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Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
Suite 400
200 Constitution Avenue, NW
Washington, D.C. 20210

Attention: D-11933

Re: *Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (RIN 1210-AB82)*

Ladies and Gentlemen:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to respond to the request for information on new exemptions or changes to the fiduciary rule and related prohibited transaction exemptions (the "RFI") published by the Department of Labor (the "Department") in the Federal Register on July 6, 2017.[2] As one of the nation's leading retirement services providers, Fidelity has a deep and long-standing commitment to working with the Department on its rulemaking in the area of investment education and advice.

Our goal is to ensure that investment advice is provided in the investor's best interest and that the rules for investment advice allow savers continued choice and access to the products and services they need. As we have stated in our previous comment letters on the Rule, we continue to believe that the Department's new framework for regulating investment advice under ERISA and the prohibited transaction provisions of the Code is misguided. As the long-standing primary regulator charged with investor protection, the Securities and Exchange Commission ("SEC") should lead the rulemaking on this topic through coordinated and constructive engagement with the Department to develop a workable solution that results in uniform protections for investors and a uniform set of rules for advisors.

Most of the RFI requests information in connection with the impact of the rule on the availability of investment advice, the development of new products and services and the costs of

[1] Fidelity was founded in 1946 and is one of the world's largest providers of financial services. Fidelity provides recordkeeping, investment management, brokerage and custodial/trustee services to thousands of Code section 401(k), 403(b) and other retirement plans covering approximately 25 million participants and beneficiaries. Fidelity is the nation's largest provider of services to individual retirement accounts ("IRA") with more than 7 million accounts under administration. Fidelity also provides brokerage, operational and administrative support, and investment products and services to thousands of third-party, unaffiliated financial services firms (including investment advisors, broker-dealers, banks, insurance companies and third party administrators) that may in turn provide investment advice to plans, participants and IRA owners.

[2] *Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions*, 82 FR 31278 (July 6, 2017). Capitalized terms not otherwise defined have the meaning ascribed to them in the RFI.

compliance. In the Attachment to this letter, we have outlined suggested changes to the Rule and the BIC Exemption that would help address the continuing concerns we have with the Department's rulemaking in this area. However, we would like to focus our comments on an independent legal basis that we believe compels the Department to rethink the scope and nature of the Rule itself. This legal basis is grounded in the policies and concerns underlying the enactment of ERISA and exposes as yet unresolved inconsistencies between the Rule, ERISA's fiduciary framework and the rules of ERISA section 404(c) that govern liability of fiduciaries for participant-directed investments.

A careful analysis leads to the inevitable conclusion that, despite the Department's more than 20-year old interpretive position, the statutory language of ERISA and its underlying policies do not support imposing ERISA fiduciary standards on advice to *participants* (individuals responsible for their own retirement assets) as opposed to advice to *plans and plan fiduciaries* (institutional fiduciaries such as trustees and plan sponsors responsible for overseeing the retirement assets of others). This analysis also shows that the Rule is inconsistent with the priorities of the Administration to encourage and empower Americans to make their own financial decisions.

Advice to Individuals, including Participants, Should Be Subject To Standards of Conduct Defined by Financial Services Regulation, and Not ERISA

The extensive regulation of the financial services industry in the United States is fragmented. The primary financial services regulators vary depending on the activities of the provider and the products they sell – the SEC for registered investment advisers, FINRA for broker-dealers, the OCC or state regulators for banks and state-level regulation for insurance companies. This fragmented regulatory framework is particularly problematic for retail investors looking to navigate the market for financial services and is precisely the reason Congress enacted Dodd-Frank section 913. As stated by the SEC staff:

> Broker-dealers and investment advisers are regulated extensively, but the regulatory regimes differ, and broker-dealers and investment advisers are subject to different standards under federal law when providing investment advice about securities. Retail investors generally are not aware of these differences or their legal implications. Many investors are also confused by the different standards of care that apply to investment advisers and broker-dealers. That investor confusion has been a source of concern for regulators and Congress.[3]

The Department's rulemaking to establish the best interest standard through ERISA and the Internal Revenue Code prohibited transaction rules only adds to the fragmentation and confusion. Investors are now faced with different standards of conduct, disclosure requirements and enforcement mechanisms for retirement and non-retirement accounts – effectively doubling the complexity of the regulatory framework in one stroke.

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[3] *Study on Investment Advisers and Broker-Dealers: As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC Staff (January 2011).

ERISA does not require this additional level of regulatory complexity nor does ERISA's statutory framework as envisioned by Congress clearly support it. As the Department has pointed out many times, ERISA was enacted in 1974 prior to the existence of participant-directed 401(k) plans, the widespread use of IRAs, and the now commonplace rollover of plan assets from ERISA-protected plans to IRAs.[4] At that time, defined benefit plans were the predominant workplace retirement arrangement and participants have no role in plan investment decision-making in a defined benefit plan. Therefore, Congress could not have envisioned that participants would have primary responsibility for investment decision-making in the retirement plans that today provide the main source of their retirement income and, consequently, the important role that investment advice to participants might play in retirement security.

The Department uses this change in the retirement landscape to justify exercise of its rulemaking power under ERISA to effect the broad and sweeping changes that the Rule is making to the financial services industry. An equally valid point of view, though, is that these changes in the retirement landscape require a closer look at the policy of regulating individual participant investment decisions under a statute intended to regulate institutional fiduciaries of employee benefit plans. Participant-directed individual account plans such as typical 401(k) plans are more in the nature of employer-sponsored and maintained investment platforms than traditional pooled employee benefit plan arrangements, and participants treat their plan accounts much like any other investment account they maintain. Now more than ever, individual investors need to make holistic investment decisions across their savings accounts whether in individual plan accounts, IRAs or retail brokerage accounts. Therefore, advice to individuals with respect to those accounts should be subject to the same regulatory framework.

The legal path to this consistent regulatory framework already exists under the statutory provisions of ERISA. However, it requires new thinking about the way ERISA's advice rules operate that test basic assumptions underlying more than 20 years of interpretation by the Department. This new thinking is based on a legal analysis that shows that subjecting advice to *participants* – as opposed to advice to a *plan or a plan fiduciary* – to ERISA's fiduciary responsibilities is not supported by the statutory provisions of ERISA that apply where a participant exercises independent control over his or her account. The key points of this analysis are as follows:

- ERISA provides a precise framework for the allocation of fiduciary responsibilities with respect to the investment of plan assets which does not readily accommodate fiduciary status for advisors selected by *participants* and not the *plan or another plan fiduciary*.

