners and $400 billion in institutional retirement plan assets for over 3 million retirement plan participants. This makes us the 6th largest IRA provider and the 7th largest institutional retirement plan recordkeeper (based on assets) in the United States. We serve our clients when, where and how they want to be served – through financial professionals, bank and brokerage branches, call centers, websites, mobile devices or a combination of these options – to help them succeed financially.

As a leading provider of retirement solutions to millions of people of varying means and needs, we are uniquely positioned to provide insight into how the Proposal may impact the ability of Americans to invest for retirement. We, like the Department, see the growing importance of saving through both IRAs and individual and employer-sponsored retirement plans (e.g., 401(k) plans). Based on our first-hand experience, we believe a "best interest" standard of care for clients must both facilitate greater access to financial information and services and be flexible enough to serve all retirement investors – from those just beginning their savings journey to those nearing or in retirement.

We have found, consistent with independent studies, that Americans working with a financial professional generally save more,[4] enjoy greater investment returns[5] and have greater wealth at retirement than those who do not work with a financial professional.[6] Indeed, Wells Fargo's 2014 Middle-Class Retirement Study showed that people with a written plan for retirement were saving a median of $250 per month, far greater than the median $100 per month being saved by those without a written plan. This difference is the result of financial professionals working hard every day to help clients understand their goals, developing financial strategies to achieve those goals and encouraging clients to stick to those strategies during times of uncertainty.

Therefore, we support efforts by the Department to encourage Americans to work with a financial professional to obtain the assistance they need to successfully plan for their financial future. As a recent Vanguard study found, an advisor's added value "is more aptly demonstrated by the ability to effectively act as wealth manager, financial planner, and behavioral coach – providing discipline and reason to clients who are often undisciplined and emotional – than efforts to beat the market."[7] In other words, people facing difficult, and critical, financial choices benefit when working with a financial professional – and not just from technical advice on particular investments.

Wells Fargo Supports a Best Interest Standard

We agree with the core concept of the Proposal that financial professionals should be required to act in the "best interest" of their clients at all times. We also commend the Department for making great strides since 2010 in developing a new "fiduciary" definition that seeks to incorporate input from many stakeholders. We believe, however, the Proposal remains too broad in some respects, too strict in others and too complex overall. If the Proposal becomes effective as currently envisioned, the likely result will be that investors, particularly middle-class savers, will receive less individualized retirement education and support and have fewer choices when preparing for retirement than they have today.

We propose to address these challenges by recommending a "best interest" standard of care that fosters greater access to financial education and retirement services for every investor. Our recommendation is to simplify and incorporate additional flexibility into the Proposal so that retirement investors will retain access to the information, advice and services that best fit their individual circumstances, while also benefitting from an explicit higher standard of care.

We believe a "best interest" standard of care based on the following core principles could be implemented relatively quickly and, most importantly, would help investors meet their retirement planning goals. Below each principle, we summarize our recommended changes to the Proposal to better align it with that principle. In Appendix A to this letter, titled *Detailed Comments of Wells Fargo Regarding the Department's "Fiduciary" Proposal*, we provide our detailed comments on the key areas where we believe retirement investors will be negatively affected by the Proposal and offer alternative solutions to address those impacts and to achieve our common goal of establishing a "best interest" standard of care.

1. **Encourage Clients' Financial Education**

People facing important financial decisions should have access to more, not less, financial information and assistance. In these times, financial professionals should continue to serve as an important source of financial education and information for all investors.

Recommendation: We recommend the definition of "fiduciary" in the Proposal be narrowed and the Proposal's carve-outs and contemplated exemptions be expanded. This will allow investors to continue to obtain the financial information and education they need from financial professionals or retirement plan service providers, helping them to be better informed decision-makers.

2. **Establish a "Best Interest" Standard of Care for Clients**

A financial professional should be required to act in the client's best interest with the flexibility to recommend individualized investments and service models to help each client achieve their unique retirement planning goals.

Recommendation: The complexity and cost of the Best Interest Contract Exemption ("BIC Exemption") as proposed makes it an unworkable solution; as a result, there may be fewer available investment and service options, particularly for middle-class savers. For example, we are uncertain whether recommending best in class products and services to clients that are not the lowest cost option are permitted under the BIC Exemption's "impartial conduct standards." Consequently, such products would likely not be offered to clients. We believe the proposed contract under the BIC Exemption should be narrowed to focus on establishing a "best interest" standard of care for clients, which would ensure investment advice is based on the unique needs of each investor. Likewise, to serve the best interests of each client, we believe principal transactions should be permitted without the complicated conditions of the proposed Principal Transaction Exemption. Alternatively, any conditions should align with the Investment Advisers Act of 1940 to reduce regulatory conflicts and likely improve and simplify clients' experiences.

3. **Disclose Fees and Commissions to Clients**

Clients should be provided clear "plain-English" information regarding fees and charges for products and services and should not be overwhelmed with complex disclosures.

Recommendation: The disclosure requirements contemplated by the BIC Exemption should leverage existing disclosures, instead of creating entirely new and overly complex requirements. For example, the Department recently developed new disclosures requirements under Employee Retirement Income Security Act ("ERISA") Section 408(b)(2), to specifically address fee and conflict issues for ERISA-covered plans. Service providers have spent considerable time and effort developing systems and documents that comply with these requirements. In the interest of simplicity and efficiency, the existing 408(b)(2) disclosures should be used to provide IRA accountholders with the same detailed fee transparency and conflict information.

4. **Reduce or Eliminate Conflicts of Interest and Disclose Them to Clients**

Conflicts of interest that may impact a financial professional's ability to act in the best interest of the client should be reduced or, where possible, eliminated and in any event, disclosed.

Recommendation: The BIC Exemption should use existing Form ADV (presently used by SEC registered investment advisers). Form ADV was designed specifically to inform investors of potential conflicts of interest and could help clients further understand a financial professional's compensation and reduce or eliminate conflicts of interest.

5. **Hold Advice Providers Accountable**

Clients should be confident that a financial professional is providing advice in their best interest.

Recommendation: The parties should enter into a binding agreement – similar to the BIC Exemption contract discussed in our detailed comments – at account opening, which commits the financial institution to work in the best interest of each client and provides a remedy should the standard be breached.

6. **Eliminate Overlapping Regulations with a Regulatory Exemption**

Based on our experience, we believe clients will receive the best advice under a uniform standard of care. A uniform standard would provide the most beneficial protection for clients by creating one set of obligations across all account types, eliminating client confusion concerning what advice comes with a particular type of account.

Recommendation: To encourage broader adoption of a uniform "best interest" standard of care for clients, we believe an exemption should be created for broker-dealers or other regulated entities that are subject to a "best interest" standard of care for their clients adopted by another regulator or self-regulatory organization meeting the Department's fundamental requirements.

7. <u>HSAs and Similar Accounts Serve Different Client Needs</u>

Health Savings Accounts ("HSAs"), Coverdell Education Savings Accounts ("ESAs") and other similar accounts are fundamentally different from retirement accounts in their purpose and operation.

<u>Recommendation:</u> The Department requested comment on the advisability of including HSAs, ESAs and other similar accounts in this Proposal. We believe HSAs and ESAs and other similar accounts should be excluded from the Proposal altogether, because clients primarily use these accounts as spending accounts and not to save for retirement.

8. <u>An Appropriate Implementation Time Period Is Crucial to Client Service</u>

Retirement savers have trillions of dollars invested under the existing regulatory structure. A reasonable time to design, build, test and train on new documentation, disclosures, procedures and systems must be permitted to continue servicing existing and new clients.

<u>Recommendation:</u> Clients may have limited service and investment options if service providers are not able to implement all the new documentation, disclosures, procedures and systems called for in the Proposal within the implementation time period. For example, we could not use the BIC Exemption until all the proper controls and disclosures are in place. Given the complexity of the Proposal in its current form, the eight month implementation time period is simply unattainable and unrealistic. We believe three years, if not more, is necessary to ensure all the requirements of the Department's proposed rule are properly implemented.

****

Once again, we thank the Department for the opportunity to comment on the Proposal and intend to stay engaged with the Department on this important topic. In addition to <u>Appendix A</u> – *Detailed Comments of Wells Fargo Regarding the Department's "Fiduciary" Proposal*, <u>Appendix B</u> – *A Summary of Wells Fargo's Recommended Changes to the Proposal* has also been included for your quick reference.

Sincerely,

David M. Carroll

David M. Carroll
Senior Executive Vice President
Wealth, Brokerage & Retirement
Wells Fargo & Company

cc: The Honorable Thomas E. Perez, Secretary of Labor

[1] Dep't of Labor, Employee Benefits Security Admin., *Definition of Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 80 Fed. Reg. 21928 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pts. 2509 and 2510), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08831.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Best Interest Contract Exemption*, 80 Fed. Reg. 21960 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs*, 80 Fed. Reg. 21989 (proposed Apr. 20, 2015) (to be codified 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08833.pdf.; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to Prohibited Transaction Exemption (PTE) 75-1, Part V, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Broker-Dealers; Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, 80 Fed. Reg. 22004 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08836.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters*, 80 Fed. Reg. 22010 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08837.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Proposed Partial Revocation of PTE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, 80 Fed. Reg. 22021 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08838.pdf; Dep't of Labor, Employee Benefits Security Admin., *Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1*, 80 Fed. Reg. 22035 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08839.pdf.

[2] *See generally* Correspondence from Joseph Ready, Executive Vice President of Wells Fargo Institutional Retirement and Trust to the Office of Regulations and Interpretations, Employee Benefits Securities Administration, *regarding* RIN 1210-AB32, Definition of Fiduciary Proposed Rule (Feb. 3, 2011), *available at:* http://www.dol.gov/ebsa/pdf/1210-AB32-176.pdf.

[3] *See* Correspondence from Robert J. McCarthy, Director of Regulatory Policy at Wells Fargo Advisors, LLC, to Elizabeth M. Murphy, Secretary of Securities and Exchange Commission, *regarding* File No. 4-606; Release No. 34-69013; IA-3558; Duties of Brokers, Dealers and Investment Advisers, at 2-7 (July 5, 2013), *available at:* https://www.sec.gov/comments/4-606/4606-3127.pdf (outlining Wells Fargo's support for a uniform fiduciary duty that: (i) incorporates a duty of loyalty to act in the client's best interests; (ii) protects broker-dealer and investment adviser business models; (iii) preserves client choice in service and pricing models; (iv) applies only to personalized investment advice; (v) covers only transactions resulting in compensation; (vi) preserves access to the full range of securities products and services; and, (vii) facilitates flexible and practical disclosure and consent).

[4] Claude Montmarquette and Nathalie Viennot-Briot, "Econometric Models on the Value of Advice of a Financial Advisor," Centre for Interuniversity Research and Analysis on Organizations (CIRANO) (July 2012), at 9, 15-35, 56, *available at:* http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf.

[5] David Blanchett and Paul Kaplan, "Alpha, Beta, and Now…Gamma," Morningstar Investment Management (Aug. 28, 2013), at 16, *available at:* http://corporate.morningstar.com/ib/documents/PublishedResearch/AlphaBetaandNowGamma.pdf.

[6] *Id.*

[7] Donald G. Bennyhoff and Francis M. Kinniry Jr., "Advisor's Alpha," Vanguard Research (Apr. 2013), at 3, *available at:* https://advisors.vanguard.com/iwe/pdf/ICRAA.pdf?cbdForceDomain=true.

Wells Fargo & Co.
Appendix A

DETAILED COMMENTS OF WELLS FARGO
REGARDING THE DEPARTMENT'S "FIDUCIARY" PROPOSAL

We applaud the Department's efforts to establish a "best interest" standard and recognize that the Proposal represents a significant undertaking. The Proposal's complicated provisions, however, contain elements that effectively undermine its stated objectives and impose new limits on retirement investors' choice of investment products and services, and their access to financial education at times when they need it the most. This appendix discusses the key areas where we believe retirement investors will be negatively affected by the Proposal and provides specific recommendations on how to address those impacts to achieve our common goals. We include at the outset a table of contents to guide the Department through our comments. While we believe there should be one uniform "best interest" standard for all clients, we secondarily believe the Department's Proposal, which impacts retirement advice only, may be made more workable by incorporating the recommendations set forth herein.

TABLE OF CONTENTS

I. THE PROPOSED DEFINITION OF "FIDUCIARY" IS OVERLY BROAD AND RESTRICTS ACCESS TO INFORMATION.

Planning for their financial future is one of the most important and daunting tasks facing retirement investors and businesses today. Investors face an investment landscape filled with a broad choice of retirement products and investment options that is accompanied by reams of complex information. Sorting through these options and information can be confusing and overwhelming. Consequently, many individuals and business owners seek assistance to help them understand the strategies, retirement products and investment options that may be appropriate to help them achieve their financial goals, both to accumulate assets for retirement and to spend those assets responsibly during retirement.

Indeed, the Department noted in the Proposal's preamble "the need for plans and IRA owners to seek out and rely on sophisticated financial advisers to make critical investment decisions in an increasingly complex financial marketplace."[1] The Department further states the Proposal is "intended to ensure that small plan fiduciaries, plan participants and IRA owners would be able to obtain the essential information regarding important decisions they make regarding their investments without the providers of that information crossing the line into fiduciary status."[2]

Unfortunately, the combination of expanding the definition of covered advice so broadly as to classify all manner of information as fiduciary advice while providing only narrow exemptive relief from Employee Retirement Income Security Act's ("ERISA") prohibited transaction provisions, undermines the stated intent of the Proposal. Below, we make recommended modifications to the Proposal to help ensure that retirement investors will continue to have access to the information they need to be informed decision-makers while receiving the protections sought by the Department.

