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The Honorable Jeanne Klinefelter Wilson
Acting Assistant Secretary
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Ave NW
Washington, DC 20210

RE: Improving Investment Advice for Workers & Retirees (ZRIN 1210-ZA29)

Dear Assistant Secretary Klinefelter Wilson:

On behalf of our clients working in the retirement services industry (the "Group"), we appreciate your efforts to ensure that retirement savers have access to high-quality investment advice. We are submitting this comment letter in support of a broad-based exemption like the proposed exemption *Improving Investment Advice for Workers & Retirees* (the "Proposed Exemption"). We are hopeful that the exemption will provide a stable framework to allow more Financial Institutions and Investment Professionals to offer high-quality investment advice to meet the needs of today's Retirement Investors. By finalizing a broad exemption that covers advice regarding rollovers and the sale of other investment products and annuities to plans and IRAs, the Department is helping to ensure that Retirement Investors have access to the types of information and products they need while at the same time ensuring that those same Retirement Investors are well-protected. While the Proposed Exemption has flaws, we are confident that the Department can and will convert the proposal into a workable final exemption.

To be clear, where advice is given, the Group has a desire to provide advice that is in the best interest of the retirement customers they serve and that does not subordinate their interests to the interests of the recommender or any third party. We believe the provision of best interest advice can be served through a class exemption that includes workable terms and conditions for providers. Our Group's ability to help plan participants make prudent investment decisions depends upon a stable, longstanding exemption framework. This is why we believe that a class exemption makes the most sense.[1] The need for an exemption is amplified by the Department's

[1] Financial Institutions have developed compliance programs based around Field Assistance Bulletin ("FAB") 2018-02. It is important that FAB 2018-02 remain in place for at least an extended transition period to allow retirement savers to continue to receive high-quality investment advice during the period where Financial Institutions decide whether to utilize the

novel interpretations of the "five part test," 29 CFR § 2510.3–21(c), which would have the effect of expanding the scope of who is an ERISA fiduciary. As you can see from the comments below, we appreciate the work the Department has put into this important initiative and hope that the end product will be a final, workable class exemption that can be viewed as a permanent success by both consumer advocates and the financial services industry.

While we support the Department's efforts, there are a number of important revisions to the Proposed Exemption and its preamble, including with regard to the five-part test, that we believe would benefit retirement investors and the U.S. retirement system generally.

I. Preamble of Proposed Exemption

The preamble to the Proposed Exemption provides the Department's interpretation of the five-part test and several aspects of the Proposed Exemption. We provide these significant comments in response to the Department's request for comments on its statements included in the preamble.[2]

A. Discussion of Five-Part Test

Within the preamble to the Proposed Exemption, the Department made a number of statements regarding the application of the five-part test defining fiduciary investment advice. The preamble discussion is troubling in that it upsets long-standing interpretations of certain prongs of the test. First, the preamble states that a rollover recommendation that does not constitute fiduciary investment advice may later "become" fiduciary investment advice if the recommendation is followed up with additional advice following the rollover.[3] This statement is inconsistent with the fundamental principle that a determination of whether advice is fiduciary is made at the time the underlying recommendation is made.[4] This interpretation also contradicts the requirement that a relationship of "trust and confidence" be present as a pre-requisite to

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new exemption, develop a different compliance strategy, or withdraw from the market. Even after the exemption is finalized, we encourage the Department to allow Financial Institutions and Investment Professionals to rely on FAB 2018-02 as an alternative compliance strategy.

[2] 85 Fed. Reg. 40834, 40840 (July 7, 2020).

[3] 85 Fed. Reg. 40834, 40839 (July 7, 2020).

[4] *See* ERISA § 409(b) ("No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary."); *Moreland v. Behl*, C-92-1238 MHP, 1996 WL 193843, at *11 (N.D. Cal. Apr. 17, 1996) (holding a party cannot be held retroactively liable for advice it provided prior to becoming a fiduciary); *see also Fite v. Merrilll Lynch & Co*, SACV1000008DOCANX, 2010 WL 11556808, at *7 (C.D. Cal. Nov. 2, 2010).

fiduciary status, which the Fifth Circuit found to be the "sine qua non" of fiduciary status in *Chamber of Commerce v. U.S. Department of Labor*.[5]

