FINANCIAL SERVICES ROUNDTABLE

Statement for the Record
of

Felicia Smith

on behalf of the

Financial Services Roundtable

On

United States Department of Labor
Employee Benefits Security Administration
Hearing on

Conflict of Interest Rule
RIN: 1210-AB32 and ZRIN: 1210-ZA25

August 10, 2015

The Financial Services Roundtable ("FSR")[1] appreciates the opportunity to provide our views on a matter of high importance for Americans who are saving to meet their unique needs in retirement. FSR believes that providing these opportunities for all Americans to plan and save for their retirement years is important because savings increase domestic investment, encourage economic growth, and result in higher wages, financial freedom, and a better standard of living.[2]

We believe that most Americans should approach retirement with a comprehensive strategy that incorporates a number of retirement vehicles. Consumer education about retirement savings products can help them make sound investment decisions and provide opportunities to maximize their retirement savings. Further gains can be achieved through better use of investment advice, and by promoting policies that provide for more diversified, dynamic asset allocation, and exploration of new and innovative methods to help individuals make better investment decisions.

PART I

On April 20, 2015, the Department of Labor (the "Department") published for notice and comment proposals regarding the (1) Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment

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[1] As *advocates for a strong financial future*™, FSR represents the largest integrated financial services companies providing banking, insurance, payment, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

[2] *See*, OXFORD ECONOMICS, *Another Penny Saved: The Economic Benefits of Higher US Household Saving* (June 2014), *available at* http://www.oxfordeconomics.com/anotherpennysaved.

Advice,[3] (2) Best Interest Contract Exemption (the "BIC Exemption"),[4] (3) Principal Transaction Exemption,[5] and (4) related amendments to four existing prohibited transaction class exemptions[6] (collectively, the "Proposal").

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[3] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Definition of Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice* [RIN: 1210-AB32], 80 Federal Register 21928 (Apr. 20, 2015) (the "Re-Proposing Release"), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08831.pdf.

[4] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Best Interest Contract Exemption*, Application No. D-11712 [ZRIN: 1210-ZA25], 80 Federal Register 21960 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf.

[5] 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*, Application No. D-11713 [ZRIN: 1210-ZA25], 80 Federal Register 21989 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08833.pdf.

[6] 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*, Application No. D-11687 [ZRIN: 1210-ZA25] 80 Federal Register 22004 (Apr. 20, 2015), *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*, Application No. D-11850 [ZRIN: 1210-ZA25], 80 Federal Register 22010 (Apr. 20, 2015), *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*, Application No. D-11327 [ZRIN: 1210-ZA25], 80 Federal Register 22021 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08838.pdf; and DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1*, Application No. D-11820 [ZRIN: 1210-ZA25], 80 Federal Register 22035 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08839.pdf.

The financial services industry supports implementing a "best interests" standard in an appropriate uniform, coordinated way.

FSR supports a "best interests" standard that would be applicable to investment products and services, and administered in a coordinated manner by federal agencies and self-regulatory organizations that serve as front-line regulators of the financial services industry. FSR's position is consistent with its long-held support of a uniform standard of care applicable to broker-dealers and investment advisers providing personalized investment advice to retail customers,[7] which predates the Department's October 2010 publication of its original proposal to revise its investment-advice fiduciary rule.[8]

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[7] *See* FINANCIAL SERVICES ROUNDTABLE, *Study Regarding Obligations of Brokers, Dealers, and Investment Advisers pursuant to section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* [File No. 4-606] (Aug. 30, 2010), *available at* http://www.sec.gov/comments/4-606/4606-2659.pdf (supporting "harmonization of the regulations for broker-dealers and investment advisers when providing personalized investment advice to retail customers); *see also*, FINANCIAL SERVICES ROUNDTABLE, *Duties of Brokers, Dealers, and Investment Advisers*, Securities Act Release No. 69013 [File No. 4-606] (July 5, 2013), *available at* http://www.sec.gov/comments/4-606/4606-3125.pdf.

[8] *See* DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Definition of the Term "Fiduciary,"* [RIN: 1210-AB32], 75 Federal Register 65263 (Oct. 22, 2010), *available at* http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24328. *See also, Definition of "Fiduciary*,*"* 29 C.F.R. § 2510.3-21, 40 FR 50842 (Oct. 31, 2975) (establishing a "five-part test" to determine whether an ERISA service provider is a fiduciary because it renders "investment advice" to an ERISA plan). The elements of the current five-part test focus on whether an advisor who does not have discretionary authority or control over an ERISA plan's assets: (1) Provides *advice* concerning the *value* of—or makes *recommendations* as to the *advisability* of investing in, purchasing, or selling—securities or other property; (2) on a *regular basis*; (3) pursuant to *a mutual agreement*, arrangement or understanding with the plan or plan fiduciary that (4) the *advice* will serve as a *primary basis for investment decisions* concerning plan assets; and that (5) the *advice* will be *individualized* based on the *particular needs of the plan*. *See Definition of "Fiduciary*,*"* 29 C.F.R. § 2510.3-21(c) (2010).

The Proposal is extremely complicated and impractical, and would adversely impact retirement savings, particularly for lower- and moderate-income Americans.

FSR strongly disagrees with key aspects of the Proposal, as well as certain premises and presumptions underlying the Proposal. FSR also believes assumptions relating to the likely economic impact of the Proposal, such as costs of legal and other services required to implement fully the Proposal, are flawed. Indeed, a recent study finds that "the cost of depriving clients of human advice during a future market correction (just one of the costs not considered by DOL) could be as much as $80 billion, or twice the claimed ten-year benefits that DOL claims for the rule."[9]

Adoption of the Proposal also exceeds the authority of the Department to promulgate regulations, as Congress had accepted the currently effective 40-year old definition of investment advice, and the Department's actions otherwise conflict with expressed Congressional intent regarding the application of ERISA's substantive provisions to Individual Retirement Accounts ("IRAs") and the scope of the responsibilities of fiduciaries who provide advice to persons who direct their own investments.

As more fully described in its written comments to the Department on July 21, 2015,[10] FSR is concerned that the Proposal could have the unintended adverse effects of (1) limiting retirement services and guidance;

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[9] *See*, Robert Litan and Hal Singer, *Good Intentions Gone Wrong: The Yet-To-Be-Recognized Costs of the Department of Labor's Proposed Fiduciary Rule*—Overview of the Report, ECONOMISTS INC. at 1 (July 2015) (finding that the "DOL's Regulatory Impact Analysis . . . concludes erroneously that the net benefits of the rule would be roughly $4 billion per year (the CEA, making related errors, pegs the benefit at $17 billion").

[10] FINANCIAL SERVICES ROUNDTABLE, *Comments on Revised Definition of Investment Advice and Related Exemptions* (July 21, 2015), *available at* http://fsroundtable.org/protecting-americas-financial-future-retirement/#6.

(2) limiting the types of retirement investment products commonly available today; (3) requiring customers to review large volumes of disclosures regarding all potential investments; (4) requiring a signed contact with a financial professional before even general discussions regarding retirement goals could take place; and (5) limiting employee access to financial education and guidance through workplace savings plans.

FSR believes these adverse impacts could deter retirement savings at a time when more saving for retirement is urgently needed.[11] While well-intentioned, the Proposal is too long, extremely complicated, and impractical.

FSR's SIMPLE solution preserves retirement savers' access to financial advice and guidance, and flexibility to work with their preferred financial professional or institution, and pay for products and services as they choose.

We urge the Department to adopt FSR's *Simple Investment Management Principles and Expectations* ("SIMPLE") prohibited transaction class exemption ("PTE"),[12] which would achieve the Department's articulated policy goals of a "best-interest" standard coupled with a reasonable compensation standard for services provided, but without the burdensome and extremely complicated requirements set forth in the Proposal. This

[11] *See*, OXFORD ECONOMICS, *Another Penny Saved: The Economic Benefits of Higher US Household Saving* at vi (June 2014), *available at* http://www.oxfordeconomics.com/anotherpennysaved (noting that an increase in the nation's saving rate over the next 25 years "would add a discounted $7 trillion to America's economy, equal to about half of today's GDP;" a result that would "generate greater [U.S.] household wealth, [and] better insulate the [U.S.] economy from international capital shocks).

[12] FINANCIAL SERVICES ROUNDTABLE, *Simple Investment Management* Principles and Expectations Prohibited Transaction Class Exemption, *available at* http://fsroundtable.org/protecting-americas-financial-future-retirement/#5.

approach would allow transaction-based compensation, as opposed to fee-based compensation, where it would make more sense for both the retirement saver and the financial professional or firm.

FSR's SIMPLE PTE focuses on ensuring that financial professionals and firms manage potential conflicts of interest so that any potential conflict would not impact the advice provided to retirement savers. The reasonable compensation standard would reflect the prevailing market rates or practices for that specific product or service, and recognize that fees and expenses of various investment products and services vary based on the particular type of product or service. We note that recent amendments to ERISA reflect Congress' policy preference to ensure that advice is broadly available by emphasizing management of conflicts rather than outright prohibitions. FSR's SIMPLE PTE is consistent with this policy preference.

The principal elements of FSR's SIMPE PTE are:

Best-Interest Standard: Financial professionals and firms must put the interests of their customers first.	Reasonable-Compensation Standard: Financial professionals and firms may receive reasonable compensation for their services.
Clear, Concise and Understandable Disclosures: Financial professionals and firms must provide clear and concise disclosures *in "plain English"* on their material conflicts of interest and compensation to customers.	Reasonably Designed Internal Controls and Compliance Procedures: Financial professionals and firms must adopt a compliance process tailored to its business and operations that is reasonably designed to enable compliance with the SIMPLE PTE and remediate promptly failures to comply.
Prompt Resolution of Complaints: Financial professionals and firms must resolve customer complaints and inadvertent violations promptly.	Hold People and Firms Accountable: SIMPLE PTE further empowers regulators to hold financial services providers accountable for their violations of the rules.

FSR's SIMPLE PTE would easily harmonize with any broader efforts to establish a single fiduciary standard for all investment products and services.[13] FSR's SIMPLE PTE also harmonizes with the currently-existing regulatory framework of federal capital markets and prudential regulators (securities, options, futures, commodities, and banking), and state banking, insurance, and securities authorities.

For example, under the "substituted compliance" approach of FSR's SIMPLE PTE, financial professionals and institutions that are subject to a regulatory régime administered by authorities such as the Securities and Exchange Commission, FINRA, or state insurance commissioners, could satisfy the SIMPLE PTE requirements through compliance with regulations governing compensation standards and disclosures of material conflicts or compensation as administered by the relevant federal or state authority.

There are many federal, state, and industry regulations to hold financial professionals and institutions accountable. Federal, state, and

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[13] For example, the Securities and Exchange Commission is authorized to engage in rulemaking as necessary or appropriate in the public interest and for the protection of individual investors to address legal and regulatory standards of care applicable to broker-dealers and investment advisers who provide personalized investment advice about securities to individual investors. *See* section 913(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203. 124 STAT. 1376, 1827 (July 21, 2010). In 2013, the Commission solicited data to inform its consideration of appropriate standards of care under section 913. *See*, *Duties of Brokers, Dealers, and Investment Advisers*, Exch. Act Rel. No. 69,013 (Mar. 1, 2013), 78 Fed. Reg. 14,848 (Mar. 7, 2013), *available at http://www.gpo.gov/fdsys/pkg/FR-2013-03-07/pdf/2013-05222.pdf*. FINRA's CEO Richard Ketchum has been an active voice for a best-interest standard for the securities industry. *See, e.g.*, Richard G. Ketchum, *Remarks From the 2015 FINRA Annual Conference* (May 27, 2015) (stating that "[a] best interest standard tailored for broker-dealers would build on the extensive protections already provided by broker-dealer regulation), *available at* http://www.finra.org/newsroom/speeches/052715-remarks-2015-finra-annual-conference. In its comments on the Department's Proposal, FINRA's also suggested improvements to the Department's approach, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-00405.pdf. *See also*, SIFMA's proposed best-interest standard for securities broker-dealers, *available at* http://www.sifma.org/issues/item.aspx?id=8589954937.

industry regulators have many tools they can use to punish those who violate the law, including civil and administrative suits, suspensions or bars from the industry, criminal penalties and, when appropriate, jail-time. Let's fully enforce existing laws to remove "bad actors" from the industry and further ensure all customers receive investment advice that is in their best interest.

FSR urges the Department to adopt the SIMPLE PTE as a final rule.

Under the Administrative Procedure Act,[14] agency rulemaking provides for notice of proposed rulemaking and solicitation of comments from members of the public, including persons affected by potential agency action. Given our view that the SIMPLE PTE fully addresses the Department's articulated policy goals as communicated in person to us, but without the extremely-complicated and burdensome hurdles of the proposed BIC Exemption, we urge the Department to solicit public comment on the SIMPLE PTE. FSR's SIMPLE PTE incorporates a sixty-day comment period, which would expire by October 12, 2015, if the SIMPLE PTE were published by the Department in the FEDERAL REGISTER on August 14, 2015.

FSR urges federal and state regulators to collaborate on a uniform best-interest standard for all investment products and services.

Rather than a continuation of the *status quo*, where financial professionals and firms are subject to varying regulatory standards

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[14] 5 U.S.C. § 553 (2015).

governing all facets of the provision of financial products and services (including standards of care, disclosure, and sales practices), FSR believes retirement savers and individual investors would benefit from a "best interest" standard that is administered in a coordinated manner by federal and state authorities who regulate U.S. financial markets.

As the principal capital markets regulator, the Securities and Exchange Commission should take the lead, and coordinate its efforts across all federal, state, and industry regulators. For example, retirement savers, financial professionals and firms would benefit materially from the Department allowing the Securities and Exchange Commission through its Office of Compliance Inspections and Examinations to: (1) complete focused examinations of registered broker-dealers and investment advisers; (2) identify whether and to what extent improper conduct in the provision of retirement products or services has occurred; and (3) allow the Securities and Exchange Commission to develop a best interest standard that will protect retirement savers and individual investors generally, which is informed by actual data from investigations—rather than assumptions and academic theories.[15]

PART II

FSR identified the following issues with the Department's Proposal in its July 21st comment letter:

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[15] SEC. & EXCH. COMM'N, OFFICE OF COMPLIANCE INSPECTIONS AND EXAMINATIONS, National Exam Program Risk Alert, *Retirement-Targeted Industry Reviews and Examinations Initiative*, vol. IV, issue 6 (June 22, 2015), *available at* http://www.sec.gov/about/offices/ocie/retirement-targeted-industry-reviews-and-examinations-initiative.pdf.

- *Adverse Impact on Access to Affordable Advice from Preferred Financial Professionals*

The Proposal would adversely affect Americans' ability to plan and save for retirement, because it would limit access to affordable retirement savings advice and guidance from their preferred financial professionals. Studies confirm the impact would be especially pronounced on low- and moderate-income individuals, younger employees, and members of minority communities.[16]

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[16] *See* JEANNA TOWLER, *Govt and FCA launch major review of financial advice market*, INVESTMENT WEEK (Aug. 3, 2015) (noting that Her Majesty's Treasury and the Financial Conduct Authority have launched a "major review into consumer access to the financial advice market," which will: "Examine the 'advice gap' for those who want to "work hard, do the right thing and get on in life but do not have significant wealth;" Ensure the regulatory and legislative environment allows and encourages firms to innovate and grow their business models to include affordable and accessible financial advice; and Consider ways to encourage people to seek financial advice, addressing unnecessary barriers that currently deter them"), *available at* http://www.investmentweek.co.uk/investment-week/news/2420302/govt-and-fca-launch-major-review-of-financial-advice-market; OLIVER WYMAN, *The role of financial advisors in the US retirement market* at 2 (July 10, 2015) ("OLIVER WYMAN 2015") (finding that "advised individuals aged 35-54 years making less than $100K per year had 51% more assets than similar non-advised investors"), *available at* http://fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf; LIMRA SECURE RETIREMENT INSTITUTE, *Matters of Fact: Consumers, Advisors, and Retirement Decisions (and Results)* at 10 (May 2015) (noting that "[f]inancial professionals/advisors are highly influential in helping individuals to make informed rollover decisions"), *available at* http://www.limra.com/uploadedFiles/limra.com/LIMRA_Root/Posts/PR/_Media/PDFs/Facts-about-retirement-decisions.pdf; BIPARTISAN POLICY CENTER, "A Diversity of Risks: The Challenge of Retirement Preparedness in America" at 31 (Sept. 2014) (noting "cash-outs severely damage the retirement readiness of workers, especially those in the lower parts of the income distribution"), *available at* http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/BPC%20Retirement%20Security%20Personal%20Savings.pdf; QUANTRIA STRATEGIES, LLC, "Access to Call Centers and Broker Dealers and Their Effects on Retirement Savings," at 13 (Apr. 9, 2014) ("QUANTRIA Study") (finding that "[cash-outs] are more likely to occur among individuals who (1) have a low account balance, (2) are under age 30, or (3) have lower wages. Higher cash-out rates are also an issue for African-Americans and Hispanics"). *See, also* FINRA, "Rollovers to Individual Retirement Accounts: FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers" [Regulatory Notice 13-45] at 2 (Dec. 2013) (providing guidance on recommendations and marketing activities for IRA services, which "is intended to help firms ensure that they have policies and procedures in place that are reasonably designed to

Former employees, retirees, and persons nearing retirement who need advice on alternatives other than taking a *lump-sum distribution* from their 401(k) plan (including IRA rollovers) would be particularly impacted by the Proposal.

An estimated 19 million Americans employed by small businesses do not have a workplace retirement plan. The Proposal would no longer allow financial professionals to provide guidance (including a "menu" of investments) to small business owners contemplating or maintaining a plan for their employees.[17]

- Compliance Costs and Burdens are Grossly Underestimated

The BIC Exemption's complexity imposes undue burdens and costs on retirement savers, as well as on the individuals and firms who serve them, and the benefits of the BIC Exemption do not outweigh the burdens.[18]

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achieve compliance with FINRA rules"), *available at* http://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.

[17] *See* BRADFORD P. CAMPBELL, "Locked Out of Retirement: The Threat to Small Business Retirement Savings" at 4 (2015) (noting that "small business SEP IRA and SIMPLE IRA arrangements that currently depend on these advisors for affordable assistance are likely to disproportionately bear the costs of excessive regulation—their small scale means they are more expensive to serve"), *available at* *https://www.uschamber.com/sites/default/files/us_chamber_-_locked_out_of_retirement.pdf*; GREENWALD & ASSOCIATES, "The Impact of the Upcoming Re-Proposed Department of Labor Fiduciary Regulation on Small Business Retirement Plan Coverage and Benefits" at 3 (May 14, 2014) (finding that: (a) about 30% of small businesses would likely drop retirement plans for their employees; (b) almost 50% would change their plans to reduce the matching contribution, offer fewer investment options, and increase fees for participants; (c) the rule would deter almost 50% of small businesses that have not established a plan from offering one; and (d) any new plans would likely impose higher fees on participants but not offer matching contributions for almost 40% of small businesses).

[18] *See*, Robert Litan and Hal Singer, *Good Intentions Gone Wrong: The Yet-To-Be-Recognized Costs of the Department of Labor's Proposed Fiduciary Rule*, ECONOMISTS INC. at 2 (July

Retirement savers often interact with financial professionals by telephone and, in the case of market transactions (purchases or sales of securities, for example), buy or sell orders must be entered before the market moves adversely from the client's desired position. However, the Proposal would dramatically impact the way retirement savers interact with their financial professionals (*e.g.*, requiring retirement savers to sign a contract before deciding whether or not they want to hire a particular financial professional, and review voluminous disclosures on all possible investments). Such burdens will likely discourage savings or cause missed market opportunities.

As proposed, financial professionals and firms would be required to design, develop, test, implement, and maintain extensive new information technology and compliance systems and controls to meet *overbroad disclosure obligations* that will require them to produce voluminous catalogs of disclosures on all possible investment products. The Securities and Exchange Commission has found investors generally favor *clear* and *concise* disclosures.[19]

2015) (finding that "two of [these] broker-provided benefits—coaching to stay invested through market downturns, and assistance in portfolio rebalancing—conservatively total 44.5 basis points annually . . . enough to outweigh the DOL's claimed 25 basis point benefits for its rule, and to even more substantially outweigh a more accurate, lower accounting of the rule's claimed benefits. [As] this report shows, emails and tweets from a robot will not prevent an investor from selling in a panic, and the value of that human interaction during periods of market stress will swamp anything else a small saver does with respect to outcomes and retirement security.").

[19] SEC. & EXCH. COMM'N, *Study Regarding Financial Literacy Among Investors*: *As Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* at vi (Aug. 2012), *available at* http://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf.

The Department grossly underestimates expenses associated with compliance—which we understand may be as much as $100 million individually for certain of FSR's members, depending on the size and nature of their business operations. Although the Department estimates 60 hours of legal time to rely on the BIC Exemption, certain of our members estimate that they have already incurred at least 200 hours of legal time (excluding the fees and expenses of outside counsel) just to review the intricate and complex requirements of the BIC Exemption.

- **BIC Exemption Imposes Conditions Unnecessary to Protect Retirement Investors and Provides Remedies Beyond Those Authorized Under ERISA**

The BIC Exemption's intricate and extremely complex provisions impose many limitations on retirement savers that are not needed to implement a best-interest standard. *For example,* only limited types of investment assets are permitted. As a result, if an investment in options, futures, hedge funds, or foreign securities would be in the best interest of a retirement saver, a financial professional or firm that relies on the BIC Exemption could not recommend those otherwise prudent investments to its client. The Department has also not made allowance for financial professionals to serve pre-existing clients with assets that are not on the Department's *approved list* ("legacy assets"). Because their financial professional does not have clear authority from the Department to provide continuing advice or guidance on these legacy assets, such investments could become "orphaned."

- Inadequate Implementation Period

Under the Proposal and the proposed BIC Exemption, financial professionals and firms must restructure existing business relationships with plans, plan participants and beneficiaries, IRA owners, and anyone taking a distribution from a plan. The Department's economic analysis grossly underestimates the costs and burdens of restructuring such relationships and compliance costs associated with the Proposal and the proposed BIC Exemption.

The Department substantially underestimates the implementation period in light of extensive changes needed to systems, business operations, and compliance controls. Firms would **need at least thirty-six (36) months to build new systems** that would enable them to comply with the BIC Exemption—**not the eight (8) months the Department estimated.**

- Valuation Statements Are an Administrative—Not Fiduciary—Function

Banks and other firms that offer custody or valuation services to retirement savers provide numerous valuations of assets to facilitate the operation of the underlying plans and to provide important information to retirement savers in the ordinary course of business, and not in connection with a planned investment. Yet, the Proposal could apply fiduciary duties to these ordinary course administrative functions.

- Relief, Clarifications, and Interpretative Guidance Are Necessary

FSR requests the Department provide clarification or relief related to application of the Proposal that, among other things, would:

> (a) permit financial professionals and firms to address the needs of their currently-existing customer relationships (*"grandfathering"*);
> (b) exclude all welfare benefit plans (*i.e.*, health insurance, long term care insurance, disability insurance, *etc.*);
> (c) exclude insurance contract sales to welfare benefit plans that do not have an investment component;
> (d) exclude distributions from qualified plans directly into an annuity or insurance product in non-qualified plans; and
> (e) allow financial professionals and financial services institutions to recommend and sell proprietary and other limited range of products and services.

The Department's Proposal also would impact retirement savers' personal financial privacy and data security. As proposed, financial professionals and firms must upon request provide each client's personal financial data (including IRA owner information) to the Department, and the Department may publish data derived from this client information. Clients are likely to hold their financial professional responsible for any harm associated with improper disclosure of their personal financial information.