A. *The Definition of Investment Advice Should Be Narrowed.*

Individuals and their families seeking retirement assistance, whether in a retirement plan or otherwise, want to know what products and services are available to help them. They can then make an informed decision about whether to invest with a financial professional, select their own retirement products or take no action. As noted above, the Department concurs that financial professionals should be able to provide "essential information" to retirement investors without crossing the line into fiduciary status.

The current regulation regarding the establishment of a fiduciary relationship is straightforward and workable. Under the regulation, a financial professional becomes a fiduciary by providing investment advice, when it is provided on a regular basis and where there is a

[1] 80 Fed. Reg. at 21929.

[2] *Id*. at 21942.

mutual agreement, arrangement or understanding that the advice will form a primary basis for the investment decision. Thus, fiduciaries know when they are fiduciaries and the identity of the persons relying on them for investment advice. This also leaves investors free to seek retirement investment information from financial professionals without that professional crossing the line to become a fiduciary.

Under the Proposal, fiduciary status attaches at the "suggestion"[3] that a person take a particular course of action that is "individualized to" or "specifically directed to" that person for "consideration in making investment…decisions."[4] This is so broad as to encompass nearly every conversation between a financial professional and a client or prospective client regarding retirement products and services. As a result, we believe the Proposal will unreasonably restrict the essential information that individuals receive unless it is modified as set forth below.

i. We Recommend Clarifying that Providing General Information About Our Products and Services Does Not Constitute Investment Advice.

Any conversation between a financial professional and a retirement investor regarding retirement products or services will inevitably be used by the investor to determine if the financial professional is the right fit for them, which means the conversation will necessarily be classified as "for consideration in making investment…decisions" and fiduciary obligations would attach under the Proposal. To encourage the free flow of information between a retirement investor and a financial professional, we recommend the Department revise the Proposal to permit individuals to receive information about available retirement product options (including available investment options and the costs associated with particular products) so that they can understand the available options before establishing a binding fiduciary relationship with a financial professional.

The fiduciary commitment should begin at the point at which the retirement investor relies on the financial professional and the financial professional receives compensation. Most logically, this would occur at the time an account is opened or the product is purchased by the investor. This means that access to investment, distribution and other assistance would be preserved while investors would still be protected through the application of a "best interest" standard when the investor opens an account, deposits funds, acquires a specific product, acknowledges a fiduciary relationship or reviews specific investment recommendations with the financial professional as discussed further in Section I.A.iv. below.

In addition, the scope of the Proposal in its current form also potentially pulls in relationships where each party's status is unclear. For example, mutual fund wholesalers often provide education to financial professionals on the product their company offers and mutual fund service center representatives answer product questions from financial professionals. These

---

[3] 80 Fed. Reg. at 21960 (§ 2510.3-21(f)(1)).

[4] *Id*. at 21957 (§ 2510.3-21(a)(2)(ii)).

activities may be deemed fiduciary if the inquiring financial professional is a plan fiduciary or if the call center provides distribution options even without providing advice. We recommend the Department clarify that this type of activity is information sharing between intermediaries and not investment advice.

ii. We Recommend Adding a "Mutual Understanding" Element to the Definition.

The Department has eliminated the "mutual agreement" requirement contained in the current regulation. However, financial professionals must have the ability to discuss their products and services, which is the "essential information" an investor needs, without arbitrarily "crossing the line into fiduciary status." We believe the most appropriate and easily determinable time to attach fiduciary obligations is when the financial professional and the retirement investor reach some mutual understanding that they have entered into an advice relationship. If the understanding is not mutual, providers seeking to comply with the duties of a fiduciary will not know when those duties attach and will not know what information they may give.

The Department's broader language could make a larger group of providers liable as fiduciaries and does not accomplish the objective of enhancing the quality of advice that providers give to individuals while still providing access to "essential information." We understand that the Department is concerned that individuals or entities may seek to avoid fiduciary status by deliberately refusing to agree to such status, even when the other facts of the relationship would support a fiduciary role. For this reason, we suggest that the parties should have a reasonable expectation that they are in a fiduciary relationship and that the final rule include a requirement that this arrangement or agreement be "mutually understood."

iii. We Recommend Deleting "Specifically Directed to" from the Definition or, at a Minimum, Adding the Phrase "Advice that Is Individually Tailored" to Narrow the "Specifically Directed to" Element of the Definition.

In order to make an informed decision about retirement assets, individuals need to have information about the products and services available to them. However, because investment advice is defined so broadly under the Proposal, even activities such as mailing brochures that discuss a financial institution's product and service offerings, including IRA or plan services, would be considered "specifically directed to" a recipient and thus inappropriately be considered fiduciary investment advice.

Furthermore, advertisements that are specifically targeted to investors based upon past consumer behavior or demographic information would also inappropriately be considered fiduciary investment advice. For instance, today, by virtue of online activity, individuals receive advertisements that are tailored to them based on prior online activity. In these instances, the information may be delivered in response to prospective client needs or interests, but the financial institution does not have enough information to make a true recommendation for the information recipient, nor would the recipient reasonably understand the information to be anything other than sales material.

If an individual pursued a product or service as a result of this kind of material, he or she typically would receive additional specific information and, if working with a financial professional, would be able to provide personal information that could help the financial professional make a specific fiduciary recommendation. Thus, we believe the "specifically directed to" element of the definition by itself is unnecessarily broad and any recommendation should be individually tailored to the recipient before it could be considered "advice." We recommend either deleting the phrase "specifically directed to" from the definition of "investment advice" or adding "advice that is individually tailored" to the definition.

Finally, a materiality or reliance qualifier is also necessary to narrow the scope of fiduciary advice. Such a qualifier will focus the application of fiduciary obligations on activities and actions of the most importance and raise the very low bar set by the proposed "for consideration" standard. Logically, if the retirement investor does not rely on the advice there should be no compensable damages, but the absence of an explicit qualifier from the regulation will likely have a chilling effect on the provision of general education information that the producer does not intend as advice.

iv. We Recommend Clarifying that "Investment Advice" Means a "Recommendation" – Consistent With Current Securities Law – and Should Apply After New Account Opening.

The Department states that it looked to Financial Industry Regulatory Authority ("FINRA") guidance on when suitability obligations attach to recommendations to help guide the Department in determining when fiduciary obligations should attach to retirement investor interactions.[5] FINRA guidance to its Rule 2111, or the "Suitability Rule," applies to recommendations to a "potential investor" who then becomes a "customer." Thus, the Suitability Rule's investor protections extend to prospective clients *if* that individual executes transactions through the broker-dealer that made the recommendation or if the broker-dealer receives or will receive compensation as a result of the transaction.[6] Under FINRA's guidance, broker-dealers do not escape liability for a recommendation made prior to account opening but later implemented at account opening.[7] We believe the same standard would be appropriate for determining when fiduciary obligations attach under the Proposal and would establish a brighter line for when fiduciary status begins for both the investor and financial professional.

[5] *See*, *e.g.*, 80 Fed. Reg. at 21938 and 21945.

[6] *See* FINRA, Regulatory Notice 12-55, *Suitability* (Dec. 2012), at 2 (FAQs 6(a) and 6(b)), *available at:* https://www.finra.org/sites/default/files/NoticeDocument/p197435.pdf.

[7] *See Id.* at 6 (FAQ 6(b), n.10) ("[For a] recommendation to a *potential investor*, suitability obligations attach when the transaction occurs, but the suitability of the recommendation is evaluated based on the circumstances that existed at the time the recommendation was made.").

B. *Additional Parties Should Be Included in the Seller's Carve-Out.*

The Department states that the "overall purpose" of the carve-out for counterparty transactions with plan fiduciaries[8] ("Seller's Carve-Out") is "to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of proposed deals."[9] As currently proposed, the Seller's Carve-Out fails to achieve this purpose.

i. <u>We Recommend Including All ERISA-Covered Plans, Regardless of Size.</u>

The availability of the Seller's Carve-Out depends on (1) the number of participants in the plan and (2) the amount of plan assets under management of the plan fiduciary. If a plan does not satisfy these threshold requirements, the Seller's Carve-Out is unavailable whether or not "neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser."[10] Any requirement based on plan size will raise the practical problem of monitoring plan sizes, which tend to vary. Thus, it may not be clear whether a plan falls within the Seller's Carve-Out at the time a particular recommendation is made. As *all* ERISA fiduciaries are required to have or obtain sufficient expertise to prudently discharge their duties, we recommend the Seller's Carve-Out should not be conditioned on plan size.

Recognizing the Department's efforts in this area, plan fiduciaries are typically educated on these requirements and use many of the same bidding and review processes when engaging a provider and making investment decisions. We note also that plan size does not necessarily correlate to the investment sophistication of the plan's fiduciary or to their willingness to engage consulting assistance when needed. Small companies may engage in complex and expensive business transactions and are considered to have sufficient expertise for such transactions. As we believe commercial entities do have different expectations and expertise than individuals, we recommend the Seller's Carve-Out should be amended to cover all ERISA-covered plans, regardless of size.

ii. <u>We Recommend Including Sophisticated Investors.</u>

As set forth above, we believe all plans should be carved-out. At a minimum, however, we believe the Seller's Carve-Out should include accredited retail and institutional investors. The stated purpose of the Seller's Carve-Out's current conditions is to serve as "proxies for identifying persons with sufficient investment-related expertise to be included in a Seller's Carve-Out."[11] Accreditation serves to identify those with sufficient financial sophistication to understand and bear economic risk. Moreover, including accredited investors in the Seller's Carve-Out would be consistent with other securities regulations, such as Regulation D of the

---

[8] 80 Fed. Reg. at 21957 (§ 2510.3-21(b)(1)(i)).

[9] *Id*. at 21941.

[10] *Id*.

[11] *Id*.

Securities Act,[12] where regulators have acknowledged that accredited investors do not require the same protections as other investors.

iii. We Recommend Revising the Carve-Out to Accommodate Requests for Proposals and Similar Sales Transactions.

Under the Proposal, the Seller's Carve-Out has a number of conditions, including a requirement that the counterparty receive certain written representations (or have a reasonable belief that the counterparty meets certain size or sophistication criteria). However, for ERISA-covered plans, it is unlikely that this kind of information would be received in a sales transaction.

Service providers often receive requests for proposals ("RFPs") or other similar sales proposals from plan fiduciaries or their agents, such as consultants. The RFP may or may not disclose sufficient information for the service provider to determine whether the Seller's Carve-Out would apply, and is often in a format that would make it difficult to obtain the various representations required under the Carve-Out. RFPs often ask for sample fund line-ups and other criteria which would likely be considered investment advice under the Proposal. The service provider is usually one of many providers competing for the business offered in the RFP, and may respond, but not win the business. As RFPs and similar types of sales transactions are well-recognized as arm's length discussions and both parties understand that a subsequent negotiation must take place, we recommend RFP responses and similar types of sales transactions should be included in the types of transactions carved-out from "investment advice."

C. ***The Platform Providers and Selection and Monitoring Assistance Carve-Outs Should Be Expanded.***

i. We Recommend the Carve-Outs Cover All Platforms.

Products and product platforms are not developed with individual plans, participants or retirement investors in mind. The investments available through a platform may be impacted by a number of operational or other considerations, such as the availability of an agreement with a particular fund family. Because of such considerations, we are not aware of any platform that offers every permissible investment option available in the universe of investment options. By

[12] *See* Rule 501, Regulation D, Securities Act of 1933, *Definitions and Terms Used in Regulation D* (17 CFR 230.501 (a)):

(a) Accredited investor shall mean any person who comes within any of the following categories…:

(1) [A]ny employee benefit plan within the meaning of [ERISA] if the investment decision is made by a plan fiduciary…

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000…

(6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.

providing limited carve-outs for platform providers[13] ("Platform Provider Carve-Out") and selection monitoring and assistance[14] ("Selection and Monitoring Assistance Carve-Out"), we are concerned the Department has implied that the development of a platform, including the choice or restriction of investments generally available through the platform, is fiduciary in nature.

We agree that development and provision of a platform for investment is not a fiduciary activity. However, the limitations included in the current Platform Provider and Selection and Monitoring Assistance Carve-Outs suggest that platforms other than those of 401(k) recordkeepers somehow include fiduciary advice. We note individuals and plan fiduciaries would still have protection for the advice given specifically in connection with their retirement assets even if these Carve-Outs are explicitly broadened. As such, we recommend the Department broaden the Platform Provider and Selection and Monitoring Assistance Carve-Outs to cover any type of platform, including platforms provided to IRAs, Health Savings Accounts ("HSAs"), Coverdell Education Savings Accounts ("ESAs") and any other type of platform provider.

ii. We Recommend Allowing the Provision of Objective, Publicly Available Investment Information.

We agree with the Department that service providers should be able to market their platforms and give objective investment information without such activity being considered investment advice. However, we believe Platform Provider and Selection and Monitoring Assistance Carve-Outs must better accommodate situations where neither party is expecting to be in a fiduciary relationship, but plan fiduciaries need additional investment information. For those reasons, we recommend the Platform Provider and Selection and Monitoring Assistance Carve-Outs be available to any service provider – and not just recordkeepers – providing objective, publicly available investment information to plan fiduciaries. So long as the information is not coupled with a recommendation to make a particular plan investment choice and the service provider furnishes fee disclosures in accordance with 408(b)(2) and a statement that the provider is not offering investment advice as set forth in the Proposal, it should be clear that providing such information is not a fiduciary activity.

iii. We Recommend Allowing Service Providers to Assist Plan Fiduciaries in Creating a Platform and Believe Clarity Is Needed Regarding Platform Marketing.

Many service providers offer a platform with "open architecture," meaning plan fiduciaries are able to pick any investment option (such as a mutual fund or collective fund) that is compatible with the provider's operating system. This provides plan fiduciaries with the greatest amount of flexibility to choose prudent investment options for the plan's participants. Other service providers offer a short list of investment options in each investment category, or only proprietary investments.