Moreover, the possibility for retroactive application of fiduciary status would be difficult for Financial Institutions to administer and may cause personalized investment advice to become less available to Retirement Investors. For example, a Financial Institution with no prior relationship to a Retirement Investor may recommend that the Retirement Investor rollover to a self-directed IRA (*i.e.*, an IRA where the Financial Institution will not provide advisory services) it will custody. Following the rollover, the Retirement Investor may desire to avail him or herself of investment advice services offered by the Financial Institution. Under this scenario, the Financial Institution could not offer the services unless it had complied with the Proposed Exemption in connection with its rollover recommendation – which it did not do based on its understanding that it would provide advice only on a one-time basis.[6] Under the Department's interpretation, the Financial Institution would retroactively become a fiduciary at the time of its rollover recommendation, and the rollover would retroactively become a prohibited transaction when it otherwise had not been. To avoid engaging in a retroactive prohibited transaction, the Financial Institution would need to deny the Retirement Investor's request to receive needed advisory services. The Department's position that non-contemplated future acts could make the permissible previous acts impermissible raises serious due process concerns.

The retroactivity issue also arises in the context of "required minimum distributions" for purposes of the Internal Revenue Code of 1986, as amended (the "Code"). In determining whether advice has been provided on a regular basis, "recommendations" should not include advising individuals to take action such individuals are already required to take by law. In this regard, a "recommendation" that someone take a required minimum distribution coupled with a recommendation of what to do with the required minimum distribution should not constitute investment advice under the five-part test.

Further, the preamble discussion suggests that if a rollover recommendation is individualized to an advice recipient, it will necessarily serve as a primary basis for the advice recipient's decision to rollover.[7] Such an interpretation would swallow the primary basis prong and essentially change the five part test to a four part test without a notice and comment process,

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[5] 885 F.3d at 370–371.

[6] We are also concerned that the Department is now aggregating recommendations given to multiple plans or IRAs to determine if advice has been given on a "regular basis". The text of the five-part test and ERISA's statutory text strongly support the conclusion that for someone to become a fiduciary to multiple entities, such person would need to satisfy ERISA section 3(21) or the five-part test looking exclusively at each entity.

[7] 85 Fed. Reg. 40834, 40840 (July 7, 2020).

in violation of the Administration Procedure Act. Moreover, we disagree with the Department's suggestion that recommendations broker-dealers provide that are compliant with Regulation Best Interest should be held to a fiduciary standard. Under Dodd Frank, the Securities and Exchange Commission ("SEC") was required to determine whether to subject broker-dealers to a fiduciary standard, and Regulation Best Interest illustrates the SEC's decision not to do so.[8] Simultaneous with its release of Regulation Best Interest, the SEC also issued guidance distinguishing the activities of broker-dealers from those of investment advisers who must register with the SEC and act as fiduciaries under the Investment Advisers Act of 1940, as amended.[9] Therefore, Regulation Best Interest cannot be used as an indicator of a fiduciary relationship. The Department's presumption that advice that satisfies Regulation Best Interest would satisfy the five part test's "primary basis" prong is unsupported by SEC guidance and judicial interpretations of the five part test.

Accordingly, the Group respectfully requests that the Department state in the preamble to the final exemption that it has reconsidered the above statements and that the statements should be disregarded.

Additionally, the preamble to the Proposed Exemption states that provisions disclaiming a mutual understanding or forbidding reliance on investment advice are to be "appropriately considered" in determining whether a mutual agreement to provide personalized investment advice for purposes of the five-part test exists.[10] The Department should confirm that broker-dealers can provide such a disclaimer in cases where they provide investment recommendations that comply with Regulation Best Interest. This clarification would be important because the Department suggested, as described above, that broker-dealers' investment recommendations should always meet certain prongs of the five-part test. However, to give meaning to the mutual agreement prong of the five-part test, broker-dealers must be permitted to decide whether they will either agree to provide advice that will serve as the primary basis for an Retirement Investor's investment decision, or not agree (*i.e.*, to disclaim agreement).

In light of the novelty of the Department's commentary on the five-part test, and in particular the test's regular basis prong, it is important that the Department acknowledge that certain types of advice or recommendations are not within ERISA's scope. For example, the Department should acknowledge that a recommendation that someone take a distribution from a plan or an IRA and use that money to purchase something that will not be held by a plan or IRA is not "investment advice" even if the salesperson receives a commission. To interpret the five-part test otherwise would constitute an impermissible rewrite of the statute and could subject

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[8] 84 Fed. Reg. 33318, 33322 (July 12, 2019).

[9] 84 Fed. Reg. 33681 (July 12, 2019).

[10] 85 Fed. Reg. 40834, 40840 (July 7, 2020).

boat salespeople, life insurance salespeople, and real estate agents to ERISA. If Congress intended to subject non-plan/non-IRA salespeople to ERISA, it would have done so during the 45 years that have passed since the enactment of ERISA.