Such **concerns are heightened by the massive data breach** at the federal Office of Personnel Management that resulted in the theft of highly-sensitive

personal information (including Social Security numbers) on over 22 million current and former federal government employees.[20] The Government Accountability Office continues to warn federal agencies of increased vulnerabilities to such cyber threats and the dangers associated with outdated and ineffective data systems.[21]

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[20] *See,* Cory Bennett, *OPM hack hit over 22 million people*, THE HILL (July 9, 2015) (reporting that "more than 22 million people have had their personal information stolen" from the U.S. Office of Personnel Management), *available at* http://thehill.com/policy/cybersecurity/247410-report-opm-hack-hit-over-25-million-people; Patrick Zengerle and Megan Cassella, *Millions more of Americans hit by a government personnel data hack*, REUTERS (July 9, 2015), *available at http://www.reuters.com/article/2015/07/09/cybersecurity-usa-idUSKCN0PJ2MQ20150709;* Chris Strohm, *U.S. Hack May Have Disclosed 18 million Social Security Numbers*, BLOOMBERG BUSINESS (June 24, 2015) (reporting that the "agency that manages U.S. government personnel records is investigating whether Social Security numbers for as many as 18 people were taken in the massive cyber-attack"), *available at* http://www.bloomberg.com/news/articles/2015-06-24/u-s-hack-may-have-disclosed-18-million-social-security-numbers; Devlin Barrett, Danny Yadron, and Damian Paletta, *U.S. Suspects Hackers in China Breached About 4 Million People's Records, Officials Say*, WALL ST. J., (June 5, 2015) (reporting on the alleged theft of personnel records "in one of the most far-reaching breaches of government computers"), *available at* http://www.wsj.com/articles/u-s-suspects-hackers-in-china-behind-government-data-breach-sources-say-1433451888?KEYWORDS=office+of+personnel+management; Lisa Rein, *$21 million tab to taxpayers for clean up after massive Chinese hack of federal database,* THE WASHINGTON POST (June 11, 2015), *available at http://www.washingtonpost.com/blogs/federal-eye/wp/2015/06/11/nervous-employees-dial-call-centers-a-21-million-casualty-of-massive-federal-data-theft/*.

[21] *See, e.g.,* Gregory C. Wilshusen, Director, Information Security Issues, "Information Security: Cyber Threats and Data Breaches Illustrate Need for Stronger Controls across Federal Agencies," Testimony Before the Subcommittees on Research and Technology and Oversight Committee on Science, Space, and Technology, House of Representatives, GAO-15-758T at 2 (July 8, 2015) (finding that concerns about cyber-based threats to federal systems "are further highlighted by recent incidents involving breaches of sensitive data and the sharp increase in information security incidents reported by federal agencies over the last several years, which have risen from 5,503 in fiscal year 2006 to 67,169 in fiscal year 2014"), *available at* http://www.gao.gov/assets/680/671253.pdf; Gregory C. Wilshusen, Director, Information Security Issues, "Cybersecurity: Recent Data Breaches Illustrate Need for Strong Controls across Federal Agencies," Testimony Before the Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, Committee on Homeland Security, House of Representatives, GAO-15-725T (June 24, 2015) (warning that "[until] federal agencies take actions to address these challenges—including implementing the hundreds of recommendations we and inspectors general have made—federal systems and information will be at an increased risk of compromise from cyber-based attacks and other threats), *available at* http://www.gao.gov/assets/680/670935.pdf; GOVERNMENT ACCOUNTABILITY OFFICE, "High-Risk Series: An Update," GAO-15-290 at 236 (Feb. 2015) (finding that the "number of reported security incidents involving [personally identifiable information] at federal

The Department must implement a comprehensive, robust data security program to mitigate such privacy and data security threats. The Department should also solicit public comment on its privacy and data security procedures.

The Department intends to use the data to compare the investment results of clients of one financial professional to clients of another financial professional. **The benefits from publishing this data assuming there are any—even in aggregated form—will pale by comparison to damage from unauthorized publication or distribution of sensitive client financial information.** Because each client will have particular facts that will dictate a distinct investment strategy, this data cannot be used to make an "apples-to-apples" comparison with any other client or groups of clients.

Accordingly, FSR believes the Department should not receive or publish such data.

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agencies has increased dramatically in recent years"), *available at* http://www.gao.gov/assets/670/668415.pdf.

Part III

FSR and its members appreciate and laud the Department's objective of protecting the interests of retirement savers against improperly motivated advice, and support the concept of strengthening the already applicable laws and regulations designed to protect them. But applying an expansive scope of the prohibited transaction provisions of ERISA and the Internal Revenue Code are not the proper means to achieve this end. These provisions were designed for different purposes and preclude any person taking action when conflicts of interest exist. These statutory provisions do not presume that all such actions are improper, but for administrative convenience preclude all such actions.

The Proposal and the BIC Exemption should be modified to ensure that customer choice in the manner of accessing retirement investment advice is preserved. A commissioned-based investment model is the only choice for many retirement savers, and can be the lowest cost choice in many instances desired by clients,[22] that generally works in the best interests of clients. It is a model that has long been utilized in commercial practices, and is subject to oversight and regulation by the Securities and Exchange Commission, FINRA, and various state regulatory agencies, including insurance and securities regulators.

Yet, it does appear from the design and structure of the Department's Proposal, as well as the public commentary by officials at the Department,

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[22] OLIVER WYMAN, ASSESSMENT OF THE IMPACT OF THE DEPARTMENT OF LABOR'S PROPOSED "FIDUCIARY" DEFINITION RULE ON IRA CONSUMERS 12 (2011) (noting that many low- and moderate-income investors prefer a commission-based fee structure over a fee-based advisory relationship), *available at* http://www.dol.gov/ebsa/pdf/WymanStudy041211.pdf.

that the Department perceives a commission-based model as inherently unfair to clients. FSR does not share that view, and believes that this view is contrary to that of the agencies generally responsible for the oversight and regulation of insurance and investment activities.

As is illustrated by the commentary set forth in FSR's July 21st comment letter, the Department's Proposal and the proposed BIC Exemption would create a regulatory régime that will require an entire overhaul of how financial professionals, firms, and others do business with retirement plans and retirement savers, and that places undue and unnecessary burdens and restrictions on the individuals and firms who will be deemed to be "fiduciaries" under the Department's re-engineering of the definition of "investment advice."

FSR believes it is a reasonable assumption that many financial professionals and firms will cease to provide services to retirement savers, or to those with small to modest account balances,[23] and to small businesses that would adopt modest retirement programs. It is these investors who need the greatest level of assistance to plan and save to meet their unique needs in retirement, but the BIC Exemption is likely to reduce access to that assistance.

The expenses and increased legal liability exposure inherent in the BIC Exemption that is the centerpiece of the Department's Proposal, and its numerous, complex and elaborate conditions will drive the cost of providing

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[23] *See*, *e.g.*, Robert Litan and Hal Singer, *Good Intentions Gone Wrong: The Yet-To-Be-Recognized Costs of the Department of Labor's Proposed Fiduciary Rule*, ECONOMISTS INC. at 2 (July 2015) (showing that "if brokers leave the small-saver segment—as many would because the proposed rules make it uneconomic for brokers to serve them without charging commissions—their clients would be deprived of multiple benefits that brokers now provide to them").

services to retirement savers up dramatically (if such services are at all available to low- and moderate-income Americans). While it is conceivable that the Proposal will force financial professionals and firms into a "fee-for-service" model with respect to some segment of the market, it is likely that many customers, especially those with small to modest account balances and those who are "buy-and-hold" investors,[24] will find that model unacceptable, and forego the assistance that may be made available thereunder.

Thus, it is FSR's view that the Proposal will have the contrary effect to the objective that the Department intends to achieve—which is helping retirement savers. If adopted substantially as proposed, our expectation is that the review of efficacy will be "the operation was a success, but the patient died."

On the other hand, the FSR SIMPLE PTE would meet the Department's articulated policy goals without imposing the burdens of the Proposal or the BIC Exemption on retirement savers or the financial professionals and firms that serve them. The SIMPLE PTE would maintain access to professional investment advice and guidance, help savers meet their unique financial needs in retirement, and make those savings last a lifetime. Finally, the SIMPLE PTE would preserve Americans' flexibility to work with their

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[24] Securities broker-dealers also will have to weigh whether placing clients with "small or modest account balances" in a fee-for-service advisory program would comply with applicable securities law requirements. *See, e.g.,* SEC. & EXCH. COMM'N, OFFICE OF COMPLIANCE INSPECTIONS AND EXAMINATIONS ("OCIE"), *Examination Priorities for 2015* at 2 (Jan. 13, 2015) (noting the risks arising from financial professionals that offer a variety of fee arrangements to retail investors, OCIE's 2015 exam focus will consider "recommendations of account types and whether they are in the best interest of the client at the inception of the arrangement and thereafter, including fees charged, services provided, and disclosures made about such relationships"), *available at* http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf.

preferred adviser, and to pay for retirement products and services in the manner of their choosing.

Accordingly, we recommend that the Department adopt the SIMPLE PTE in lieu of the Proposal and the proposed BIC Exemption.

Attachments:

FSR's Comments on Revised Definition of Investment Advice and Related Exemptions (Transmittal Letter and FSR's Comments)

FSR's *Simple Investment Management Principles and Expectations (SIMPLE) Prohibited Transaction Class Exemption*

VIA http://www.regulations.gov

July 21, 2015

Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Revised Definition of Investment Advice and Related Exemptions

Ladies and Gentlemen:

I have attached the Financial Services Roundtable's ("FSR") [1] comments on the United States Department of Labor's (the "Department") proposals regarding the (1) Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice,[2] (2) Best Interest Contract Exemption (the "BIC Exemption"),[3] (3) Principal

[1] As *advocates for a strong financial future*™, FSR represents the largest integrated financial services companies providing banking, insurance, payment, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

[2] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Definition of Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice* [RIN: 1210-AB32], 80 Federal Register 21928 (Apr. 20, 2015) (the "Re-Proposing Release"), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08831.pdf.

[3] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Best Interest Contract Exemption*, Application No. D-11712 [ZRIN: 1210-ZA25], 80 Federal Register 21960 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf.

Transaction Exemption,[4] and (4) related amendments to four existing prohibited transaction class exemptions[5] (collectively, the "Proposal").

FSR supports a "best interests" standard that would be applicable to investment products and services provided to Americans. However, FSR strongly disagrees with key aspects of the Proposal, as well as certain premises and presumptions underlying the Proposal. FSR also believes assumptions relating to the likely economic impact of the Proposal, such as costs of legal and other services required to implement fully the Proposal, are flawed. Adoption of the Proposal also exceeds the authority of the Department to promulgate regulations, as Congress had accepted the currently effective 40-year old definition of investment advice, and the Department's actions otherwise conflict with expressed Congressional intent regarding the application of ERISA's substantive provisions to Individual Retirement Accounts ("IRAs") and the scope of the responsibilities of fiduciaries who provide advice to persons who direct their own investments.

Nonetheless, if the Department ultimately determines to adopt its preferred policy alternative substantially in the manner as set forth in the Proposal, FSR presents in APPENDIX A guidance regarding how the Department can address significant deficiencies

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[4] 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*, Application No. D-11713 [ZRIN: 1210-ZA25], 80 Federal Register 21989 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08833.pdf.

[5] 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*, Application No. D-11687 [ZRIN: 1210-ZA25] 80 Federal Register 22004 (Apr. 20, 2015), *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*, Application No. D-11850 [ZRIN: 1210-ZA25], 80 Federal Register 22010 (Apr. 20, 2015), *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*, Application No. D-11327 [ZRIN: 1210-ZA25], 80 Federal Register 22021 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08838.pdf; and DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1*, Application No. D-11820 [ZRIN: 1210-ZA25], 80 Federal Register 22035 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08839.pdf.

in the Proposal. We also present FSR's *Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption* (the "SIMPLE PTE") that would address the Department's public policy goals while better addressing the needs of Retirement Investors[6] by mitigating the burdens imposed on Retirement Investors as a result of implementation of the Department's Proposal.

Executive Summary

a. Principal Concerns

FSR's principal concerns with the Department's Proposal and the BIC Exemption include:

(1) *The Proposal would adversely affect Americans' ability to plan and save for retirement*, because it would limit access to affordable retirement savings advice and guidance from their preferred financial professionals. Studies confirm the impact would be especially pronounced on low and moderate income individuals, younger employees, and members of minority communities.

Impacts on separated and retired employees. Former employees, retirees, and persons nearing retirement who need advice on alternatives other than taking a *lump-sum distribution* from their 401(k) plan (including IRA rollovers) would be particularly impacted by the Proposal.

Impacts on Americans employed by small businesses. An estimated 19 million Americans do not have a workplace retirement plan. The Proposal would no longer allow financial professionals to provide guidance (including a "menu" of investments) to small business owners contemplating or maintaining a plan for their employees.

(2) *FSR supports a best interest standard, but the Department's approach is impractical.* The BIC Exemption's complexity imposes undue burdens and costs on Retirement Investors, as well as on the individuals and firms who serve them, and the benefits of the exemption do not outweigh the burdens.

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[6] *Retirement Investor* means: (1) a participant or beneficiary of a plan subject to Title I of Employee Retirement Income Security Act ("ERISA") with authority to direct the investment of assets in his plan account or to take a distribution; (2) the beneficial owner of an individual retirement account ("IRA") acting on behalf of the IRA; or (3) a plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer, or director thereof) of a plan subject to Title I of ERISA to the extent it acts as a fiduciary for the plan. This definition excludes non-retirement accounts in section 408; however, if the Department ultimately decides to include these non-retirement accounts, the definition of "Retirement Investor" also would include the owners of those accounts,

Impacts on Retirement Investors. Retirement Investors often interact with financial professionals by telephone and, in the case of market transactions (purchases or sales of securities, for example), buy or sell orders must be entered before the market moves adversely to the client's desired position.

The Proposal would dramatically impact the way Retirement Investors interact with their financial professionals (*e.g.*, requiring Retirement Investors to sign a contract before deciding whether or not they want to hire a particular financial professional, and review voluminous disclosures on all possible investments). Such burdens will likely discourage savings or cause missed market opportunities.

Impacts on financial professionals and financial institutions. The Proposal will require financial professionals and financial institutions to design, develop, test, implement, and maintain extensive new information technology and compliance systems and controls to meet *overbroad disclosure obligations* that will require financial professionals and institutions to produce voluminous catalogs of disclosures on all possible investment products. The Securities and Exchange Commission has found investors generally favor *clear* and *concise* disclosures.

The Department grossly underestimates expenses associated with compliance—which we understand may be as much as $100 million individually for some financial institutions, depending on the size and nature of their business operations. Although the Department estimates 60 hours of legal time to rely on the BIC Exemption, certain of our members estimate that they have already incurred at least 200 hours of legal time (excluding the fees and expenses incurred by outside counsel) just to review the intricate and complex requirements of the BIC Exemption. Moreover, financial institutions would **need at least thirty-six (36) months to build new systems** that would enable them to comply with the BIC Exemption**—not the eight (8) months the Department estimated.**

(3) *The BIC Exemption's conditions are not necessary to protect Retirement Investors*. The intricate and complex provisions of the BIC Exemption impose many limitations on Retirement Investors not needed to implement a best-interest standard. *For example,* only limited types of investment assets are permitted. As a result, if an investment in options, futures, hedge funds, or foreign securities would be in the best interest of a Retirement Investor, a financial professional or institution that relies on the BIC Exemption could not recommend those otherwise prudent investments to its client. The Department has also not made allowance for financial professionals to serve pre-existing clients with assets that are not on the Department's *approved list* ("legacy assets"). Because their financial professional does not have clear authority from the Department to provide continuing advice or guidance on these legacy assets, such investments could become "orphaned."

(4) ***Impact on Retirement Investors' personal financial privacy and data security.*** Financial professionals must upon request provide each client's personal financial data to the Department, and the Department may publish data derived from this client information (including IRA owner information). Clients are likely to hold their financial professional responsible for any harm associated with improper disclosure of their personal financial information.

Such concerns are heightened by the massive data breach at the federal Office of Personnel Management that resulted in the theft of highly-sensitive personal information (including Social Security numbers) on over 22 million current and former federal government employees. The Government Accountability Office continues to warn federal agencies of increased vulnerabilities to such cyber threats and the dangers associated with outdated and ineffective data systems. The Department must implement a comprehensive, robust data security program to mitigate such privacy and data security threats. The Department should also solicit public comment on its privacy and data security procedures.

The Department intends to use the data to compare the investment results of clients of one financial professional to clients of another financial professional. The benefits from publishing this data assuming there are any—even in aggregated form—will pale by comparison to damage from unauthorized publication or distribution of sensitive client financial information. Because each client will have particular facts that will dictate a distinct investment strategy, this data cannot be used to make an apples-to-apples comparison with any other client or groups of clients. Accordingly, FSR believes the Department should not receive or publish such data.

b. Summary of Comments

In addition to the principal concerns above, FSR's specific comments on the Proposal and the BIC Exemption are summarized below:

- FSR has long-supported harmonizing regulatory régimes applicable to securities broker-dealers and investment advisers when providing personalized investment advice to clients.[7]

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[7] *See* FINANCIAL SERVICES ROUNDTABLE, "Study Regarding Obligations of Brokers, Dealers, and Investment Advisers" pursuant to section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 [File No. 4-606] (Aug. 30, 2010), *available at* http://www.sec.gov/comments/4-606/4606-2659.pdf (supporting "harmonization of the regulations for broker-dealers and investment advisers when providing personalized investment advice to retail customers").

- FSR supports a “best interest” standard that would be applicable to investment products and services provided to Americans, which is administered in a coordinated manner by federal agencies and self-regulatory organizations that serve as front-line regulators of the financial services industry. An effective best-interest standard must: (1) preserve access to professional financial advice that will help savers meet their unique financial needs in retirement; (2) enable them to work with their preferred adviser; and (3) preserve flexibility to pay for retirement services and products in an appropriate manner of their choosing.

- Implementation of the Proposal would adversely impact American workers’ access to affordable advice from their preferred financial professional(s).

- Investors and financial institutions would benefit materially from the Department allowing the Securities and Exchange Commission (the “Commission”) through its Office of Compliance Inspections and Examinations to: (1) complete focused examinations of registered broker-dealers and investment advisers; (2) identify whether and to what extent improper conduct in the provision of retirement products or services has occurred; and (3) allow the Commission to develop a best interest standard that will protect Retirement Investors and retail investors generally, which is informed by actual data from investigations.

- The Proposal would expand the definition of investment advice to include the IRA market, in direct conflict with Congressional mandates to the contrary that expressly exclude IRAs from ERISA, but instead subjects IRAs to coverage under the Internal Revenue Code of 1986.

- The Proposal and the proposed Best Interest Contract Exemption would require financial professionals and financial institutions to restructure existing business relationships with plans, plan participants and beneficiaries, IRA owners, and anyone taking a distribution from a plan. The Department’s economic analysis grossly underestimates the costs and burdens of restructuring such relationships and compliance costs associated with the Proposal and the proposed Best Interest Contract Exemption.

- The Department substantially underestimates the implementation period in light of extensive changes needed to systems, business operations, and compliance controls.

- The proposed BIC Exemption imposes conditions that are not necessary to protect Retirement Investors, and certain permitted investor remedies exceed ERISA authority.

- FSR requests the Department provide clarification or relief related to application of the Proposal that, among other things, would: (a) permit financial professionals and financial institutions to address the needs of their currently-existing customer relationships (*"grandfathering"*); (b) exclude all welfare benefit plans (*i.e.*, health insurance, long term care insurance, disability insurance, *etc.*); (c) exclude insurance contract sales to welfare benefit plans that do not have an investment component; (d) exclude distributions from qualified plans directly into an annuity or insurance product in non-qualified plans; (e) allow financial professionals and financial services institutions to recommend and sell proprietary and other limited range of products and services; and (f) eliminate certain mass data gathering requirements that could adversely implicate personal financial privacy and data security.[8]

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[8] *See*, *e.g.,* Gregory C. Wilshusen, Director, Information Security Issues, "Information Security: Cyber Threats and Data Breaches Illustrate Need for Stronger Controls across Federal Agencies," Testimony Before the Subcommittees on Research and Technology and Oversight Committee on Science, Space, and Technology, House of Representatives, GAO-15-758T at 2 (July 8, 2015) (finding that concerns about cyber-based threats to federal systems "are further highlighted by recent incidents involving breaches of sensitive data and the sharp increase in information security incidents reported by federal agencies over the last several years, which have risen from 5,503 in fiscal year 2006 to 67,169 in fiscal year 2014"), *available at* http://www.gao.gov/assets/680/671253.pdf; Gregory C. Wilshusen, Director, Information Security Issues, "Cybersecurity: Recent Data Breaches Illustrate Need for Strong Controls across Federal Agencies," Testimony Before the Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, Committee on Homeland Security, House of Representatives, GAO-15-725T (June 24, 2015) (warning that "[until] federal agencies take actions to address these challenges—including implementing the hundreds of recommendations we and inspectors general have made—federal systems and information will be at an increased risk of compromise from cyber-based attacks and other threats), *available at* http://www.gao.gov/assets/680/670935.pdf; GOVERNMENT ACCOUNTABILITY OFFICE, "High-Risk Series: An Update," GAO-15-290 at 236 (Feb. 2015) (finding that the "number of reported security incidents involving [personally identifiable information] at federal agencies has increased dramatically in recent years"), *available at* http://www.gao.gov/assets/670/668415.pdf. *See also,* Cory Bennett, "OPM hack hit over 22 million people", THE HILL (July 9, 2015) (reporting that "more than 22 million people have had their personal information stolen" from the U.S. Office of Personnel Management), *available at* http://thehill.com/policy/cybersecurity/247410-report-opm-hack-hit-over-25-million-people; Patrick Zengerle and Megan Cassella, "Millions more of Americans hit by a government personnel data hack," REUTERS (July 9, 2015), *available at* *http://www.reuters.com/article/2015/07/09/cybersecurity-usa-idUSKCN0PJ2MQ20150709;* Chris Strohm, "U.S. Hack May Have Disclosed 18 million Social Security Numbers," BLOOMBERG BUSINESS (June 24, 2015) (reporting that the "agency that manages U.S. government personnel records is investigating whether Social Security numbers for as many as 18 people were taken in the massive cyber-attack"), *available at* http://www.bloomberg.com/news/articles/2015-06-24/u-s-hack-

- Banks and other institutions that provide custody or valuation services to Retirement Investors provide numerous valuations of assets to facilitate the operation of the underlying plans and to provide important information to Retirement Investors in the ordinary course of business, and not in connection with a planned investment. Yet, the Proposal could apply fiduciary duties to these ordinary course administrative functions.

- It is unclear how the Proposal will impact institutional retirement services providers, which provide products or services to groups of employees (*e.g.*, group annuity contracts). The institutional service provider's fees have no correlation to its responses to questions raised by employees, which employees may perceive as a "recommendation."

- The Proposal fails to "consider flexible approaches that reduce burdens and maintain freedom of choice."[9] Instead, it reduces choice for Retirement Investors and increases dramatically the burdens for Financial Professionals and Financial Institutions. Moreover, the Office of Management and Budget directs agencies 'to specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt."[10] The Proposal does exactly the opposite by imposing a complex regulatory structure that, in part, specifies an elaborate set of warranties that must be made, requiring Financial Professionals and Financial Institutions to modify their compensation structures, and mandating elaborate and specifically-formatted disclosure, while offering little or no clarity regarding specific performance objectives.

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may-have-disclosed-18-million-social-security-numbers; Devlin Barrett, Danny Yadron, and Damian Paletta, "U.S. Suspects Hackers in China Breached About 4 Million People's Records, Officials Say," WALL ST. J., (June 5, 2015) (reporting on the alleged theft of personnel records "in one of the most far-reaching breaches of government computers"), *available at* http://www.wsj.com/articles/u-s-suspects-hackers-in-china-behind-government-data-breach-sources-say-1433451888?KEYWORDS=office+of+personnel+management; Lisa Rein, "$21 million tab to taxpayers for clean up after massive Chinese hack of federal database," THE WASHINGTON POST (June 11, 2015), *available at http://www.washingtonpost.com/blogs/federal-eye/wp/2015/06/11/nervous-employees-dial-call-centers-a-21-million-casualty-of-massive-federal-data-theft/*.

[9] Regulatory Impact Analysis: A Primer, Office of Management and Budget, available at *www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regualtory-impact-analysis-a-primer.pdf*.

[10] *Id.*

c. FSR's Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption (SIMPLE PTE)

FSR recommends the Department adopt a *Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption* (the "SIMPLE PTE"). Such an approach would address the Department's public policy goals of ensuring Retirement Investors receive best-interest advice and that compensation received by firms or individuals providing advice is reasonable. The SIMPLE PTE also preserves: (a) access to professional financial advice and guidance to help savers plan and meet their unique financial needs in retirement; and (b) flexibility to work with their preferred financial professional or firm, and pay for retirement products and services in the manner of their choosing.[11] This approach would allow transaction-based compensation, as opposed to fee-based compensation, where it would make more sense for both the Retirement Investor and the financial professional or institution.