[13] 80 Fed. Reg. at 21957-58 (§ 2510.3-21(b)(3)).

[14] *Id*. at 21958 (§ 2510.3-21(b)(4)).

Given the large number of mutual and collective funds to choose from, plan fiduciaries often need meaningful assistance in limiting the number of investment options in particular categories (e.g., large cap growth) when selecting or replacing investments. Often, even with objective, narrow criteria used to reduce the number of funds, there still can be dozens of funds that meet the criteria selected. Faced with such decisions, plan fiduciaries may request assistance in narrowing the possible investment options to a more manageable number of funds. A similar process may also occur during the initial sales process. Service providers often provide such assistance, fully disclosing the impact to their fees as required under the Department's 408(b)(2) regulations.

In the absence of such assistance, plan fiduciaries may need to hire additional consultants to assist in analyzing fund selections, which would impose additional costs to the plan, likely borne by participants. Furthermore, service providers may begin restricting investment choices offered on their platforms, which limitation would be detrimental to retirement plan participants.

We believe that by providing fee disclosures in accordance with 408(b)(2), along with the proposed statement that the provider is not offering investment advice,[15] plan fiduciaries should be adequately informed of a service provider's interests to permit service providers to continue to assist plan fiduciaries in narrowing the range of investment options for plan participants. Thus, we recommend the Platform Provider and Selection and Monitoring Assistance Carve-Outs be clarified to permit such functions, so long as disclosures are provided and specific recommendations are not made.

Additionally, as creating a platform has traditionally not been viewed as a fiduciary act, marketing the platform should not be limited to the creator of the platform, but rather intermediaries should be allowed to market a platform. Likewise, we recommend clarifying that a service provider may market to an intermediary plan fiduciary under the Platform Provider and Selection and Monitoring Assistance Carve-Outs rather than being limited to marketing to the plan itself. This is necessary now that there is an implication that marketing a platform would be fiduciary in nature if a service provider were to use an indirect distribution channel. We would also recommend clarifying that marketing of multiple platforms would not be considered fiduciary advice if retirement investors are segmented into investor types and marketed a corresponding platform (i.e., open architecture for large plans and a more limited platform for micro-plans).

D. *The Financial Reports and Valuations Carve-Out Should Be Expanded.*

Many service providers supply valuations for plan investments. In particular, many large, participant-directed plans offer unitized investment options (including, but not limited to, company stock funds).[16] The service provider will perform calculations regarding the value of

[15] 80 Fed. Reg. at 21957-58 (§ 2510.3-21(b)(3)) ("if the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity").

[16] We note collective funds may have only *one* investor. We recommend the Department clarify the language of the Financial Reports and Valuations Carve-Out to ensure that it is available to such funds.

such funds in order to calculate a net asset value to facilitate daily trading. As currently drafted, the carve-out for financial reports and valuations[17] ("Financial Reports and Valuations Carve-Out") may not include these types of calculations.

Providing these calculations is mostly an administrative function using asset valuations provided by the market or another fiduciary. The Department rightly points out that this prong of covered advice does not require a recommendation. There is no particular call to action. As these calculations are not fiduciary in nature, the Financial Reports and Valuations Carve-Out should clearly include them.

E. ***The Investment Education Carve-Out Should Be Expanded.***

i. We Recommend Permitting the Provision of Investment Information as Education.

In 1996, the Department published guidance outlining the types of information that would not be considered fiduciary investment advice. [18] In the nearly twenty years since, the Department has recognized that certain classes of information provided to participants of ERISA participant-directed account plans are more accurately considered investment education and have not been treated as fiduciary investment advice.

Under the Proposal, the Department is proposing to expand the scope of the exception so that it will now apply to IRAs and to ERISA plans that do not provide for participant-directed investments, and to cover communications to plan fiduciaries and IRA owners. However, the Department is proposing new conditions on the 1996 guidance under the carve-out for investment education[19] ("Investment Education Carve-Out") that materially dilute the positive effect of extending the guidance to cover advice related to IRA plans.

While we applaud the Department's expansion of its 1996 guidance regarding financial education to IRAs and other ERISA plans, the limiting conditions of Investment Education Carve-Out effectively undercut the utility of the guidance:

- First, the Investment Education Carve-Out adds a specific condition that the information *cannot* include any advice or recommendations concerning specific investment products, investment managers or the value of investments.

- Second, asset allocation models *cannot* include any specific investment alternatives offered under the plan, and interactive investment materials can include specific plan investment alternatives only if such alternatives are specifically selected by the participant. Thus,

---

[17] 80 Fed. Reg. at 21958 (§ 2510.3-21(b)(5)).

[18] *See* Dep't of Labor, Pension and Welfare Benefits Admin., *Interpretive Bulletin 96-1; Participant Investment Education; Final Rule*, 61 Fed. Reg. 29586 (June 11, 1996) (codified at 29 C.F.R. pt. 2509) *available at:* http://www.gpo.gov/fdsys/pkg/FR-1996-06-11/pdf/96-14093.pdf.

[19] 80 Fed. Reg. at 21958 (§ 2510.3-21(b)(6)).

educational materials that include asset allocation models or interactive investment tools cannot identify specific investment alternatives available under the plan for those materials to come within the Investment Education Carve-Out.

We recommend the Investment Education Carve-Out be modified to more closely resemble the Department's 1996 guidance and that the Carve-Out more specifically cover the situations described below.

Plan sponsors and administrators rely heavily on service providers to help operate their retirement plans. In an effort to assist plan participants with retirement preparedness, many plan administrators enlist the assistance of their service providers to help educate participants regarding how participants' investment decisions may affect their retirement plan accounts. For example, plan administrators may design (or approve a service provider's) mailers reminding participants of the benefits of diversification if they are heavily invested in one particular asset class, including employer securities. Generally, such educational efforts are targeted toward those participants whose selected investments indicate they would benefit from such education.[20]

As currently drafted, such informational assistance could be considered investment advice under the proposed regulation. Some of these communications may include references to specific investment options available in the plan, which may exclude them from the Investment Education Carve-Out. Furthermore, if such information is only sent to certain participants, it could be sufficiently "individualized" or "specifically directed to" participants to be considered investment advice. Most service providers would be unwilling to take on fiduciary status based on the distribution of such information. Plan sponsors and administrators would have similar concerns and participants would lose access to valuable information regarding their investment decisions. Therefore, we recommend the Department clarify the regulation so that such generalized investment information would not be considered investment advice.

The revised description of investment education raises other issues as well. As previously discussed, under the Proposal, a financial professional is only permitted to provide a retirement investor with generic education materials and asset allocation information (without mention of any specific investment products or services) to avoid fiduciary status. This is especially problematic in the retirement plan space. Such plans have a set of investment options available that have been selected by the plan sponsor. The inability of a financial professional to provide basic information about these investments, what they are and how they are priced, would seem counter-productive to helping educate investors.

[20] While sending the information to all plan participants may make the information no longer individualized or specifically directed to, that would (1) confuse many participants for whom the information is not relevant and (2) involve additional expense, which would likely be charged against participants' accounts. For example, mailers may be sent to participants who have more than 20% of their account invested in employer securities, as mentioned on participant statements. Another example would be sending mailers to participants under age 30 who have all their account balance invested in a principal preservation vehicle, informing them of the risk that inflation may pose to retirement income. A third example could be a mailers discussing "target date" funds to individuals who have invested their account balances in multiple target date funds (of the same series, but with different target dates), which may indicate such participants are unclear on how target date funds are intended to operate.

In addition, the limitation on the provision of investment examples for asset allocation models is too severe. The limitation relegates discussions regarding investment alternatives to esoteric conversations and prohibits the provision of plan-specific information. We believe a financial professional should be able to discuss what types of investments fall into various asset classes (e.g., providing objective information on mutual funds that may satisfy the investor's needs), without being considered a fiduciary, so long as he or she is not making a recommendation as to a particular investment.

ii. We Recommend Rollover Assistance Be Considered Education.

Retirement plan service providers also assist plan participants when the participants have terminated employment and are deciding what to do with their retirement plan benefits. Such services typically are provided through call centers that provide information to plan participants regarding the plan's distribution options. Our experience has been that many participants call because they are unsure about their options and the related financial or tax implications. Service provider call centers often provide critical information to such participants, including whether the participant can leave the funds in the plan, take a cash distribution, or rollover the funds to another retirement plan or IRA.

As recognized by the Department, rolling over the account balance can be a good option for participants as it preserves the tax-deferred nature of their retirement benefits. Our experience has shown that participants who are more informed of their distribution options are more likely to retain their retirement benefits instead of cashing them out. The Department has noted that it is generally in the participants' best interest not to take a pre-retirement distribution.

While the Department has clarified that distribution education is not investment advice, the Department should understand that participants often have additional questions after receiving an explanation of their distribution options. Participants often ask if the service provider or its affiliates offer IRAs. Given that the BIC Exemption may not cover rollovers by its terms, and that it would be difficult, if not impossible, to implement the BIC Exemption in a call center setting, service providers will not be able to answer participants' reasonable inquiries for fear that the discussion would be considered fiduciary investment advice.

The result will be that participants, who reasonably request information about a service provider or an affiliate's products, will be left without the information they need. In addition, if participants ask to be connected to an affiliate, such as an affiliated call center, that offers such products (e.g., bank IRAs, direct-to-fund IRAs, self-directed IRAs or advised IRA brokerage accounts) to obtain information about the products offered, they will not receive this support.

For these reasons, we recommend the Department clarify that the provision of general information about the products and services offered is not investment advice if it is part of a discussion that is otherwise educational in nature. If a financial institution is providing information about plan distribution options in a manner that would be considered investment education under the Proposal, the financial institution should be able to mention that it offers

IRAs or other products so long as it does not recommend such products or that the individual take a particular action with respect to plan assets.[21]

F. ***HSAs and ESAs – non-ERISA accounts – Should Be Carved-Out of the Proposal.***

The Department requested comment as to whether it is appropriate to cover and treat HSAs and ESAs (non-ERISA accounts) under the Proposal in a manner similar to IRAs with regard to both coverage and applicable carve-outs. These non-ERISA accounts serve entirely different purposes than the covered ERISA accounts and plans identified in the Proposal and should therefore not be covered.

i. HSAs Are Used to Pay for Health Care Expenses and <u>Cannot Receive Rollovers from Traditional ERISA Plans.</u>

The focus of the Proposal is on retirement savings vehicles like qualified pension plans and IRAs. In including HSAs within the definition of IRAs, the Department observes that HSAs can be used as "long term savings vehicles for retiree health care expenses."[22] Although this is possible, HSAs are much different than IRAs. To make or receive HSA contributions, individuals must meet eligibility criteria, including being enrolled in a high-deductible health plan ("HDHP"). HSAs permit individuals with HDHP coverage to save money on a pre-tax basis to pay for medical expenses incurred before their deductible is met. Thus, while IRAs are designed to encourage the accumulation of retirement assets with significant penalties for withdrawals, HSAs are primarily designed for the payment of current medical and other healthcare expenses.

Our experience is that HSA balances generally are deposited and withdrawn on a regular basis (using, for example, a debit card) and carry relatively small balances. The average balance of our account owners is $3,062 (as of April 2015). For the Wells Fargo HSA product, individuals have to accumulate at least $1,000.00 in a deposit account before investment in a mutual fund is allowed. In fact, 90% of Wells Fargo HSA account owners keep their money in a deposit account and do not invest their HSA balances (as of April 2015).

Rollovers to HSAs are also very limited. HSAs can only receive rollovers from other HSAs, Archer MSAs and IRAs. Further, the ability to "roll" funds from an IRA is subject to maximum annual HSA contribution limits of roughly $6,650 (for family coverage) and is limited to a "once in a lifetime" transfer of funds. Thus, the Department's concern for protecting funds rolled from traditional ERISA plans into IRAs does not apply to HSAs.

In addition, HSA owners are subject to strict oversight, including IRS audit, regarding the use of their accounts. The imposition of additional regulatory restrictions on top of the current

[21] FINRA Regulatory Notice 13-45 sets forth a list of factors that should be considered by an investor in making a rollover decision. The Investment Education Carve-Out could also accommodate the presentation of these factors in a non-biased fashion. *See* FINRA, Regulatory Notice 13-45, *Rollovers to Individual Retirement Accounts* (Dec. 2013), at 2-3, *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.

[22] 80 Fed. Reg. at 21947.

extensive regulatory structure is unnecessary. For these reasons, we believe that HSAs should not be covered under the final rule. If, however, HSAs are included in the final rule, we recommend the following amendments to the Proposal:

- *Clarify that the Platform Provider Carve-Out Applies to HSAs.* All HSAs should be included under the Platform Provider Carve-Out. HSAs differ from IRAs in that employers are frequently involved in the selection of an HSA provider for their employee population,[23] often using an RFP process to evaluate potential providers. Employers may select a single HSA provider for their employees for purposes of facilitating HSA contributions without triggering ERISA, as long as the employer does not restrict the employees' ability to move their balances to another HSA and meet other criteria established by the Department.[24] Although employers do not select an HSA provider in a fiduciary capacity, they do serve as an independent entity interacting with the provider to ensure that an appropriate product is offered to the account owners.

  The investment platform we offer for HSAs is a limited selection of mutual funds, including proprietary and nonproprietary funds. We are able to offer this simple platform today without charging separate fees for investing or transactions because its management is administratively straightforward. An account owner must accumulate at least $1,000.00 in a deposit account before investment in the platform is allowed and the platform is the same whether or not Wells Fargo is selected by the HSA owner's employer or an individual who sets up an HSA outside of the employer relationship or who de-affiliates with an employer. Given that only roughly 10% of account owners invest their HSA funds, it would be difficult to justify the cost of offering different products to different segments of the population. As such, we believe the Platform Provider Carve-Out should include all HSAs so that the same rules apply to all segments of the account owner population.