- An important component of this framework is ERISA section 404(c) which insulates *all* plan fiduciaries, including investment advisors, from liability *for any loss* so long as they do not improperly influence participant decision-making. This means that an investment advice provider should not be subject to ERISA's

[4] 81 FR 20946 (June 9, 2016).

standards of conduct when providing advice to a participant who is exercising independent control over his or her account.

- Advice to plan fiduciaries should be subject to ERISA standards because it impacts decisions those fiduciaries make on behalf of the plan. Participants are not fiduciaries under section 404(c) and investment advice they choose to receive impacts only that participant's account.

- Participants remain protected by the vast body of financial services laws and regulations that define appropriate conduct for the firms and their representatives that are subject to them.

Although different in approach and detail, the protections to investors under the laws and regulations of the SEC, FINRA, OCC and state regulators are very substantial and rigorously enforced. With respect to registered investment advisers and broker-dealers, the SEC has stated:

> Investment advisers and broker-dealers are subject to extensive regulation and oversight designed to protect clients and customers, whether retail or other. Both regulatory regimes require investment advisers and broker-dealers to adhere to high standards of conduct in their interactions with retail investors, which are intended to encourage both broker-dealers and investment advisers to act in the interests of their investors and minimize conflicts of interests when providing personalized investment advice or recommendations.[5]

Since commission-based compensation is a primary focus of the Rule, particularly notable are the protections imposed under FINRA rules applicable to broker-dealers. In fact, the much-maligned and mischaracterized "suitability" requirement has been expressly interpreted by FINRA and the court to impose an obligation on broker-dealers to act in their customer's best interest when making investment recommendations. This prohibits a broker-dealer from putting its own interests ahead of the customer's.[6] In connection with the sale of commission-based annuities, another primary focus of the Rule, the so-called Harkin amendment to the Dodd-Frank act is an implicit recognition by Congress of the sufficiency of state suitability regulation of annuity sales.[7] Extensive protections also exist for customers of banks[8]. There is no need to introduce ERISA's separate, distinct and additional fiduciary regime when these existing regulators are already charged with investor protection and have decades of carefully considered rules and principles that do so. In short, the litigation risk and prohibited transaction excise tax exposure that are a direct consequence of the Rule will only increase the costs of providing investment advice to individuals while adding nothing substantive to the securities regulatory framework that already protects investors.

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[5] Staff of the Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers* (January 2011) at 102 (https://www.sec.gov/news/studies/2011/913studyfinal.pdf).
[6] FINRA Regulatory Notice 12-25 (July 9, 2012), FAQ 1.
[7] Section 989J of the Dodd-Frank Wall Street Reform Act of 2010.
[8] *See, e.g.*, 12 CFR part 9; Office of the Comptroller of the Currency, *Personal Fiduciary Activities* (February 2015) (found at https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/am-pfa.pdf).

Respecting ERISA's statutory framework for participant advice provides a path to restore a uniform standard of conduct that applies to both retirement and non-retirement accounts. Otherwise, the Department's advice rule overlaps financial services regulation for retirement accounts, increases complexity and compounds the very investor confusion that Congress sought to address through Dodd-Frank section 913.

ERISA's Statutory Framework

ERISA establishes a comprehensive fiduciary framework governing both the investment and administrative activities of employee benefit plans. It requires that every plan have at least one named fiduciary responsible for operation and administration of the plan.[9] In the case of a funded plan, it also requires that the plan have a trustee with exclusive authority and discretion to manage and control the assets of the plan.[10] And it imposes high standards of conduct on fiduciaries, including duties of prudence and loyalty.[11]

ERISA includes detailed provisions for allocating fiduciary responsibilities to investment managers and among other fiduciaries to ensure that all aspects of administering the plan and investing its assets are subject to fiduciary oversight.[12] Under ERISA, the trustee has *exclusive* authority to invest the assets of the plan. The only exceptions are where the trustee is subject to directions of a named fiduciary or where a named fiduciary appoints an investment manager as defined in section 3(38).[13] This section in turn requires that the investment manager acknowledge fiduciary status with respect to the plan. In this way, any person designated by a named fiduciary to provide discretionary investment management services to a plan is brought within ERISA's fiduciary framework with a clear allocation of responsibility among the plan's fiduciaries.

In terms of allocation of responsibilities for nondiscretionary investment advice, ERISA states that if the plan so provides a named fiduciary may employ a person "to render advice with regard to any responsibility such fiduciary has under the plan."[14] Although this provision does not use the term "*investment* advice", guidance issued in 1975 by the Department interpreted this term as relating to the investment responsibilities of the fiduciary.[15] This provision empowers named fiduciaries to use investment advisors and dovetails with the definition in section 3(21)(A)(ii) which then makes persons who provide such investment advice themselves fiduciaries to the plan. These provisions say nothing about the responsibility of persons providing nondiscretionary investment advice to participants.

Within this comprehensive framework governing investment fiduciaries, ERISA provides for an important exception from the fiduciary responsibility provisions for participant-directed

[9] ERISA section 402(a)(1).
[10] ERISA section 403(a).
[11] ERISA section 404(a)(1).
[12] ERISA section 402(b) and (c).
[13] ERISA section 403(a)(1) and (2).
[14] ERISA section 403(c)(2).
[15] 29 CFR section 2509.75-8, FR-15.

plans under ERISA section 404(c):

> (c) CONTROL OVER ASSETS BY PARTICIPANT OR BENEFICIARY –
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> (1) (A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—
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> (i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
> (ii) 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….

The breadth of this provision is striking. First, participants are categorically not fiduciaries even though they are exercising discretionary control over plan investments. This immediately raises the question of how a party independently selected by the *participant* (who is by statute not a fiduciary) causes such party to become a fiduciary *to the plan* without the knowledge or action of someone who is already a plan fiduciary such as the trustee or a named fiduciary.