B. Application of Fiduciary Duties to IRAs

In a footnote in the preamble to the Proposed Exemption, the DOL suggested that the requirement that prohibited transactions under the Code be corrected imposes affirmative fiduciary duties on disqualified persons with respect to IRAs.[11] Specifically, the footnote states, "Code section 4975(f)(5) . . . defines 'correction' with respect to prohibited transactions as placing a Plan or IRA in a financial position not worse that it would have been in if the person had acted ''under the highest fiduciary standards."[12] The Department uses this footnote to support the imposition of the Impartial Conduct Standards as a condition of the Proposed Exemption in the IRA market. We believe this interpretation was flatly rejected in *Chamber of Commerce v. U.S. Department of Labor*, which described Congress's intention not to impose a fiduciary duty on IRAs.[13] Therefore, the Group respectfully requests that the Department state in the preamble to the final exemption that it has reconsidered the statement and that the statement should be disregarded.

C. Hold Recommendations

The preamble states that the Proposed Exemption would cover investment advice to "hold" investments.[14] However, a hold recommendation is not considered investment advice under the five part test. The Department's 2016 investment advice rule did explicitly cover a hold recommendation, but it was vacated.[15] This statement appears to suggest the Department is, through novel interpretations, amending the five-part test without a notice and comment process, in violation of the Administrative Procedure Act. Therefore, the Group respectfully requests that the Department clarify in the preamble to the final exemption that a hold recommendation is not covered advice for purposes of the five-part test.

D. Account Monitoring Requirement

In the preamble, the DOL suggested that some types of investments may be so complex and risky that an Investment Professional and Financial Institution could not comply with the

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[11] 85 Fed. Reg. 40834, 40842 n. 50 (July 7, 2020).

[12] *Id*.

[13] 885 F.3d at 381.

[14] 85 Fed. Reg. 40834, 40838 (July 7, 2020).

[15] 81 Fed. Reg. 20946, 20997 (Apr. 8, 2016).

Best Interest Standard if they do not provide account monitoring services to the Retirement Investor.[16] This statement appears to suggest the Best Interest Standard goes beyond ERISA's prudence requirement, because the Department's regulation at 29 CFR § 2550.404a-1 regarding a fiduciary's duty of prudence in connection with investment decisions does not require account monitoring. The Department states that the Proposed Exemption is designed to align with other regulations, including SEC Regulation Best Interest.[17] We recognize that the SEC does allow broker-dealers to provide limited monitoring on a voluntary (i.e., contractually-agreed upon) basis as a part of its business of effecting future securities transactions.[18] However, SEC Regulation Best Interest does not require broker-dealers to offer account monitoring. In fact, it prohibits them from providing continuous monitoring or monitoring "that in effect results in the provision of advisory services" that are not in connection with the effecting of securities transactions.[19] In response to SEC Regulation Best Interest, broker-dealers were therefore required to design their incidental advice programs to exclude continuous account monitoring.[20]

The Group respectfully requests that the Department clarify in the final exemption that an Investment Professional does not have to automatically provide "monitoring" in connection with any type of investment, including long term, complex, or illiquid investments. It should be left to the Retirement Investors to determine they type of relationship they want to have with Investment Professionals.

Further, requiring monitoring by Investment Professionals and Financial Institutions who either do not or cannot provide continuous monitoring services would either put broker-dealers at a disadvantage compared to registered investment advisers or put Retirement Investors at a disadvantage, as they would lose access to recommendations regarding the complex products for which advice is most likely to be sought. In essence, this provision would bar broker-dealers from recommending certain classes of investments.

E. The Department's Preamble Statements Regarding Contractual Terms Add Needless Complexity and Mandate Particular Forms of Dispute Resolution

Section II(a)(3) of the Proposed Exemption would require that statements by the Financial Institution and its Investment Professionals to the Retirement Investor about the recommended transaction and other relevant matters not be materially misleading at the time

[16] 85 Fed. Reg. 40834, 40843 (July 7, 2020).

[17] 85 Fed. Reg. 40834, 40836 (July 7, 2020).

[18] 84 Fed. Reg. 33318, 33340 (July 12, 2019).

[19] 84 Fed. Reg. 33681, 333687 (July 12, 2019).