- *Clarify that the Investment Education Carve-Out applies to discussions of distributions from HSAs for qualified medical expenses.* At present, the Investment Education Carve-Out does not address certain aspects of HSA products that are different in nature from ERISA plans and IRAs. For example, the Investment Education Carve-Out does not include the provision of information regarding "qualified medical expenses."[25] In addition, HSAs are transactional accounts, and individuals need information on how to access their funds for medical expenses, including use of the associated debit card. Thus, we believe informational communications to account owners regarding how to take distributions from their HSA should be considered investment education.

---

[23] In 2015, 72% percent of accounts at Wells Fargo were affiliated with an employer.

[24] *See, e.g.*, Dep't of Labor, Field Assistance Bulletin No. 2006-02, *Health Savings Accounts – ERISA Q&As* (Oct. 27, 2006), *available at*: http://www.dol.gov/ebsa/regs/fab_2006-2.html; Dep't of Labor, Field Assistance Bulletin No. 2004-01, *Health Savings Accounts* (Apr. 7, 2004), *available at*: http://www.dol.gov/ebsa/regs/fab_2004-1.html.

[25] 26 U.S.C. § 213(d).

ii. ESAs Are Used to Pay for Education Expenses and Cannot Receive Rollovers from Traditional ERISA Plans.

Like HSAs, ESAs are very different in nature than IRAs. ESAs are savings accounts designed exclusively for funding education expenses for a designated beneficiary who is under age 18 or is a special needs beneficiary. The annual contribution limit is $2,000 for each designated beneficiary, no matter how many ESAs are set up for that beneficiary.

Traditional ERISA plan assets are not eligible to be transferred or rolled into an ESA. Assets can only be rolled over from one ESA to another. Generally, funds must be distributed when the designated beneficiary reaches age 30, unless he or she is a special needs beneficiary. Thus, the Department's concern for protecting funds rolled from traditional ERISA plans into IRAs also does not apply to ESAs.

Considering the limited funding and generally short life of the account, additional regulatory restrictions are unnecessary. Thus, we believe that including ESAs in the final rule would not comport with the Proposal's stated objectives. If, however, ESAs continue to be included in the Proposal, we recommend communications to accountholders regarding ESA-related regulations and key product features should be included in the Investment Education Carve-Out. In addition, the identification of specific investment products or alternatives available for an ESA should also be permitted.

II. THE BEST INTEREST CONTRACT EXEMPTION IS IMPRACTICABLE AS PROPOSED.

The Department's expansion of the definition of fiduciary investment advice has the potential to not only disrupt the ability of retirement investors to receive appropriate investment information, but to restrict the provision of investment advice (even if the advice is in the investor's best interest) and to limit the freedom of investors to choose among varying service and fee models. This is because the prohibited transaction rules prohibit fiduciaries from providing advice if the advice could affect the compensation of the fiduciary. Consequently, many of the advice models most economical for smaller accounts and small businesses would become prohibited under the Proposal.

To lessen the harsh effects of the proscriptions contained in ERISA's prohibited transaction provisions, the Proposal includes a Best Interest Contract Exemption (the "BIC Exemption"), which is intended to "preserve beneficial business models for delivery of investment advice"[26] and which the Department believes will "permit firms to continue common fee and compensation practices, as long as they are willing to adhere to basic standards aimed at ensuring their advice is in the best interest of their customers."[27]

---

[26] 80 Fed. Reg. at 21929.

[27] *Id*.

We believe the Department's objective to craft an exemption providing certain retirement investors and financial professionals with the flexibility to determine what service and fee models are appropriate for a particular investor is the right course. However, the BIC Exemption as currently designed is an unviable solution with overly complex requirements. Below we recommend specific changes to the BIC Exemption that attempt to address these practical problems, protect investors and fulfill the stated purpose of the Exemption.

A. ***The Proposed "Written Contract" Is Not Operationally Feasible.***

We understand that the BIC Exemption's "written contract"[28] represents the Department's desire to have a binding commitment from financial institutions that they will live up to the Department's "best interest" standard. As proposed, however, the contract presents a number of challenges that essentially undercut the BIC Exemption's purpose.

i. We Recommend the Contract Only Be Executed <u>After a Prospective Customer Becomes a Customer</u>**.**

A plan, participant, beneficiary or IRA owner should not be required to enter into a contract with a financial institution or financial professional prior to deciding whether to hire that financial institution or financial professional, particularly when any investment advice will be subject to the "best interest" standard. To facilitate the exchange of information between financial institution, financial professional and prospective customer, any contract should be executed at or shortly after the time of account opening. At the most basic level, a contract establishes the agreement that parties have made and to fix their rights and duties in accordance with that agreement. Consequently, it makes sense that when establishing an account and depositing funds with a financial institution or financial professional that the parties execute a document detailing the terms and conditions of their relationship.

Under the terms of the BIC Exemption, the Department requires that a BIC Exemption contract be executed before a retirement investor can obtain basic investment information from a financial institution or financial professional that will permit the investor to make an informed decision on whether to hire the financial professional or purchase products or services from the financial institution. Requiring that a consumer execute a contract even before being presented with a proposal or at least a general description of the products and services offered, will be disconcerting and may inhibit a consumer's willingness to shop for retirement investment services.

The simple fix is to include the BIC Exemption contract as part of new account opening ("NAO") documentation which would fulfill the Department's policy objectives while permitting retirement investors to gather the information they need about investment options, products or services to make an informed decision. If a prospective client does decide to purchase products or services from or open an account and deposit funds with the financial institution, the client will receive the fiduciary protections sought by the Department prior to the execution of any transactions.

---

[28] 80 Fed. Reg. at 21984 (§ II(a)).

The execution of the BIC contract as part of the NAO documents is also consistent with current commercial practices and regulatory requirements. For example, as noted earlier, FINRA's guidance to the Suitability Rule provides assistance in determining when its requirements apply. The Suitability Rule applies to a "customer" and FINRA has indicated (for purposes of the Suitability Rule) that a "customer" is a person who opens an account at a broker-dealer or purchases a security for which the broker-dealer receives or will receive compensation – directly or indirectly – even if the security is not held at the broker-dealer. [29]

The Suitability Rule also applies to a "potential investor" who then becomes a "customer." Thus, the Suitability Rule's investor protections extend to prospective clients *if* that individual executes the transaction through the broker-dealer that made the recommendation or if the broker-dealer receives or will receive compensation as a result of the transaction.[30]

Conversely, the Suitability Rule does not apply to a recommendation made to a prospective client if the prospective client does not act on the recommendation or executes the recommended transaction away from the broker-dealer without the broker-dealer receiving compensation for the trade.[31] However, this does not mean that broker-dealers are not responsible for such recommendations, as broker-dealers are subject to stringent conduct standards even when dealing with prospective clients.[32]

By contrast, the BIC Exemption would create a contractual relationship between a retirement investor and a financial professional even in instances where, for example, the retirement investor chooses to work with another financial professional. Thus, there could be more than one fiduciary and questions could arise regarding which fiduciary has liability for recommendations made to the investor.

Thus, we recommend, consistent with current regulations applicable to broker-dealers, the BIC Exemption be modified so that any required contract need only be executed *concurrent with or after* a prospective client becomes a client. The BIC Exemption contract should simply be included as part of the NAO documentation. The execution of the contract with the NAO documentation will provide retirement investors with "best interest" protections, while providing retirement investors with unfettered access to financial professionals and needed retirement products and services.

---

[29] *See* FINRA, Regulatory Notice 12-55, at 2 (FAQ 6(a)).

[30] *See id*. (FAQ 6(b)).

[31] *See id*.

[32] For example, FINRA Rule 2010 requires that broker-dealers observe high standards of commercial honor and just and equitable principles of trade and Rule 2020 prohibits broker-dealers from effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance. *See* FINRA, Rule 2010, *Standards of Commercial Honor and Principles of Trade*, *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5504 and FINRA, Rule 2020, *Use of Manipulative, Deceptive or Other Fraudulent Devices*, *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5513.

ii. We Recommend Any Required Repapering of Current Client Agreements Be Effectuated Via Notice.

Similarly, requiring the execution of tri-party contracts for millions of existing contracts, within eight months or even twelve months, is not feasible and would be extremely costly. For example, Wells Fargo Advisors ("WFA") incurred costs of over $4 million to implement new account documentation requirements under FINRA Rule 2090.[33] Moreover, only about 25% of WFA brokerage clients currently receive account documents via electronic delivery. Therefore, the costs for obtaining new tri-party contracts for millions of accounts would be extraordinary and may not be economical for smaller balance accounts.

In addition, not all clients diligently sign and return paperwork – either electronically or through the mail, which means that only a fraction of retirement investors may affirmatively enter into the contract envisioned by the Department in the proposed implementation timeframe. Thus, for existing clients, we recommend the Department confirm that the BIC Exemption is available if existing contracts are amended consistent with the contract's amendment provisions, including, without limitation, provisions authorizing amendment by notice or negative consent. Permitting financial institutions to amend existing contracts by notification would be efficient and would allow them to be in compliance with the contract requirements under the BIC Exemption within a relatively short period of time. We estimate it could be completed within twenty-four months.

Utilizing a notice amendment process alleviates the practical issue of how to address instances where the retirement investor does *not* sign the contract. Should the Department require affirmative execution of BIC Exemption contracts for existing retirement investors, there is not a good service alternative for the potential "non-responders." Moreover, some retirement account custodians and trustees may feel obligated to resign from a "non-responder" account which would result in a distribution to the retirement investor, leading to more issues and concerns. Consequently, should there be a requirement to establish a new contractual relationship for existing clients, we recommend it be done though a negative consent process.

iii. We Recommend the BIC Exemption Not Require Actual Signatures in Connection with the Contract.

The BIC Exemption appears to contemplate that the contract will be signed by the financial institution, financial professional and the client. As part of NAO procedures, client agreements typically only require a client signature, which is sufficient to create a legally enforceable right on the part of the client. We believe the requirement that the financial institution sign the contract will raise operational issues, while not enhancing responsibility for contract terms. We also believe the requirement that financial professionals sign the contract will result in numerous practical problems. For example, financial institutions with multiple service models may provide client services through multiple financial professionals. In addition, it may not be possible to

[33] FINRA, Rule 2090, *Know Your Client Rule* (adopted by SR-FINRA-2010-039 and amended by SR-FINRA-2011-016 effective July 9, 2012), *available at*: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9858.

identify the impacted financial professionals in advance of contract execution and the financial professionals servicing a particular client may change over time. We also note that financial professionals are agents of their respective financial institutions and as such their signatures are not necessary for the financial institution to enforce its policies and procedures against them. Therefore, we recommend financial professional signatures should not be required so long as the financial institution remains bound by the terms of the contract and the financial institution implements policies and procedures to hold the financial professional accountable for any breach of contract terms.

B. *The Terms Used in the "Impartial Conduct Standards" Should Be Clarified to Ensure Investor Choice.*

A source of confusion is that the "Impartial Conduct Standards" do not exactly mirror related ERISA provisions. These standards should be modified to use the exact language of ERISA Section 404 or, alternatively, be inapplicable to ERISA covered plans.[34] In order to ensure investor choice is retained, we recommend the Department provide clarity regarding how the "Impartial Conduct Standards"[35] permit common compensation structures "that, in the absence of an exemption, would not be permitted."[36] This includes providing examples of how to apply the "Impartial Conduct Standards" to similar products with different compensation structures, payment models and proprietary products.

i. We Recommend Retirement Investors <u>Have the Ability to Choose Prudent Products.</u>

In order to make a recommendation that is in a retirement investor's "best interest," a financial professional should not be restricted to only recommending the least expensive product or strategy. A prudent investment product is not necessarily the lowest cost alternative. As such, there should be no "low fee exemption" (as the Department indicated it is exploring in the Proposal),[37] nor bias for passive products, because investment cost should be only one factor in determining what product or service is in the investor's best interest.

The "Impartial Conduct Standards" allow financial institutions and financial professionals (and their affiliates) to receive "reasonable compensation" under certain conditions.[38] The Department should confirm that this condition does not require financial professionals and financial institutions to recommend the lowest cost alternative. In this respect, the Department has long recognized that a fiduciary need not select the lowest-cost service provider so long as the compensation or fees paid to the service provider are determined to be reasonable in light of

---

[34] 29 U.S.C. § 1104.

[35] 80 Fed. Reg. at 21984 (§ II(c)).

[36] *Id*. at 21961.

[37] *See id*. at 21977-80. Furthermore, even if we wanted to provide substantive comments on this undefined proposal, we do not have adequate information to do so.

[38] *Id*. at 21984 (§ II(c)(2)).

the particular facts and circumstances.[39] The BIC Exemption clearly contemplates a wide variety of indirect compensation. We believe this provision should not prohibit the financial institution from receiving different types and different amounts of fees from different sources with respect to services provided in connection with a plan.

The BIC Exemption also requires financial institutions to contractually warrant they have adopted written policies and procedures that are reasonably designed to "mitigate the impact of material conflicts of interest" that exist with the provision of investment advice and ensure adherence to the "Impartial Conduct Standards."[40] While the Department stated in the preamble to the BIC Exemption that a "level-fee" structure is not required to mitigate "material conflicts of interest," the Department provided five examples of permissible compensation structures, all of which are variations of level-fee arrangements.[41] Thus, recommending an investment product where a level-fee arrangement is not in effect could be deemed an unacceptable contractual liability risk by financial institutions in view of the examples that the Department has provided.