Second, Section 404(c) provides that "no person who is otherwise a fiduciary" is liable for a loss that results from the participant's exercise of control. Taking the words at face value, an investment advice fiduciary is covered by section 404(c) unless investment advice somehow deprives the participant from exercising control.[16] Importantly, the relief from liability is solely with respect to liabilities *under this part* which is a reference to the fiduciary obligations under Part 4 of Title 1 of ERISA. A fiduciary remains subject to liability under other provisions of law, including the financial services laws and regulations.

There is Reason to Question the Extension of ERISA Fiduciary Standards to Participant Advice

Nothing in the language of section 3(21)(A)(ii) either compels or precludes the conclusion that investment advice to *participants* makes a person a fiduciary with respect to the *plan*. Instead, the statute's application to investment advice to participants has been a matter of interpretation by the Department over the past four decades.

The Department's original regulation defining investment advice enacted in 1975 made clear that this definition applied only to "'investment advice' to an employee benefit plan."[17] There is no reference whatsoever to advice to participants in the regulation. In fact, one of the

[16] Section 404(c)'s also encompasses the plan sponsor or other plan fiduciary that hires an advice provider. That is, "no person" includes the plan sponsor or another plan fiduciary, and thus the sponsor or other plan fiduciary is not liable for a loss resulting from a participant's exercise of control under section 404(c).
[17] 29 CFR section 2510.3-21(c)(1).

requirements of the prior regulation was that the advice be provided pursuant to an agreement that the advice will serve as a primary basis for investment decisions. The agreement must be between the advice provider and "the plan or a fiduciary with respect to the plan."[18] Since the participant under section 404(c)(1)(A)(i) is not a fiduciary, this requirement would never be met for investment advice provided to a participant where section 404(c) applies or when the advice provider is independently selected by the participant.

Prior to issuing the new investment advice rule, the Department had expressly provided guidance on advice to participants on only two occasions.[19] On neither occasion did it provide any analysis or discussion on why it was appropriate to treat advice to participants as subject to ERISA's fiduciary standards of conduct. More importantly, the Department never addressed whether an investment advice provider has fiduciary liability for its advice in the context of section 404(c).

First, in 1996 the Department issued Interpretive Bulletin 96-1 ("IB 96-1).[20] For the first time in this guidance, the Department set forth its views "concerning the circumstances under which the provision of investment-related information to participants and beneficiaries in participant-directed individual account pension plans will not constitute the rendering of 'investment advice' under the Employee Retirement Income Security Act of 1974, as amended (ERISA)." However, the Department offered no discussion or rationale for why advice to a participant constituted or was equivalent to advice to an employee benefit plan and thus why it should constitute investment advice within the meaning of the 1975 regulation at all. It merely asserted without discussion that the investment advice regulation applies when determining whether a person renders investment advice to a plan participant who can direct investment of an individual account "because section 3(21)(A)(ii) applies to advice with respect to 'any moneys or other property' of a plan and 29 CFR 2510.3-21(c) is intended to clarify the application of this section…."[21] It even went so far as asserting that an agreement with the participant or beneficiary would satisfy the regulatory definition of investment advice which was contrary to the clear language of the regulation in effect at that time requiring an agreement with the plan or a fiduciary with respect to the plan.[22]

While the Department deemed advice to participants to give rise to fiduciary status, it also recognized that section 404(c) limited fiduciary liability for participant advice in the preamble to IB 96-1:

> Although section 404(c) of ERISA, 29 U.S.C. 1104(c), and the Department's regulations, at 29 CFR 2550.404c–1, provide limited relief from liability for fiduciaries of pension

[18] 29 CFR section 2510.3-21(c)(1)(ii)(B).
[19] In addition to the two instances discussed below, the Department also issued regulations under Sections 408(b)(14) and (g) with respect to a prohibited transaction exemption for participant advice created through the Pension Protection Act in 2006. These regulations are also discussed below.
[20] 29 CFR. section 2509.96-1.
[21] 29 CFR. section 2509.96-1(c).
[22] *Id.*

> plans that permit a participant or beneficiary to exercise control over the assets in his or her individual account, there remains a need for employers and others who provide investment information with respect to pension plan assets to know what standards apply in determining whether an education activity may give rise to fiduciary status."[23]

If section 404(c) were completely inapposite to a fiduciary providing participant investment advice, it would have been much more straightforward for the Department to have stated that the guidance was necessary because section 404(c) provides no relief for investment advice fiduciaries. Instead, the Department clearly implied that section 404(c) applies in circumstances where the participant exercises control over the account but there still "remains a need" for additional guidance. In addition, footnote 2 of the bulletin indicates that issues relating to the circumstances under which information provided to participants may affect the ability to exercise "independent control" for purposes of section 404(c) are beyond the scope of the interpretive bulletin, and that no inferences should be drawn regarding such issues.[24] If investment advice fiduciaries were never entitled to section 404(c) protection, this statement likewise would have been unnecessary. Having clearly recognized the problem, the Department never attempted to reconcile its assertion that participant advice constituted fiduciary activity with the fact that section 404(c)'s fiduciary protection would effectively render ERISA's fiduciary standards of conduct irrelevant with respect to such advice.

No further guidance was issued regarding participant investment advice until 2005. At that time, the Department in an advisory opinion addressed the provision of discretionary investment management services to a participant in a section 404(c) plan that selected and hired the advice provider and concluded that the discretionary manager would be liable for imprudent decisions because they "would not have been the direct and necessary result of the participant's exercise of control, even though the participant selected the person to manage the assets in his or her individual account".[25] The Department did not specifically address the provision of non-discretionary investment advice in the advisory opinion, although it cited IB 96-1 in noting generally that it "has taken the position that [the] definition of fiduciary also applies to investment advice provided to a participant or beneficiary in an individual account plan that allows participants or beneficiaries to direct the investment of their account."[26]

The Department's 2016 investment advice rulemaking is the first time that participant advice has been expressly referenced in a regulatory definition of investment advice by the Department. However, when it issued the advice rule, the Department dismissed the applicability of section 404(c) outright in a manner that is both inconsistent with the statements made in connection with IB 96-1 and that fails to consider how section 404(c) operates or ERISA's allocation of fiduciary responsibilities where the participant exercises independent control. The sum total of the discussion of section 404(c) in the rule's preamble is as follows:

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[23] 61 FR 29586 (June 11, 1996).
[24] 29 CFR. section 2509.96-1(b), *fn 2.*
[25] DOL Advisory Opinion 2005-23.
[26] *Id.*