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[11] The terms and conditions of FSR's proposed *SIMPLE PTE* are attached as **APPENDIX B**.

FSR appreciates the opportunity to submit comments on the Department's Proposal. We would welcome additional opportunities to engage with the Department on the Proposal generally and our specific concerns outlined in APPENDIX A. We also will request an opportunity to present testimony at the hearings scheduled for August 10-13, 2015, under separate cover. If it would be helpful to discuss FSR's specific comments or general views on this issue, please contact me at Richard.Foster@FSRoundtable.org, or Felicia Smith, Vice President and Senior Counsel for Regulatory Affairs at Felicia.Smith@FSRoundtable.org.

Sincerely yours,

Richard Foster
Senior Vice President and Senior Counsel for Regulatory and Legal Affairs
Financial Services Roundtable

Attachments: APPENDIX A, "FSR's Comments on Revised Definition of Investment Advice and Related Exemptions"

APPENDIX B, FSR's *Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption*

With a copy to:

The Honorable Thomas E. Perez, Secretary

The Honorable Phyllis Borzi, Assistant Secretary
Judy Mares, Deputy Assistant Secretary for Policy
Tim Houser, Deputy Assistant Secretary and Chief Program Operations Officer
Joe Canary, Director, Office of Regulation and Interpretation
Fred Wong, Office of Regulation and Interpretation
Lyssa Hall, Director, Office of Exemption Determinations
Karen E. Lloyd, Chief, Division of Class Exemptions, Office of Exemption Determinations

Employee Benefits Security Administration
United States Department of Labor

The Honorable Mary Jo White, Chair
The Honorable Luis A. Aguilar, Commissioner
The Honorable Daniel Gallagher, Commissioner
The Honorable Kara Stein, Commissioner
The Honorable Michael Piwowar, Commissioner

Dr. Mark J. Flannery, Director and Chief Economist
Division of Economic and Risk Analysis

David Grim, Director, Division of Investment Management
Stephen Luparello, Director, Division of Trading and Markets
United States Securities and Exchange Commission

The Honorable Timothy G. Massad, Chairman
The Honorable Mark P. Wetjen, Commissioner
The Honorable Sharon Y. Bowen, Commissioner
The Honorable J. Christopher Giancarlo, Commissioner
United States Commodity Futures Trading Commission

The Honorable Monica J. Lindeen, President
National Association of Insurance Commissioners

The Honorable William Beatty, President of the Board of Directors
North American Securities Administrators Association

FINANCIAL
SERVICES
ROUNDTABLE

APPENDIX A

Financial Services Roundtable

Comments on Revised Definition of Investment Advice and Related Exemptions

July 21, 2015

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I. Introduction

FSR welcomes the opportunity to comment on the United States Department of Labor's (the "Department") proposals regarding the (1) Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice,[1] (2) Best Interest Contract Exemption (the "BIC Exemption"),[2] (3) Principal Transaction Exemption,[3] and (4) related amendments to four existing prohibited transaction class exemptions[4] (collectively, the "Proposal").

Consistent with FSR's long-held support for harmonizing the regulatory régime applicable to securities broker-dealers and investment advisers when providing

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[1] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Definition of Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice* [RIN: 1210-AB32], 80 Federal Register 21928 (Apr. 20, 2015) (the "Re-Proposing Release"), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08831.pdf.

[2] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Best Interest Contract Exemption*, Application No. D-11712 [ZRIN: 1210-ZA25], 80 Federal Register 21960 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf.

[3] 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*, Application No. D-11713 [ZRIN: 1210-ZA25], 80 Federal Register 21989 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08833.pdf.

[4] 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*, Application No. D-11687 [ZRIN: 1210-ZA25] 80 Federal Register 22004 (Apr. 20, 2015), *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*, Application No. D-11850 [ZRIN: 1210-ZA25], 80 Federal Register 22010 (Apr. 20, 2015), *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*, Application No. D-11327 [ZRIN: 1210-ZA25], 80 Federal Register 22021 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08838.pdf; and DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1*, Application No. D-11820 [ZRIN: 1210-ZA25], 80 Federal Register 22035 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08839.pdf.

personalized investment advice to consumers,[5] FSR supports a "best interest" standard that would be applicable to investment products and services provided to clients, administered in a coordinated manner by federal agencies and self-regulatory organizations that serve as front-line regulators of the financial services industry.

While FSR and its members support a best-interest standard, the Proposal raises significant public policy and practical implementation concerns. These concerns include the likely adverse impact on individual choice regarding how to pay for retirement products and services and decreased access to financial services for low and moderate-income clients.

FSR also is concerned the Proposal would eliminate conversations with departing employees, employees nearing retirement, and retirees. The Proposal restricts the ability of financial professionals to give specific investment recommendations to former employees and employees nearing retirement related to their benefits in an employer-sponsored retirement plan (usually a 401(k) plan or other thrift savings plan account). These employees would not receive meaningful guidance from financial professionals as a result. If financial professionals cannot provide meaningful guidance, then where are the former employees and employees nearing retirement supposed to get this information? Former employees and employees nearing retirement would be at risk of just "cashing-out" assets in employer-sponsored retirement plans.[6] Such lump sum distributions are subject to current income taxation and possibly substantial tax penalties. If they did not "cash-out," employees nearing retirement might not fully understand the availability of products and services to help them best manage their retirement plan assets to last their lifetime. Most at risk in this regard are younger workers and members of minority communities.[7]

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[5] *See* FINANCIAL SERVICES ROUNDTABLE, *Study Regarding Obligations of Brokers, Dealers, and Investment Advisers pursuant to section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* [File No. 4-606] (Aug. 30, 2010), *available at* http://www.sec.gov/comments/4-606/4606-2659.pdf (supporting "harmonization of the regulations for broker-dealers and investment advisers when providing personalized investment advice to retail customers); *see also*, FINANCIAL SERVICES ROUNDTABLE, *Duties of Brokers, Dealers, and Investment Advisers*, Securities Act Release No. 69013 [File No. 4-606] (July 5, 2013), *available at* http://www.sec.gov/comments/4-606/4606-3125.pdf.

[6] *See* OLIVER WYMAN, *The role of financial advisors in the US retirement market* at 2 (July 10, 2015) ("OLIVER WYMAN 2015") (finding that "advised individuals aged 35-54 years making less than $100K per year had 51% more assets than similar non-advised investors"); LIMRA SECURE RETIREMENT INSTITUTE, *Matters of Fact: Consumers, Advisors, and Retirement Decisions (and Results)* at 10 (May 2015) (noting that "[f]inancial professionals/advisors are highly influential in helping individuals to make informed rollover decisions").

[7] *See* BIPARTISAN POLICY CENTER, "A Diversity of Risks: The Challenge of Retirement Preparedness in America" at 31 (Sept. 2014) (noting "cash-outs severely damage the retirement readiness of workers, especially those in the lower parts of the income distribution"); QUANTRIA STRATEGIES, LLC, "Access to Call Centers and Broker Dealers and Their Effects on Retirement

Given the need to ensure Americans increase savings,[8] and the demonstrable benefits Americans generally derive from working with financial professionals,[9] these detrimental impacts deeply concern FSR members.

The Proposal would also impose substantial burdens on small businesses, and decrease the likelihood small businesses will adopt or continue retirement savings plans.[10] For example, the Department's proposed revisions to the "seller's exemption"

Savings," at 13 (Apr. 9, 2014) ("QUANTRIA Study") (finding that "[cash-outs] are more likely to occur among individuals who (1) have a low account balance, (2) are under age 30, or (3) have lower wages. Higher cash-out rates are also an issue for African-Americans and Hispanics"). *See, also* FINRA, "Rollovers to Individual Retirement Accounts: FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers" [Regulatory Notice 13-45] at 2 (Dec. 2013) (providing guidance on recommendations and marketing activities for IRA services, which "is intended to help firms ensure that they have policies and procedures in place that are reasonably designed to achieve compliance with FINRA rules"), *available at* http://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.

[8] *See*, OXFORD ECONOMICS, *Another Penny Saved: The Economic Benefits of Higher US Household Saving* at vi (June 2014), *available at* http://www.oxfordeconomics.com/anotherpennysaved (noting that an increase in the nation's saving rate over the next 25 years "would add a discounted $7 trillion to America's economy, equal to about half of today's GDP;" a result that would "generate greater [U.S.] household wealth, [and] better insulate the [U.S.] economy from international capital shocks).

[9] *See*, *e.g.*, LIMRA SECURE RETIREMENT INSTITUTE, *Matters of Fact: Consumers, Advisors, and Retirement Decisions (and Results)* at 3 (May 2015) (noting that "Households that use financial advisors are three times as likely as non-advised households to have $250,000 or more in retirement savings … and are more than twice as likely to have $100,000 or more"); FRANCIS M. KINNIRY JR., COLLEEN M. JACONETTI, MICHAEL A. DIJOSEPH, AND YAN ZILBERING, *Putting a value on your value: Quantifying Vanguard Advisor's Alpha*, The Vanguard Group at 16 (2014), *available at* http://www.vanguard.com/pdf/ISGQVAA.pdf (finding that based on "actual client behavior, . . . investors who deviated from their initial retirement fund investment trailed the target-date fund benchmark by 150 [basis points]. This suggests that the discipline and guidance that an advisor might provide through behavioral coaching could be the largest potential value-add of the tools available to advisors. In addition, Vanguard research and other academic studies have concluded that behavioral coaching can add 1% to 2% in net return.").

[10] BRADFORD P. CAMPBELL, "Locked Out of Retirement: The Threat to Small Business Retirement Savings" at 4 (2015) (noting that "small business SEP IRA and SIMPLE IRA arrangements that currently depend on these advisors for affordable assistance are likely to disproportionately bear the costs of excessive regulation—their small scale means they are more expensive to serve"), *available at https://www.uschamber.com/sites/default/files/us_chamber_-_locked_out_of_retirement.pdf*; GREENWALD & ASSOCIATES, "The Impact of the Upcoming Re-Proposed Department of Labor Fiduciary Regulation on Small Business Retirement Plan Coverage and Benefits" at 3 (May 14, 2014) (finding that: (a) about 30% of small businesses would likely drop retirement plans for their employees; (b) almost 50% would change their plans to reduce the matching contribution, offer fewer investment options, and increase fees for participants; (c) the rule would deter almost 50% of small businesses that have not established a plan from offering one; and (d) any new plans would likely impose higher fees on participants but not offer matching contributions for almost 40% of small businesses).

would apply only to large plans with at least 100 employees.[11] As a consequence, financial professionals would be unable to provide meaningful assistance to small business owners. Financial professionals provide information and guidance regarding how small businesses can establish a retirement plan and the "menu of investments" available for such a plan. Without adequate guidance to help them navigate the complex process of identifying an appropriate menu of investments from thousands of potential choices, small business owners may "give up" and offer no plan.[12]

II. Implementation of the Department's Proposal Would Adversely Impact Access to Affordable Advice from Preferred Financial Professionals

a. FSR's Concerns and Objections

FSR's comments and objections to the Proposal are summarized below.

(i) If implemented as proposed, the Proposal and the BIC Exemption will adversely affect the very Retirement Investors[13] the Department seeks to protect because the Proposal will adversely impact the ability of financial professionals and financial services institutions to provide services to the full range of workers, including lower and moderate-income individuals. As we note in **Section III**, data indicates the efforts of financial professionals and financial services institutions are crucial to encouraging individuals to plan and save for retirement.[14] As more fully discussed in **Section VII**, the Proposal and the BIC Exemption will impose burdens and restrictions on financial professionals and their firms that will undermine their ability to provide cost-effective investment assistance to many Retirement Investors.

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[11] *See*, OLIVER WYMAN 2015 *supra* note 6 at 1 (noting that "over 19 million people who work for businesses with fewer than 50 employees do not currently have access to a workplace retirement plan").

[12] *See,* Greenwald & Associates *supra* note 10.

[13] *Retirement Investor* means: (1) a participant or beneficiary of a plan subject to Title I of Employee Retirement Income Security Act ("ERISA") with authority to direct the investment of assets in his plan account or to take a distribution; (2) the beneficial owner of an individual retirement account ("IRA") acting on behalf of the IRA; or (3) a plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer, or director thereof) of a plan subject to Title I of ERISA to the extent it acts as a fiduciary for the plan. This definition excludes non-retirement accounts in section 408; however, if the Department ultimately decides to include these non-retirement accounts, the definition of "Retirement Investor" also would include the owners of those accounts.

[14] *See*, OLIVER WYMAN 2015 *supra* note 6 at 2 (finding that "advised individuals aged 35-54 years making less than $100K per year had 51% more assets than similar non-advised investors"); LIMRA SECURE RETIREMENT INSTITUTE, *Matters of Fact: Consumers, Advisors, and Retirement Decisions (and Results)* at 10 (May 2015) (noting that "[f]inancial professionals/advisors are highly influential in helping individuals to make informed rollover decisions").

(ii) A best interest standard that protects Retirement Investors and other clients from abusive tactics or recommendations that are not in their best interests should be implemented by Congress so broad policy considerations can be appropriately and openly debated, and various federal laws implicated can be addressed in a comprehensive and coordinated fashion.

If a best interest standard is implemented through regulatory action, it should be applied consistently for all individuals, not just retirement savers. Such a standard should be developed and applied through the authority of federal capital markets regulators and Congressionally mandated industry self-regulatory organizations (*e.g.*, the Commission, the Commodity Futures Trading Commission, and FINRA) as well as state banking, insurance, and securities authorities. As discussed in **Section IV**, capital markets regulators are charged with responsibility for the administration of federal securities and commodities laws and regulation of securities and commodities registered professionals and firms. State officials also have an important regulatory role with respect to the offering of products and services within their respective jurisdictions and the licensing of individuals and firms that conduct business within their jurisdictions.

(iii) FSR questions whether forty years after the enactment of ERISA[15] (which Congress has amended frequently), the Department should revise the interpretation of a fundamental fiduciary concept under the statute. Congress and the courts have relied on prior interpretations of the statute, which were adopted substantially contemporaneously with the enactment of the statute. Extending fiduciary standards to "rollover" and IRA distribution advice this many years after the plans were introduced also raises questions about what was settled law. FSR also believes the Proposal conflicts with ERISA by requiring IRA service providers to agree to be bound by fiduciary responsibility provisions Congress did not apply to such persons, and by creating liability for such persons beyond Section 404(c) of ERISA. *See* **Section V**.

(iv) The BIC Exemption imposes unnecessary burdens, costs and restrictions on financial professionals and institutions that are not required to better protect Retirement Investors. FSR believes significant revisions are required to make the Proposal work effectively and efficiently to protect Retirement Investors, and provide them affordable access to the services from their preferred financial professional and institution. *See* **Section VII.**

(v) The Department's estimates of compliance the costs and burdens (*e.g.*, legal and technology and systems) with the Proposal are grossly understated. *See* **Section VI**.

(vi) The proposed transition period for implementation of the BIC Exemption is inadequate. The costs and burdens associated with the massive undertakings required to

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[15] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 STAT. 829 (Sept. 2, 1974) [codified at 29 U.S.C. § 1001 e*t seq*.].

develop, test, and implement systems and programs to comply with the BIC Exemption are substantial and will require more time. FSR members estimate that a transition period of 36 months would be necessary to implement the Proposal and the BIC Exemption. *See* **Section VIII**.

(vii) The Proposal raises concerns which require clarification or relief, including: (a) "grandfathering" existing customer relationships; (b) an express exclusion for all employer-sponsored welfare benefit plans (*i.e.,* health insurance, long-term care insurance, disability insurance, *etc.*); (c) express approval for financial services firms to recommend and sell proprietary as well as limited-range products and services; and (d) elimination of certain mass data gathering requirements that could adversely implicate personal financial privacy and data security.[16] *See* **Section XI.**

(xiii) The Proposal presents impediments for institutional retirement services businesses which generally do not provide investment advice to Plan participants or other Retirement Investors. The breadth of the Proposal would implicate such ordinary course activities and the extremely complex conditions of the BIC Exemption could be triggered as a result. *See* **Section XI(i).**

(ix) If the Department adopts the Proposal, FSR presents guidance on how the Department can address the significant deficiencies in the Proposal. *See* **Section VII.**

b. FSR's Simple Investment Management Principles and Expectations (SIMPLE PTE)

In keeping with FSR's long-standing support for a best interest standard, FSR proposes the *Simple Investment Management Principles and Expectations* prohibited transaction class exemption under ERISA (the "SIMPLE PTE") for the Department's consideration. The SIMPLE PTE would maintain access to professional financial advice and help savers address their unique financial needs in retirement, and make those savings last a lifetime.[17] The SIMPLE PTE would meet the needs of Americans preparing for retirement without the burdens imposed by the Department's Proposal. The SIMPLE PTE also would preserve Americans' flexibility to work with their preferred adviser, and to pay for retirement products and services in the manner of their choosing. *See* **Section XII.**

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[16] *See*, Devlin Barrett, Danny Yadron, and Damian Paletta, *U.S. Suspects Hackers in China Breached About 4 Million People's Records, Officials Say,* WALL ST. J., (June 5, 2015) (reporting on the alleged theft of personnel records "in one of the most far-reaching breaches of government computers"), *available at* http://www.wsj.com/articles/u-s-suspects-hackers-in-china-behind-government-data-breach-sources-say-1433451888?KEYWORDS=office+of+personnel+management.

[17] *See*, APPENDIX B, FSR's *Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption*.

III. The BIC Exemption Would Adversely Impact Low- and Moderate-Income Americans and Small Businesses

The BIC Exemption is intended to assure that:

(1) recommendations Retirement Investors receive are not motivated by improper influences;

(2) compensation Retirement Investors pay for advice is reasonable in relation to the services provided;

(3) institutions servicing investors have taken actions to avoid conflicts of interest that may adversely influence their advice; and

(4) Retirement Investors are provided detailed disclosures regarding fees and expenses so investors can make sound judgments.

The BIC Exemption also creates an avenue for investors, instead of the Department or the Internal Revenue Service, to enforce compliance with the above-described commitments and obligations, as well as any other laws.

While these are laudable objectives, the BIC Exemption will fail to achieve its intended objectives. Institutions design products to serve the needs of clients and to make a reasonable and appropriate profit. So investment products and services are necessarily offered with both the interest of the client and the profit interest in mind.[18]

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[18] Notably, the medical profession also has to contend with policy issues implicated by potential conflicts of interest. For example, Dr. Lisa Rosenbaum recently recommended "a more rational approach to managing conflicts and 'to shift the conversation away from one driven by indignation toward one that better accounts for the diversity of interactions, the attendant trade-offs, and our dependence on industry in advancing patient care.'" *See* Joseph Rago, *A Cure for "Conflict of Interest" Mania: A crusading physician says medical progress is hampered by a holier-than-thou 'moralistic bullying,'* WALL ST. J. (June 26, 2015), *available at* http://www.wsj.com/articles/SB11760718815427544683404581068401388235760.

Rago profiles noted cardiologist Dr. Tom Stossel, who observed that "private industry is the engine of innovation, with productivity and new advances dependent on relationships between commercial interests and academic and research medicine. Companies, not universities or research with federal funding, run 85% of the medical-products pipeline. 'We all inevitably have conflicts all the time. You only stop having conflicts when you're dead. The only conflict-free situation is the grave,' he says." *Id.*

The pursuit of the illusion "to be pure, to be priestly, to be supposedly uncorrupted by the profit motive," Dr. Stossel says, often has the effect of banishing or else discounting the expertise of the people who know the most but whose integrity and objectivity are allegedly compromised by industry ties. What ought to matter more, he adds, is simply "Results. Competence." *Id.*

Yet, the BIC Exemption requires that the Financial Professional or Institution can only make a recommendation if it has no interest in respect to the recommendation. In a free-market economy, those who develop superior products with superior benefits and results for clients should be rewarded.

Through the BIC Exemption, the Proposal attempts to limit compensation an institution receives to the "value" of the services provided. In connection with servicing the accounts of Retirement Investors, however, what exactly are the services being provided? The BIC Exemption intimates such services are simply investment recommendations. Such recommendations are not made in isolation.

In the highly regulated arenas in which financial services institutions operate, services provided to clients must also account for the time, effort, and expenses incurred in developing products, recordkeeping, administration, legal compliance, and more. Without these costs, no products or services could be recommended to Retirement Investors.

Products, no matter how beneficial to a client, also do not usually sell themselves. The benefits of products must be brought to the attention of the client, especially in a highly competitive market. Individuals and firms understand the need to be fairly compensated for their effective sales and marketing efforts. Yet, the BIC Exemption prohibits use of commonplace and effective systems of compensation that reward performance through differentiated compensation.

While limiting compensation, the BIC Exemption requires the accumulation, distillation and dissemination of elaborate amounts of data and information about the products that must be shared and discussed with the client. If Retirement Investors were held responsible for decisions based on this extensive data, mandating disclosure of such

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See, also Chairman Phil Roe, U.S. Dept. of Labor, U.S. HOUSE COMM. ON EDUC. AND THE WORKFORCE, SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS (June 17, 2015) (criticized the "flawed" comparisons of the Department's Proposal to standards applicable to physicians).

> As a physician with more than 30 years of experience in treating patients, let me just say that the approach reflected in this proposal would destroy what's left of our health care system. Imagine what would happen if doctors were prohibited from receiving compensation or were required to sign a contract with each patient before delivering services or were forced to publish online each and every treatment that had been prescribed the following year. No doctor could run a successful practice under this type of regulatory regime and no reasonable financial adviser will be able to, either. Make no mistake, if this rule goes into effect, a lot of people will quickly learn that their financial adviser, someone they have known and trusted for years, will no longer be able to take their call. And, it's important to note that low and middle-income families are the ones who will bear the brunt of this misguided proposal. They will lose access to their personal service that they've relied on and be forced to find suitable advice online or simply fend for themselves.

data would make much more sense. However, under the BIC Exemption, persons offering products and services are liable for improper offerings and decisions.

Given the elaborate systems that will be required to service accounts, related compliance costs and efforts, unknown liability exposure created by the Proposal (both in terms of potential liabilities and taxes under ERISA and the Internal Revenue Code of 1986 (the "Code")[19]), and the enforcement of contractual rights under the BIC Exemption, the cost of servicing retirement accounts will increase dramatically. Financial institutions currently servicing Retirement Investors' needs for guidance are likely to find that these costs will prevent profitably servicing both small and modest accounts as well as small businesses. Thus, the BIC Exemption will likely have the effect of denying such Retirement Investors access to needed assistance.

As a result of the experience of the past several years, all institutions have undertaken programs to make sure that each institution properly assesses the risks and exposures of each line of business in which it engages that offers products or services to Retirement Investors. The risks and expenses imposed on financial professionals and financial institutions that seek to comply with the vague and extensive requirements of the Proposal will likely prove to be prohibitive in light of the amount of compensation that financial professionals or financial institutions could reasonably expect to receive from providing services to individual accounts of limited size and businesses that have modest resources to devote to providing retirement programs. Thus, it is reasonable to conclude that many financial professionals and financial institutions will either exit this market,[20] or agree to provide services only to accounts that have a fairly significant amount of assets.

The adverse effect of limiting the access of small investors to such advice and guidance on retirement savings is likely to be devastating. The Federal Reserve has reported that "many respondents are not saving for retirement, lack confidence in their ability to invest their retirement savings, or appear ill-informed about their retirement

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[19] 26 U.S.C. §1 *et seq*.

[20] A study commissioned by the Financial Conduct Authority following the implementation of a comparable initiative in the United Kingdom explains that during the period following proposal of the initiative "there was some exit from the advisory market, particularly in the period leading up to the [effectiveness of the initiative] by banks and by some financial advisers." EUROPE ECONOMICS, RETAIL DISTRIBUTION REVIEW POST IMPLEMENTATION REVIEW 84 (2014), *available at* http://www.fca.org.uk/static/documents/research/rdr-post-implementation-review-europe-economics.pdf. This report attempts to diminish any correlation between the Retail Distribution Review and the exit of advisers from the industry, claiming that the decision of advisers to exit the marketplace was "strategic" due to "declining profitability and regulatory failings" and that the effect of the initiative on such decisions was likely "partial and indirect at most."

accounts."[21] Almost forty percent (40%) of respondents to the Federal Reserve's survey indicated that they had given either "no" or "very little" thought to financial planning for retirement. Slightly more than half of the respondents with self-directed accounts indicated they were "either 'not confident' or only 'slightly confident' in their ability to make the right investment decisions when investing money in these accounts."[22]

Securities brokers can help investors save more, better customize their portfolios to individual risk tolerance, increase overall investor comfort with investment decisions, and improve financial literacy.[23] Many retail investors seek help from financial professionals because they are "uncomfortable tackling retirement savings on their own."[24] This preference stems from retail investors' lack of investment knowledge and the anxiety of entering financial markets unaided.[25] Accordingly, actions that would limit access to qualified financial professionals would be contrary to the substantial needs indicated in the Federal Reserve Report to promote retirement savings.