As an example of a situation where a level-fee is not paid, a financial professional may recommend Fund A – which has historically outperformed against its benchmark – to a retirement investor instead of Fund B – which has historically underperformed against its benchmark. If Fund A pays more in compensation to "the Adviser, Financial Institution, or any Affiliate and Related Entity"[42] than Fund B, we are concerned the investor could seek a claim for damages simply because, despite the stronger performance of Fund A, the investor believes the financial professional was not acting without regard to his or her own financial interests because of the greater compensation paid to the financial professional by Fund A. The possibility of this claim, therefore, would make financial professionals reluctant to recommend an investment in Fund A, even where Fund A may be the more appropriate investment. We request that the Department provide examples of fee arrangements other than level-fee structures to illustrate that a higher compensation level does not result in a per se violation of the "best interest" standard or required contractual warranties.

The Department should also confirm that merely recommending products that are not the lowest cost alternative would not, in and of itself, "tend to encourage individual Advisors to make recommendations that are not in the Best Interest of the Retirement Investor" in violation of the proposed warranties.[43] FINRA Regulatory Notice 12-25 ("Notice 12-25") provides guidance as to the appropriate factors to be considered in making a recommendation in the best

[39] *See, e.g.*, Dep't of Labor, Employee Benefits Security Admin., *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 72 Fed. Reg. 70988, at 70993 (proposed Dec. 13, 2007) (to be codified at 29 C.F.R. pt. 2550) ("A responsible plan fiduciary should not consider any one factor, including the fees or compensation to be paid to the service provider, to the exclusion of other factors."), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2007-12-13/pdf/E7-24064.pdf.

[40] 80 Fed. Reg. at 21984 (§ II(d)(2)).

[41] *Id*. at 21971.

[42] *Id*. at 21984 (§ II(c)(1)).

[43] *Id*. (§ II(d)(4)).

interests of the client. Notice 12-25 clarifies aspects of FINRA's Suitability Rule, and states with respect to product or strategy costs that:

> The requirement that a broker's recommendation must be consistent with the customer's best interests does not obligate a broker to recommend the "least expensive" security or investment strategy…as long as the recommendation is suitable and the broker is not placing his or her interests ahead of the customer's interests. … *The cost associated with a recommendation…ordinarily is only one of many important factors to consider when determining whether the subject security or investment strategy involving a security or securities is suitable.*
>
> The customer's investment profile, for example, is critical to the assessment, as are a host of product- or strategy-related factors in addition to cost, such as the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions. These are all important considerations in analyzing the suitability of a particular recommendation, which is why the suitability rule and the concept that a broker's recommendation must be consistent with the customer's best interests are inextricably intertwined.[44]

We recommend the Department adopt this standard. The inclusion of this standard would permit financial professionals to recommend a product or service that is in the investor's best interest, whether it is the least expensive option or not, and will allow transaction-based accounts to continue to be viable options for client accounts.

ii. We Recommend Retirement Investors Have <u>the Freedom to Choose Appropriate Payment Models.</u>

The interaction between the Proposal's "Impartial Conduct Standards" and the BIC Exemption's conflict mitigation provisions appear to restrict an investor's choice regarding advice models if the alternatives involve differential compensation received by the financial institution or financial professional.[45] The ability to choose the most economical payment models is critically important for smaller balance accounts. Many clients, retirement or otherwise, choose a "pay as you go" model where clients incur charges when a transaction occurs while higher income clients tend to have a mix of commission based accounts and advisory or asset fee based accounts.

We have observed in households served by our WFA affiliate that as wealth increases, a greater percentage of investors elect a "hybrid model" of investing in which some of their assets are held in commission-based brokerage accounts and an increasing percentage of assets shifts toward fee-based advisory accounts. Among WFA households maintaining at least one advisory

[44] *See* FINRA, Regulatory Notice 12-25, *Suitability* (May 2012), at 3 (FAQ 1) (emphasis added).

[45] Retirement investors currently have several choices of how to pay for service (1) a one-time fee for advice, (2) an ongoing fee for continuing advice, (3) fee for transactions, including incidental to advice and (4) fee for transactions effected without receiving any personalized advice.

account, nearly two thirds also have a brokerage account. Moreover, WFA households with both brokerage and advisory accounts hold nearly four times the assets of households with only a brokerage account.

Similarly, when reviewing the effects of simply extending the Investment Advisers Act of 1940 (the "Advisers Act") to cover client activity with broker-dealers the SEC stated:

> If, in response to the elimination of the broker-dealer exclusion, broker-dealers elected to convert their brokerage accounts from commission-based accounts to fee-based accounts, certain retail customers might face increased costs, and consequently the profitability of their investment decisions could be eroded, especially accounts that are not actively traded, e.g., fee-based accounts that trade so infrequently that they would have incurred lower costs for the investor had the accounts been commission-based. This practice is commonly referred to as "reverse churning" or "underutilization."[46]

Consequently, the Department must ensure that investors retain the ability to choose the appropriate fee and advice model for their particular situation. We request the Department clarify how the requirements of the BIC Exemption can be satisfied through a commission-based account. As we note above, the only compliant examples provided by the Department in the Proposal were level-fee options. This is particularly important in light of the fact that level-fee accounts may not be the best option for investors with limited trading activity.

iii. We Recommend Providing Guidance on How Financial Professionals Can <u>Recommend Proprietary Products Under the "Impartial Conduct Standards."</u>

The impact of the BIC Exemption on proprietary products[47] is unclear. We recommend the Department clarify that as long as a proprietary product is in the best interest of the investor and the cost is reasonable compared to other like products, the investor should not be restricted from using the product. To do so, we recommend the Department either eliminate the phrase "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity or other party" [48] or replace it with "despite the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity or other party." We believe that this better captures the intent of the Department which has a history of permitting conflicted fiduciaries to continue to act, subject to conditions, through its administrative exemption process. Should it remain unaltered, the Department must provide guidance on how this provision can be applied in a differential compensation environment and where proprietary products may be available.

---

[46] SEC, *Study on Investment Advisers and Broker-Dealers* (Jan. 2011), at 152-153, *available at*: https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[47] Virtually all major broker-dealers have proprietary funds. Typically proprietary products are developed, in part, because a financial institution sees a client need and believes it can satisfy it.

[48] 80 Fed. Reg. at 21984 (§ II(c)(1)).

Furthermore, if sales of proprietary funds do indeed have different standards applicable to them under the Proposal, we believe the final rule will have to address many nuances surrounding proprietary status, which may change over time. For example, many existing Wells Fargo proprietary funds held by our clients date from a period when they were acquired from a predecessor firm. They are proprietary today but were not proprietary when purchased. Conversely, some financial institutions have divested their asset management businesses and a fund that was proprietary may become non-proprietary. On a smaller scale, when a financial professional moves from one financial institution to another, he or she typically keeps existing clients in existing investments and those investments may move between proprietary and non-proprietary status. We believe the fact that "proprietary" status is transient is one more reason not to adopt rules that place extra burdens on sales of proprietary funds.

C. *The Definition of "Asset" Unnecessarily Limits Investor Choice.*

The BIC Exemption covers the receipt of compensation for only the limited list of approved investment products and securities included in the definition of "Asset." [49] This definition excludes numerous investments that investors make in IRAs, including, for example, limited partnerships, hedge funds, private equity funds, and covered calls, and may exclude future product innovations unless it is frequently updated. In excluding these investments, the Proposal fails to recognize the value that other types of investments, such as alternative investments, can add to investor retirement portfolios. Furthermore, the definition of Asset does not appear to cover the recommendation of services, such as advisory or discretionary management programs.

i. We Believe the Recommendation of a Firm <u>Sponsored Advisory Program Must Be Clearly Permitted.</u>

We are unclear whether a financial professional may refer or recommend retirement investors to an affiliated or unaffiliated investment adviser or proprietary investment advisory product under the BIC Exemption. We understand the Department did not intend to restrict access to such services; if so, the Department should eliminate the "Asset" list, or revise the list to include such services.[50] Moreover, we believe the sale of any product or service subject to an existing exemption, or otherwise compliant, should be excluded from the Proposal or subject only to the "best interest" standard requirement of the BIC Exemption.

ii. <u>We Recommend Eliminating the "Asset" List.</u>

Financial professionals and retirement investors should be permitted to make judgments about appropriate investments. The Department should not substitute its judgment for that of a fiduciary, concerning product and service selections. As all recommendations will be subject to

[49] 80 Fed. Reg. at 21987 (§ VIII(c)).

[50] We ask that the Department confirm that to the extent that the recommendation of a related investment adviser does not result in third-party compensation to the recommender and the advisory program itself does not result in differential compensation to the financial professional, there should be no need for compliance with BIC Exemption for the initial recommendation of the advisory program.

a "best interest" standard, there is no need to place limits on investments beyond those Congress has already established.[51] The "best interest" standard requires investment advice be "based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor." This standard makes a "one-size fits all" limitation on investor choice of products and services unnecessary, as financial professionals are already restricted to recommending only those products or services that are in their clients' best interest.

Finally, a limited definition of "Asset" also does not allow for the introduction of innovative products. For example, no one could have predicted the development and tremendous growth of exchange traded funds ("ETFs") – which are included in the current definition of "Asset" – over the past decade and a half. Therefore, we recommend replacing the term "Asset" with the phrase "securities or other property" in order to eliminate the concept of a permitted list of investments.

iii. <u>We Recommend Annuities Continue to Be Offered Under PTE 84-24.</u>

Annuities are commonly used by retirement investors in their IRAs as a source of regular income. However, the Department has proposed modification or elimination of existing prohibited transaction exemptions ("PTE") upon which the insurance industry currently relies that will present significant challenges to their continued use. In particular, PTE 84-24 would be revised to exclude advice about variable annuities and other registered products to IRA owners, which advice would now have to meet the requirements of the BIC Exemption.[52] Financial professionals and institutions will be challenged to offer annuities under the BIC Exemption, however, because of the investment platforms that are built in to such products. As such, we recommend, due to variable annuities' unique insurance component, they should continue to be offered under PTE 84-24.

iv. <u>We Recommend Eliminating Limits on Sophisticated Investor Choice.</u>

Should the Department choose to retain its narrow definition of "Asset," we recommend the definition not apply to retirement investors that can be designated as accredited retail or institutional investors. We are making a similar recommendation with respect to the Seller's Carve-Out in Section I.B.ii. The apparent rationale behind the definition of "Asset" was to capture the most common IRA investments. This limitation should not apply to more sophisticated investors who are familiar with the potential risks of less common investment types. Such an approach would also be consistent with FINRA's Suitability Rule, which includes a carve-out from the customer-specific suitability obligation for institutional accounts.[53]

[51] *See* 26 U.S.C. § 408.

[52] 80 Fed. Reg. at 22010-22020.

[53] *See* FINRA, Rule 2111(b). "A member or associated person fulfills the customer-specific suitability obligation for an institutional account…if (1) the member or associated person has a reasonable basis to believe that the institutional customer is capable of evaluating investment risks independently…and (2) the institutional customer affirmatively indicates that it is exercising independent judgment in evaluating the member's or associated person's recommendations."

v. We Recommend the BIC Exemption Provide Limited Compliance Requirements for Products and Services that Address Conflict Issues Under Existing Regulations.

Many financial institutions have developed products and services – both discretionary and non-discretionary – under which they act as a fiduciary today. These products and services were developed to comply with existing exemptions or are otherwise structured to avoid conflict and prohibited transaction issues. We believe that the most appropriate solution for these types of products and services is to make clear that the sale of such a product or service is not "investment advice." However, to the extent that such a sale might be considered a recommendation that is advice, we recommend the BIC Exemption provide relief for the recommendation and the associated compliance conditions be limited to contractual provisions implementing the "best interest" standard of care. We believe the other proposed requirements for the BIC Exemption, such as the list of permissible "Assets" and lengthy disclosures, do not provide additional protections for investors when the product or service is already compliant with ERISA and the prohibited transaction restrictions of the Internal Revenue Code.

D. ***The Proposed Disclosures Fail to Leverage Existing Disclosures and Will Not Be Effective.***

We support the need for effective disclosures as part of a well-designed best-interest standard, and encourage the Department to craft a disclosure regime that advances investor protection while avoiding duplication that may frustrate and confuse retirement investors. The BIC Exemption requires extensive new disclosures, which are duplicative of many current disclosures. The nature and format of the new disclosures would also require extensive rebuilding of current systems. There is simply no way to plan, build, test and implement the bevy of disclosures set forth in the proposed implementation timeframe.

The only practical avenue we see to implement additional disclosure requirements in a reasonable time period is to leverage existing disclosure requirements. Robust disclosures are already provided under ERISA Section 408(b)(2). These disclosures were implemented less than three years ago by the industry at considerable expense. Therefore, we recommend, instead of requiring new disclosures, the Department should rely on these 408(b)(2) disclosures as currently in place, as well as leverage other disclosures that are already provided, such as summary prospectuses, prospectuses, confirms, informational guides, Form ADV Part 2(a) and (b) and account agreements.[54]

[54] In addition, Wells Fargo provides numerous guides and disclosures in paper and electronically through our websites, such as our *A Guide to Investing in Mutual Funds*, *Guide to Buying Annuities*, *A Guide to Choosing a Financial Professional with Wells Fargo Advisors* or *Wells Fargo Advisors Financial Network*, *A Guide to Financial Protection for Older Investors* and *Investment Advisory and Brokerage Services* guide. These guides, and others, are available at: https://www.wellsfargoadvisors.com/disclosures/guide-to-investing.htm.

i. We Believe the Point of Sale Transaction Disclosure Is Duplicative of Existing Disclosures.

The BIC Exemption's point of sale transaction disclosure requires provision of a chart setting forth the "all-in" cost and anticipated future costs over a 1, 5 and 10 year period of a recommended asset prior to execution of the purchase of the asset. We believe this disclosure as proposed will be difficult, if not impossible, to provide.