> ERISA section 404(c) provides relief for acts which are the direct and necessary result of a participant's or beneficiary's exercise of control. Although a participant or beneficiary may direct a transaction in his or her account pursuant to fiduciary investment advice, that direction would not mean that any imprudence in the advice or self-dealing violation by the fiduciary investment adviser in connection with the advice was the direct and necessary result of the participant's action. Accordingly, section 404(c) of ERISA would not provide any relief from liability for a fiduciary investment adviser for investment advice provided to a participant or beneficiary. This position is consistent with the position the Department took regarding the application of section 404(c) of ERISA to managed accounts in participant directed individual account plans. *See* 29 CFR 2550.404c–1, paragraphs (f)(8) and (f)(9).[27]

The Department's assertion that its position on the application of section 404(c) to nondiscretionary advice is consistent with its position on managed accounts overlooks critical distinctions between a discretionary investment manager and a nondiscretionary provider of investment advice within ERISA's fiduciary framework. A discretionary manager has full authority to manage plan assets and therefore, by definition, its actions in managing the account are not the result of the participant's exercise of control. A nondiscretionary provider of investment advice makes recommendations that will only affect a participant's account if the participant chooses to implement the recommendation. In other words, a participant who receives nondiscretionary investment advice continues to exercise some level of control over investment decisions by choosing to implement them while a participant who appoints an investment manager does not. Regardless of the merits of the Department's position on the application of section 404(c) to discretionary managers, it is irrelevant to the application of section 404(c) to nondiscretionary advice providers.[28]

Even apart from this fundamental distinction between discretionary management and non-discretionary investment advice for purposes of section 404(c), it is questionable whether comparing a discretionary investment manager selected by a trustee or named fiduciary to a non-discretionary investment advice provider independently selected by a participant would be appropriate under ERISA's fiduciary framework. As explained above, exclusive authority for managing plan assets resides in the trustee. The only exceptions are where the trustee is subject to the direction of a named fiduciary or the named fiduciary appoints an investment manager. Unless the participant is a named fiduciary, which is rarely the case, the trustee (who has custody and controls the assets of the plan) cannot follow the directions of an investment manager independently selected by the participant without risking liability based on the trustee's exclusive responsibility for managing investments of the plan. Therefore, a discretionary manager is not properly appointed as a fiduciary under ERISA unless appointed by a named fiduciary as an

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[27] 81 F.R. 20965-66 (April 8, 2016).

[28] The Department has similarly adopted a regulation providing that section 404(c) does not apply to protect a plan fiduciary from liability for the imprudent selection or monitoring of designated investment alternatives under a plan. 29 CFR 2550.404c–1(d)(3). As with a discretionary investment manager, a participant has no control over the selection of designated investment alternatives by the plan fiduciary. Thus, this position is similarly inapposite to a non-discretionary investment advice provider.

investment manager under the plan.[29] Admittedly, a participant could give effective control to a managed account provider without involvement of the plan fiduciary by giving the manager access to his or her account (e.g., by sharing log-in credentials). However, this is more properly viewed as essentially having the manager act as a proxy for the non-fiduciary participant rather than the manager itself exercising control over the account as a plan fiduciary. In any case, if a discretionary manager is not viewed as properly appointed when appointed independently by the participant, then it would be a perverse result indeed for a nondiscretionary investment advisor selected by a participant, without any involvement of the trustee or named fiduciary, to be treated as a plan fiduciary.

In any event, the preamble's cursory statement on section 404(c) provides no analysis and simply states that a provider's investment advice is not the direct and necessary result of a participant's exercise of control. But this merely states the obvious. Any action by a fiduciary that would form the basis for liability under ERISA must have been taken by the fiduciary itself and not the participant. If that fact alone disqualified a fiduciary from section 404(c) protection, then no breach by a fiduciary would be subject to 404(c) protection, and the Department's rationale would render section 404(c)'s protection essentially meaningless.

One potential rationale for not relieving an investment advice fiduciary of liability under section 404(c) is to assert that investment advice effectively prevents a participant from exercising control over his or her account, notwithstanding that the participant must act to implement the advice. Under the new advice rule, advice includes any communication that can be reasonably understood as a suggestion that a participant take or refrain from taking an action. It is not clear how, for example, a mere suggestion that a participant consider investing in a plan's target date mutual fund would deprive a participant from exercising control over his or her account as a practical matter. But asserting that is so nevertheless merely assumes the intended result and begs the key question that the Department has not addressed throughout this rulemaking – what are the circumstances under which information provided to a participant by an investment advice provider may affect the ability of the participant to "exercise control" within the meaning of section 404(c)?

In fact, the Department regulation adopted in 1992 specifically outlines what is required for a participant to exercise control over the account in order to qualify for the relief of section 404(c).[30] The basic concepts underlying the section 404(c) regulation are that participants must have access to a sufficiently broad range of investment choices, be able to exercise choice freely from among those investments and have access to sufficient information to make an informed choice. While some of these requirements are quite onerous, the basic purpose of section 404(c) is to encourage plans to allow individual participants to have choice in how they invest their assets.

The regulation also requires that the participant's exercise of control be "independent" which is defined as follows:

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[29] This is recognized in the two examples cited by the Department in the advice rule's preamble both of which contemplate a plan fiduciary designating the investment managers selected by the participant. *See* 29 CFR 2550.404c–1, paragraphs (f)(8) and (f)(9).

[30] 29 CFR 2550.404c–1

> (c)(2) *Independent control.* Whether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case. However, a participant's or beneficiary's exercise of control is not independent in fact if:
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> (i) The participant or beneficiary is subjected to improper influence by a plan fiduciary or the plan sponsor with respect to the transaction;
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> (ii) A plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary, unless the disclosure of such information by the plan fiduciary to the participant or beneficiary would violate any provision of federal law or any provision of state law which is not preempted by the Act; or
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> (iii) The participant or beneficiary is legally incompetent and the responsible plan fiduciary accepts the instructions of the participant or beneficiary knowing him to be legally incompetent.[31]

In short, under section 404(c), a fiduciary may not subject a participant to improper influence and may not conceal material non-public facts (unless revealing them would violate applicable law), but is otherwise not subject to liability under ERISA so long as the participant has full information and a full opportunity to implement his or her own investment choices.[32]

The section 404(c) regulation goes even further where a participant or beneficiary exercises control over the assets in his account to engage in a sale, exchange or leasing of property, or a loan with a plan fiduciary or an affiliate of such fiduciary. The regulation states that such exercise of control will not be "independent" unless the terms of the transaction are "fair and reasonable" to the participant or beneficiary at the time of the transaction.[33] A transaction will be deemed to be fair and reasonable to the participant or beneficiary if he pays no more than, or receives no less than, adequate consideration as defined in ERISA section 3(18) in connection with the transaction. As explained in the preamble to the section 404(c) regulation, these standards were adopted from established principles relating to the circumstances under which consent of a beneficiary of a trust will relieve a trustee from liability for breach of his fiduciary duties, citing to the Restatement of Trusts.[34] What this means is that, under section

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[31] 29 CFR section 2550.404c-l(c)(2).