It may be that the true intent of the Proposal is to migrate Retirement Investor accounts to an advisory account model in which the institution is compensated *via* a fee based upon assets under management, rather than on a commission-based model. Perhaps the Department has looked to the experience of defined benefit plan investments that have been managed efficiently and effectively on this basis, in compliance with the duties and responsibilities under ERISA for many years, and assumed that such a model can be applied to small individual accounts. However, such a view likely does not take into consideration practical and regulatory reasons that would likely restrict access to a fee-based model for smaller-balance retirement accounts, and accounts owned by individuals that have a "buy-and-hold" investment strategy.

Institutions serving defined benefit accounts have clients that are generally investing large sums under the management of the firm. With larger amounts invested, a fee structure can fairly compensate the institution for efforts required to properly invest such assets, as well as the substantial compliance and administrative costs associated with complying with ERISA and the Code with respect to fee-based accounts.

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[21] FEDERAL RESERVE BOARD, *Report on the Economic Well-Being of U.S. Households in 2014,* May 2015, at 37.

[22] *Id*. at 38.

[23] *See* Daniel Bergstresser *et al*., *Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry* (October 2009), 22 REV. FIN. STUD. (ISSUE 10) 4129 (2009), *available at* http://ssrn.com/abstract=1479110; Nicola Gennaioli *et al*., *Money Doctors* (Nat'l Bureau of Econ. Research, Working Paper No. w18174, 2012), *available at* http://ssrn.com/abstract=2089246.

[24] *See* OLIVER WYMAN 2015 *supra* note 6 at 1 (July 10, 2015) (observing that "58% of households with under $100,000 in investable assets, and 75% of households with over $100,000 in investable assets solicit professional financial advice").

[25] *See* Gennaioli *et al*., *supra* note 23.

With regard to a small, individual account owner, financial institutions will have many of the same legal obligations and compliance expenses. The effort involved in making sure advice is properly tailored to meet the suitability requirements under applicable laws (*e.g.*, securities and insurance laws) prevents managers from simply comingling assets under management and treating accounts as though they were investing like a large defined benefit plan representing retirement assets of a number of individuals. Thus, the alternative model the Department appears to favor will likely not translate efficiently and effectively to the marketplace for small Retirement Investors. Such Retirement Investors could be left without access to valuable and essential assistance if the Proposal is implemented.

The Proposal also fails to take into consideration the fact that a fee-based account is not suitable for all Retirement Investors. For example, a fee-based account is not suitable for those Retirement Investors who engage in relatively few securities transactions a year (a "buy-and-hold" investor), or where the retirement account is small. The Department's preferred approach also fails to acknowledge the Commission has made suitability for fee-based accounts (known as "reverse-churning") an exam priority.[26] Financial professionals and institutions are highly unlikely to move all Retirement Investors into fee-based accounts when doing so could give rise to adverse consequences noted above.

IV. The Department Is Not the Appropriate Agency to Fashion a Best Interest Standard, Especially Using the Prohibited Transaction Provisions

The Department's Proposal is designed to change the manner in which retirement accounts are managed through the provisions of the prohibited transaction provisions of ERISA and the Code. The Code imposes an excise tax of 15 percent (15%) of the "amount involved" in the prohibited transaction for the taxable year in which such prohibited transaction occurs, and for each subsequent taxable year in which such transaction continues uncorrected. If the transaction is not corrected by the time the IRS assesses the basic prohibited transaction excise taxes, the rate of tax increases to 100 percent (100%). Additional penalties and liabilities may be imposed under ERISA, to the extent applicable.

The Proposal uses the prohibited transaction provisions because they are the only tool available to the Department to effectuate a best interest standard applicable to IRAs, since Congress chose not to apply ERISA's fiduciary responsibility provisions to IRAs. The Department is only able to impact IRAs by expanding the scope of who is deemed an

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[26] SEC. & EXCH. COMM'N, OFFICE OF COMPLIANCE INSPECTIONS AND EXAMINATIONS ("OCIE"), *Examination Priorities for 2015* at 2 (Jan. 13, 2015), *available at* http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf.

investment-advice fiduciary, so that their activities fall within the purview of the prohibited transaction provisions. However, these provisions were designed to limit conduct Congress determined to be inappropriate, not as a tool for the Department to dictate the conduct it deems appropriate.

By resorting to this imprecise tool, the Proposal prohibits the provision of "investment advice" (as defined under the Proposal) on a commission-based model—notwithstanding the Department simultaneously proposing a limited exception to the complete prohibition that it has otherwise created. By completely reversing its 40-year-old interpretation of a statutory provision of ERISA, the Proposal creates an unworkable structure that imposes potentially draconian penalties on financial professionals and institutions that fail to meet the conditions that the Department has imposed.

The régime created by the Proposal will cause remarkable confusion, expense and complexity for everyone, including savers, financial professionals, and institutions. If issues and concerns need to be addressed through the introduction of a best interest standard, such a standard should apply equally to all accounts, not just to accounts that through some contortion the Department can regulate. FSR supports a best interest standard for all investors.

The Proposal will require financial professionals and institutions to operate under a substantially different régime with regard to contracts, disclosure, and compliance for different kinds of accounts. IRA investors often also invest non-retirement account assets with the same financial professionals and the same institutions (reflecting their confidence in those persons and entities). The Proposal would have the effect of requiring two distinct and non-complementary sets of complex rules and regulations applying to accounts that are beneficially the assets of the same individual. Financial professionals deal with people, not just accounts.

Implementation of the Proposal will confuse clients and disrupt relationships with financial professionals and institutions with regard to both accounts. It will be difficult for the average client to comprehend how the Department, which is charged with overseeing ERISA, has mandated complex changes in the manner in which financial services professionals engage with the client's IRA account, which is not subject to ERISA. As a consequence, the client's IRA and non-retirement accounts will not be managed in a similar fashion—or considered holistically—even if that is the client's preference. Imagine a financial professional having to explain that an asset recommended for a non-retirement account (or held in the IRA prior to the implementation date of the Proposal) cannot be added to the IRA because the Department does not allow that asset to be purchased pursuant to the BIC Exemption.[27]

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[27] *See* DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and*

Again, a standard of conduct that protects the best interests of clients is a laudable goal. Changes to certain industry practices may be required to accommodate a best interest standard, and changes to certain laws and to the conduct that is allowed or required today under applicable federal or state laws may be necessary to properly align the conduct that is deemed desirable under a best interest standard.

The task of creating such a standard is best addressed through an open and transparent legislative process, where Congress can express its perspectives as part of the public record, and explain the rationale for its proposal. Ancillary questions of significant importance should be properly considered and debated, such as whether the Department's Proposal constitutes a federal intrusion into the regulation of insurance, an area that has long been subject to comprehensive regulation solely by the states.

The Department supports its position by asserting that substantial changes have occurred since the enactment of ERISA in the manner in which retirement assets are invested, and such changes have resulted in an explosion of individual account plans and increased use of IRAs. The Department's analysis overlooks the fact that Congress created and facilitated this sea change by legislation and has been aware of these changes, as it has regularly amended ERISA over the 40 years following its enactment. FSR believes that, if a radical shift in the currents is required to address this sea change, such a shift is a task that should be left to Congress.

Further, if the change in current practices should be addressed through regulatory action, the Commission should lead that charge, in collaboration with FINRA. We understand the Department consulted with the Commission in developing its Proposal,[28] and that the Commission has confirmed that it provided technical assistance. However, it is not clear the Commission staff believed the Proposal should be implemented or whether the Commission or its staff raised concerns or objections that have not been addressed by the Proposal, or otherwise opposed or criticized the Proposal.[29]

Employee Benefit Plans and IRAs, Application No. D-11713 [ZRIN: 1210-ZA25], 80 Federal Register 21994 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08833.pdf.

[28] *See, Testimony of Secretary Thomas E. Perez*, U.S. Dept. of Labor, U.S. HOUSE COMM. ON EDUC. AND THE WORKFORCE, SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS (June 17, 2015) (testifying that "[this] proposed rule is a product of lengthy, exhaustive outreach. It includes extensive consultation with the SEC, whose expertise has been invaluable as we've developed this rule. Our outreach to the SEC was not box-checking exercise, it was critical to the rulemaking and it has helped us make a better proposal.").

[29] *See also,* Richard G. Ketchum, *Remarks from the 2015 FINRA Annual Conference* (May 27, 2015) (noting his belief that while a "properly designed best interests standard is a must . . . the current Labor proposal is not the appropriate way to meet that goal"), *available at* http://www.finra.org/newsroom/speeches/052715-remarks-2015-finra-annual-conference.

Since the 1930s, the Commission and FINRA have exercised oversight over U.S. capital markets and securities professionals and firms. Both regulators continue to focus on investment products and services for the retirement market, including initiatives intended to protect individuals saving for retirement. For example, during the 2015 examination cycle, the Commission's staff focus includes the nature of fee arrangements (*e.g.*, fees based on assets under management, hourly fees, performance-based fees, wrap fees, *etc.*); sales practices related to certain transactions like rollovers (especially when they pose greater risks and/or charge higher fees); the suitability of recommendations "to invest retirement assets into complex or structured products and higher yield securities;" and a continuing assessment of alternative investment funds and strategies, including the leverage, liquidity, valuation, internal controls, and marketing activities of such funds.[30]

More recently, the Commission announced the Retirement-Targeted Industry Reviews and Examination Initiative, which will focus examination resources on certain registered investment advisers and broker-dealers that provide retirement products or services to retail investors. These examinations will focus on whether a reasonable basis exists for the recommendations made to Retirement Investors; conflicts of interest; supervision and compliance controls, and marketing and disclosure.[31]

Investors and the financial services industry would benefit materially from allowing the Commission, through its Office of Compliance Inspections and Examinations, to conduct these focused examinations and the nature and extent of any improper conduct that may have occurred. The Commission could then develop a best interest standard that will protect both Retirement Investors and retail investors more generally. Such a process would be based upon actual data from investigations, rather than anecdotes, academic research, and assumptions.

As described above, the Proposal would have a significant and adverse effect on the role financial professionals and institutions play in providing assistance to retirement savers. Compliance burdens would increase materially, as institutions would need to develop and operate two distinct régimes for dealing with retail accounts. They would

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[30] *See* SEC. & EXCH. COMM'N, OFFICE OF COMPLIANCE INSPECTIONS AND EXAMINATIONS, National Exam Program, *Examination Priorities for 2015* at 2-3 (Jan. 13, 2015), *available at* *http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf*. *See also,* FINRA, *2015 Regulatory and Examination Priorities Letter* at 2-3 (Jan. 6, 2015) (discussing "recurring challenges," including putting customer interests first; firm culture; supervision, risk management, and controls; creating a proper environment for a good firm culture, strong supervisory and risk management systems, product and service offerings; and conflicts of interest), *available at* http://www.finra.org/sites/default/files/p602239.pdf.

[31] SEC. & EXCH. COMM'N, OFFICE OF COMPLIANCE INSPECTIONS AND EXAMINATIONS, National Exam Program Risk Alert, *Retirement-Targeted Industry Reviews and Examinations Initiative*, vol. IV, issue 6 (June 22, 2015), *available at* http://www.sec.gov/about/offices/ocie/retirement-targeted-industry-reviews-and-examinations-initiative.pdf.

also need to educate and monitor advisers to properly bifurcate these different régimes for different accounts, even though the same individual owns both accounts.

The Department may believe institutions can readily apply the conditions of the BIC Exemption to all investors, not just Retirement Investors. To comply with the BIC Exemption, an institution will need to undertake significant changes in business operations. In the case of IRA owners, the financial institution will be agreeing to: (1) contractually apply a standard of conduct that is not imposed by statute; (2) provide a private cause of action for every state and federal law to which it is subject; and (3) open up certain business practices (*e.g.*, adviser compensation practices) to scrutiny and challenge by individual investors and their attorneys.

While some institutions may reluctantly accept the substantial risks and burdens in order to continue to service Retirement Investors under the Proposal, none can be expected to voluntarily undertake the same burdens where it is not required to (*i.e.*, the non-retirement market). Accordingly, the Proposal will result in a dual system that will add cost and complexity for all investors. Such a result would be unnecessary if the Department and the Commission worked together to develop a coordinated and integrated best interest standard that would protect investors in a reasonable, practical, and efficient manner.

V. Proposed Rule Conflicts with Provisions of ERISA

The Proposal exceeds the Department's authority to promulgate interpretative regulations and is inconsistent with the statutory provisions it purports to interpret. The proposed broad re-definition of "investment advice" will subject virtually every service provider involved in providing investment-related education, products, or services (including those involved in investing assets at the direction of an IRA owner or plan participant) to draconian penalties under the excise tax provisions of Section 4975 of the Code. The Department proposes to offer relief from these prohibited transaction provisions in the form of the BIC Exemption which, among other material conditions, requires any person who purports to rely on its terms to agree to be bound to the substantive fiduciary responsibility provisions of ERISA. In combination, the Proposal and the terms of the proposed BIC Exemption would make financial professionals and institutions that provide advice and guidance to IRAs subject to the fiduciary responsibility provisions of ERISA.

Congress limited ERISA's scope to "employee benefit plans" maintained by an employer, and Congress expressly decided not to make IRAs subject to ERISA when it enacted ERISA in 1974. Instead, Congress subjected IRAs to the corresponding prohibited transaction provisions of the Code, as set forth in Title II of ERISA. Thus, the Department's proposed expanded definition of investment advice and the BIC Exemption requirement would collectively replace Congress's judgment. The Department is essentially attempting to amend ERISA to encompass IRAs without Congressional

action. Amending ERISA requires an act of Congress, not an informal rulemaking under the Administrative Procedure Act.[32]

The Department seeks to justify its expansion of ERISA by dismissing the Department's original definition of an investment-advice fiduciary—promulgated approximately 40 years ago—which interpreted "investment advice" as a rule that unintentionally narrowed the breadth of the statutory provision. In the accompanying explanation of the need to revise the definition of an investment-advice fiduciary, the Department stated:

> In 1975, the Department issued regulations that significantly narrowed the breadth of the statutory definition of fiduciary investment advice by creating a five-part test that must, in each instance, be satisfied before a person can be treated as a fiduciary adviser. This regulatory definition applies to both ERISA and the Code. The Department created the test in a very different context, prior to the existence of participant-directed 401(k) plans, widespread investments in IRAs, and the now commonplace rollover of plan assets from fiduciary-protected plans to IRAs.[33]

The Department further stated that:

> With this regulatory action, the Department proposes to replace the 1975 regulations with a definition of fiduciary investment advice that better reflects the broad scope of the statutory text and its purposes and better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty.[34]

However, the Department's original explanation, as well as ERISA and the Code, provide otherwise. In proposing its current definition of an investment-advice fiduciary shortly after the enactment of ERISA, the Department stated:

> The proposed regulation is designed to clarify the applicability of the definition of the term "fiduciary" set forth in Section 3(21)(A) to persons who render investment advice to employee benefit plans and to persons who execute securities transactions on behalf of such plans.[35]

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[32] Administrative Procedure Act, 5 U.S.C. § 553 (2015).

[33] Proposing Release, 80 Federal Register at 21928.

[34] *Id*. at 21929.

[35] *Definitions and Coverage Under the Employee Retirement Income Security Act of 1974*, 40 Federal Register 33561, at 33562 (August 8, 1975).

And, in the explanation accompanying the final regulation, the Department stated:

> In response to several written comments, paragraph (c)(1) has been modified to make it clear that for a person to be a fiduciary under paragraph (c)(1) (ii)(B) any such agreement, arrangement or understanding to provide such [investment] advice must be mutually agreed upon, arranged or understood by the person providing such advice and the plan or the fiduciary.[36]
>
> It was also noted in the letters of comment that advice on the availability of securities or other property or of purchasers or sellers of securities or other property is often merely an integral part of the execution of transactions rather than the provision of investment advice.[37]

It is apparent that when the current regulations were adopted, the Department's intent was to "clarify the applicability" of the statutory provision—not narrow its application—and the Department clearly adopted the conditions contained in the current rule in response to comments seeking further clarification of that statutory provision. Thus, the Department's current position is diametrically opposed to the positions the Department expressed when it promulgated the current regulations.

Moreover, the Department now states the revised definition "better reflects the broad scope of the statutory text" because the original rule was promulgated "prior to the existence of participant-directed 401(k) plans, widespread investments in IRAs, and the now commonplace rollover of plan assets from fiduciary-protected plans to IRAs."[38] This statement ignores the fact Congress established, as part of ERISA, the very rules that permitted and authorized the growth of participant-directed accounts and investment by individuals in IRAs. The Department claims that the need to revamp the definition of investment advice arises because of subsequent developments ignores Congressional intent and action. Congress affirmatively permitted rollovers from employee benefit plans to IRAs, and chose not to subject IRAs to the broad protections that it enacted under ERISA.

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[36] *Definition of the Term "Fiduciary,"* 40 Federal Register 50842 (October 31, 1975).

[37] *Id*.

[38] Proposing Release, *I. Executive Summary*, 80 Federal Register at 21928.

Perhaps more importantly, Section 404(c) affirmatively states that, to the extent that a participant directed the investment in his own account under an employee benefit plan:

> "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control …."[39]

This clearly demonstrates Congress did not intend the ERISA fiduciary responsibility to apply when an individual has control over his investments in a participant-directed account. No similar provision in the Code applies to IRAs, presumably because Congress viewed IRAs as the ultimate participant-directed account.

In an employee benefit plan, a participant and beneficiary may control investments made on her behalf only to the extent the plan sponsor affords investment discretion to the participant or beneficiary.

By contrast, an IRA owner has full control and power to determine the investment. The IRA owner enters into a custody agreement that governs the investment of the IRA, and all investment power and control resides with the IRA owner. An interpretation that Congress chose to exculpate any person who might be deemed a fiduciary from responsibility or liability in respect to a participant-directed employee benefit plan, but that Congress intended to impose fiduciary responsibility and liability on persons similarly assisting IRA owners is inconsistent with the unambiguous legislative intent clearly expressed when ERISA was adopted—and which has been reaffirmed as ERISA has been amended over the past 40 years.

Despite this express allocation of individual responsibility by Congress, the Department now attempts to make any recommendation with regard to the investment of any plan or IRA a fiduciary action, which will trigger the concerns discussed above.

To illustrate this point, assume a plan with fewer than 100 participants chooses not to designate any particular investment options under the plan, but instead affords the plan participants the right to direct the investment of their assets in any publicly traded security or any open-ended mutual fund. If the person who effects the transactions on behalf of the plan provides a recommendation to a participant, such person would be a fiduciary to the participant. Under the Proposal, that person will be potentially subject to an excise tax under the Code because the Department has asserted that the exculpatory

[39] 29 U.S.C. § 1104(c).

provisions of Section 404(c) do not exempt a fiduciary from the excise taxes under the Code.[40]

To avoid such an excise tax under the Department's Proposal, the financial professional and/or financial institution would need to agree to contractual responsibilities and liabilities under ERISA that Congress expressly provided would not be applicable to them as service providers. Similarly, if a service provider makes a recommendation to an employee benefit plan participant with regard to the decision to roll over her account assets to an IRA—a decision that would be totally within the control of the participant—the service provider would need to agree to the conditions of the BIC Exemption to avoid potential excise tax exposure, and then be subjected to liabilities Congress did not intend in such circumstances.

Finally, the Department ignores the fact Congress amended ERISA regularly during the 40 years since its enactment, including adding a specific prohibited transaction exemption as part of the Pension Protection Act of 2006.[41] That exemption addresses advice provided by computer-generated programs and advice provided by a fiduciary under a participant-directed plan that might otherwise be conflicted.

It is well established that Congress is deemed to accept the interpretations of a regulatory agency promulgated prior to amendments to statutory provisions.

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change…. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.[42]

The Department's argument that Congress was not aware of the types of advice and investments made in IRAs and self-directed-plans loses any efficacy in light of the subsequent amendments to ERISA, especially those adopted in 2006. Congress clearly would have been aware of obvious changes in investment practices at that time, yet it took no action to change the interpretation of investment advice promulgated by the Department immediately after the enactment of ERISA. As a result, the Department

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[40] 29 C.F.R. § 2550.404c-1(d)(3).

[41] U.S. CONGRESS, *Pension Protection Act of 2006*, Pub. L. No. 109-280, 120 Stat. 952 (August 17, 2006), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-109publ280/pdf/PLAW-109publ280.pdf.

[42] *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580-581 (U.S. 1978) (*citing Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951).

cannot radically modify its interpretation of the definition of investment advice in the manner proposed.

VI. The Department Grossly Underestimates the Cost and Burden of Compliance

The Department has grossly underestimated the cost and burden of complying with the Proposal. In the proposed BIC Exemption, the Department seeks to impose an elaborate disclosure system, which not only requires the assembly and reporting of detailed, far-reaching information not currently accumulated, but includes disclosure updating and formatting requirements. Compliance will require extensive new information technology systems that do not currently exist and the development of ongoing data integrity processes. Compliance with these disclosure requirements is necessary to receive an exemption from substantial incremental excise taxes under the Proposal.

Institutions will need to develop complex and elaborate compliance systems so that data are properly accumulated, maintained, and disclosed. Some of the required data is outside of the control of the financial professional and/or institution (*e.g.*, total cost of the product, and related fees and charges), and the financial professional or institution will need to obtain this information from the product manufacturer. The Department must consider the need for institutions to develop new systems—including entirely new and never before used compensation structures—to comply with the warranties included in the BIC Exemption, and systems and structures to assure and constantly test compliance with the requirements of the warranties.

A few illustrations demonstrate how the Department grossly understated the financial impact of compliance with the régime it has constructed. Given the breadth of its definition of investment advice in determining whether someone is acting as a fiduciary, any person receiving compensation (directly or indirectly) in connection with any recommendation made to a Retirement Investor will engage in a prohibited transaction unless an exemption is available. Thus, under the Proposal, all persons will generally need to rely on the BIC Exemption to continue to service the Retirement Investor market using a commission-based investment model.

With regard to the legal costs an institution relying on the BIC Exemption will incur, the Department:

> . . . estimates that drafting the PTE's contractual provisions, the notice to the Department, and the limited menu disclosure will require 60 hours of legal time for financial institutions during the first year that the financial institution uses the PTE. This legal work results in approximately 168,000 hours of burden during the first year and approximately 13,000 hours of

> burden during subsequent years at an equivalent cost of $21.8 million and $1.7 million respectively.[43]

Sixty (60) hours of legal time is seven and one-half eight hour days for a single attorney. This estimate is given in the face of the Department promulgating hundreds of pages of materials in connection with the Proposal, which has taken ***more than 200 hours*** of time for individual legal departments of certain affected financial institutions to review (*excluding* time billed by outside counsel), let alone implement.

The Department's estimate also does not reflect the time necessary to develop required training programs for financial professionals who will need to operate within the conditions of the BIC Exemption, explain the conditions of the Exemption to clients, and further explain the complex legal analysis on which the condition of the BIC Exemption applies only to their retirement accounts and not their personal accounts.

It does not include time spent on developing compliance programs to assure far-reaching and elaborate BIC Exemption conditions are, and continue to be, met. Nor does it include time for attorneys to explain to institutions' management the complex rules imposed by the BIC Exemption, and to analyze risks of compliance so management can decide whether to undertake the burdens imposed.

The Department's estimate also ignores the time needed to review existing compensation arrangements, including but not limited to current contracts with financial professionals and third-party agreements (*e.g.*, with mutual funds and wire houses), and negotiate changes to them. Plus, the estimate does not cover the likely expenditure of legal time and expense associated with defending alleged violations of the sweeping contractual provisions required with the BIC Exemption. Even meritless claims will trigger substantial legal effort to dismiss them. These are only examples of legal work required in connection with the BIC Exemption.