As an initial matter, the Proposal calls for a point of sale disclosure but the total cost of transaction – to the penny[55] – cannot be provided until *after* the transaction has been executed. In addition, the disclosure appears to be modeled after mutual fund summary prospectuses. Other asset types such as stocks or bonds do not have future costs that can be readily broken down into 1, 5 and 10 year segments. Furthermore, providing "reasonable assumptions" about an investment's future performance could be perceived as conflicting with FINRA rules prohibiting predictions or projections of future performance.[56]

In addition, this disclosure would also unnecessarily interrupt the investment process. As the disclosure must be in form of a chart, it cannot be communicated verbally over the phone. By the time the chart is provided to an investor, the recommendation itself could be stale, such as in cases where a stock price changes.

Mutual fund summary prospectuses provide investors with 1, 3, 5 and 10 year total costs (based on a $10,000 investment with a reasonable growth assumption) at or prior to settlement of a transaction. Additional disclosures are also provided regarding annuity costs and qualified plan fees and other costs are disclosed on transaction confirms. Because retirement investors are already provided with a wealth of information at or prior to settlement regarding initial and ongoing costs of their investments, we believe an additional point of sale disclosure is unnecessary. If the point of sale disclosure is not eliminated, we recommend the Department rely on mutual fund summary prospectuses for mutual fund transactions, as these documents provide a large portion of the information proposed to be disclosed. As we note above, we believe the existing 408(b)(2) disclosure process could also provide this information and already serves this purpose for ERISA-covered plans today.

The Department has also asked for comment on the effectiveness and cost of a "cigarette warning"-style disclosure, which could be placed on a confirmation, and provided instead of the point of sale disclosure. While such a disclosure would be less costly, we believe there is nothing *inherently bad* for a person about investing with a financial professional. Even though we do not believe such a "warning" is necessary, we recommend this type of disclosure at account opening as the more appropriate course should the Department decide additional information should be provided.

---

[55] Wells Fargo recommends that this requirement be changed to provide for the disclosure of ranges of expenses.

[56] *See, e.g.*, FINRA, Regulatory Notice 12-29, *Communications with the Public* (June 2012), at 16 (Predictions and Projections of Performance), *available at*: https://www.finra.org/sites/default/files/NoticeDocument/p127014.pdf. FINRA Rule 2210(d)(1)(F) prohibits communications predicting and projecting performance with an allowance for hypothetical illustrations of mathematical principles.

ii. We Believe the Annual Disclosure Is Unnecessary.

The Department has also proposed in the BIC Exemption an annual disclosure (1) identifying assets purchased or sold, (2) total amount of fees or expenses paid by retirement investor on each asset and (3) compensation received by the financial institution and financial professional for each asset. As an initial matter, these proposed disclosures are unlikely to assist the average investor in making informed decisions. Assets purchased and sold throughout the year already appear on account statements throughout the year, as does much fee and expense information. Moreover, we reiterate our belief that the Department should leverage existing fulsome 408(b)(2) disclosures rather than create a new disclosure. While some information, such as indirect compensation received in connection with an asset, may not appear on regular statements, it could be disclosed using the 408(b)(2) disclosure that is already available.

Finally, systematically collecting a detailed accounting of the dollars attributable to each asset in every account, if it is even possible, will significantly add to the cost of servicing accounts, making the servicing of small balance accounts uneconomical or driving investor costs higher. It is also unclear how such an amount could be determined in time to meet the 45 day deadline. We understand that the Department seeks to ensure that individuals have information about the cost and compensation associated with their account. However, because of the complexity of the proposed disclosure, we recommend that the Department leverage existing disclosures as part of the implementation of the Proposal and engage in a subsequent process to consider a disclosure that supplements existing disclosures and is easier to understand and implement.

iii. We Are Concerned that the Public Website Disclosure Will Increase Costs.

In addition to the transaction and annual disclosures, the BIC Exemption requires disclosure on a public website of direct and indirect material compensation within the last 365 days. This is a hugely complicated undertaking requiring the listing of tens of thousands of products that requires daily updating.

We estimate the cost of the proposed website will be significant and expect it cannot be constructed within the proposed eight-month implementation period. In addition, the phrase "last 365 days" implies a rolling disclosure that must be updated daily as to potentially tens of thousands of data points. Continually updating the website in this manner will lead to substantial additional costs. We believe given the comprehensive disclosure regime already in place such costs are unwarranted. Therefore, if the public website disclosure is retained, we recommend it be limited to a static website with the current 408(b)(2) disclosure and quarterly updates of recent changes. We believe this would considerably reduce compliance costs, while providing investors with the information they need to make an informed decision. As is the case with the proposed transaction and annual disclosures, this information will be supplemented by existing disclosures contained in prospectuses, confirms and retirement investor statements.

iv. We Believe the Data Disclosure to the Department is Overly Burdensome.

The BIC Exemption requires financial institutions to disclose to the Department, within six months of a request, data for the preceding six year period concerning investment inflows, outflows and holdings for each asset purchased, sold or held under the BIC Exemption. In addition, financial institutions must maintain a record of individual investors' portfolio performance and the identity of their adviser. Even if individually-identifiable financial information is removed in any public disclosure of such data, we are concerned that sensitive information about individual investors would remain at risk in the event of a data breach, such as those which have recently victimized millions of federal employees.

In addition, we believe the proposed method of aggregating this data will fail to show how the choice of a particular investment strategy, including asset selections or decisions based on investor age or risk tolerance, may have impacted portfolio performance. Judging financial professionals in the absence of such critical nuance would unfairly assess their roles in assisting investors to meet their unique goals.

Finally, we are unclear how this requirement will benefit retirement investors as a comprehensive disclosure framework is already administered by the SEC and FINRA. We anticipate the systems necessary to effect this additional reporting requirement will take significant time and money to build. As such, we believe this requirement is unnecessary and unduly burdensome and the Department should leverage existing recordkeeping requirements instead of imposing new, costly recordkeeping requirements that will add to the costs of servicing retirement accounts.

E. ***The BIC Exemption Contract Warranties Are Unnecessary.***

Given the comprehensive legal and regulatory framework already in place,[57] and the other proposed provisions of the BIC Exemption contract, we believe that the proposed warranties should not be part of the contract. We believe the ability of investors to seek redress should the "best interest" standard be violated is sufficiently protective. In addition, as set forth above, we believe conflicts of interest should be addressed by utilizing the existing Form ADV to help investors further understand a financial professional's compensation and to reduce or eliminate conflicts of interest.

We are concerned that the inclusion of the warranties in the contract will give rise to significant risk and uncertainty on the part of financial institutions. For example, a warranty to comply with federal or state law may have the effect of penalizing financial institutions and financial professionals for any slight violation or failure to comply. As we are subject to

[57] Investor protections under the broker-dealer model are quite extensive and include, among other requirements, qualification and registration for broker-dealer representatives, continuing education requirements, a transparent system for reporting of disciplinary information of all kinds, specific supervision requirements, pre-use review and approval of communications with the public and formal rules governing a broker-dealer representative's outside business activity. Furthermore, FINRA routinely examines financial institutions for compliance with these and other requirements.

substantial regulatory and legal oversight, we think the provision related to compliance with all applicable federal and state law should be eliminated entirely. We do not believe that this warranty gives an additional protection to investors unavailable under the relevant law itself.

While we believe the "best interest" standard obviates the need for the other proposed warranties, if they are retained in any form, we believe they should instead be conditions of the BIC Exemption itself. We note that regulators generally are better positioned to review the types of activities covered by the proposed warranties. For example, it would be extremely burdensome to respond to individual claims to review policies and procedures. Because the requirements of the BIC Exemption are so complex, we also suggest that the Department consider some procedure for financial institutions to correct errors and maintain compliance on an ongoing basis.

F. ***The Range of Investment Options Notice and The BIC Exemption's Other Provisions Are Incongruous.***

We are uncertain of the purpose of the notice required under the Range of Investment Options provision of the BIC Exemption.[58] While the Department restricted the types of investments that retirement investors can make in IRAs elsewhere in the BIC Exemption, the provision's "limited range of investment options" notice appears to penalize financial professionals or financial institutions who only offer a limited set of investments, such as certain investment specialists. The business of such specialists, who are not responsible for a retirement investor's entire portfolio, should not be hampered by the requirement that they notify a client or prospective client that they do not "recommend a sufficiently broad range of Assets."[59] Furthermore, the definition of "sufficiently broad" is unclear. For example, a retirement investor requiring only the purchase of a particular "Asset" from a financial professional may very well have their needs satisfied. We recommend the Department provide greater clarity with respect to when the requirements of the notice would apply to financial institutions with only proprietary products (e.g., offering only proprietary mutual funds and direct to fund retirement investors).

G. ***The Pre-Existing Transactions Exemption Should Be Broadened.***

The Pre-Existing Transaction Exemption is conditioned on not providing additional advice to existing clients and does not include investments that are not "Assets." We believe the Pre-Existing Transaction Exemption should be expanded to permit the ongoing advice most consumers expected at the time of purchase without fundamentally disrupting the relationship by requiring a contract and the other BIC conditions. Therefore, we recommend that the Department consider an exemption to *all* accounts existing as of the effective date of the final rule.

Alternatively, the BIC Exemption conditions should only apply to investments purchased after the applicable date. Under this alternative, we would still require guidance and examples of

---

[58] 80 Fed. Reg. 21985 (§ IV(b)).

[59] *Id*. (§ IV(b)(4)).

how financial institutions should deal with such new limitations and restrictions on existing investments so that they remain grandfathered. Furthermore, this exemption should include existing investments that do not conform to the definition of "Assets." For example, if a client has a municipal bond, that client should be permitted to keep the bond instead of having to liquidate it prematurely or purchase another asset regardless of whether it falls within the BIC Exemption's "Asset" list. In addition, institutions should be permitted to advise an individual to liquidate such a grandfathered holding, without such a recommendation being considered "investment advice."

III. THE PRINCIPAL TRANSACTION EXEMPTION IS TOO NARROW AND SHOULD LEVERAGE EXISTING REGULATORY REQUIREMENTS.

As an initial matter, we believe a limitation on principal trading, and therefore the Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs ("Principal Transaction Exemption"), will not benefit retirement investors and, thus, *all* principal transactions should be exempted. Alternatively, should there be any limitation on principal trading, it should be consistent with the relief provided by the SEC under Rule 206(3)-3T ("Rule 206(3)-3T" or the "Rule") of Advisers Act.[60]

Rule 206(3)-3T applies to institutions that are dually registered as investment advisers and broker-dealers and to transactions in non-discretionary accounts at such institutions. Rule 206(3)-3T does not relieve in any way an investment adviser from acting in the best interests of an advisory client, including fulfilling the duty with respect to the best price and execution for the particular transaction for an advisory client. Nor does the Rule relieve an investment adviser from any obligation that may be imposed by section 206(1) or (2) of the Advisers Act[61] or by other applicable provisions of the federal securities laws.

We believe the Principal Transaction Exemption should mirror Rule 206(3)-3T, including with respect to the best execution and pricing obligations. Furthermore, harmonizing the Principal Transaction Exemption with the requirements under Rule 206(3)-3T would make the Exemption both operationally workable and would benefit investors purchasing or selling certain securities on a principal basis.

---

[60] *See* SEC, Rule 206(3)-3T, Investment Advisers Act of 1940, *Temporary Rule for Principal Trades with Certain Advisory Clients* (codified at 17 C.F.R. pt. 275.206(3)-3T).

[61] 15 U.S.C. § 80b-6:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly –
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

A. *The Exemption Should Include Other Types of Securities.*

The Principal Transaction Exemption is unnecessarily limited to certain debt securities.[62] We believe retirement investor's will be afforded greater, and equally prudent, choices under a limitation similar to Rule 206(3)-3T with respect to the types of securities covered. Rule 206(3)-3T permits principal transactions in *any* security. The only exception is where the investment adviser or affiliate is the issuer of, or, at the time of the sale, an underwriter of, the security – unless the security is an "investment grade debt security."[63] We encourage the Department to make such a change to provide retirement investors flexibility to choose what accounts are most appropriate for purchasing initial public offerings ("IPOs") and other such capital markets transactions.

B. *A Client's Written Prospective Consent to Act as a Principal Should Be Sufficient.*

We believe the contract required under the Principal Transaction Exemption is not necessary. The contract required under the Principal Transaction Exemption contains the same elements as the BIC Exemption and, therefore, raises many of the same issues. In particular, we note again that the industry typically relies on negative consent for account changes and obtaining the retirement investor's affirmative written consent will be operationally challenging.

We recommend the contract element of the Principal Transaction Exemption be limited to a written prospective consent similar to those which financial institutions customarily capture under the Rule 206(3)-3T.[64] Such a consent would authorize the financial professionals – directly or indirectly – to act as principal. These disclosures would also include a conspicuous, plain English statement that the client may revoke the written consent without penalty at any time by written notice to the financial professional.

---

[62] The Principal Transaction Exemption also contains an unclear requirement that the debt possess no greater than "moderate credit risk." This term is not defined in the Proposal. Wells Fargo suggests that the Department adopt the Rule 206(3)-3T definition of "investment grade debt security." *See* 17 C.F.R. pt. 275.206(3)-3T(c).

[63] "Investment grade debt security means a non-convertible debt security that, at the time of the sale, is rated in one of the four highest rating categories of at least two nationally recognized statistical rating organizations." *Id*.

[64] Under Rule 206(3)-3T, an advisory client must execute "a written, revocable consent prospectively authorizing the investment adviser directly or indirectly to act as principal for its own account in selling any security to or purchasing any security from the advisory client, so long as such written consent is obtained after written disclosure to the advisory client explaining:

(i) the circumstances under which the investment adviser directly or indirectly may engage in principal transactions;

(ii) the nature and significance of conflicts with its client's interests as a result of the transactions; and

(iii) how the investment adviser addresses those conflicts."