[20] 84 Fed. Reg. 33681, 333687 (July 12, 2019).

they are made.[21] The preamble to the Proposed Exemption states the Department's view that Financial Institutions cannot rely on the exemption if they include exculpation or indemnification provisions in their agreements that are not permitted by applicable law because the condition prohibiting materially misleading statements would be violated.[22]

One of the aims of ERISA is to provide a uniform national standard in the retirement space. This provision could undermine that uniformity. Various states have adopted different standards for brokers, advisers, and insurance agents. But Congress drafted ERISA to promote uniform national regulation of employee benefit plans.[23] The Department should seek to ensure that there is a uniform national standard for compliance with its exemptions. Linking compliance to local and state laws undermines the ability of Investment Professionals and Financial Institutions to provide affordable services to Retirement Investors. Rather than having to develop a single compliance structure, Financial Institutions could be required to develop compliance processes for every state and potentially every city, depending on municipal codes. Exemptions should operate under a national framework.

Moreover, the Department does not explain why it views limits on contractual provisions necessary in light of the robust protections offered elsewhere in the exemption and under ERISA. The Proposed Exemption should focus on ensuring that a Retirement Investor receive high quality advice. Section II(b) of the Proposed Exemption, for example, requires Financial Institutions to disclose their Investment Professional's material conflicts of interest because a reasonable Retirement Investor would view the conflicts of interest as important in deciding whether to accept an Investment Professional's investment recommendation.[24] Retirement Investors are interested in conflicts and mitigation. Retirement Investors are not interested in requirements that Financial Institutions constantly update their contracts based on changes in state and local law.

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[21] We note that it is unclear why a contract between a Retirement Investor and an Investment Professional or Financial Institution for recommendation-related services would provide any information, material or otherwise, about the specific investment course of action that may ultimately be recommended by an Investment Professional to a Retirement Investor.

[22] 85 Fed. Reg. 40834, 40844 (July 7, 2020).

[23] *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657 (1995).

[24] *See Basic* v. *Levinson*, 485 U.S. 224 (1988).

Financial Institutions are already required to comply with applicable law. Applicable law has its own penalties. It is not the Department's place to enforce those laws to the extent those laws do not relate directly to the Department's standard of care.[25]

Additionally, the prohibition on certain exculpation or indemnification provisions is unworkable. Financial Institutions attempt to include such provisions where they believe them to be enforceable. However, in many cases, a Financial Institution will only learn that an indemnification or exculpation provision is impermissible after a court has held such the provision to be impermissible under relevant facts and circumstances. As a result, Financial Institutions who believe, in good faith, that their contractual provisions comply with applicable law may face the retroactive loss of the Proposed Exemption. This alone creates too much uncertainty.

Finally, we are concerned that the language in the preamble related to exculpation and indemnification could be read as an invitation to sue Financial Institutions and Investment Professionals. Litigation risk drives up compliance costs.

We ask that the Department make clear that the availability of the exemption is tied to compliance with the Department's rules and not tied to compliance with all applicable law: municipal, state, or federal. Moreover, notwithstanding that the Department's prohibited transaction class exemptions do not commonly contain a provision creating a private right of action, given the history of the Proposed Exemption, we suggest the Department include a statement in the body of the final exemption clarifying that the exemption does not create a new private right of action.

F. Proprietary Products

The preamble to the Proposed Exemption states that, if applicable, the Financial Institution would need to adopt policies and procedures addressing circumstances where the Financial Institution and its Investment Professionals determine "its proprietary products or limited menu do not offer Retirement Investors an investment option in their best interest when compared with other investment alternatives available in the marketplace."[26] This statement would seem to require an Investment Professional and Financial Institution making recommendations from a limited menu – such as proprietary products – to not only conclude that there is advice that it can give that is prudent despite the constraint but instead goes further and would require determinations that each option is prudent "when compared with other investment

[25] If anything, the implication of an incorrectly-worded indemnification or exculpation provision would be that the Retirement Investor would need to be *less*, not more, careful in reviewing an investment recommendation.

[26] 85 Fed. Reg. 40834, 40847 (July 7, 2020).

alternatives available in the marketplace." We do not believe that Investment Professionals and Financial Institutions should be required to consider investment alternatives it cannot offer to Retirement Investors. This requirement would only serve to limit investor access to prudent investment advice. We agree that Financial Institutions will "form a reasonable conclusion about whether the menu of investment options would permit Investment Professionals to provide fiduciary investment advice to Retirement Investors in accordance with the Impartial Conduct Standards," as stated in the preamble to the Proposed Exemption.[27] If the menu would permit such advice to be provided, there should not be a need for Investment Professional to compare investment options on the menu to those offered by the Financial Institution's competitors. Instead, the Department should align with the SEC's Regulation Best Interest, which does not require consideration of investment options that cannot be recommended.[28]