The Department's projections of information technology expenses associated with the Proposal and the BIC Exemption also are materially understated:

> The Department estimates that updating computer systems to create the required disclosures, insert the contract provisions into existing contracts, maintain the required records, and publish information on the Web site will require 100 hours of IT staff time for financial institutions during the first year that the financial institution uses the PTE. This IT work results in approximately 280,000 hours of burden during the first year and

[43] Proposing Release, *Legal Costs*, 80 Federal Register at 21982.

> approximately 22,000 hours of burden during subsequent years at an equivalent cost of $22.3 million and $1.8 million, respectively.[44]

Although the Department assumes financial professionals and/or institutions could manage IT costs through automation of disclosures posted on their websites, FSR understands from its members that a more accurate range of expenses for information technology resources to implement the BIC Exemption (including compliance and related controls) in the first year ***is $1 million to at least $100 million per institution,*** with ***annual compliance costs ranging from $400 thousand to $20 million,*** depending on the size and nature of the member financial institution's business operations. Our members estimate they would require ***at least thirty-six (36) months*** to bring their companies into compliance with the Proposal.[45]

> The Department assumes that nearly all financial institutions already maintain Web sites and that updates to the disclosure required by Section III(c) could be automated. Therefore, the IT costs required by Section III(c) would be almost exclusively start-up costs. The Department invites comment on these assumptions.[46]

So, for each institution, the Department is predicting the extensive information for both the institution's website and each recommendation the institution makes (whether that recommendation is accepted or rejected by the Retirement Investor) will only require one member of the institution's IT department to spend 12½ eight-hour working days. Of course, it will likely take more than one person to effect these changes. So, according to the Department's estimate, a two-person team would only require 6¼ eight-hour working days, and a three-person team will have it all implemented, tested and operational in about 4 days' time. It will *likely require more than 100 hours to merely identify the sources* required to fulfill the Department's disclosure requirements, let alone write programs to capture that information, distill it into the proper format for delivery to the investors and place it on the website, and then test the systems to assure the information being provided to satisfy the various disclosure requirements is accurately conveyed.

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[44] *Id.*, *IT Costs*.

[45] The size of the teams necessary to design, implement and support the new systems average about 17 employees, and include the following functions: program managers, business leads, business analysts, compliance, regulatory, and legal personnel, and various IT personnel (project managers, solution architects, network architects, programming managers, GUI designers, testing managers, test designers, programmers, and information managers).

[46] Proposing Release at n. 54, 80 Federal Register at 21982.

But perhaps the most amazing estimates relate to implementation of the contractual requirement.

> The Department estimates that approximately 21.3 million plans and IRAs have relationships with financial institutions and are likely to engage in transactions covered under this PTE. The Department assumes that financial institutions already maintain contracts with their clients. Therefore, the required contractual provisions will be inserted into existing contracts with no additional cost for production or distribution.[47]

These assumptions are made with no support and are inherently flawed. In a number of instances, no written contract exists related to the services provided to institutional clients. Even where such contracts exist, this estimate presumes no personnel time will be required to assure proper updating of existing contractual provisions is effected for thousands of contracts. The Department simply ignores the work required to make these contract changes.

For instance, each financial institution will need to review all existing contracts to determine changes needed to comply with the BIC Exemption, and then required changes for each contract will have to be drafted and reviewed. The financial institution will need to notify clients of changes to their contracts, taking into account any notice requirements contained in the existing contracts.

Financial institutions also will incur costs to distribute updated contracts to current clients, especially those to whom a paper copy will need to be mailed. The time spent to satisfy the written contract requirement may be limited, if the Department expressly provides changes to the contracts may be implemented by negative consent (and the existing contracts make similar provision).[48] Either way, compliance with this provision will require significant effort, time and money.

Financial institutions also will rely on their legal and compliance personnel to draft and implement new policies and procedures (including appropriate training for supervisory and other personnel)—all of which will require substantial time and attention. The Department's estimate significantly underestimates these costs.

The estimate seems to also mistakenly reflect that Retirement Investors will simply embrace changes without question or comment and that no discussion will ensue regarding the changes in their relationship with their advisers. Accordingly, the Department's estimate with regard to the contractual requirement of the BIC Exemption

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[47] *Id.*, *Production and Distribution of Required Contract, Disclosure and Notices*, at 21982.

[48] We understand that implementation of the contract provision through a "negative-consent" process may, however, not be permitted by insurance authorities in certain jurisdictions.

fails to recognize efforts required to assure a contract is implemented for every existing Retirement Investor client. It also fails to take into account the cost for contract negotiations with potential and future clients.

The Proposal will require an extensive revision of the manner in which services have been provided to Retirement Investors. As a result of the Proposal, a financial professional who services both the Retirement Investor's retirement assets and the investor's personal accounts will be subject to very different rules and limitations with regard to the retirement account that will not be applicable to the investor's taxable account. This sea change will cause confusion for clients without any benefit that would outweigh the burden created for financial professionals and institutions.

Moreover, while the Department has not made compliance with warranties a condition to the applicability of the BIC Exemption for purposes of avoiding the potentially draconian excise tax exposure, these warranties are part of the contract that each financial institution will need to enter into with Retirement Investors. It is unclear what liability may arise from failure to comply with such warranties, and any prudent institution will need to expend substantial resources to monitor compliance with these warranties.

The Proposal affords each Retirement Investor the opportunity to challenge an institution's compliance with the extensive disclosure, warranties and other requirements of the BIC Exemption. Institutions will face the prospect of continuous legal challenges as a result. Many of these challenges are likely to prove meritless, technical in nature or otherwise not cause material damage to Retirement Investors. The institutions, however, will need to devote substantial resources to responding to the extensive discovery requests that will derive from the conditions of the BIC Exemption, and to having these claims adjudicated and dismissed.

We note that Secretary Perez recently acknowledged that the Department did not provide any cost estimates for increased litigation in the Department's regulatory impact analysis,[49] thereby putting in question whether the requirements of the Administrative Procedure Act have been satisfied.

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[49] *Testimony of Secretary Thomas E. Perez*, U.S. Dept. of Labor, U.S. HOUSE COMM. ON EDUC. AND THE WORKFORCE SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS (June 17, 2015) (testifying that "we now have a controlled experiment going on because there's a substantial subset of people in this space who are already fiduciaries. So if your theory is correct that if you are operating under the best-interest standard you are more susceptible to litigation, that hasn't been borne out. There's no evidence that folks who are fiduciaries get sued more often. What the evidence shows is that when times are good, there tend to be less lawsuits against advisers. And when times are bad, there tend to be more lawsuits, regardless of whether you're a broker dealer or whether you're a fiduciary").

VII. BIC Exemption Imposes Conditions Unnecessary for the Protection of Retirement Investors and Provides Remedies Beyond Those Authorized Under ERISA

To be eligible for the BIC Exemption, financial professionals (and any financial institution retaining the services of such financial professional) must enter into a written contract affirmatively acknowledging they are fiduciaries under ERISA or the Code with regard to any recommendation made to the Retirement Investor, and setting forth certain representations and warranties to the Retirement Investor.

Pursuant to the contract, the financial professional and the financial institution must agree that:

> (1) each will provide investment advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, without regard to the financial or other interests of the financial professional, financial institution or any of their respective affiliates or any other party (the "Impartial Conduct Standards");
>
> (2) each will not recommend any assets for purchase if the total amount of compensation anticipated to be received by the financial professional, the financial institution, and their respective affiliates and any related entities in connection with the purchase, sale or holding of the asset will exceed reasonable compensation in relation to the total services provided to the retirement investor (the "Total Compensation Condition"); and
>
> (3) all statements they make regarding the asset, the fees, the material conflicts of interest that they face in connection with the proposed transaction, and any other matters relevant to the investor's investment decisions, will not be misleading.

In addition, the BIC Exemption imposes a number of additional warranties that the financial professional and/or the financial institution must make, including:

> (1) the financial professional, the financial institution, and their respective affiliates will comply with all applicable federal and state laws regarding the rendering of the investment advice, the purchase, sale and holding of the asset, and the payment of compensation related to the purchase, sale and holding of the asset;

> (2) the financial institution has adopted written policies and procedures reasonably designed to mitigate the impact of material conflicts of interest and ensure that its individual financial professionals adhere to the Impartial Conduct Standards; and
>
> (3) neither the financial institution nor (to the best of its knowledge) any affiliate or related entity uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they would tend to encourage individual financial professionals to make recommendations that are not in the best interest of the retirement investor.

If the Impartial Conduct Standards and the Total Compensation Condition are satisfied, it is difficult to envision a circumstance in which a breach of the warranties would occur. Accordingly, the warranties seem redundant and unnecessary to the protection of the individual Retirement Investor.

Separately the warranties also create liability risk for the financial professional or institution because they give incentive to unharmed Retirement Investors to bring claims for violations. For example, if an institution failed to identify each of the potential material conflicts that could exist or had a compensation structure that could be said to encourage violations of the Impartial Conduct Standards, but such omission or such compensation structure did not cause a violation of such Standards as to ***Retirement Investor A***, there would be no harm to ***Retirement Investor A***. On the other hand, if the institution's compliance failures caused a violation of the Impartial Conduct Standards to ***Retirement Investor Z***, the financial professional and institution would be liable to ***Retirement Investor Z*** for their breaches. However, the financial professional and institution could also be liable to the unharmed ***Retirement Investor A***.

It is unclear why the interests of an unharmed Retirement Investor are furthered by deeming the financial professional or institution to be in breach of its warranties, if such breach occurs with regard to its conduct toward a second investor. The second investor would certainly have a claim under the BIC Exemption if the applicable standards were not met in the context of his account, and would be empowered to address that damage under the contract mandated by the BIC Exemption. On the other hand, applying basic principles of contract law, it is impossible to ascertain damages to an unaffected investor if the Impartial Conduct Standards and the Total Compensation Condition have been satisfied.

It appears warranties may have been included to afford the Department (which lacks direct regulatory authority) an opportunity to monitor or regulate the conduct of financial professionals and financial institutions, by empowering the plaintiff's bar to enforce compliance with these standards of conduct through class action breach of contract law suits, despite the absence of harm to a particular Retirement Investor.

Moreover, nothing in ERISA creates an independent individual right or remedy for any affected individual due to a violation by a fiduciary of a state law or other federal law. Of course, to the extent a violation of any such law would in and of itself cause a violation of the fiduciary's duties under ERISA, then there would be a right and remedy against that fiduciary under ERISA. In the context of the BIC Exemption, that circumstance would be adequately protected by the Impartial Conduct Standards.

FSR sees no reason why the BIC Exemption should, as a condition to complying with an exemption from the prohibitions otherwise imposed by ERISA and the related provisions of the Code, afford a Retirement Investor a private right of action not provided by ERISA or the Code themselves. If the Impartial Conduct Standards and Total Compensation Condition are satisfied, any institution and financial professional that has accepted and acknowledged status as a fiduciary will have fulfilled their respective obligations as a fiduciary. The additional contractual cause of action with regard to such other laws is not necessary to further the interests of such Retirement Investor under ERISA, as enacted by Congress and as extended to service providers of IRAs by the other conditions of the BIC Exemption. The Department should eliminate the warranty requirements from any final rule adopted to implement the BIC Exemption as a result.

a. Disclosure Requirement is Overbroad and Unnecessary

In support for the proposed expanded definition of investment advice, the Department states:

> Disclosure alone has proven ineffective to mitigate conflicts in advice. Extensive research has demonstrated that most investors have little understanding of their advisers' conflicts, and little awareness of what they are paying via indirect channels for the conflicted advice. Even if they understand the scope of the advisers' conflicts, most clients generally cannot distinguish good advice, or even good investment results, from bad. The same gap in expertise that makes investment advice necessary frequently also prevents investors from recognizing bad advice or understanding advisers' disclosures. Recent research suggests that even if disclosure about conflicts could be made simple and clear, it would be ineffective—or even harmful.[50]

Consistent with this view, the Department has proposed a definition of "investment advice" for purposes of determining who is a fiduciary under ERISA and the Code assigns a fiduciary status to any person who receives a fee, directly or indirectly, in connection with a recommendation of any investment for the benefit of a Retirement

[50] Proposing Release, 80 Federal Register at 21953.

Investor, including one involving the rollover of assets into an IRA. It has proposed exemptive relief from the prohibited transaction provisions of ERISA and the Code that require that any adviser or associated financial institution must comply with the Impartial Conduct Standards and the Total Compensation Condition.

If the Department's definition of investment advice is applied, any person who receives a fee or other commission in connection with rendering a recommendation to a Retirement Investor will incur potentially substantial penalties if such person does not meet these conditions of the BIC Exemption. Such conditions, standing alone, should more than suffice to assure the Retirement Investor is protected from conflicted advice and be comfortable in relying on the recommendation of the adviser.

Yet, on top of these significant conditions, the Department proposes to require financial professionals or institutions to make substantial, material disclosures of the fees on their websites and with respect to each individual transaction, as a condition to reliance on the BIC Exemption. With regard to the website disclosure, the Department has provided a requirement that

> the Financial Institution maintains a public Web page that provides several different types of information. The Web page must show the direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate for services provided in connection with each Asset (or, if uniform across a class of Assets, the class of Assets) that a plan, participant or beneficiary account, or an IRA, is able to purchase, hold, or sell through the Adviser or Financial Institution, and that a plan, participant or beneficiary account, or an IRA has purchased, held, or sold within the last 365 days, the source of the compensation, and how the compensation varies within and among Asset classes. The Web page must be updated at reasonable intervals, not less than quarterly. The compensation may be expressed as a monetary amount, formula or percentage of the assets involved in the purchase, sale or holding. The information provided by the Web page will provide a broad base of information about the various pricing and compensation structures adopted by Financial Institutions and Advisers. The Department believes that the data provided on the Web page will provide information that can be used by financial information companies to analyze and provide information comparing the practices of different Advisers and Financial Institutions. Such information will allow a Retirement Investor to evaluate costs and Advisers' and Financial Institutions' compensation practices.[51]

[51] Proposing Release, 80 Federal Register at 21973.

The Department concludes the lack of Retirement Investors' expertise makes them incapable of distinguishing good advice, or even good results, from bad. If the Department's perception of the capabilities of the Retirement Investors is correct, this extensive disclosure will not likely afford material benefit to a Retirement Investor.

With regard to the specific transaction disclosure, the Department has proposed as a condition of the BIC Exemption that elaborate and detailed disclosures be provided in a specified format.

> The exemption requires point of sale disclosure to the Retirement Investor, prior to the execution of the investment transaction, regarding the all-in cost and anticipated future costs of recommended Assets. The disclosure is designed to make as clear and salient as possible the total cost that the plan, participant or beneficiary account, or IRA will incur when following the Adviser's recommendation, and to provide cost information that can be compared across different Assets that are recommended for investment. In addition, the projection of the costs over various holding periods would inform the Retirement Investor of the cumulative impact of the costs over time and of potential costs when the investment is sold.[52]
>
> As proposed, the disclosure requirement of Section III(a) would be provided in a summary chart designed to direct the Retirement Investor's attention to a few important data points regarding fees, in a time frame that would enable the Retirement Investor to discuss other (possibly less costly) alternatives with the Adviser prior to executing the transaction. The disclosure chart does not have to be provided again with respect to a subsequent recommendation to purchase the same investment product, so long as the chart was previously provided to the Retirement Investor within the past 12 months and the total cost has not materially changed.[53]

With such specific and detailed information provided to the Retirement Investor about a specific investment, it is not clear how the general website disclosure will further assist the Retirement Investor, particularly in the context of a rule designed to protect the Retirement Investor from specific conflicted investment advice.

The "summary chart" should be a one-page document that presents the information in a standardized format. The information should be presented in a clear and concise manner using "plain English" narrative disclosures that investors can easily understand.

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[52] *Id.*

[53] *Id.*

If the Department truly believes Retirement Investors "generally cannot distinguish good advice, or even good investment results, from bad" and the "gap in expertise that makes investment advice necessary frequently also prevents investors from recognizing bad advice or understanding advisers' disclosures," then the Department is mandating the disclosure of massive amounts of financial information to persons the Department has said are not capable of evaluating or understanding such information. If the Department views Retirement Investors as capable of understanding and evaluating such information, sufficiently to justify the burden of providing such disclosure, then such disclosure, standing alone, should be sufficient to afford Retirement Investors adequate protection when directing investments, and the remaining conditions of the BIC Exemption are not necessary.

The financial professional and the institution must represent and warrant compliance with the Impartial Conduct Standard and the Total Compensation Condition. The combination of the expansive definition of investment advice and the elaborate conditions proposed with respect to the BIC Exemption place the responsibility for any recommendation at the feet of the adviser and the financial institution, essentially in the same manner as if they had sole discretion over the decision-making with respect to the investment.

If the adviser and institution satisfy the Impartial Conduct Standard and the Total Compensation Condition in these circumstances, in providing advice in reliance on the BIC Exemption and having acknowledged their status as fiduciaries to the Retirement Investor, then the provision of reams of detailed information about potential conflicts, their overall fees structure and the expenses, the Retirement Investor may incur in making the investment adds no additional protection for the Retirement Investor.

Such disclosure—or at least some portion of that disclosure—would be appropriate in a circumstance where the regulatory régime places the responsibility for the investment decision with the Retirement Investor. But it seems difficult to understand why the financial advisor or institution should undertake the substantial expense of complying with such disclosure requirements and still have to undertake the responsibility to demonstrate the Impartial Conduct Standards and Total Compensation Condition have been satisfied, especially if one adopts a view contrary to the stated position of the Department that Retirement Investors are capable of understanding and evaluating such disclosure.

b. Limited Definition of Available Assets

With regard to trust investments and other investments subject to fiduciary standards, many states have established lists of legally permissible investments. Congress did not impose any restriction on the type and class of investments that could be made by plans subject to ERISA. Indeed, even at common law, where such legal lists

of investments have been adopted, provision was usually made to allow the grantor of the trust to expressly permit a broader range of investments in the document governing the duties and responsibilities of the trustee. Through the conditions of the BIC Exemption, the Department again chooses to do precisely what Congress specifically determined not to do when enacting ERISA.

By restricting the application of the BIC Exemption to specific categories of investment assets, the Department has essentially created a legal list of permissible investments for Retirement Investors, and substituted its judgment for the judgment of Retirement Investors.

The Department has limited the BIC Exemption to assets it believes are common investments for IRAs. While the Department has stated that its goal was to identify common investments,[54] it has listed only those investments that have a readily-identifiable fair market value or can otherwise be readily valued with a high degree of certainty.

Given the breadth of the definition of "investment advice," the Department is practically eliminating all other classes of investments as legally permissible investments by IRAs and small plans, unless the financial professional and institution are providing services exclusively under a fee for service model. If Congress wanted to further restrict assets that may be held by IRAs, it would amend Code Section 408(m) to reflect such a decision. It has not done so.

The restrictions in the Proposal would deny Retirement Investors access to a class of investments that can be beneficial for retirement savings and may enhance overall returns, or protect against risk of loss. There are legitimate and compelling reasons for some clients to invest in assets outside of those recognized by the Department. The Department should not substitute its judgment for that of the client or Congress.

In enacting and amending ERISA, Congress did not choose to limit the types of investments available to Retirement Investors. Congress allowed investments in all types of assets. The Department should not develop a condition that has the practical effect of denying Retirement Investors access to assets that may be beneficial to them solely to add "belts and suspenders" to standards of conduct that already more than assure fair treatment of Retirement Investors. However, if the Department insists on limiting the assets which may be recommended in reliance on the BIC Exemption, a number of technical adjustments are necessary to protect the interests of Retirement Investors.

First, many investors will have acquired non-qualifying assets prior to the effectiveness of the final rule implementing the Department's Proposal. The current

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[54] *Proposed Best Interest Contract Exemption*, 80 Federal Register 21960 at 21967.

grandfathering rule would preclude the provision of assistance to such investors with regard to such investments. Similarly, after the effectiveness of the final rule, it is quite likely that Retirement Investors will acquire non-qualifying investments on a derivative basis from qualifying investments. Again, advice could not be provided to them concerning those assets, despite the investor's need for advice. This would not be in the best interests of Retirement Investors.

Accordingly, the BIC Exemption should provide a broader grandfather provision that would allow Retirement Investors adequate access to advice on assets held if and when the Department's Proposal takes effect. Thus, we recommend the Department eliminate the Impartial Conduct Standard with regard to the holding of the asset, if holding the asset is prudent for the investor, and with regard to the disposition of the asset, if and when a disposition is prudent and in the best interest of the Retirement Investor. Similarly, with regard to after acquired non-qualifying investments, a similar exclusion should apply that would allow financial professionals and financial institutions to assist investors to liquidate or otherwise deal with such assets that were not acquired at the recommendation of the financial professional or the institution.

Second, in the context of rollovers from thrift savings plans like Section 401(k) plans, participants frequently choose to invest their assets in a managed account, investment advisory program, or other program of investments. These programs are frequently not legal assets but constitute services. Yet there may be an agreement by the Retirement Investor for the provision of these services for a fee to an institution that could be perceived under the Proposal to be providing investment advice and making recommendations as to investments. If the provision of this kind of program is investment advice, and the BIC Exemption is not available for this kind of service (because the service is not a permitted asset), then the institution may not be able to "recommend" the Retirement Investor participate in its program.

Prior to the Proposal, one would have simply understood the institution was offering to provide the Retirement Investor a service not in a fiduciary capacity, and the provision of such service would readily have been exempt (to the extent an exemption was needed) under the "service provider exemption" under Section 408(b)(2). However, if the recommendation to enter into the program is now "investment advice," that exemption would not be available to the extent the fiduciary is recommending an action that would cause the Retirement Investor to pay an incremental fee. Thus, the class of recommended "assets" under the BIC Exemption must be expanded to include such an investment program, as the broad brush used to paint investment advice would appear to include an institution presenting its services to a Retirement Investor in this context.

Third, there may be circumstances where the structure for the program of investment may entail investing in a collective investment vehicle, such as a trust. Such collective investment vehicles should be included in the list of acceptable assets under the BIC Exemption. Alternatively, the Department could provide an additional carve out to

make clear an institution recommending an investor retain the institution's services with respect to an investment program not be deemed to be a recommendation that constitutes investment advice.

Fourth, the proposed definition of Asset precludes investing in municipal bonds, foreign bonds, foreign equities, foreign currency, options, futures, over-the-counter equities (including but not limited to American Depositary Receipts), structured products (other than corporate bonds), hedge funds, private equity and other alternative investments. These types of investment instruments may be appropriate for certain Retirement Investors and the Department should not preclude them.

Depending on a Retirement Investor's particular situation (financial goals, risk tolerance, *etc*.), investing in foreign securities, municipal bonds, foreign currency, options, futures, or other assets that do not fall within the Proposal's definition of "Asset" may be in the best interest of the Retirement Investor. For example, certain "options-based strategies can be useful in improving the risk-return characteristics of a long equity portfolio," such as may be held in a 401(k) plan.[55] FSR urges the Department to eliminate the list of permissible Assets in the final rule.

c. The BIC Exemption's Standards for Impartial Conduct Are Unnecessary and Unclear

Under the BIC Exemption, a financial professional or institution must provide advice in accordance with the Impartial Conduct Standards, which require provision of investment advice that reflects "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the adviser, financial institution or any of their affiliates or any other party."

As discussed above, it is impossible to contend that any such investment product or service can be offered without regard to the interest of the individual financial professional or institution in making a profit from the conduct of its business. Because non-compliance would lead to a breach of warranty action, the BIC Exemption should provide unambiguous criteria for determining how to adhere to the Impartial Conduct

[55] *See* Michael L. Hemler and Thomas W. Miller, Jr., *The Performance of Options-Based Investment Strategies: Evidence for Individual Stocks During 2003-2013* at 1 (April 26, 2015) (stating that "[adding] options to the portfolio can be a convenient and effective way for the manager to tailor his equity position, augment income, or limit risk as market conditions change"), *available at* http://www.optionseducation.org/content/dam/oic/documents/literature/files/perf-options-strategies.pdf. Based on data from January 2003 through August 2013, the authors "[examined] the relative performance of options-based investment strategies versus a buy-and-hold strategy" of "ten stocks widely held in 401(k) plans." *Id*. at 14.