Id. at 206(3)-3T(a)(3).

C. *The Disclosures Required Under the Exemption Are Unnecessarily Burdensome.*

The pre-transaction disclosures required under the Principal Transaction Exemption are operationally impracticable. In particular, the requirement that the price is at least as favorable to the plan or IRA as the contemporaneous price for the debt security (or similar security if a price is not available for the same debt security) offered by two ready and willing counterparties that are not affiliated with the financial institution. As an initial matter, the idea that there are at least two other counterparties is somewhat inconsistent with the stated rationale of the Principal Transaction Exemption.[65] More importantly, compliance with this condition would increase costs and narrow the universe of securities for which the Principal Transaction Exemption is available.

We recommend the two quote requirement be eliminated. In the alternative, we recommend an allowance for instances in which obtaining two quotes is impossible. For example, retirement investors may need to liquidate a percentage of their account to meet an immediate income need. We believe the Department's assumption that it will only take "five minutes" to get the two quotes,[66] based upon our experience, is faulty in many instances and that retirement investors will be harmed if they are forced to wait the duration of time that it will take to accumulate the necessary information.

We believe the mark-up/mark-down disclosure is also unreasonable. For example, this disclosure will require a unique confirm for IRA accounts. Our recommendation is that this disclosure be eliminated.

The Principal Transaction Exemption further requires the financial institution and financial professional to provide certain written information to the retirement investor annually. This annual disclosure includes a list identifying each principal transaction engaged in during the applicable period, the prevailing market price at which the debt security was purchased or sold, and the applicable mark-up/mark-down or other payment for each debt security. We believe this disclosure is unnecessary and that the disclosure of the transaction price as per Rule 206(3)-3T is sufficient to achieve the objectives of the Principal Transaction Exemption.[67]

The Principal Transaction Exemption also requires upon-request disclosures at any time within six years of the debt security's purchase or sale. We are uncertain exactly what additional information, not already provided, must be saved for six years. We recommend the Department eliminate these burdensome requirements and adopt the disclosures required under Rule 206(3)-3T.

---

[65] We understand the Department's rationale to be that the danger of conflicts of interest in principal transactions involving other types of securities, which may be more "widely available," outweighs the reduced choices for plans. 80 Fed. Reg. 21994. Whereas "debt securities…may need to be sold on a principal basis because particular bond issues may be sold by only one or a limited number of financial institutions." *Id*.

[66] *Id*. at 22000.

[67] Rule 206(3)-3T requires investment advisers to send to the client, no less frequently than annually, written disclosure containing a list of all transactions that were executed in the client's account in reliance upon this rule, and the date and price of such transactions. *See* 17 C.F.R. pt. 275.206(3)-3T(a)(6).

D. *Existing Investor Protections Mitigate the Risk of Excessive Mark-Ups/Mark-Downs and the Need for Additional Pricing Transparency*.

The Principal Transaction Exemption requires financial institutions to provide a written confirmation of the principal transaction in accordance with Rule 10b-10 of the Securities Exchange Act of 1934[68] that also includes disclosure of the mark-up/mark-down or other payment to the financial institution, financial professional or affiliate in connection with the principal transaction. As an initial matter, we note that Rule 10b-10 does not require disclosure of mark-ups/mark-downs and that putting such information on the trade confirmation may have to be approved by the SEC.

Rule 206(3)-3T requires investment advisers to send a written confirmation of the transaction at or before completion of each such transaction that includes, in addition to the information required by Rule 10b-10, a conspicuous, plain English statement of the information that the adviser disclosed to the client. This includes disclosure to the client prior to the execution of the transaction that the adviser may be acting in a principal capacity in connection with the transaction and the client authorized the transaction; and that the adviser sold the security to, or bought the security from, the client for its own account.[69] We believe this confirmation is sufficient.

IV. MEETING THE EIGHT-MONTH IMPLEMENTATION DEADLINE IS IMPOSSIBLE.

The Proposal is one of the most complicated regulatory initiatives proposed in recent memory. Yet the Department is proposing a short eight-month implementation time period to largely restructure our entire approach to advising retirement investors, including, but not limited to, repapering millions of existing retirement accounts, developing new disclosure processes, new supervisory processes, new training classes/modules and new data collection processes. The proposed eight-month implementation time period is not practicable and could cause unintended harm to the retirement investors the Department purportedly seeks to protect.

The Department vastly underestimates the time and resources necessary to code, build and implement entirely new technology infrastructure to service and support the new regulatory requirements. The actual implementation period is compressed even further given required system and compatibility testing prior to any production.

Other significant and less complicated regulatory reporting initiatives have taken far longer to be fully implemented than the Department's proposed implementation timeline. The Department allowed a two year implementation period for the development of Rule 408(b)(2)

---

[68] SEC, *Confirmation of Transactions*, Rule 10b-10, Securities Exchange Act of 1934 (codified at 17 C.F.R. pt. 240.10b-10).

[69] *See* 17 C.F.R. pt. 275.206(3)-3T(4) and (5).

disclosures.[70] Similarly the SEC allowed two years to implement its Large Trader Reporting initiative.[71] We estimate the development, testing and implementation of the Proposal's BIC Exemption's website disclosure alone would take far longer than eight months. To rush through the development of new processes, procedures, disclosure systems and employee training could lead to system and process shortcomings that increase, rather than decrease, investor protections.

In addition, considering the number of IRA accounts we have, and the number of IRA accounts even smaller financial institutions have, taking on manual processes is unworkable. Most financial institutions, large and small, will rely on automated systems and processes to comply. Therefore, an eight-month implementation timeframe is not realistic.

Given the uncertainty as to the details of the final rule, we cannot identify a specific timeframe to implement the Proposal's requirements with confidence. Based on the Proposal, though, processes such as mapping data; archiving and storage protocols; validation; and reconciliation may take three years or longer, notwithstanding other significant work such as system testing, security and governance protocols. Furthermore, this list just captures technology protocols. Implementing these changes alone suggests eight months is an unreasonable time period, and we recommend the Department establish a more realistic implementation time period of at least three years.

We also believe that the Proposal should be implemented in phases and that each phase give adequate time to implement the required activity properly and prepare for the subsequent phase. Our review of the Proposal is ongoing and we hope to provide a more detailed suggestion for phased implementation in a subsequent letter. However, we note that whatever the final form of the regulation and exemptions may be, it appears that there will be substantial change to existing procedures and systems and unanticipated challenges will certainly arise. Therefore, we strongly recommend that the Department provide a compliance relief period for those who make a good faith effort to comply in a timely fashion.[72]

V. AN EXEMPTION SHOULD BE MADE FOR ACTIVITIES REGULATED BY AN SRO OR A REGULATORY AGENCY.

Broker-dealers, investment advisers, banks and other institutions that provide investment advice to investors operate within a comprehensive regulatory framework established and

[70] *See, e.g.*, Dep't of Labor, Employee Benefits Security Admin., *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 77 Fed. Reg. 5632, at 5649 (Feb. 3, 2012) (codified at 29 C.F.R. pt. 2550), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2012-02-03/pdf/2012-2262.pdf.

[71] *See, e.g.*, SEC, *Order Temporarily Exempting Certain Broker-Dealers and Certain Transactions from the Recordkeeping and Reporting Requirements of Rule 13h-1 under the Securities Exchange Act of 1934,* Release No. 34-70150 (Aug. 8, 2013), *available at:* http://www.sec.gov/rules/exorders/2013/34-70150.pdf.

[72] *See, e.g.*, Dep't of Labor, Employee Benefits Security Admin., *Frequently Asked Questions: The 2009 Form 5500 Schedule C,* at FAQ 40 (providing compliance relief period for good faith compliance efforts), *available at:* http://www.dol.gov/ebsa/faqs/faq_scheduleC.html.

overseen by various federal and state agencies and self-regulatory organizations ("SROs").[73] An exemption from the Proposal for accounts, including IRAs, or persons subject to the regulatory jurisdiction of an SRO or a regulatory agency under a "best interest" standard for the provision of personalized investment advice would mitigate the overlap between these regulatory frameworks and the Proposal.

We have supported the SEC's efforts to establish one harmonized fiduciary standard consistent with Section 913 of the Dodd-Frank Act.[74] We have also supported recent industry proposals to, among other changes, amend FINRA's Suitability Rule to include a "best interest" standard that applies to *all* retail brokerage accounts. Such changes to either SEC or FINRA rules would incorporate much of the "best interest" standard defined by the Department under the BIC Exemption and would build on the extensive protections already provided by current regulation.

As retirement planning includes assets outside of traditional retirement accounts, we believe a uniform standard will provide the most beneficial protection to investors by creating a consistent set of obligations across all account types and eliminating investor confusion concerning the applicable standard of care. Therefore, we propose an exemption under the Proposal for accounts, including IRAs, maintained at a financial institution or with a financial professional subject to the regulatory jurisdiction of an SRO or a federal securities regulator if such SRO or federal securities regulator subjects the associated financial institution or financial professional to standards no less than those specified in the BIC Exemption. The exemption for such accounts would require the SRO or federal securities regulator standards include at a minimum:

- A "best interest" standard of care for activities affecting customers;

- Disclosures of conflicts and commissions, such as summary prospectuses, prospectuses, confirms, Form ADV and 408(b)(2) disclosures, and mitigation of conflicts of interest to the extent practicable; and

- Any other customer protections developed by the SRO or federal securities regulator meeting the Department's fundamental requirements.

---

[73] At the federal level, investment advice is regulated primarily by the SEC and FINRA. The investment advice provided by banks is generally exempt from SEC regulation, but depending on whether the bank is nationally chartered or state chartered, is subject to regulation and supervision by one or more of the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("FRB"), the Federal Deposit Insurance Corporation ("FDIC") and state banking authorities. Further regulation is overseen by the Municipal Securities Rulemaking Board ("MSRB") (for advice with respect to municipal securities) and the Commodity Futures Trading Commission ("CFTC") and the National Futures Association ("NFA") (for advice with respect to commodity trading).

[74] *See* Correspondence from Robert J. McCarthy, Director of Regulatory Policy at Wells Fargo Advisors, LLC, to Elizabeth M. Murphy, Secretary of Securities and Exchange Commission, *regarding* File No. 4-606; Release No. 34-69013; IA-3558; Duties of Brokers, Dealers and Investment Advisers, at 2-7 (July 5, 2013), *available at:* https://www.sec.gov/comments/4-606/4606-3127.pdf.

Such an exemption would allow the same standards to be applied across all accounts at broker-dealers. In addition, such an exemption would lead to direct regulatory enforcement of "best interest" standards through resolution of customer claims via existing processes at broker-dealers rather than by contractual litigation.

VI. CONCLUSION

Wells Fargo appreciates the opportunity to respond to the Department's Proposal. As discussed above, we have consistently supported, and continue to support, a "best interest" standard of care for retirement and nonretirement advice that enhances protections for investors while preserving access to the full range of investment products and services they currently enjoy. We believe this can be accomplished by establishing a "best interest" standard (to replace the existing suitability standard), enhancing disclosures to investors in a manner consistent with what is currently prescribed (utilizing existing disclosures including, for example, 408(b)(2) disclosures for retirement plan investors) and specifying these "best interest" standards through a new contract with investors that is entered into at the time an account is opened.

While we support the Department's efforts in creating a retirement standard of care that eliminates or mitigates conflicts of interest, we believe the limiting of investor education, the impractical and overly burdensome requirements of the BIC Exemption, the mandating of excessive warranties that create uncertainty, a short eight month implementation deadline and the complexities of overlapping regulatory frameworks make the Proposal an impracticable option as it is written today. We would also recommend the Department provide an additional exemption for IRA accounts of financial institutions regulated by an SRO or regulatory agency that has adopted an agreed upon "best interest" standard for the provision of personalized investment advice.

In sum, we believe the Proposal presents a number of issues for investor access to investment education and advice, investor choice in retirement investments and investor costs. Accordingly, we stand ready to work with the Department to achieve a workable outcome that benefits retirement investors. If you would like to further discuss any of Wells Fargo's comments, please contact Robert J. McCarthy, Director of Regulatory Policy, at (314) 955-2156 or robert.j.mccarthy@wellsfargoadvisors.com or Kenneth L. Pardue, Managing Director, Retirement Plans, at (314) 875-2927 or kenneth.pardue@wellsfargoadvisors.com.

Wells Fargo & Co.
Appendix B

A SUMMARY OF WELLS FARGO'S RECOMMENDED CHANGES TO THE PROPOSAL

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
1-14 § I	The proposed **definition of "fiduciary"** classifies all manner of information as fiduciary advice while providing only narrow carve-outs.	The **definition of "fiduciary" should be narrowed** and the available carve-outs should be appropriately broadened.	Investors will have access to the financial information they need to be informed participants and decision makers.
2 § I.A.i	Under the Proposal, **fiduciary status attaches to advice "for consideration"** by the investor.	Individuals should be **permitted to receive sales information** about available product options before committing to a financial professional or product.	Investors will have access to investment, distribution and other assistance in understanding available options before establishing a binding contractual commitment.
3 § I.A.ii	The Proposal **eliminates the "mutual agreement"** requirement contained in the current regulation.	Fiduciary obligations should attach when the financial professional and the investor **"mutually understand"** they have entered into an advice relationship.	A best interest fiduciary standard will protect the investor from the point an advice relationship begins while providing investors with access to essential information beforehand.
3 § I.A.iii	The proposed definition of "fiduciary" includes **advice that is "specifically directed to"** the investor.	The language "**specifically directed to" should be eliminated** to avoid capturing activities such as mailings discussing specific products and services.	Providing specific product and service information to an investor directly is essential to establishing a disciplined approach to retirement investing and planning.
4 § I.A.iv	The Proposal's distinction between **when a recommendation becomes advice** is unclear.	A brighter line for when fiduciary status begins should be established, **consistent with** the definition of "customer" under **FINRA Rule 2111 –** the "Suitability Rule."	Establishing a consistent regulatory framework – regardless of account type – will reduce investor confusion.