[32] The focus on "improper" influence in the regulation is particularly striking. If investment advice meeting a fiduciary standard – which would presumably constitute "proper" influence – also served to prevent a participant from exercising independent control, then the regulation would not have used the word "improper" rather than simply referencing "influence" generally.

[33] 29 CFR section 2550.404c-l(c)(3).

[34] 57 FR 46906 (October 13, 1992), *see* text at FN 25 citing *Restatement (Second) of Trusts,* section 216 (1959) which provides:

> (l) Except as stated in Subsections (2) and (3), a beneficiary cannot hold the trustee liable for an omission of the trustee as a breach of trust if the beneficiary prior to or at the time of the act or omission consented to it.
>
> (2) The consent of the beneficiary does not preclude him from holding the trustee liable for a breach of trust, **if–**

404(c), the trustee of the plan can engage in a principal transaction with a participant so long as the trustee does not exert improper influence and the terms of the transaction are fair and reasonable. What is important to infer here is that the definition of independent control is intended to protect the participant in transactions with a plan fiduciary or plan sponsor where the overwhelming balance of power in the transaction rests with the institutional plan fiduciary, as opposed to protecting the participant from himself or herself.

While the preamble to the Department's advice rule provides no real explanation of how the Rule comports with section 404(c), the Rule itself clearly goes far beyond the existing regulatory framework. The new investment advice regulation imposes ERISA fiduciary standards of conduct on any person that makes "a communication that would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action" with respect to a participant's investment of his or her account. Imposing prudence and loyalty standards on anyone who makes a "suggestion" is a far cry from imposing those standards only when the person exercises "improper influence" or "conceals material non-public facts". That is a remarkable extension of the conduct standards beyond those that apply under section 404(c). It essentially implies that once a participant receives such a suggestion, the participant is no longer competent to evaluate it independently.

In addition, the failure to reconcile the Rule with section 404(c) is perhaps most clearly evidenced by a provision in the 404(c) regulation which states: "A fiduciary has no obligation under Part 4 of Title I to provide investment advice to a participant or beneficiary under an ERISA section 404(c) plan." [35] This provision appears in the section of the regulation defining what constitutes the exercise of independent control, and was included to make clear that a plan need not provide investment advice in order for section 404(c) to apply. IB 96-1 states similarly that there is no requirement under the section 404(c) regulation to provide either investment education or investment advice. [36] However, if there were an obligation for a fiduciary to provide investment advice to comply with section 404(c), and the fiduciary providing the advice had liability for that advice under section 404(c) as it does under the new investment advice rule, the result would be circular. In other words, if a fiduciary must provide investment advice in order to ensure that the participant exercises independent control, but the recommendations in connection with that investment advice give rise to liability notwithstanding section 404(c), a fiduciary could never fully insulate itself from liability as section 404(c) specifically contemplates. The fact that the Department felt the need to clarify this in the section 404(c) regulation demonstrates that

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(a) the beneficiary was under an incapacity at the time of such consent or of such act or omission; or
(b) the beneficiary, when he gave his consent, did not know of his rights and of the material facts which the trustee did not reasonably believe that the beneficiary knew; or
(c) the consent of the beneficiary was induced by improper conduct of the trustee.

(3) Where the trustee has an adverse interest in the transaction, the consent of the beneficiary does not preclude him from holding the trustee liable for a breach of trust not only under the circumstances stated in Subsection (2), but also if the transaction to which the beneficiary consented involved a bargain which was not fair and reasonable.

See also III Scott, Trusts section 216 (3rd ed.1967); Bogert, Trusts section 941 (2d ed. 1960).

[35] 29 CFR 2550.404c–1(c)(4).

[36] 29 CFR. section 2509.96-1(b), *fn 1*.

investment advice fiduciaries were to be protected from liability for advice to participants under section 404(c). The new advice rule reversed this long-standing position without analysis or discussion and now stands in conflict with the language of the 404(c) regulation and section 404(c) itself.

The extent to which the investment advice rule deviates from ERISA's statutory scheme for allocation of fiduciary responsibilities is also clearly evident in the area of distributions. The Rule provides that a recommendation to take a distribution from a plan is "investment advice" under ERISA. If that is true, then the distribution decision must be an incidence of managing the plan's assets. However, the trustee under ERISA has *exclusive* authority to manage the assets and section 404(c) is the only provision available to relieve that trustee from liability for participant's decisions. On what legal principle is the trustee relieved from liability for a participant's decision to take a distribution from the plan where section 404(c) does not apply (for example, a distribution from a defined benefit plan)? No one would take the position that a trustee of a defined benefit plan should be liable for a distribution made solely at a participant's request pursuant to the terms of the plan. Yet, the logic of the Department's advice rule would require that result since the distribution, even though it was made without any input from the trustee, would nevertheless be the exclusive responsibility of the trustee under those circumstances. The problem is not with ERISA and section 404(c) but with the Department's attempt to impose liability under the advice rule in connection with participant-decision making under ERISA in ways never contemplated by ERISA itself.

This Analysis is Supported by the Statutory Exemption for Participant Advice Enacted by Congress in 2006

Congress amended ERISA through the Pension Protection Act of 2006 to include a new prohibited transaction exemption for the provision of investment advice to participants.[37] This marked the first time that the statute itself explicitly referred to participant investment advice. A fair question is why a prohibited transaction exemption is needed if advice to participants is not subject to ERISA's fiduciary framework. Where a plan complies with section 404(c) thus protecting all fiduciaries from liability, a prohibited transaction exemption may seem unnecessary and superfluous.