Standards. For example, it is unclear under what circumstances a financial professional or institution can be assured that any action it takes can be proven to have been taken without any regard to its financial or other interest, or that of any of its affiliates.

FSR requests the Department revise the language and provide guidance (including illustrations) regarding (a) how these standards apply when recommending proprietary or affiliated products or any product for which the financial professional or financial institution (including their respective affiliates) will receive a benefit; and (b) how the financial professional or financial institution is able to establish proof that it has indeed satisfied this standard for purposes of the exemption.

It is unclear how the Impartial Conduct Standards would apply as between clients. For example, financial professionals and financial institutions often discount or adjust fees and charges based on the complexities and size of the client's relationship. However, it is unclear whether the financial professional or financial institution would be permitted to discount a fee for one client's account without risking that a second client will claim the financial professional or financial institution is not acting in his best interest because he is not also getting the lowest fee.

Finally, it is unclear how a finding that the financial professional or institution breached the Impartial Conduct Standards with respect to a single client would affect the ability of the financial professional or institution to rely on the BIC Exemption in general. FSR urges the Department to clarify in the final rule implementing the BIC Exemption that a financial professional or institution may provide a discount on fees—or other accommodation—to a particular client that it does not make available to any other client without violating the Impartial Conduct Standards and their application in the context of the BIC Exemption.

d. *BIC Exemption Standards Related to Compensation Are Vague and Unclear*

Under the BIC Exemption, compensation received by a financial professional or institution or their respective affiliates and related entities cannot exceed the total value of the services provided to the Retirement Investor. It is not clear from the Proposal whether this standard differs from the standard of "reasonable compensation" that has generally been used for statutory exemptions under Section 408 of ERISA, including the service provider exemption under Section 408(b)(2). In regard to the statutory service provider exemption, whether compensation for the provision of a good or service is reasonable would generally be determined based on the market value for such good or service; that is, what a willing purchaser of such good or service would pay to acquire such good or service. For example, whether the amount a doctor, lawyer or entertainer is paid for his time and performance is reasonable is determined by market forces and is not measured by some other unspecified standard.

In the BIC Exemption, it appears the Department intends to create an independent standard of what constitutes reasonable compensation (or perhaps is attempting to redefine what reasonable compensation means for ERISA purposes). As compliance with the Total Compensation Condition is a critical element of the BIC Exemption, the Department must be absolutely clear and specific about how financial professionals and institutions must determine whether compensation is reasonable "in relation to the total services provided." If this standard of reasonable compensation is to be determined on a market-based standard (*i.e.*, within a range of amounts customarily paid by investors for such services), then the Department should so state.

If the Department intends for a different standard to apply, the Department should not only identify that standard with substantially greater specificity and clarity, but should also provide useful and meaningful guidance regarding how to comply with the standard. In such case, the Department should provide examples of circumstances that would comply with the standard it believes to be applicable to the BIC Exemption, and offer specific scenarios that, if met as proposed, would be deemed to satisfy the Total Compensation Condition.

This concept is critical to the ability to comply with the BIC Exemption, and the Department needs to define a clear path for financial professionals and institutions who wish to rely on the BIC Exemption to comply with this standard. The BIC Exemption is entirely impractical because a critical standard for compliance is unspecified. It also leaves the financial professional and institution at risk for challenges to the reasonableness of compensation arrangement after the fact, regardless of whether the client, financial professional, and the institution thought the compensation being paid was reasonable at the time the services were rendered.

e. Limited Investment Alternative Compensation Conditions Are Unnecessary and Unclear

The BIC Exemption also imposes an additional condition when a financial institution or adviser offers a finite list of investment alternatives to a Retirement Investor. In such case, the total compensation received by the institutional group cannot exceed the fair market value of the services provided (the "Fair Market Value Condition"). It is unclear how this condition differs from the similar Total Compensation Condition. More specifically, how does the "fair market value" of services differ from "the total value" of the services provided? As a practical matter, this additional condition—which appears aimed at the proprietary products offered by a financial institution—will essentially always be applicable, since no institution or adviser will be in position (within the standards applicable to an ERISA fiduciary) to offer recommendations regarding an unlimited number of investment products.

Moreover, it is not apparent what incremental level of protection would be afforded to a Retirement Investor from this incremental condition. If the Total

Compensation Condition is met, the Retirement Investor will have received appropriate value because the compensation received will not exceed reasonable compensation in relation to the total services provided.

Adding an additional restraint upon the compensation the institution receives does not enhance Retirement Investor protection beyond the protection provided by the combination of the Impartial Conduct Standards and the Total Compensation Condition. Since this condition is not needed to protect the Retirement Investors, the protection is not necessary.

If the Department determines nevertheless to require this incremental limitation on compensation received as a condition to availability of the BIC Exemption, the Department should clearly and thoroughly explain the difference between the Fair Market Value Condition and the Total Compensation Condition. Is the Fair Market Value Standard determined by amounts paid for similar products and services in the marketplace? If so, how does that standard differ from the Total Compensation Condition? Is the Department suggesting services related to the recommendation of proprietary products are somehow to be isolated from the overall services provided, and the Fair Market Value Standard is to be measured solely against this subset of services?

As with the Total Compensation Condition, the Department needs to specify a clear standard to be met to satisfy the condition and should provide illustrative examples of how this standard is to be determined, as well as the circumstances under which this standard will be deemed to apply.

f. The Proposed Disclosure Mechanics Are Impractical

Under the BIC Exemption, the required disclosure of cost projections needs to be provided to a Retirement Investor prior to the time a recommendation is made. This condition is impractical as proposed. The disclosure required is detailed, and generating it will have associated costs. As proposed, the information must be provided before adviser financial professional knows whether the Retirement Investor (who has final discretionary authority) will have any interest in the asset(s) being recommended. The time delay associated with providing this disclosure has not been considered, especially as it relates to the cost projections. Prices for securities are constantly changing and because there is no *de minimis* or "good faith" exception, any change in price would appear to require a new disclosure. It is unclear how any trade could be timely executed given this requirement. The Department should provide in the final rule a *de minimis* or "good faith" exception.

Additionally, much of the interaction between Retirement Investors and financial professionals takes place telephonically. Thus, another avenue for the delivery of disclosures will need to be established before the discussion can occur. E-mail and other electronic delivery methods could be used. The Department should allow the financial

professional and institution to rely on the fact that the disclosure information was sent, regardless of whether the client has read the disclosure.

A more practical, and equally protective, approach would be to require the information be provided before the recommendation is implemented. A cynic might contend that providing the information after the financial professional has made the recommendation and discussed it with the Retirement Investor would allow the financial professional the opportunity to negate the benefit of the disclosure. However, such a view would overlook the proposed BIC Exemption requirement of compliance with the Impartial Conduct Standards, which prevents the financial professional or institution from making misleading statements to the Retirement Investor.[56] If the financial professional were to negate the efficacy of the disclosure through other statements, the conditions of the BIC Exemption would not be satisfied, regardless of when the disclosure is provided.

VIII. Inadequate Implementation Period

The Department has proposed an eight (8) month period for the industry to implement an extensive overhaul of how it provides services to small plans and IRA owners. Contrary public assertions by the Department, the Proposal and the conditions of the BIC Exemption are not designed to permit financial institutions to preserve their existing business models. Thus, an 8-month implementation period reflects a woefully inadequate understanding of industry practice and business limitations. FSR members estimate that a transition period of at least 36 months would be necessary to implement the Proposal.

The BIC Exemption disclosure will require the accumulation, distillation and dissemination of information no institution currently collects. Given that much of the total cost disclosure will be in the hands of product manufacturers rather than financial professionals or institutions, time will be necessary to determine how such information can be accessed, integrated into data and communication systems and made available to investors. That information will also need to be updated with great regularity, and no recommendation can be made prior to the delivery of certain elaborate information to a Retirement Investor, in the prescribed format. This data gathering will require the development of new industry-wide systems for mutual funds and annuities that will take

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[56] However, any material misstatement or omission in connection with the purchase or sale of a security that was made using the telephone, U.S. Mail, or other means or instrumentality of interstate commerce would violate section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j] and rule 10b-5 thereunder [17 C.F.R. § 240.10.5]. Any person who violates the general anti-fraud provisions of the Exchange Act would be subject to civil, administrative, and criminal sanctions. *See* sections 18, 21(d), 21B, and 32 of the Exchange Act [15 U.S.C. §§ 78r, 78u, 78u-2, and 78ff].

substantially longer than 8 months to develop and program, let alone distill and disseminate the data gathered in a specified format.[57]

A perception may exist that technology is so advanced that even daunting tasks can be done instantly and with reasonable cost. The reality is that daunting tasks are daunting tasks. Actual experience trying to implement recent legislative and regulatory initiatives, such as the Dodd-Frank Wall Street Reform and Consumer Protection Act,[58] the Volcker Rule,[59] and the disclosure of fees and expenses under the Section 408(b)(2) guidance,[60] have shown that implementation of complex changes takes time. Indeed, it took the Department almost four years just to re-propose its view regarding the scope of investment advice that will give rise to fiduciary status. The Department's proposed transition period would require an information gathering system to be developed, tested and operational in just a matter of months, at a projected expense level that likely is a mere fraction of the true cost of compliance.

The Proposal would also require a complete overhaul of compensation programs applicable to financial professionals and institutions working with Retirement Investors. The Department offered suggested approaches that would satisfy the requirements of the BIC Exemptions, but all of them required flat fee arrangements. In addition, none of these suggestions would meet the objectives served by a compensation program to encourage superior effort and performance, while creating incentives for employees to remain in service. Financial institutions will need substantially more time than the proposed transition period to properly study acceptable incentives that still function to reward superior performers and compensate them for operating within the new régime.

The Department's perception regarding the ease of implementing the contractual requirements of the BIC Exemption also seems fanciful. The Department ***estimates a zero cost*** for putting into place contracts that pertain to *tens of thousands of customers*. These customers are unlikely to understand the reasons material changes are occurring in the way their accounts are administered. They will not understand why they must receive elaborate disclosures, even before a recommendation can be made. They will also not

[57] For example, a securities broker-dealer will have to obtain total cost information related to the annuities available on its platform from each annuity carrier, and similar information for the thousands of mutual funds. Presumably this will be done by enhancing existing systems like DTCC or annuity-net, but those systems will not be built overnight and it will not be under the control of the broker-dealer.

[58] Pub. L. No. 111-203 (July 21, 2015).

[59] Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, an Relationships With, Hedge Funds and Private Equity Funds" [S7-41-111] (Dec. 10, 2013), *available at* http://www.sec.gov/rules/final/2013/bhca-1.pdf.

[60] *Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure/Web Page*, 77 Federal Register 41678 (July 16, 2012), *available at* http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=26218.

understand why these requirements apply to their retirement accounts and not their personal accounts, when the same financial professional helps them with both accounts.

So an inordinate amount of time and effort will be required by financial professionals and financial institutions to explain these changes, including potentially different cost structures Retirement Investors will need to accept under the Proposal. It is hard to imagine all this being completed in eight (8) months, especially with institutions also being required to comply with the other requirements of the BIC Exemption. And as noted above, the requirement that new contracts be negotiated and entered into with Retirement Investors will certainly take more than eight (8) months, assuming that it is even possible to "re-paper" all existing retirement accounts.

The Department asks whether there should be a longer transition period for certain elements of the BIC Exemption. By raising this question, it appears the Department is considering whether the primary conditions could be implemented, at least initially, without the mandated disclosure or compliance with some or all warranties. If that is the case, it raises the question of whether the secondary conditions are truly needed.

A bifurcated approach is impractical. The Department's Proposal presupposes that institutions could opt to change business models in light of the BIC Exemption without knowing whether they can comply with and monitor compliance with the requirements of the BIC Exemption. This would encourage risk taking of a type and nature criticized heavily by banking, securities, and insurance regulators.

The provision of the BIC Exemption that precludes any exculpatory provision is evidence of the view that the Department is deputizing hundreds of thousands of lawyers to monitor and attack institutions. These lawyers will have an economic motivation in finding deficiencies. They will be economically motivated to not only pursue circumstances where the financial professionals and institutions have failed to meet their fiduciary obligations to one or more Retirement Investors, but also to challenge violations of the very elaborate technical requirements of the BIC Exemption, regardless of whether any corresponding damages have occurred.

By adding a private right of action under the BIC Exemption for any violation of applicable law, the Department is authorizing the plaintiffs' bar to support regulators in every federal agency and every state agency that might have jurisdiction over a financial professional or institution.

In light of this clear invitation to the plaintiff's bar to challenge the conduct of any financial professional or institution that continues to service retirement accounts, no prudent individual or institution would engage in such business without a high level of certainty that it understands all of the conditions it has to meet, how it will meet such

conditions, how it will assure it can comply with such conditions, and what it will take to document compliance with every requirement contained in the Proposal.

Thus, a piecemeal phase-in of the BIC Exemption's requirements is not a helpful or practical solution, if the goal and objective is to implement a system that can be implemented for the benefit of Retirement Investors. The Proposal and the BIC Exception should not become effective until all applicable conditions can be met. That will take years as the BIC Exemption is proposed, not months.

IX. No Need to Revise Existing Exemptions

The Department has proposed material modifications to three class exemptions that have been widely utilized for many years in the effective and efficient administration of plan investments. Indeed, the most recently adopted of these exemptions was initially promulgated in 1986, nearly 30 years ago. In promulgating these exemptions, the Department had to conclude, after a proposal and opportunity for public comment, the exemption was in the best interest of plan participants and beneficiaries.

Thus, the Department previously and formally concluded the currently effective conditions were sufficient to safeguard the interests of those plans, plan participants and beneficiaries that engaged in transactions in reliance thereon. The Department has presented no evidence that indicates the conditions of the current exemptions are no longer sufficient to protect the interests of plans and their participants and beneficiaries.

Moreover, the Department overlooks that transactions effected under the existing exemptions by fiduciaries on behalf of employee benefit plans must nonetheless still satisfy the requirements of Section 404(a) of ERISA, which are the basis for the Impartial Conduct Standard. This is to be contrasted with the BIC Exemption, which on its face appears primarily targeted at the investment of IRA assets that Congress chose not to subject to the fiduciary responsibility provisions of ERISA. Thus, regardless of the terms of the applicable prohibited transaction exemption, the persons serving as fiduciaries and receiving the benefit of these pre-existing exemptions must nonetheless comply with the fiduciary responsibility provisions of ERISA.

It is unclear why the currently existing prohibited transaction class exemptions need to be revised to include the BIC Exemption Impartial Conduct or other standards, especially in the absence of compelling data suggesting the existing exemptions fail to protect adequately the interests of plans and their participants and beneficiaries. The addition of this requirement to existing exemptions will create significant disruption in implementing securities transactions, potentially increase costs for plans, plan participants and beneficiaries and potentially threaten the ability to provide best execution of securities trades, and likely reduce investment opportunities and advice for the plans of small businesses, certain other plans and their participants and beneficiaries. The Department should provide detailed findings related to efficacy or perceived lack

thereof with respect to each of the current exemptions it is proposing to modify or eliminate.

X. Custodial Banks and Others that Provide Valuation Statements Perform Administrative—Not Fiduciary—Functions

Banks and trust companies provide safekeeping and recordkeeping services when acting as trustees and custodians of plans, plan asset vehicles, and IRAs. These services include the production of periodic statements which reflect the reported value of the assets and investments held in the plan, plan asset vehicle, or IRA.

In addition, financial institutions (or one or more of their affiliates) provide valuation services to mutual funds, hedge funds, exchange traded funds, and others. Among these services are the determination and issuance of the value of the investment, such as net asset value ("NAV") which could be determined daily. These services may also include the production of periodic statements which reflect the reported value of the assets and investments held in the plan, plan asset vehicle, or IRA.

Under the Proposal, "investment advice" includes "an appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA." This suggests valuations noted in periodic account statements would be exempt from the term "investment advice," but it is not clear since continuing to hold a security is not a transaction involving the "acquisition, disposition, or exchange, of such securities or other property by the plan or IRA."

The carve-out to this provision states that an appraisal, fairness opinion, and statement of value are not considered "investment advice" if, among other things, it is provided "solely for compliance with the reporting and disclosure provisions" under ERISA or the Code, or under "any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization rule or regulation." Not all of the valuation services being provided fall within this exception.

These two provisions read together could be interpreted to mean that a statement of value must fit within this disclosure/reporting provision in order not to be deemed investment advice. However, the determination of value is normally a ministerial act or may be conducted for purposes of determining whether a collateral requirement has been satisfied. The more reasonable interpretation is that statements of value that fall outside the ambit of the definition of investment advice are exempt altogether and need not resort to the carve-out. This would include, for example, statements of value issued in connection with: (i) participant-level transactions based on unit value NAVs, (ii) calculation of daily NAV for single plan unitized investment pools within participant-

directed plans, (iii) master trust plan accounting services, and (iv) valuations provided in advance of a plan merger.

Such an interpretation is especially critical, given the need for valuations to be provided separate and apart from any advice or recommendation. If a transaction occurs, the value is required to be provided. Plans and IRA owners need to know the value of investments in the account for various reasons, including required annual tax reporting and required minimum distributions. This valuation information, in and of itself, should not trigger fiduciary status simply because it relates to the investment.

This interpretation is also consistent with the statutory framework of ERISA. It is common for banks, trust companies, and other financial institutions to prepare and provide reports and statements more frequently than required under federal or state law. For example, many custodians, trustees, recordkeepers, and other financial institutions (or their affiliates) in addition to providing periodic (*e.g.*, monthly or quarterly) statements, calculate daily NAVs for investment funds and make available continuous access online to current information regarding plan investments.

Providing NAVs, periodic statements, and online access and information are purely administrative functions and should not be considered a fiduciary act. Therefore, the Department should exclude from the final rule's coverage any statement of value not intended as investment advice.

XI. The Proposal Raises Significant Issues that Require the Department to Provide Additional Relief, Clarifications, and Interpretative Guidance

a. Definitions of "Recommendation" and "Investment Advice"

We note that the proposed Impartial Conduct Standards would require that the service provider agree that it will not "'*recommend*'" an Asset if the total amount of compensation anticipated to be received by the Adviser, Financial Institution," and other parties . . . will exceed reasonable compensation . . . ."[61] We further note that the Proposal does not define the term "recommend" for the purposes of the proposed BIC Exemption.

FSR believes the definition of "recommendation" should be clear and unambiguous. In our view, the approach FINRA uses for determining the existence of a "recommendation," which was largely adopted by the Department for purposes of the Proposal in connection with the definition of "investment advice," would also be appropriate for purposes of the proposed BIC Exemption. Applying FINRA's approach

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[61] *See,* Proposing Release, 80 Federal Register at 21984.

to the Proposal, the term *recommendation* would encompass only those communications that would objectively be viewed as "a 'call to action,' or suggestion that the client engage in a securities transaction."[62]

Accordingly, for purposes of the Proposal—including the proposed BIC exemption—FSR urges the Department to adopt a definition of the term "recommendation" that is consistent with FINRA guidance and the principles we discuss above, as set forth in the proposed SIMPLE PTE discussed below. In addition, FSR requests that the Department provide more specific guidance, including examples, regarding application of the definition for purposes of the fiduciary definition and BIC Exemption.

Moreover, the definition and concept of a "recommendation" implicates whether or not investment advice has been provided. FSR believes the Department should clarify the Proposal so that the definition of "investment advice" incorporates a mutuality concept. For purposes of the "investment advice" definition, FSR believes that there should be a *mutual understanding* between the client and the financial professional or institution that the recommendations will play a significant role in the client's decision-making. There should also be a mutual understanding within the definition of recommendation that the discussion or material is provided for the purpose of acting on such recommendation.

FSR asks the Department to clarify the meaning of the phrase "individualized to, or specifically directed to," to narrow the circumstances under which the definition is intended to apply. In our view, the definition should exclude the promotion of services, advertising, and marketing available for general circulation, and should permit the provision of educational materials as described in Interpretive Bulletin 96-1.[63]

b. The Department Also Should Provide an Express General "Carve-out" for Parties Who Are Just "Sellers"

The breadth of the Proposal is such that one could assert that any seller of any good, product or service is providing "investment advice." It is likely that, in the context

[62] *See*, FINRA Policy Statement 01-23. FINRA's guidance provides that the "'facts and circumstances' determination of whether a communication is a 'recommendation' requires an analysis of the content, context, and the presentation of the particular communication or set of communications. The determination of whether a 'recommendation' has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether—given its content, context, and manner of presentation—a particular communication from a broker/dealer to a customer reasonably would be viewed as a 'call to action,' or suggestion that the customer engage in a securities transaction." *Id*.

[63] 29 C.F.R. § 2509.96-1.

of negotiating the sale, the seller of the good or product would make suggestions as to why it would be beneficial for the purchasing Retirement Investor to effect the purchase. Such person would receive consideration in connection with the transaction that could be sufficient to meet the conditions of the proposal. If the purchaser makes its decision in part in reliance on the suggestions made by the seller, the seller might be providing investment advice. Ordinarily, the provisions of Section 408(b)(2) would provide a prohibited transaction exemption for the provision of services, and Section 408(b)(17) might apply to the sale of a good. However, if the person is providing investment advice as a fiduciary, which would appear to be the case under the Proposal, then these exemptions would not be available.

FSR urges the Department to include an express carve-out—or general statement that provides that common sense should prevail, such that no person should be treated as having provided investment advice—and therefore be deemed to be a fiduciary—in any circumstances where the recipient of the advice should have no reasonable expectation that the party providing such advice is acting in the Retirement Investors' interest. This should include any entity selling a good or service where it is not otherwise providing services to the Retirement Investor, or offering its services to the investor for the first time.

c. The Department Should Provide an Express "Carve-out" for Offering Services

A financial professional or institution offering services to a Retirement Investor likely would be deemed to be offering investment advice under the Proposal. Such an entity will likely be deemed to be suggesting it be retained as an investment manager. In promoting services and illustrating possible benefits of using these services, the adviser may be making recommendations that could be implemented, if the financial professional or institution is retained. The same is true when a financial professional or institution responds to a request for information ("RFI") or a request for a proposal ("RFP"). In responding to an RFI or an RFP, it is unlikely the requestor would be confused and think that the financial professional or institution was acting in any capacity other than merely recommending its own services.

Such a recommendation would not meet the requirements of the BIC Exemption because the exemption is not available for recommendations of services or investment programs, the required contract would not have been in place, and the mandated disclosure will not likely have been provided. Additionally, it is impossible to conclude that, when recommending that a Retirement Investor retain the entity's services, the entity is not acting in its own interests. If the Department did not intend to include the efforts of an entity or other person offering its own services for hire by a client as investment advice, a simple additional carve-out to the proposed amendment to the regulation would resolve this concern.

FSR also requests guidance concerning the circumstances under which advertising and marketing services to clients may be considered a recommendation, and guidance regarding the extent to which the best interest standard and BIC Exemption apply to the recommendation of the financial professional or institution's services. Advertising and marketing materials distributed broadly, or recommending one's own services, should not constitute a "recommendation" resulting in fiduciary status.

d. Grandfathering

Additionally, when investors invest in a mutual fund complex and pay a fee in connection with their initial investment, the investors are paying for future investment advice. The grandfathering provision ignores this fact. To the extent the investment is not one of the proposed permissible assets approved for use in connection with the BIC Exemption, the Retirement Investor will be deprived of access to advice for which the investor already paid.

If ongoing fees are payable for investments made in such a mutual fund complex prior to the effective date of the Proposal and the BIC Exemption, and transfers among investment options within such a complex are permitted without additional fees, the grandfathering provisions of the BIC Exemption would preclude investors from receiving no-additional cost advice to the extent that the complex offered investment options not included on the Department's approved list of investments.

Accordingly, the Department should expressly allow financial professionals or institutions to provide advice to Retirement Investors with respect to investments within a complex of investments made prior to the effectiveness of the BIC Exemption, regardless of whether such investments are otherwise eligible for the BIC Exemption, where such advice is generally provided at no additional cost to the Retirement Investor.[64]

e. Proprietary Products

The Department should provide a specific mechanism for a financial professional or institution to recommend proprietary and affiliated products. As stated throughout our letter, the Department should provide guidance—including illustrations—regarding how the best interest standard applies to recommendations of proprietary products or affiliated services. Specifically, the Department should address how a financial professional or institution can prove a recommendation of proprietary products was "without regard to the financial or other interest of the adviser, financial institution, or affiliate;" and how to determine, and comply with, the proposed additional reasonable compensation standard with respect to the provision of proprietary products.