Wells Fargo & Co.
Appendix B

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
5 § I.B.i	The **availability of the proposed Seller's Carve-Out** depends on (1) the number of participants in the plan, and (2) the amount of plan assets under management of the plan fiduciary.	As all ERISA fiduciaries must have sufficient expertise to prudently discharge their duties, the Seller's Carve-Out should cover **all ERISA-covered plans, regardless of size**.	Providing small plans will access to the Carve-Out will allow them to avoid unnecessary expenses.
5 § I.B.ii	The **Seller's Carve-Out** does not include **accredited retail or institutional investors**.	Accredited investors **should be included** in the Carve-Out consistent with current securities law.	Sophisticated investors who are familiar with the potential risks will be permitted greater latitude.
6 § I.B.iii	The **Seller's Carve-Out** has a number of conditions, including a requirement that the **counterparty receive certain written representations**.	The Carve-Out should be drafted to ensure that investment advice does not include **the response of a service provider to a request for proposal.**	Broadening the Carve-Out to include common sales transactions will allow competition and provide investors with greater price efficiency.
6 § I.C.i	The **Platform Providers and Selection and Monitoring Assistance Carve-Outs** could be interpreted as **limited to recordkeepers**.	These Carve-Outs should **include all platforms.**	Broadening the Carve-Outs will allow for the development of a product platform.
7 § I.C.ii	The **Platform Providers and Selection and Monitoring Assistance Carve-Outs** may not accommodate situations where **neither party is expecting to be in a fiduciary relationship.**	These Carve-Outs should allow for the **provision of objective, publicly available investment advice**.	Broadening the Carve-Outs will allow service providers to provide plan fiduciaries with valuable assistance.
7 § I.C.iii	The **Platform Providers and Selection and Monitoring Assistance Carve-Outs** may not permit service providers to **analyze fund selections**.	These Carve-Outs should allow service providers to assist plan fiduciaries in **narrowing the range of investment options for plan participants**.	Broadening the Carve-Outs will allow service providers to continue to assist plan fiduciaries in choosing from available funds.
8 § I.D	The **Financial Reports and Valuations Carve-Out** may **not include** certain **administrative functions**.	The Financial Reports and Valuations Carve-Out should **include valuations of plan investments** provided by plan service providers.	Investors will benefit from the inclusion of such calculations in the Carve-Out because they help to facilitate daily trading.

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
9 § I.E.i	The Proposal places new conditions on what is considered **investment advice**, including that information and asset allocation models ***cannot* include specific investment alternatives**.	The Investment Education Carve-Out should be **modified to more closely resemble the DOL's 1996 guidance**, which allowed discussion of specific investment alternatives.	Investors will receive objective information and benefit from discussing investment alternatives.
11 § I.E.ii	The Proposal **does not accommodate the questions that plan participants have** after receiving an explanation of their distribution options.	Service provider **call centers inform plan participants** about distribution options and should be permitted to continue, at a minimum, to confirm that IRAs are offered by the service provider **without fiduciary status**.	Participants who are more informed of their distribution options will be more likely to retain their retirement benefits instead of cashing them out.
12 § I.F.i	The Proposal covers and treats **HSAs in a manner similar to IRAs**.	The Proposal **should not include HSAs** because they serve an entirely different purpose than IRAs. If HSAs are ultimately included in the Proposal: (1) **Platform Provider Carve-Out** should be **extended to HSAs**; and (2) communications regarding how to use an HSA should be **included in the Investment Education Carve-Out**.	Investors use HSAs to pay for medical and other healthcare expenses and will not benefit from the imposition of additional regulatory restrictions and costs on top of the existing extensive regulatory structure.
14 § I.F.ii	The Proposal covers and treats **ESAs in a manner similar to IRAs**.	The Proposal **should not include ESAs** because they serve an entirely different purpose than IRAs. If ESAs are ultimately included in the Proposal, communications regarding how to use an ESA should be **included in the Investment Education Carve-Out**.	Investors use ESAs to fund education expenses for a designated beneficiary who is under age 18 or is a special needs beneficiary. Given the limited funding options and generally short life of ESAs, additional regulatory restrictions will not benefit investors.

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
14-29 § II	The **BIC Exemption** is intended **to "preserve beneficial business models for delivery of investment advice."**	The BIC Exemption **is impracticable as proposed.**	A revised exemption will provide flexibility to determine the appropriate service and fee models for each investor.
15 § II.A.i	The BIC Exemption's **"written contract" requirement** will cause a number of challenges **for prospective clients**.	Consistent with FINRA's Suitability Rule, the contract should only be **executed after a prospective customer becomes a client**.	The execution of the contract with new account opening documentation will provide investors with "best interest" protections, while providing access to financial professionals.
17 § II.A.ii	The BIC Exemption's **"written contract" requirement** will cause a number of challenges for **existing clients**.	For existing clients, firms should be permitted to amend existing contracts with the new BIC Exemption **via notice**.	Utilizing a notice amendment process alleviates the practical issue of how to address instances where the investor does *not* sign the contract.
17 § II.A.iii	The BIC Exemption's **"written contract" requirement** appears to contemplate **signatures** from the financial institution, the financial professional and the client.	Obtaining financial institution and financial professional **signatures** will raise numerous practical issues and **should not be required**.	Client agreements typically only require a client signature, which is sufficient to create a legally enforceable right on the part of the client.
18 § II.B.i	The BIC Exemption's "Impartial Conduct Standards" may effectively **restrict** financial institutions to recommending the **least expensive product or strategy**.	The Proposal should provide investors with the **freedom to choose prudent products**, e.g., FINRA Regulatory Notice 12-25 provides other factors to consider in addition to cost.	Investors will retain access to products or services that are in their best interest, whether they are the least expensive option or not.
20 § II.B.ii.	The BIC Exemption's "Impartial Conduct Standards" may **restrict** investor choice regarding advice models if the alternatives **involve differential compensation**.	The Proposal should provide investors with the **freedom to choose appropriate payment models**.	Investors will retain the choice to pay for service as (1) a one-time fee, (2) an ongoing fee, (3) a fee for transactions incidental to advice, and (4) fee for transactions without advice.

Wells Fargo & Co.
Appendix B

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
21 § II.B.iii	The **impact** of the BIC Exemption's "Impartial Conduct Standards" **on proprietary products is unclear**.	This **phrase** "**without regard to the financial or other interests** of the Adviser, Financial Institution or any Affiliate, Related Entity or other party" **should be eliminated**.	Investors will retain access to proprietary products so long as the proprietary product is in the investor's best interest.
22 § II.C.i	The **effect** of the BIC Exemption **on** a financial professional's ability to offer services such as **advisory programs** to investors is unclear.	If the Department did not intend to restrict access from advisory services, the Department should **eliminate the "Asset" list**, or revise to include such services.	A financial professional will be permitted to recommend a firm sponsored advisory program if such a recommendation is in the investor's best interest.
22 § II.C.ii	The BIC Exemption includes a **limited definition of "Asset."**	Financial professionals and investors **should be permitted to make judgments** about appropriate investments and the concept of permitted investments should be eliminated.	Investors will retain access to innovative products so long as they are in the investor's best interest.
23 § II.C.iii	**Variable annuities** and other registered products are **included in** the **definition of "Asset."**	**Annuities should continue to be offered under PTE 84-24** as financial professionals and institutions will be challenged to offer annuities under the BIC Exemption.	Annuities provide an important source of cash flow for investors during their retirement years.
23 § II.C.iv	The BIC Exemption **does not contain a carve-out for accredited retail and institutional investors**.	The **definition of "Asset" should not apply to** investors that can be designated as **accredited investors**.	Sophisticated investors are familiar with the potential risks of less common investment types and should be not restricted from using such products.
24 § II.C.v	The BIC Exemption does not distinguish **products and services** that address **conflict issues under existing regulations**.	Compliance conditions associated with such products and services should be **limited to contractual provisions implementing the "best interest" standard of care**.	Investors will not benefit from the proposed additional protections when the product or service is already compliant with ERISA and the prohibited transaction restrictions of the Internal Revenue Code.

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
25 § II.D.i	The BIC Exemption requires a **point of sale transaction disclosure** of the "all-in" cost and anticipated future costs of a recommended asset prior to execution of the purchase of the asset.	Instead of requiring new disclosures, the **408(b)(2) disclosures should be utilized**. Other disclosures that are already provided could also be leveraged.	The transaction disclosure will be difficult, if not impossible, to provide as currently proposed and will unnecessarily interrupt the investment process.
25 § II.D.i	The Department has proposed a **"cigarette warning"-style disclosure**.	This type of disclosure at account opening may be a **more appropriate disclosure than the point of sale disclosure.**	A "cigarette warning"-style point of sale disclosure is unnecessary as there is nothing inherently bad about investing.
26 § II.D.ii	The BIC Exemption requires an **annual disclosure** identifying assets purchased or sold and associated fees and expenses and compensation.	Existing **408(b)(2) disclosures are fulsome disclosures** and they should be applied to IRAs as is without an annual disclosure.	The annual disclosure – if it is even possible as proposed – will significantly add to the cost of servicing accounts, making the servicing of small balance accounts uneconomical.
26 § II.D.iii	The BIC Exemption requires **disclosure on a public website** of direct and indirect material compensation within the last 365 days.	Much of this information can be supplied by **applying current 408(b)(2) requirements** to cover IRA accounts.	The time and resources that would have to be allocated to build the proposed public website will significantly impact the services available to investors.
27 § II.D.iv	The BIC Exemption requires financial institutions to **disclose** to the Department within six months of a request certain **data for the preceding six year period**.	This requirement **is unnecessary** as the Department should leverage existing recordkeeping requirements instead of imposing new, costly requirements.	The proposed data disclosure will add unnecessary costs to servicing retirement accounts.
27 § II.E	The BIC Exemption's **warranties are unnecessary**.	The "best interest" standard **obviates the need** for the other proposed warranties.	The ability of investors to seek redress should the best interest standard be violated is sufficiently protective.

Wells Fargo & Co.
Appendix B

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
28 § II.F	The purpose of the BIC Exemption's **notice** to a client or prospective client that an investment specialist **does not "recommend a sufficiently broad range of Assets" is unclear**.	The business of certain **investment specialists**, who are not responsible for an investor's entire portfolio, **should not be hampered by the requirement that they provide such a notice**.	Investors will be encouraged to work with investment specialists if it is in their best interests.
28 § II.G	The BIC Exemption's **Pre-Existing Transactions Exemption** is conditioned on not providing additional advice and **is too narrow**.	An **exemption** should be made for **all investments** that are **held** by investors **on the applicability date of the final rule** without application of the BIC Exemption conditions.	Restricting accounts in line with the Proposal will likely be costly and difficult to implement. The allocation of such resources will ultimately affect the quality of client service.
29-32 § III	The **Principal Transaction Exemption** is too narrow and **does not leverage existing regulatory requirements**.	Any limitation on principal trading should be **consistent with** the relief provided by the SEC under **Rule 206(3)-3T** under the Investment Advisers Act of 1940.	Permitting principal transactions under conditions aligning with the Advisers Act will improve and simplify investors' experiences.
30 § III.A	The Principal Transaction Exemption is unnecessarily **limited to certain debt securities**.	Rule 206(3)-3T permits principal transactions in ***any* security** with a limited exception where the financial professional is an issuer or underwriter of the security.	Broadening the Exemption will provide investors with certain tax advantages such as those associated with purchasing IPOs in IRAs
30 § III.B	The **contract** required under the Principal Transaction Exemption contains the **same elements as the BIC Exemption** and, therefore, **raises many of the same issues**.	The contract element **should be limited to a written prospective consent** similar to those which financial institutions customarily capture under Rule 206(3)-3T.	The investor could revoke such a consent without penalty at any time. This consent will provide investors with sufficient protection without unnecessarily inhibiting principal trades.
31 § III.C	The **pre-transaction disclosures** required under the Principal Transaction Exemption **are operationally impracticable**.	**These disclosures should be eliminated** and the disclosures required under Rule 206(3)-3T should be used.	The provision of the proposed disclosures will be impossible in some cases, and operatically burdensome in many others, with little practical benefit to investors.

Page & Section	Department Proposal Provision	Wells Fargo Recommendation	Benefit to Investors
32 § III.D	The Principal Transaction Exemption requires financial institutions to provide a **written confirmation**, including disclosure of the mark-up/mark-down.	**Existing investor protections mitigate the risks of excessive mark-ups/mark-downs**. Further, SEC approval may be required to include mark-ups/mark-downs on the trade confirmations.	Investors already benefit from the pricing transparency provided by the Rule 10b-10 written confirmation. Additional disclosures on confirmations are unnecessary.
32-33 § IV	The Department is proposing **a short eight-month implementation period** to largely restructure the industry's whole approach to advising investors.	Given the uncertainty as to the details of the final rule, we cannot identify a specific timeframe to implement the Proposal's requirements with confidence, but assume it **will be at least three years**.	A hurried implementation of the Proposal in eight months is not only impossible, a less than thorough restructuring would do investors a great disservice.
33-35 § V	The Proposal further contributes to an **overlapping regulatory framework**.	**An exemption** should be made for activities regulated by **an SRO or a federal securities regulator's best interest standard**.	As retirement planning includes assets outside of traditional retirement accounts, a uniform standard will provide the most beneficial protection to investors by creating a consistent set of obligations across all account types.