However, section 404(c) does not say that a person providing advice is not a fiduciary. In fact, advice providers selected by another plan fiduciary may be fiduciaries under ERISA. However, section 404(c) provides that an advice provider will not have liability as a fiduciary under ERISA if its requirements are met. Accordingly, in the plan context, there is still a reason to provide certainty about the application of the prohibited transaction rules which govern the conduct of fiduciaries. Moreover, in the IRA context, the individual account holder is the fiduciary with respect to the account so prohibited transaction relief is needed for investment advice in that context as well.

[37] ERISA Sections 408(b)(14) and 408(g).

Importantly, the conditions that Congress imposed under the exemption are completely consistent with ERISA's fiduciary framework as described above. For example, the exemption requires that an advice provider apply generally accepted investment theories, use relevant information about the participant, use objective criteria to provide asset allocation portfolios and, importantly, operate "in a manner that is not biased in favor of investments offered by the fiduciary adviser".[38] These requirements, in particular the "not biased" requirement, would be unnecessary if the advice provider were always otherwise required to meet ERISA's duties of prudence and loyalty. The reason they are needed is that while an advice provider is a fiduciary, it has no liability for failing to comply with the prudence and loyalty standards of conduct where the requirements of section 404(c) are met, and thus Congress chose to impose these requirements through the prohibited transaction exemption.

It is worth noting as well that, while Congress imposed these conditions when creating the prohibited transaction exemption under ERISA, it did not require as a condition of the exemption that an advice provider meet the standards of prudence and loyalty themselves or to contractually obligate itself to do so. Yet, less than four years after enactment of the Pension Protection Act, the Department began its effort to issue an advice rule which not only purports to impose such standards of conduct with respect to advice to all participants and IRA owners, but to do so in a way that complicates the overall regulatory framework and increases the potential for confusing investors.

Excluding Participant Advice from the ERISA Fiduciary Framework is Consistent with Individual Choice

Section 404(c) is premised on the notion that where an individual has full information about a transaction, and is not subject to improper influence, the individual can make his or her own choices. It allows individual choice free from ERISA's fiduciary constraints and therefore encourages plans to offer investment choice. The investment advice rule discourages individual choice by imposing ERISA liability on advisors assisting participants with those choices in situations where Congress clearly intended to promote individual choice. The point is not that advisors should be free to act without constraints on their conduct. The point is that their conduct should be governed not by ERISA but by financial services regulators. The only time ERISA's strict fiduciary responsibility provisions should come into play is when the advisor's conduct deprives the individual of control in the manner contemplated by the section 404(c) regulation.

The Department's advice rule effectively treats advice to a participant as advice to the plan or plan fiduciary thereby bringing all advisors within ERISA's fiduciary framework. This is a questionable result as both a matter of law and a matter of policy. Until the Rule was revised, few had reason to challenge this conclusion because most investment assistance could be structured to avoid fiduciary status. With the vast expansion in scope of fiduciary liability imposed by the new Rule, the examination of the Rule should consider how this Rule as a whole integrates into

[38] These requirements apply where the advice is provided through a computer model. Similar requirements apply under the Department regulation where the advice is provided through an entity that receives a level fee.

ERISA's fiduciary framework and section 404(c). For the reasons above, we believe that advice to a participant should be treated as investment advice under section 3(21)(A)(ii) of ERISA only where the participant is not exercising independent control as defined in the section 404(c) regulation – specifically where there is a potential harm to the plan or there is risk that a plan fiduciary such as the trustee or plan sponsor is taking advantage of the participant. This approach creates a path for consistent regulation of investment advice to individuals through financial services regulation.

A New Legal Framework for Investment Advice

The approach taken by the Department in the BIC Exemption and other prohibited transaction provisions of the Rule imposes a substantive standard of conduct on fiduciaries providing advice to participants and IRA owners that is difficult to reconcile with ERISA or the Internal Revenue Code. This results in different standards of conduct for investment advice providers to plan participant accounts and IRAs than other types of non-retirement accounts with the resulting potential for complexity and confusion on behalf of retail investors.

However, the Department can apply the Rule consistent with ERISA's fiduciary framework and return responsibility for regulating conduct to the appropriate prudential regulator with two simple fixes. Taking these steps would ensure consistency between Department regulation and financial services regulation in the area of investment advice to retail investors, creating a uniform standard of conduct regardless of account type. The two fixes are:

- Change the definition of investment advice so that it continues to include advice to the plan and plan fiduciaries but does not include recommendations to participants who exercise independent control over their investment choices as defined in the section 404(c) regulation or who select their own advice providers.

- Issue a new prohibited transaction exemption that covers all transactions recommended by a regulated financial services firm so long as the recommendations comply with the standard of conduct required by its primary financial services regulator.

The first step would reinforce the primacy of ERISA's pre-existing fiduciary framework under section 404(c) over the Rule, and make it clear that the Rule only applies in circumstances where the participant is not exercising independent control or selecting his or her own advice provider. Put another way, any time a participant is exercising independent control or selecting his or her own advice provider, that participant's advice provider should be subject to its primary regulator, not to the Department's investment advice rule.

The second step would then ensure that no advice could be provided to participants or IRA owners unless the advice provider complied with its primary regulator's standards of conduct. The Department should create a new, streamlined prohibited transaction exemption the sole condition of which would be that the regulated financial services firm providing advice must have

complied with the standard of conduct specified by its primary financial services regulator (SEC for registered investment advisers; SEC/FINRA for broker-dealers; the OCC for federal banks and state banking authority for banks supervised by a state; state insurance commissioners for insurance companies). This approach would result in a uniform standard of conduct established by an advice provider's primary regulator for advice to participants and IRA owners that would be the same as the standard of conduct applicable to such customer's other account types.

The Department's advice rule would continue to apply to advice to employee benefit plans and their fiduciaries, as well as advice to participants who do not exercise independent control and do not select their own advice providers. However, this scope is in keeping with ERISA's traditional fiduciary framework.

We would be pleased to respond to any questions or comments regarding this letter.