[64] However, financial professionals and institutions would be permitted to charge for services, including execution and regular account maintenance fees.

f. Networking Arrangements and Referrals

Referral arrangements often exist between departments within a financial institution (such as those made pursuant to a Regulation R[65] networking agreement) or between non-investment related professional and investment advice professionals. These arrangements encourage non-investment personnel to recognize opportunities for retirement savings and provide access to a professional to provide much needed advice to clients. It is not in the best interest of Retirement Investors to deter or stop these arrangements and referrals, especially since the referred financial professional or financial institution will be under a duty to act in the client's best interest.

Fiduciary status should not extend to unsolicited and non-individualized referrals to financial professionals or institutions. Fiduciary status should be placed with the financial professional or institution providing advice to the client, not the person or entity whose sole role is that it made the referral. The Department should provide a specific "carve-out" for non-individualized referral recommendations or provide clarification that such arrangements would not be considered fiduciary advice under the Proposal.

The Department should also make it clear that the counterparty exception or another exception from the fiduciary definition would be available for service providers when selling the services of an affiliate or third-party adviser (such as a solicitor arrangement pursuant to rule 206(4)-3 under the Investment Advisers Act of 1940[66]). Fiduciary obligations should not extend to arms-length referrals where neither side assumes the counterparty to the plan, plan participant or beneficiary, or IRA is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of a proposed service.

The Department has not identified any risk of harm under these circumstances where the communications are non-individualized and fully transparent. This is especially true where a referral will satisfy all the conditions set forth in the counterparty exception or where a plan fiduciary, plan participant or beneficiary, or IRA owner has the expertise to evaluate the transaction and to determine whether the transaction is prudent and in the best interest of the plan, the plan's participants or beneficiaries, or IRA. To the extent the Department believes these referrals fall outside of the seller's exemption, we urge the Department to provide a separate exemption for these arrangements in order to maintain the recognizable benefits to clients and address any perceived harm.

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[65] FEDERAL RESERVE SYSTEM and SEC. & EXCH. COMM'N, *Definitions of Terms and Exemptions Relating to the "Broker" Exceptions for Banks* (Oct. 3, 2007), *available at* http://www.gpo.gov/fdsys/pkg/FR-2007-10-03/pdf/07-4769.pdf.

[66] 17 C.F.R. § 280.206(4)-3.

g. Warranty Requirements in the BIC Exemption

In Section VII, FSR urges the Department to delete the warranty requirements in the BIC Exemption because they are redundant with other aspects of the Proposal. However, if the Department decides to retain the warranty requirements within the BIC Exemption, the Department should provide further clarity regarding various terms and definitions identified. Non-compliance with these representations would subject a financial professional or financial institution to liability for a breach of warranty action. Financial professionals and financial institutions would benefit greatly from clarification concerning how to comply with the specific conditions of the exemption.

In particular, FSR asks the Department to:

- Provide further guidance and illustrations concerning the phrase "reasonably designed to mitigate the impact of material conflicts of interest." Financial professionals and financial institutions need specificity on the content of written policies and procedures that would comply with the exemption;

- Clarify the meaning of the term "material" in the definition of "material conflict of interest," and provide a *de minimis* standard that would be applicable when identifying potential conflicts of interest;

- Provide further clarity on the meaning of the phrase "would tend to encourage individual advisers to make recommendations that are not in the best interest of the Retirement Investor;" and

- Clarify that the financial professional or financial institution has no obligation to warrant compliance with the BIC Exemption's compensation structures by any of their respective affiliates or related parties ("Affiliated Party"), if the Affiliated Party is not a party to the contract with the client, and would be required to enter into a contract with the client in order to receive compensation in respect of the transaction.

h. Exculpatory Provisions

The Department should also clarify that limitations on disclaimers do not preclude a financial professional or financial institution from specifying in the contract that it is only responsible as a fiduciary for the specific role assumed in connection with the transaction (*e.g.,* a particular transaction or account).

i. Impact on Institutional Retirement Services Businesses

The manner in which the Proposal is intended to affect entities providing institutional retirement services is unclear. Such providers interface regularly with plan sponsors, plan investment committees or their consultants about investment options offered and may be perceived as providing a recommendation. When plan sponsors, plan investment committees, or their consultants ask questions regarding current investment options, they may perceive responses as providing a recommendation even if such responses were intended to be informational.

In addition, such entities may respond to RFPs by providing a sample investment option line-up. Such service providers will receive fees from the provision of their services, but the fees and services provided do not necessarily have any correlation to investments. This would be true, for example, with respect to entities that will have sold insured products, such as variable annuities or group annuity contracts.

Institutional retirement services providers will also be called upon to provide information and advice regarding investments made prior to the effectiveness of the BIC Exemption, which may or may not be on the list of assets approved for investment by the Department under the proposed BIC Exemption. But the fee arrangements will not be affected by the information or recommendations provided. Such institutions likely have no individual contracts with the individuals whom they serve under such arrangements. If the assets underlying the arrangement are invested in investments not covered by the BIC Exemption, we are concerned the financial professional or institution cannot provide information that could be considered a recommendation even though there is no fee associated with such advice, and perhaps no recommendation being made.

FSR asks the Department to define with greater specificity what constitutes a "recommendation" for purposes of the BIC Exemption. We further ask the Department to confirm that any recommendation not to take action will not be treated as investment advice for purposes of the BIC Exemption, unless such recommendation will result in a specific fee to the financial professional or the institution. Finally, FSR asks the Department to exempt responses to RFIs and RFPs, which by definition, would not be a contract between the financial professional or institution and the plan sponsor, plan investment committee, and/or their consultants.

The Department should also exempt the provision of advice between investment choices by a provider which does not receive any incremental fee for providing information or any recommendation that leads to a change in investment made by a Retirement Investor. In providing such information or such a recommendation, an entity providing such services cannot be acting in its own interests, if no additional fee or compensation is received. There is no benefit to a Retirement Investor, and no impropriety to be addressed, by imposing the conditions of the BIC Exemption in such circumstances. Where the fees that are received are related to the services of providing

the platform for investment, or the investment vehicle under which the investment is made, and the services associated with the recordkeeping thereunder, and the administration thereof, there is no fiduciary type breach that needs to be addressed by the BIC Exemption.

If the Department still determines that the BIC Exemption should apply in such circumstances, it should provide that the only condition of the BIC Exemption that needs to be satisfied in respect of this kind of institutional retirement services is complying with the Impartial Conduct Standards, so long as the compensation payable with respect to such arrangement is not directly affected by any information or recommendation provided with regard to the selection of alternative investments.

j. Impact on Retirement Investors' Personal Financial Privacy and Data Security

As proposed, under the BIC Exemption the Department has the right to request that an institution relying on the Exemption provide the Department far-ranging personal financial data on the institution's clients who are served in reliance on the BIC Exemption. Given widespread public concern about governmental and private entities' collection and use of individuals' data in light of recent revelations concerning the National Security Agency and other government entities,[67] we believe clients would hold

[67] *See, e.g.,* Gregory C. Wilshusen, Director, Information Security Issues, *Information Security: Cyber Threats and Data Breaches Illustrate Need for Stronger Controls across Federal Agencies*, Testimony Before the Subcommittees on Research and Technology and Oversight Committee on Science, Space, and Technology, House of Representatives, GAO-15-758T at 2 (July 8, 2015) (finding that concerns about cyber-based threats to federal systems "are further highlighted by recent incidents involving breaches of sensitive data and the sharp increase in information security incidents reported by federal agencies over the last several years, which have risen from 5,503 in fiscal year 2006 to 67,169 in fiscal year 2014"), *available at* http://www.gao.gov/assets/680/671253.pdf; Gregory C. Wilshusen, Director, Information Security Issues, *Cybersecurity: Recent Data Breaches Illustrate Need for Strong Controls across Federal Agencies*, Testimony Before the Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, Committee on Homeland Security, House of Representatives, GAO-15-725T (June 24, 2015) (warning that "[until] federal agencies take actions to address these challenges—including implementing the hundreds of recommendations we and inspectors general have made—federal systems and information will be at an increased risk of compromise from cyber-based attacks and other threats), *available at* http://www.gao.gov/assets/680/670935.pdf; GOVERNMENT ACCOUNTABILITY OFFICE, *High-Risk Series: An Update*, GAO-15-290 at 236 (Feb. 2015) (finding that the "number of reported security incidents involving [personally identifiable information] at federal agencies has increased dramatically in recent years"), *available at* http://www.gao.gov/assets/670/668415.pdf. *See also,* Cory Bennett, *OPM hack hit over 22 million people*, THE HILL (July 9, 2015) (reporting that "more than 22 million people have had their personal information stolen" from the U.S. Office of Personnel Management), *available at* http://thehill.com/policy/cybersecurity/247410-report-opm-hack-hit-over-25-million-people; Patrick Zengerle and Megan Cassella, *Millions more of Americans hit by a government personnel data hack*," REUTERS (July 9, 2015), *available at* *http://www.reuters.com/article/2015/07/09/cybersecurity-usa-idUSKCN0PJ2MQ20150709;* Chris Strohm, *U.S. Hack May Have Disclosed 18 million Social Security Numbers*, BLOOMBERG BUSINESS

the firm responsible for any harm derived from transmitting the clients' personal financial data to the Department or from the Department's handling of such data, especially because these clients' will be unfamiliar with the role served by the Department. This is especially true with regard to IRA owners, since the Department has no enforcement authority over the conduct of their accounts, even with respect to prohibited transactions. As a result, concerns over the access to their personal data are likely to damage institutions' relationships with their clients.

FSR does not understand the need for the institutions to provide this data to the Department, especially with regard to IRA accounts over which it has no enforcement authority. The Department has deputized each investor and his lawyers to enforce compliance with the BIC Exemption through the required contract. Such an investor will have access to his own records, and can cause his legal counsel to provide that data to the appropriate tribunal to seek recourse for any violation of an institution's requirements.

As the Government Accountability Office (the "GAO") notes, "the ineffective protection of cyber assets can result in the loss or unauthorized disclosure or alteration of information, [which] could lead to serious consequences and result in substantial harm to individuals and to the federal government."[68] The GAO further noted technological advances have enabled individuals and organizations "to correlate [personally identifiable information] and track it across large and numerous databases."[69]

In our view, it does not appear that the Department proposes to obtain the type of data that would be necessary to compare the investment performance results of clients from one financial professional and/or institution to clients of any other financial

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(June 24, 2015) (reporting that the "agency that manages U.S. government personnel records is investigating whether Social Security numbers for as many as 18 people were taken in the massive cyber-attack"), *available at* http://www.bloomberg.com/news/articles/2015-06-24/u-s-hack-may-have-disclosed-18-million-social-security-numbers; Devlin Barrett, Danny Yadron, and Damian Paletta, *U.S. Suspects Hackers in China Breached About 4 Million People's Records, Officials Say*, WALL ST. J., (June 5, 2015) (reporting on the alleged theft of personnel records "in one of the most far-reaching breaches of government computers"), *available at* http://www.wsj.com/articles/u-s-suspects-hackers-in-china-behind-government-data-breach-sources-say-1433451888?KEYWORDS=office+of+personnel+management; Lisa Rein, "$21 million tab to taxpayers for clean up after massive Chinese hack of federal database," THE WASHINGTON POST (June 11, 2015), *available at http://www.washingtonpost.com/blogs/federal-eye/wp/2015/06/11/nervous-employees-dial-call-centers-a-21-million-casualty-of-massive-federal-data-theft/*; The Republican Newsroom, *Poll: 57% fear U.S. government will use NSA data to harass political opponents* (Jun 14, 2013, 11:59 PM) (citing a Rasmussen poll indicating widespread fear that government-collected data will be used for punitive political purposes), *available at* http://www.masslive.com/politics/index.ssf/2013/06/poll_57_fear_us_government_wil.html.

[68] GOVERNMENT ACCOUNTABILITY OFFICE, *High-Risk Series: An Update*, GAO-15-290 at 235 (Feb. 2015).

[69] *Id.*

professional and/or institution. FSR believes any benefit that the Department expects to derive from its publication of individual investors' investment performance data aggregated by adviser will pale by comparison to the damage to the individual investors that could result from someone gaining improper access to this data while in the possession of the Department.

Although we do **not** believe the Department should publish data derived from clients, if the Department insists on including this provision requiring institutions to disclose to the Department personally identifiable financial information about the investment of individual clients' accounts, we believe the Department must provide notice of its privacy and data security procedures, and afford the public an opportunity to comment.

It is imperative that the Department implement a comprehensive, robust data security program to mitigate privacy and data security threats, which is compliant with privacy laws and regulations. At a minimum, the Department must address how it will protect private information, and the security protocols it will employ for handling this large amount of confidential data.

For example, will system controls be based on passwords or on more robust authentication processes? What measures will the Department take to ensure that the data it collects will not be leaked or hacked? How will the Department ensure that transmissions from institutions will be secure? We are not, of course, requesting that the Department provide highly sensitive information regarding the security system it will implement, but it would helpful to know, in at least a general form, the nature of the security standards it will implement.

Unless the Department agrees to such a program, it should not seek such personally identifiable financial information on millions of individual clients that have retirement assets held at—or managed by—financial professionals and/or financial institutions.

k. We ask the Department to Clarify that Employer-Sponsored Welfare Benefits and Similar Arrangements, and Certain Distributions Directly into Insurance Products Are Not Subject to the Best Interest Contract Exemption

Exclusion for Employer-Sponsored Welfare Benefits. The Department has requested comment on whether the Proposal should be extended such that arrangements in addition to IRAs that are subject to the prohibited transaction provisions of the Code would also become subject to the Proposal and service providers in respect of such arrangements would be required to comply with the BIC Exemption.

FSR submits that the Proposal should not be expanded to apply to employer-sponsored welfare benefit plans (such as health, long term care and disability insurance) or individually created health spending products, or to the use of (or advice to use) ERISA-governed investment accounts to pay for such plans. These arrangements are not established for the purpose of retirement savings, but for the purpose of providing the underlying benefits to the beneficiaries. The amounts invested are extremely modest relative to retirement savings. Layering onto such arrangements the complexity and costs that will be associated with complying with the BIC Exemption can be expected to significantly curtail the appetite of employers to establish these welfare benefit plans that are designed to benefit their employees, and to limit the avenues of investment for individually established arrangements to low return investments such as bank deposits.

FSR respectfully submits that even if IRAs should be brought into the scope of the rules that would pertain to participant directed retirement accounts under ERISA, doing so for these employer-sponsored welfare benefit plans, individually established health spending accounts, and educational savings accounts would negate the Congressional intent of promoting the establishment of such vehicles, which are not established for retirement. Accordingly, we urge the Department to exempt these arrangements in the final rule.

Exclusion for Insurance Contract Sales. We further submit that the Proposal should not apply to insurance contract sales to welfare benefit plans that do not have an investment component. The essence of the Department's proposed rulemaking is directed toward the provision of investment advice to Retirement Investors. We note that insurance contracts that provide no opportunity for investment gains or losses would not give rise to any need for the Retirement Investor to seek advice concerning investment of the assets related to the insurance contract. FSR urges the Department to clarify in the final rule that insurance contract sales to welfare benefit plans that do not have an investment component are excluded from coverage by the Proposal and the Proposed BIC Exemption.

Exclusion for Distributions Directly into Insurance Products. FSR also asks the Department to clarify in the final rule that the Proposal and the Proposed BIC Exemption do not apply to distributions from qualified plans directly into an annuity or insurance product.

l. Call Center Personnel

FSR submits that call center personnel should not automatically be considered fiduciaries in providing general information to plan participants or beneficiaries. Call centers are an effective way for financial institutions to provide affordable customer service to Retirement Investors. In the typical call center arrangement, the staff assists Retirement Investors with navigating information concerning the operation of their retirement savings plan. Because they do not provide investment advice, their role is

ministerial—not fiduciary. Accordingly, FSR urges the Department to clarify in the final rule that call center personnel are excluded from coverage by the Proposal.

XII. FSR's *Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption* (the "SIMPLE PTE")

FSR proposes for the Department's consideration a framework for a prohibited transaction class exemption under ERISA for the provision of investment advice and guidance[70] in lieu of the Department's Proposal, the proposed BIC Exemption, and the proposed amendments to currently-existing PTEs.

a. Background

In the past, the Department issued prohibited transaction exemptions that permit plan investments in conflicted circumstances based on the presence of protections for plan participants and beneficiaries linked to the reasonableness of the compensation received. These exemptions have operated effectively to provide important investment opportunities for plans and their participants and beneficiaries, without adverse consequences to those parties.

FSR believes that the Congressional model of imposing requirements to appropriately manage the possible adverse consequences of the potential conflicts—rather than trying to eliminate them—should be invoked to resolve the concerns that have given rise to the Department's Proposal and the proposed BIC Exemption.

The supporting statements for the Department's Proposal suggest that, inherent in the development of the BIC Exemption is a presumption that the lowest cost investment advice is the best advice for each and every Retirement Investor. Such a presumption does not reflect reality in any marketplace.

The most obvious example that *lowest cost is not always best* is the experience of the market for terminal pension annuities that existed in the early 1990's, when one carrier, Executive Life Insurance Company, was consistently the lowest cost option for providing annuities to terminating defined benefit plans. But Executive Life provided the lowest cost because it used an aggressive investment policy that led to its eventual demise. The plan participants who were to receive their benefits from the annuities sold by Executive Life would have been severely damaged if other insurance companies had not stepped up as part of the applicable guarantee associations to make good on the failed promises of the lowest cost provider Executive Life, when it was taken over by the State of California. In light of this circumstance, the Department issued Interpretative Bulletin

[70] *See*, APPENDIX B, "FSR's *Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption* (the "SIMPLE PTE").

95-1 to advise fiduciaries that they should not opt for the lowest cost alternative, but rather choose the superior product taking into account other applicable considerations unrelated to cost.[71]

This position is also contrary to the Department's stated position that cost is an element that should be taken into account and that it is not the sole determining factor. As the Department notes on its website, in the document titled "*Meeting Your Fiduciary Responsibilities*":

> Fees are just one of several factors fiduciaries need to consider in deciding on service providers and plan investments. When the fees for services are paid out of plan assets, fiduciaries will want to understand the fees and expenses charged and the services provided. While the law does not specify a permissible level of fees, it does require that fees charged to a plan be "reasonable." After careful evaluation during the initial selection, the plan's fees and expenses should be monitored to determine whether they continue to be reasonable.
>
> In comparing estimates from prospective service providers, ask which services are covered for the estimated fees and which are not. Some providers offer a number of services for one fee, sometimes referred to as a "bundled" services arrangement. Others charge separately for individual services. Compare all services to be provided with the total cost for each provider. Consider whether the estimate includes services you did not specify or want. Remember, all services have costs.

What the market teaches us is that lower cost often corresponds to lower quality, or reflects the economic reality that the effort required to provide the lower cost product is significantly less than that required in respect to other alternatives. Different costs frequently reflect attributes available under differing products.

In the investment community, the costs associated with investments in hedge funds and private equity investments are generally significantly higher than those associated with the standard management of a portfolio of publicly traded securities and considerably higher than an investment in an S&P 500 index. But, despite the broad brush conclusions contained in the literature the Department relies upon to develop the

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[71] 29 C.F.R. §2509-95.1. "The Department notes, however, that increased cost or other considerations could never justify putting the benefits of annuitized participants and beneficiaries at risk by purchasing an unsafe annuity." *Id.*

Proposal and the proposed BIC Exemption, such different products often provide superior returns that justify the additional cost of such investments.[72]

The operation of the BIC Exemption would likely deny Retirement Investors access to these higher return investment alternatives. In the context of investment advice, the lowest cost options generally follow a pre-established path of investment within a specified band of investment, while higher cost alternatives offer services that are designed to anticipate and respond more promptly to market changes and changing markets. FSR's SIMPLE PTE will allow Retirement Investors to access the investment strategy that they determine best serves their particular investment goals and objectives, while assuring that prudent advice and guidance are provided, which is intended to provide the Retirement Investors the opportunity for appropriate returns commensurate with the risks taken, which reflect their individual circumstances.

Unlike the Department's extremely complex Proposal, the FSR SIMPLE PTE would preserve Americans' access to professional financial advice and guidance to help them plan and save to meet their unique financial needs in retirement. The FSR SIMPLE PTE also would enable Retirement Investors to work with their preferred adviser or broker, and pay for that advice or guidance in the manner of their choosing.

The FSR SIMPLE PTE is intended to address the Department's stated public policy goals while reducing the potential for conflicting regulatory requirements on persons that are also subject to substantive regulation under state or federal laws of their investment-advice or brokerage businesses (*e.g.*, banking, commodities, insurance, or securities). The currently-existing prohibited transaction class exemptions would remain in place because these exemptions work well for Retirement Investors.

b. The FSR SIMPLE PTE Codifies a Best Interest Standard

The *best interest* standard would be deemed met if at the time the recommendation is made, the financial product or service recommended is in the best interests of the particular client, because the recommendation:

(1) reflects the care, skill, prudence, and diligence under the circumstances then-prevailing that a prudent person would exercise; and

(2) provides the client the opportunity for an appropriate return, risk exposure, or benefit, taking into account the client's investment objectives, risk profile and tolerance, financial circumstances and needs, and the role of the recommendation

[72] A recent study showed that private equity funds generally outperformed an S&P 500 Index by between 20 and 27% over the life of the fund. Harris, Jenkinson and Kaplan, *Private Equity Performance: What Do We Know*, J. FIN., 1851-1882 (Sept 12, 2014).

as part of the client's overall investment portfolio, as disclosed to the financial professional by the client.

It would not be a violation of the FSR SIMPLE PTE for financial professionals and/or institutions to recommend or sell only proprietary or other limited range of products or services, or to recommend itself as the provider of services that are considered by the financial professional/institution to be in the best interest of the particular client, with appropriate disclosures to the client of the nature of products and services available from that person.

Nor would it be a violation of the FSR SIMPLE PTE to recommend products or services for which the financial professional and/or institution receives variable compensation if the compensation is reasonable and the particular product or service is in the best interest of the particular client, with appropriate disclosures to the client of the nature or products and services available from the financial professional and/or institution.

c. Best Interest Standard Does Not Preclude Receipt of Reasonable Compensation

The compensation that would be permitted to be received by the financial professional and/or institution in making any such best interest recommendation would be an amount that is not in excess of prevailing market rates or practices for investments in that specific product type. *For example:* The financial professional recommends to the client a mutual fund that is primarily engaged in the investment of domestic securities, which charges fees within a range of fees commonly charged by funds of similar size and with similar investment objectives. The aggregate fees received by the financial professional and institution would be deemed *reasonable compensation* if the financial professional and institution collectively receive third party payments that are also within the range of payments generally made by such similarly situated mutual funds, and that has been disclosed in the mutual fund disclosure documents.

Reasonable compensation under the FSR SIMPLE PTE would include only direct and indirect compensation—not gifts or gratuities, except those that are considered *de minimis* (*i.e.,* less than $250 in the aggregate *per annum*), or as otherwise permitted by applicable law.

Annuity transactions, variable annuity contracts in-force, and mutual funds used in advisory programs would be eligible for coverage by the FSR SIMPLE PTE, or may also continue to be governed by currently-existing PTE 84-24.

It would not be a violation of the reasonable compensation standard for a broker or dealer subject to regulation by the Commission or FINRA to receive compensation at

levels that comply with Commission or FINRA regulations, and to disclose its compensation in conformity with applicable securities laws and Commission or FINRA regulations.

Similarly, any compensation received by an insurance agent or insurance company that is subject to regulation by insurance authorities of any state or territory of the United States that is permitted to be received under applicable insurance law or regulations also would be deemed reasonable compensation.

d. The FSR SIMPLE PTE Provides for Clear and Concise Disclosures of Compensation and Material Conflicts of Interest in "Plain English"

Financial Professionals or institutions relying on the FSR SIMPLE PTE must provide "plain English" narrative disclosures to clients that present a clear and concise summary of (1) the compensation arrangements for the financial professional or institution; (2) if applicable, the proprietary or other limited range of products or services that are available from that person; (3) material conflicts of interest of the financial professional and/or institution; and (4) how the financial professional or institution mitigate or manage the disclosed conflicts.