Sincerely,

Ralph C. Derbyshire

cc: **United States Securities and Exchange Commission**
The Honorable Jay Clayton, Chair
The Honorable Kara M. Stein, Commissioner
The Honorable Michael S. Piwowar, Commissioner

Financial Industry Regulatory Authority
Robert Cook, Chairman and Chief Executive Officer, FINRA
Robert Colby, Chief Legal Officer, FINRA

Attachment to Fidelity Investments
Comment Letter on RIN 1210-AB82
dated August 7, 2017

The body of our comment letter requests that the Department change the Rule and allow the SEC and other financial services regulators to establish standards of conduct with respect to investment advice to plan participants and IRA account holders. If the Department does not adopt this approach, this attachment sets forth a number of alternative changes to the Rule and the BIC Exemption that should be made with respect to participant investment advice. This attachment also sets forth other changes to the Rule and the BIC Exemption applicable to investment advice to plans and plan fiduciaries in any case.

The Fundamental Problem with the Rule

The fundamental problem with the Rule is that, with very limited exceptions, the broad definition of investment advice does not distinguish between an advisor's discussion and sale of its own services and the advisor's actual recommendation of investment products and services. The Rule therefore treats the advisor as a fiduciary with respect to its own services and compensation, in some cases before a fiduciary relationship even exists. This would be the case both for advisors with transaction-based compensation and advisors selling fee-based advisory services. That approach is both unprecedented in fiduciary law and not commercially viable, potentially requiring an advisor to recommend its competitors over itself even if its own services are wholly appropriate for the investor. We have previously commented extensively on the problems this approach creates and have proposed specific solutions for the Department's consideration.[A1] We will not reiterate those comments here but they warrant full consideration as the Department conducts this examination of the Rule.

One additional point of note, though, is that the failure to distinguish between sales communications and investment advice results in a bias under the Rule against the broker-dealer business model where customers incur a fee and broker-dealers receive compensation only in connection with transactions executed for the customer. For more than 80 years, the law has recognized the fundamental distinction between broker-dealers and investment advisers. This distinction is appropriate because there is a fundamental difference between selling and advising. We believe this is a fundamental distinction worth preserving. The reason is that the advice model almost always implies payment of an identifiable separate charge to the customer for the advice received. For discretionary advisers (who make investment decision on behalf of customers) and for nondiscretionary advisers who regularly advise customers, this model makes sense. However, for small investors, payment of an ongoing fee is often uneconomic because of minimum fee requirements that advisers must impose as a business matter. In addition, investors of any size who want to make their own investment decisions and only need periodic assistance from an adviser, paying an ongoing advisory fee for advice that is not needed is uneconomic. The Rule's bias toward the advisory model clearly will result in more limited investor choice in contravention

[A1] *Fidelity Investments* comment letter submitted July 21, 2015 at: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00658.pdf and comment letter submitted April 17, 2017 https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01385.pdf.

of the Administration's stated objective to empower individual choice. Fidelity is acutely aware of this problem as we seek to maintain ways to preserve investor choice for our large and diverse customer base.

The only way the final Rule recognizes a distinction between selling and advising for individual investors is a provision that purports to permit an advisor to recommend itself to a customer without that recommendation being treated as investment advice. This has become known as the "hire me" exception. However, the Department has been clear that when a recommendation to "hire me" effectively includes a recommendation on how to invest or manage plan assets, that recommendation could be considered investment advice under the Rule.[A2] This approach is wholly inadequate because financial services providers must be able to discuss the details of specific products and services they offer and are appropriate for the investor to have an effective "hire me" discussion. Following are suggested changes to address this fundamental problem:

Changes to the Rule

Require a Reasonable Level of Reliance by the Investor

The Rule subjects investment assistance to a fiduciary standard even where there is no expectation of reliance on the advice or advisor by the investor and no understanding or expectation on the part of the investor that such assistance is unbiased and is in his or her best interest. Rather, there need only be an understanding that the advice "is specifically directed to the advice recipient for consideration in making investment or management decisions…." Nor does the Rule provide any way for an advisor and an individual to avoid a fiduciary relationship, even if the parties were to enter into an express agreement to the contrary. For example, the Rule would subject an explicit sales pitch by a broker-dealer to an IRA owner to fiduciary standards, even if both the advisor and the IRA owner agreed that such communication was not intended to be unbiased advice in the IRA owner's best interest.

Such an all-encompassing definition goes beyond traditional and well-established principles of fiduciary law. Under common law, a fiduciary duty may arise when "either one of the parties, in entering [a] transaction, expressly reposes a trust and confidence in the other or because of the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence is necessarily implied."[A3] The Rule imposes a fiduciary duty even where the investor does not expressly or impliedly place trust and confidence in the advisor by relying on the advice as being unbiased and in the investor's best interest.

The Department should align the Rule with long-standing principles of fiduciary law by requiring a reasonable expectation of reliance by the advice recipient. The Department could accomplish this, for example, by modifying the definition of investment advice to require that, based on the content, context and presentation of such advice, it is reasonable for the advice

[A2] 81 FR 20968 (April 8, 2016).

[A3] See *United Jersey Bank v. Kensey,* 306 N.J.Super. 540, 551, 704 A.2d 38 (App.Div.1997), citing *Berman v.Gurwicz,* 189 N.J.Super. 89, 93, 458 A.2d 1311 (Ch.Div.1981)(internal ellipses omitted).

recipient to rely on such advice as being unbiased and in the recipient's best interest with respect to such recipient's investment or management decisions. This requirement is already effectively included in the definition to the extent that the definition treats all investment advice as fiduciary in nature where the investment advice provider states that it is acting as a fiduciary within the meaning of ERISA. Such a statement would render it reasonable for an advice recipient to rely on the advice as being unbiased and in the recipient's best interest. But, as currently proposed, there is no corollary to this rule that would treat conduct as non-fiduciary in nature even where there is an express understanding that a fiduciary relationship is not intended.

Expand the Carve-Out for Independent Fiduciaries

If reliance is made a component of the definition of investment advice as described above, there is no need for a seller's carve-out because it would be clear from the context that there is no expectation that the seller is providing unbiased advice. However, if the Department does not introduce the component of reliance, it needs to rethink the approach taken to address the problem the Rule creates for any advisor selling investment products or services. The problem is that statements made in the sales context will almost always constitute investment advice under the Rule's current formulation because they are directed to a person and intended to encourage the purchase of a particular product or service.

The Department recognizes this problem and creates an exception for "independent fiduciaries with financial expertise" which has become known as the sophisticated fiduciary exclusion or SFE. However, the SFE does not apply to either small plans or individuals.

As the basis for limiting the exclusion, the Department states that "[r]esearch has shown that disclaimers are ineffective in alerting retail investors to the potential costs imposed by conflicts of interest, of the fact that advice is not necessarily in their best interest, and may even exacerbate these costs."

We disagree that the disclosures proposed by the Department – i.e., fairly informing the counterparty of either the existence and nature of the seller's financial interests in the transaction or that the seller is not undertaking to provide impartial investment advice or act as a fiduciary – would not be effective with respect to investors other than large plan sponsors. The conclusion that retail investors are incapable of understanding this disclosure is contradicted by the prominent role that disclosures play under the BIC Exemption which is largely intended for use in connection with transactions involving individuals. Nor are long-standing, well-settled principles of fiduciary law consistent with such an assumption, as they do not impose fiduciary status on a person unless there is express or implied trust and reliance on the person by the investor and they clearly recognize and permit the need for beneficiaries to waive fully and fairly disclosed self-dealing conflicts. While financial products and services may be complex, understanding the dynamics of a sales transaction is fundamental to the commercial activity that is part of everyone's daily life and the ability to waive fully and fairly disclosed conflicts is essential to the establishment and proper functioning of fiduciary relationships. Therefore, the Department should expand the SFE to apply to small plan sponsors, participants and IRA owners.

Clarify that Recommendations to Enroll In or Contribute to A Plan or IRA is Not Advice

The RFI asks whether recommendations to make or increase contributions to a plan or IRA should be expressly excluded from the definition of investment advice. Such recommendations are not included within the plain language of the definition of advice under the Rule. The Department recently issued FAQs that confirm this result. However, the Department had issued FAQs on two separate occasions that have caused some to question the Department's position in this regard. [A4] In both FAQs, the Department concluded that the described activity would not constitute advice, but none of the described activity included a recommendation to contribute to a plan or IRA as opposed to mere information about the benefits of contributing in the abstract. The absence of a clear statement that a recommendation to contribute to a plan would not constitute advice has caused some to infer that the Department may believe that such a recommendation would constitute advice, notwithstanding the plain language of the Rule. To the extent this ambiguity has a chilling effect on such recommendations, it clearly undermines the strong public interest in encouraging retirement savings. In light of the uncertainty caused by the Department's FAQs on this issue, we respectfully request that the Department include a clear statement in the Rule confirming that recommendations to enroll in or to make or increase contributions to a plan or IRA do not constitute fiduciary advice within the meaning of section 3(21)(A)(ii).

Changes to the BIC Exemption

The approach that the Department has taken with the BIC Exemption for the transition period currently in place through January 1, 2018 is sufficiently protective of plans, participants and IRA owners. In fact, the Department has implicitly acknowledged as much by assuming that the savings to investors that it attributes to the Rule and the BIC Exemption would be achieved by allowing the Rule to become applicable on June 9, 2017. This is precisely the exemptive approach we had suggested in our comment letter on the proposal and we continue to support this approach. In addition, following are the key changes that we urge the Department to make to the BIC Exemption:

Expand the Exemption to Large Plans

The BIC Exemption only applies to investment advice provided to plan participants and beneficiaries, IRA owners, and sponsors of small plans (less than $50 million). Given the protections inherent in the BIC Exemption, there is no reason to deny an investment advice provider that wants to assume fiduciary status with respect to a large plan the ability to rely on the BIC Exemption.

Expand the Exemption to Cover Online Only Computer Model Advice

The BIC Exemption excludes online-only computer model interactions unless an individual advisor is involved in providing the information generated by the model to the investor. That is, online advice is covered so long as a human advisor reads the online results to the investor rather

[A4] *See* Conflict of Interest FAQs (408B-2 Disclosure Transition Period, Recommendations to Increase Contributions and Plan Participation), FAQ 2 and 3 (August 2017), Conflict of Interest FAQs (Part II – Rule), FAQ 9 and 10 (January 2017), and Conflict of Interest FAQs (Transition Period), FAQ 12 (March 2017).

than the investor reading the online results himself or herself. There is no justification for excluding advice in an online format solely because a human being has not read it out to the investor. On that basis alone, the Department should simply expand the BIC Exemption to cover online advice outright.

Using the PPA computer model rule is not an appropriate solution. Among other issues, this would force reliance on two separate exemptions in the extremely common situation where the advice recipient begins the interaction online but then calls to ask for personal assistance from a phone representative. The legislative history of ERISA section 408(g) evidenced the intent of Congress not to override regulatory guidance regarding alternative ways of structuring certain permissible advice arrangements. The exclusion of online-only advice from the BIC Exemption contradicts that approach.

Expand the Exemption to Cover Participants Employed by Financial Institutions

The BIC Exemption does not allow a financial institution to rely on the exemption to provide investment advice to participants in the plans that it maintains for its own employees. The Department's reasoning in adopting this approach is that because of the "special nature" of the employment relationship, the financial institution should not be permitted to profit from the investments of employees because that would not be in the best interests of the plan participants.

This approach is inconsistent with the Department's historical treatment of financial institutions as plan sponsor. For example, the Department stated in the preamble to the ERISA section 404(c) regulation proposed in 1991:

> The Department is persuaded, however, that in the case of plans sponsored by certain financial institutions which have appropriate professional expertise in investment management, the designating fiduciary need not be independent. In enacting ERISA, Congress recognized the need to accommodate such plans by fashioning special rules. For example, section 408(b)(4) of ERISA permits a bank to invest the assets of an in- house plan in deposits of that bank and section 408(b)(5) permits an insurance company to issue contracts to a plan covering its own employees. The stated Congressional policy underlying these exemptions is that it would be "contrary to normal business practice" for a bank or insurer to purchase the products of another company of its own in-house plans. Moreover, the Department has recognized in certain administrative exemptions that it would be contrary to normal business practice for a company whose business is financial management to seek financial management services from a competitor, e.g., Prohibited Transaction Exemptions 77-3 and 82-63.

There is no reason why these same considerations should not be reflected in the BIC Exemption to cover investment advice provided to employees of financial institutions. In many cases, for compliance reasons, those employees are required to maintain their financial assets with the firm itself. Denying those firms the ability to provide employees investment advice means they would have no access to advice whatsoever, unless a third party advice provider is hired at additional expense.