Our approach builds on the results of investor testing conducted by the staff of the Commission, which showed that "investors prefer that disclosures be written in clear, concise, understandable language, using bullet points, tables, charts, and/or graphs."[73]

Disclosures that satisfy applicable federal law or regulation (*e.g.*, banking, commodities, futures, or securities), or applicable state law or regulation (*e.g.*, banking, insurance, or securities) with respect to material conflicts, investment alternatives, *etc.*, will be deemed to satisfy the disclosure requirements.

[73] *See*, SEC. & EXCH. COMM'N OFFICE OF INVESTOR EDUCATION AND ADVOCACY, *Study Regarding Financial Literacy Among Investors: As Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* at iv (Aug. 2012) (finding that "Investors favor 'layered' disclosure and, wherever possible, the use of a summary document containing key information about an investment product or service"), *available at* http://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf.

e. The FSR SIMPLE PTE Requires Advisers, Brokers, and Institutions to Resolve Complaints and Inadvertent Violations Promptly

To assure appropriate oversight of compliance with the conditions of the FSR SIMPLE PTE, the financial professional or institution (the "Service Provider") must adopt the following compliance process:

- The Service Provider must design and implement written policies and procedures reasonably designed to enable the Service Provider to comply with the conditions of the FSR SIMPLE PTE and remediate promptly any failure to comply (the "Compliance Policies and Procedures").

- The Compliance Policies and Procedures must be tailored to the Service Provider's business and operations, and must include appropriate training for relevant personnel who manage the Service Provider's business and operations, or who interact with clients and members of the public (*e.g.*, senior management and supervisory personnel; registered and licensed financial professionals; and call center staff).

- The Compliance Policies and Procedures must address:

    - *Compliance with the Best Interest Standard*, including policies and procedures reasonably designed to ensure that at the time any recommendation is made, the Service Provider's recommendation to the client (a) reflects the care, skill, prudence, and diligence under the circumstances then-prevailing that a prudent person would exercise; and (b) provides the client with an opportunity for an appropriate return, risk exposure, or benefit taking into account the client's unique needs as disclosed to the Service Provider.

    - For purposes of the FSR SIMPLE PTE, the term *recommendation* means a communication that, based on its content, context, and presentation, would reasonably be viewed by an objective person as an explicit suggestion that the advice recipient engage in, or refrain from engaging in, a specific transaction or transactions; *provided*, *however* that no such communication (i) that is a general advertisement shall constitute a "recommendation" unless it includes an explicit suggestion that the recipient purchase or sell a specific asset;[74] and (ii) shall be considered a "recommendation" to continue holding an asset absent an express statement that the advice recipient should not sell or otherwise dispose of the asset.

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[74] *See, e.g.*, FINRA Policy Statement 01-23.

- The Compliance Policies and Procedures must be reasonably designed to enable the Service Provider to evaluate each recommendation in light of the totality of information the client disclosed to the Service Provider concerning the client's investment objectives; risk profile and tolerance; financial circumstances and needs; and the role of the recommendation as part of the client's overall investment portfolio.

- *Material Conflicts of Interest*, including policies and procedures reasonably designed to manage or mitigate the Service Provider's material conflicts of interest, and ensure disclosure of material conflicts to clients.

- *Reasonable Compensation Standards* adopted by the Service Provider, including policies and procedures reasonably designed to manage the Service Provider's compliance with the conditions of the FSR SIMPLE PTE applicable to compensation practices (including receipt of compensation from third parties), and ensure disclosure to clients of the Service Provider's compensation arrangements.

- *Supervisory and Internal Controls*, including policies and procedures reasonably designed to enable business unit supervisors and compliance personnel to perform their respective functions.

- The Service Provider must provide a process for the client to submit any complaint(s) to the Service Provider. The written complaint must include an explanation of the alleged failure to meet the conditions of the exemption, followed by an opportunity for the Service Provider to resolve the complaint and, if appropriate, restore the client to the place it should have been in had such failure not occurred. If the alleged failure is not resolved to the satisfaction of the client, the client could in accordance with the terms of any applicable client agreement seek arbitration or litigation of the alleged failure.

f. The FSR SIMPLE PTE Addresses Fully the Department's Public Policy Objectives for its "Investment-Advice Fiduciary" Rulemaking

FSR submits that the combination of this client-focused best interest standard and appropriate measure of reasonable compensation should be more than adequate to protect the interests of clients without undue costs and burdens on the professionals and institutions serving the needs of these clients—including low and moderate-income clients.

With these two appropriate conditions—one to assure that the recommendation is in the client's best interest and the other to limit the compensation that the financial professional and the institution receive to a level that would be consistent with prevailing market practices—FSR believes that the conditions, warranties or elaborate disclosure requirements that form the basis of the Department's BIC Exemption would not be required or necessary.

Finally, the FSR SIMPLE PTE's complaint-resolution mechanism also would provide an effective and prompt means for financial professionals or institutions to address the client's allegation of wrongdoing as well as remediate promptly violations of the FSR SIMPLE PTE.

XIII. Conclusion

FSR and its members appreciate and laud the Department's objective of protecting the interests of Retirement Investors against improperly motivated advice, and support the concept of strengthening the already applicable laws and regulations designed to protect them. But applying an expansive scope of the prohibited transaction provisions of ERISA and the Code are not the proper means to achieve this end. These provisions were designed for different purposes and preclude any person taking action when conflicts of interest exist. These statutory provisions do not presume that all such actions are improper, but for administrative convenience preclude all such actions.

The Proposal and the BIC Exemption should be modified to ensure that client choice in the manner of accessing retirement investment advice is preserved. A commissioned-based investment model is the only choice for many Retirement Investors, and can be the lowest cost choice in many instances desired by clients,[75] that generally works in the best interests of clients. It is a model that has long been utilized in commercial practices, and is subject to oversight and regulation by the Commission, FINRA, and various state regulatory agencies, including insurance and securities regulators. Yet, it does appear from the design and structure of the Department's Proposal, as well as the public commentary by officials at the Department, that the Department perceives a commission-based model as inherently unfair to clients. FSR does not share that view, and believes that this view is contrary to that of the agencies generally responsible for the oversight and regulation of insurance and investment activities.

As is illustrated by the commentary set forth in this APPENDIX A, FSR believes that the Department's Proposal and the proposed BIC Exemption would create a

[75] OLIVER WYMAN, ASSESSMENT OF THE IMPACT OF THE DEPARTMENT OF LABOR'S PROPOSED "FIDUCIARY" DEFINITION RULE ON IRA CONSUMERS 12 (2011) (noting that many low- and moderate-income investors prefer a commission-based fee structure over a fee-based advisory relationship), *available at* http://www.dol.gov/ebsa/pdf/WymanStudy041211.pdf.

regulatory régime that will require an entire overhaul of how financial professionals, institutions, and others do business with retirement plans and Retirement Investors, and that places undue and unnecessary burdens and restrictions on the individuals and firms who will be deemed to be "fiduciaries" under the Department's re-engineering of the definition of "investment advice."

We believe it is a reasonable assumption that many financial professionals and institutions will cease to provide services to Retirement Investors, or to those with small to modest account balances, and to small businesses that would adopt modest retirement programs. It is these investors who need the greatest level of assistance to plan and save to meet their unique needs in retirement, but the BIC Exemption is likely to reduce access to that assistance.

The expenses and increased legal liability exposure inherent in the BIC Exemption that is the centerpiece of the Department's Proposal, and its numerous, complex and elaborate conditions will drive the cost of providing services to Retirement Investors up dramatically (if such services are at all available to low and moderate-income Americans). While it is conceivable that the Proposal will force financial professionals and institutions into a "fee-for-service" model with respect to some segment of the market, it is likely that many clients, especially those with small to modest account balances and those who are "buy-and-hold" investors,[76] will find that model unacceptable, and forego the assistance that may be made available thereunder.

Thus, it is FSR's view that the Proposal will have the contrary effect to the objective that the Department intends to achieve—which is helping Retirement Investors. If adopted substantially as proposed, our expectation is that the review of efficacy will be "the operation was a success, but the patient died."

On the other hand, the FSR SIMPLE PTE would meet the Department's policy goals without imposing the burdens of the Proposal or the BIC Exemption on Retirement Investors or the financial professionals and institutions that serve them. The SIMPLE PTE would maintain access to professional investment advice and guidance, and help savers meet address their unique financial needs in retirement, and make those savings last a lifetime. Finally, the SIMPLE PTE would preserve American's flexibility to work

[76] Securities broker-dealers also will have to weigh whether placing clients with "small or modest account balances" in a fee-for-service advisory program would comply with applicable securities law requirements. *See, e.g.,* SEC. & EXCH. COMM'N, OFFICE OF COMPLIANCE INSPECTIONS AND EXAMINATIONS ("OCIE"), *Examination Priorities for 2015* at 2 (Jan. 13, 2015) (noting the risks arising from financial professionals that offer a variety of fee arrangements to retail investors, OCIE's 2015 exam focus will consider "recommendations of account types and whether they are in the best interest of the client at the inception of the arrangement and thereafter, including fees charged, services provided, and disclosures made about such relationships"), *available at* http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf.

with their preferred adviser, and to pay for retirement products and services in the manner of their choosing. Accordingly, we recommend that the Department adopt the SIMPLE PTE in lieu of the Proposal and the proposed BIC Exemption.

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APPENDIX B

FSR's *Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption*

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Internal Revenue Code (Code) section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan or individual retirement account (IRA) from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary discharge its duties respecting the plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of Code section 401(a) that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under ERISA section 408(a) and Code section 4975(c)(2), the Department must find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protects the rights of participants and beneficiaries of the plan and IRA owners, respectively;

(3) If granted, the proposed exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Dates: *Written Comments*: Written comments concerning the proposed class exemption must be received by the Department on or before **[Insert date that is 60 days following publication in the Federal Register].** All comments received will be made a part of the record. Comments should state the reasons for the writer's interest in the proposed class exemption.

Addresses: All written comments concerning the proposed class exemption should be sent to the Office of Exemptive Determinations by any of the following methods, identified by ZRIN: 1210-ZA[__]:

Federal eRulemaking Portal: http://www.regulations.gov at Docket ID number: EBSA-2014-00[__]. Follow the instructions for submitting comments.

Email to: e-OED@dol.gov.

Fax to: (202) 693-8474.

Mail: Office of Exemptive Determinations, Employee Benefits Security Administration, (Attention: D-11712), U.S. Department of Labor, 200 Constitution Avenue, NW, Suite 400, Washington, DC 20210.

Hand Delivery/Courier: Office of Exemptive Determinations, Employee Benefits Security Administration, (Attention: D-11712), U.S. Department of Labor, 122 C Street, NW, Suite 400, Washington, DC 20001.

Instructions. All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW, Washington, DC 20210. Comments will also be available online at www.regulations.gov, at Docket ID number: EBSA-2014-00[__] and www.dol.gov/ebsa, at no charge.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security Number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

For Further Information Contact: Karen E. Lloyd or Brian L. Shiker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (202) 693-8824 (this is not a toll-free number).

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Proposed Simple Investment Management Principles and Expectations Exemption

Section I—Best Interest Exemption

(a) *In general*. ERISA and the Internal Revenue Code (Code) prohibit a fiduciary with respect to an employee benefit plan (Plan) and any individual retirement account (IRA) from receiving compensation that varies based on its investment recommendations. Similarly, a fiduciary is prohibited from receiving compensation from third parties in connection its advice.

This exemption permits certain persons who provide investment advice or guidance to Retirement Investors (as defined in Section VI, below), and their associated Financial Institutions, Affiliates and other Related Entities (each as defined in Section VI, below), to receive such otherwise prohibited compensation as described below.

(b) *Covered transactions*. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities to receive compensation for products or services provided in connection with the following: (i) an acquisition, disposition or holding of an asset or an interest in an investment program by a Plan, participant or beneficiary account, or IRA, as a result of the Adviser's and/or Financial Institution's advice to any Retirement Investor, including, without limitation, Recommendations with respect to proprietary or other limited range of products or services or products or services that give rise to Third Party Payments; or (ii) distributions, "rollovers," transfers of property or assets of the Plan or IRA. The exemption provides relief from the restrictions of ERISA sections 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F).

The Adviser and Financial Institution must comply with the provisions of Sections II-IV, below to rely on this exemption.

(c) *Exclusions*. This exemption does not apply to the following:

(1) The compensation is received as a result of investment advice to a Retirement Investor generated solely by an interactive Internet website in which computer software-based models or applications provide investment advice based on personal information each investor supplies without any personal interaction or advice or guidance from an individual Adviser (*i.e.*, so-called "robo-advice"); or

(2) The Adviser or Financial Institution (i) exercises any discretionary authority or discretionary control respecting management of the Plan or IRA assets involved in the transaction or exercises any authority or control respecting management or disposition of such assets; or (ii) has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA.

Section II—Impartial Conduct Standard and Other Requirements

(a) *Impartial Conduct Standard*. (1) When providing investment advice to the Retirement Investor regarding any asset of a Plan or IRA or any interest in an investment program in which a Plan or IRA participates or will participate, the Adviser and/or Financial Institution will provide investment advice that is in the "Best Interest" of the Retirement Investor. The *best interest* of the Retirement Investor means that at the time any Recommendation is made, the Adviser and/or Financial Institution's Recommendation to the client: (i) reflects the care, skill, prudence, and diligence under the circumstances then-prevailing that a prudent person would exercise; and (ii) provides the Retirement Investor with an opportunity for an appropriate return, risk exposure, or benefit taking into account the Retirement Investor's unique needs as disclosed by the Retirement Investor to the Adviser and/or Financial Institution. Under this standard, the Adviser and/or Financial Institution must evaluate any Recommendation made to a Retirement Investor in light of the totality of information the Retirement Investor has disclosed to the Adviser and/or Financial Institution concerning the Retirement Investor's investment objectives, the Retirement Investor's risk profile and tolerance, financial circumstances and needs, and the role of the Recommendation as part of the Retirement Investor's overall investment portfolio; and

(2) When providing investment advice to the Retirement Investor regarding a Plan or IRA or any interest in an investment program in which a Plan or IRA participates or will participate, the Adviser and/or Financial Institution will not make a Recommendation with regard to such asset or interest if the compensation anticipated to be received by the Adviser, Financial Institution, Affiliates and Related Entities in connection with the acquisition, disposition or holding of the asset or interest by the Plan, participant or beneficiary account, or IRA, will exceed Reasonable Compensation. The term *Recommendation* is defined in Section VI, below.

(b) *Conditions*. The Adviser and/or Financial Institution shall:

(1) Adopt written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest (as defined in Section VI, below) on any Recommendation and ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II (a), above; and

(2) Identify Material Conflicts of Interest and adopt measures reasonably designed to ensure compliance with the Impartial Conduct Standards set forth in Section II (a), above.

(c) *Disclosures*. The Adviser and/or the Financial Institution must provide clear and concise disclosures in "plain English" to the Retirement Investor covering the following items:

(1) Identify and disclose any Material Conflicts of Interest, and the policies that the Adviser and/or Financial Institution have in place to mitigate the impact of any such Material Conflicts of Interests;

(2) Inform the Retirement Investor of its right to obtain (and when requested, to provide the Retirement Investor with) complete information about the fees associated with the asset or interest being recommended to be acquired, disposed of or held, that are paid or payable to the Adviser, Financial Institution, and any Affiliates, including all direct and indirect fees. Such disclosures shall be made in a manner consistent with the requirements applicable to covered service providers under Section 408(b)(2) of ERISA; *provided*, that any disclosures made that satisfy applicable federal securities or state banking or insurance law or applicable regulations thereunder with respect to Material Conflicts of Interests and the direct and indirect fees paid or payable to the Adviser, Financial Institution, or any of their respective Affiliates will be deemed to satisfy the disclosure requirements set forth in this Section II(c)(2); and

(3) Disclose to the Retirement Investor whether the Adviser and/or Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the recommended acquisition, disposition or holding of an asset of a Plan or IRA or any interest in an investment program in which a Plan or IRA participates or will participate.

Section III—Compliance Processes

(a) *Compliance Process*es. To assure compliance with the conditions in Section II of this exemption, the Adviser and/or Financial Institution must implement the following compliance processes:

(1) Adopt written policies and procedures reasonably designed to ensure that the Adviser and/or Financial Institution complies with the conditions of the exemption. The policies and procedures must be tailored to the business and operations of the Adviser and/or Financial Institution, and must include appropriate training for relevant personnel who manage the Adviser's and/or Financial Institution's business and operations and the persons who interact with Retirement Investors, including Advisers and call center and other customer service staff.

(2) Adopt written policies and procedures reasonably designed to remediate promptly any failure to comply with the conditions of this exemption. Such policies would include a process for the Retirement Investor to submit a written complaint

describing the alleged failure to meet the conditions of the exemption, which would be followed by an opportunity for the Adviser and/or Financial Institution to resolve the complaint. If the compliant accurately reflects a failure to comply with the otherwise applicable provisions of the exemption, the policies would require that the Adviser and/or Financial Institution promptly restore the Retirement Investor to the same position as it would have been in had such failure not occurred. If the correction is properly implemented, the Adviser and/or Financial Institution will be deemed to be in compliance with this exemption.

Section IV—Recordkeeping

(a) *Recordkeeping*. The Adviser and/or Financial Institution maintains for a period of six (6) years, in a manner that is accessible for examination, the records necessary to enable the persons described in paragraph (b) of this Section IV to determine whether the Adviser and/or Financial Institution has met the conditions of this exemption; *provided* that:

(1) If the records are lost or destroyed due to circumstances beyond the reasonable control of the Adviser and/or Financial Institution, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party, other than the Adviser and/or Financial Institution responsible for complying with the provisions of paragraph (a) of this Section IV, will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or are not available for examination as required by paragraph (b), below.

(b) (1) Except as provided in paragraph (b)(2) of this Section IV (and notwithstanding any provisions of ERISA section 504(a)(2) and (b)), the records referred to in paragraph (a) of this Section IV are unconditionally available at their customary location for examination during normal business hours by:

(A) Any authorized employee or representative of the Internal Revenue Service;

(B) Any authorized employee or representative of the Department with respect to Plans subject to ERISA;

(C) Any fiduciary of a Plan that engaged in an acquisition, disposition or holding of an asset or interest in an investment program which is acquired, disposed of or held in reliance on this exemption, or any authorized employee or representative of such fiduciary; or

(D) Any participant or beneficiary of a Plan or IRA owner that engaged in the acquisition, disposition or holding of an asset or interest which is purchased, disposed of or held in reliance on a Recommendation made by the Adviser and/or Financial Institution under this exemption, or any authorized employee or representative of such participant, beneficiary or owner.

(2) None of the persons described in paragraph (b)(1)(C) and (D) of this Section IV are authorized to examine privileged trade secrets or privileged commercial or financial information, of the Adviser and/or Financial Institution; or information identifying other individuals.

Section V—Exemption for Pre-Existing Transactions

Covered transaction. Subject to the applicable conditions described in this Section V, the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b) shall not apply to the receipt of compensation by an Adviser, Financial Institution, and any Affiliate and Related Entity, in connection with the acquisition, holding or disposition of any asset or interest, as a result of the Adviser's and/or Financial Institution's advice, that was purchased, disposed of, or held by a Plan, participant or beneficiary account, or an IRA before the Applicability Date.

Section VI—Definitions

For purposes of this exemption:

(a) *"Adviser"* means an individual who:

(1) Is a fiduciary of a Plan or IRA, including by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) and/or Code section 4975(e)(3)(B), and the applicable regulations thereunder; and

(2) Is an independent contractor for, or an employee, agent, or registered representative of, a Financial Institution.

(b) *"Affiliate"* of an Adviser or Financial Institution means:

(1) Any person directly or indirectly through one or more intermediaries that controls, is controlled by, or is under common control with the Adviser or Financial Institution. For this purpose, *"control"* means the power to exercise a controlling influence over the management or policies of a person;

(2) Any officer, director, employee, agent, registered representative, relative (as defined in ERISA section 3(15)), member of family (as defined in Code section 4975(e)(6)) of, or partner in, the Adviser or Financial Institution; and

(3) Any corporation, partnership, or other entity of which the Adviser and/or Financial Institution is an officer, director, employee, or similar position; or in which the Adviser and/or Financial Institution is a partner.

(c) *"Financial Institution"* means the entity that employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative; and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 [15 U.S.C. § 80b-1 *et seq*.] or under the laws of the jurisdiction in which the Financial Institution maintains its principal office and place of business;

(2) A bank or similar financial institution supervised by the United States or any state or territory of the United States; or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act [12 U.S.C. § 1813(b)(1)]);

(3) An insurance company qualified to do business under the laws of any state or territory of the United States; *provided*, that such insurance company:

(A) Has obtained a Certificate of Authority from the insurance commissioner of its jurisdiction of domicile which has neither been revoked nor suspended;

(B) Has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year, or has undergone a financial examination (within the meaning of the law of its domiciliary jurisdiction) by the jurisdiction's insurance commissioner within the preceding five (5) years; and

(C) Is domiciled in a jurisdiction whose law requires that actuarial review of reserves be conducted annually by an independent firm of actuaries and reported to the appropriate regulatory authority; or

(4) A broker or dealer registered under the Securities Exchange Act of 1934 [15 U.S.C. § 78a *et seq*.].

(d) *"Individual Retirement Account"* (*"IRA"*) means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including an individual retirement account described in Code section 408(a), but excluding any non-retirement account (*e.g.*, health savings account, education savings account, *etc*.).

(e) *"Material,"* when used to qualify a requirement in this exemption, limits the information required to those matters to which there is a substantial likelihood that a reasonable Retirement Investor would attach importance in determining engage in—or refrain from engaging in—a particular action or transaction(s).

(f) *"Material Conflict of Interest"* means an Adviser or Financial Institution has a financial interest that could materially affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding an asset or an interest in an investment program.

(g) *"Plan"* means any employee benefit plan described in ERISA section 3(3), and any plan described in Code section 4975(e)(1)(A).

(h) *"Recommendation"* means a communication that, based on its content, context, and presentation, would reasonably be viewed by an objective person as an explicit suggestion that the advice recipient engage in, or refrain from engaging in, a specific transaction or transactions; *provided*, *however* that no such communication (i) that is a general advertisement shall constitute a "recommendation" unless it includes an explicit suggestion that the recipient purchase or sell a specific asset; and (ii) shall be considered a "recommendation" to continue holding an asset absent an express statement that the advice recipient should not sell or otherwise dispose of the asset.

(i) *"Reasonable Compensation"* means an amount of compensation that is not in excess of prevailing market rates or practices for investments in that specific product type. *For example, if an* Adviser recommends to a Retirement Investor an investment in a mutual fund that is primarily engaged in the investment of domestic securities, which charges fees within a range of fees commonly charged generally by funds of similar size and with similar investment objectives, the compensation received would be deemed Reasonable Compensation.

(1) Any compensation received by a broker or dealer subject to regulation by the United States Securities and Exchange Commission (*"SEC"*) or the Financial Industry Regulatory Authority (*"FINRA"*) that is otherwise permitted to be received under applicable SEC or FINRA regulations, in conformity with applicable securities laws, shall be deemed to be Reasonable Compensation.

(2) Any compensation received by an insurance agent or insurance company subject to regulation by insurance authorities of any state or territory of the United States that is otherwise permitted to be received under applicable insurance regulations, in conformity with applicable insurance laws, shall be deemed to be Reasonable Compensation.

(3) In no event would the term Reasonable Compensation include gifts or gratuities that exceed *de minimis* amounts (*i.e.*, less than $250 in the aggregate *per annum*), or as otherwise permitted by applicable law.

(j) *"Related Entity"* means any entity other than an Affiliate in which the Adviser or Financial Institution has an interest which may affect the exercise of its best judgment as a fiduciary.

(k) *"Retirement Investor"* means:

(1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his Plan account or to take a distribution;

(2) The beneficial owner of an IRA acting on behalf of the IRA; or

(3) A Plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof) of a Plan subject to Title I of ERISA to the extent it acts as a fiduciary for the Plan.

(l) *"Third-Party Payments"* mean sales charges when not paid directly by the Plan, participant or beneficiary account, or IRA owner; or "rule 12b-1" fees (within the meaning of 17 C.F.R. § 270.12b-1) and other payments paid to the Financial Institution or an Affiliate or Related Entity by a third party as a result of the acquisition, disposition or holding of an asset or interest in an investment program by a Plan, participant or beneficiary account, or IRA owner.