G. Welfare Plans

We believe the definition of "Plan" under the Proposed Exemption includes welfare plans due to the term's inclusion of all plans defined under section 3(3) of ERISA. However, the use of the term "Retirement Investor" throughout the Proposed Exemption might be read to suggest that the Proposed Exemption is only available in connection with retirement plans. We respectfully request that the Department clarify that the Proposed Exemption is available in connection with investment advice provided to ERISA-covered welfare plans, including the participants and beneficiaries of such plans. The Department could include the following statement in the preamble to the final exemption, which was also set forth in the preamble to the 2016 Best Interest Contract Exemption:

> While the Department uses the term "Retirement Investor" throughout this document, the exemption is not limited only to investment advice fiduciaries of employee pension benefit plans and IRAs. Relief would be available for investment advice fiduciaries of employee welfare benefit plans as well.[29]

II. Text of Proposed Exemption

We set forth below our comments regarding the text of the Proposed Exemption, including our proposed revisions.

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[27] *Id.*

[28] 84 Fed. Reg. 33318, 33382 (July 12, 2019).

[29] 81 Fed Reg. 21010 n.14 (Apr. 8, 2016).

A. Acknowledgement of Fiduciary Status

The Proposed Exemption would require that a Financial Institution provide a written disclosure acknowledging "that the Financial Institution and its Investment Professionals are fiduciaries under ERISA and the Code, as applicable, with respect to any fiduciary investment advice provided by the Financial Institution or Investment Professional to the Retirement Investor."[30] We respectfully request that this requirement be removed or be replaced with a disclosure of the Proposed Exemption's Best Interest Standard.

Retirement Investors would benefit if Financial Institutions can provide investment advice that satisfies the exemption without first requiring the Financial Institution to determine its fiduciary status. Such a result would benefit both Retirement Investors and Financial Institutions. Financial Institutions would be able to gain the certainty of complying with a prohibited transaction exemption providing needed exemptive relief even if their reliance on non-fiduciary status under the five part test is not correct. Retirement Investors would receive personalized investment advice compliant with the Impartial Conduct Standards, including the best interest standard.[31]

However, the requirement to acknowledge fiduciary status would place a toe on the scale to affect the outcome under the five-part test, causing some Investment Professionals and Financial Institutions to become investment advice fiduciaries where they would not have been but for the acknowledgment. In effect, the condition discourages Financial Institutions from using the exemption when it is a close call. As a result, the Group expects that in the uncertain cases described above, Financial Institutions will either not attempt to provide individualized investment advice to Retirement Investors and limit their interactions with Retirement Investors to the information permitted under Interpretive Bulletin 96-1 or take steps to ensure that the recommendation in question is more clearly non-fiduciary. This outcome would unnecessarily harm both Financial Institutions and Retirement Investors.

If the Department believes that a disclosure of the standard of care that will apply to advice must be provided, then a disclosure of the Best Interest Standard should be provided instead of a recitation of the legal term, "fiduciary." The Best Interest Standard is descriptive and easily understood by Retirement Investors. Moreover, the term fiduciary can be confusing to Retirement Investors when considering that the legal requirements applicable to fiduciaries of ERISA plans are different from those applicable to fiduciaries of IRAs.

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[30] Proposed Exemption § II(b)(1).

[31] The Securities and Exchange Commission found that personalized investment advice provides clear benefits to investors. Preamble to Final Regulation Best Interest, 84 Fed. Reg. 33318, 33425–33428 (July 12, 2019).

B. Annual Retroactive Review Requirement and Certification

Section II(d) of the Proposed Exemption requires Financial Institutions to undertake an annual retrospective compliance review. The review must be reduced to a written report presented to the Financial Institution's Chief Compliance Officer and Chief Executive Officer. Proposed Exemption § III(d)(2). The Chief Executive Officer must then certify review of the report and certify certain findings regarding the financial institution's compliance policies and procedures. Proposed Exemption § III(d)(3). The report, certification, and supporting data must be made available to the Department, within 10 business days of the request. Proposed Exemption § III(d)(5).

The Group respectfully requests that the annual review and certification conditions be removed from the Proposed Exemption. These conditions require Financial Institutions to take steps to confirm they are in compliance, but the potential for excise tax penalties for engaging in a violation under the Code provides sufficient incentive for Financial Institutions to take these steps. The requirement that the annual review be maintained and made available to the Department within 10 business days is an example of how the annual review conditions could have unintended consequences. The goal of the annual review is to identify areas for improvement. However, if materials are required to be shared, it creates the perverse incentive to carefully craft the language so as to not suggest (A) that any violations have occurred or even (B) that the Financial Institution's compliance could be improved upon. To do otherwise would create a litigation and enforcement roadmap. In any event, the Department should not be permitted to request the materials from Financial Institutions that only rely on the Proposed Exemption in connection with IRAs, where the Department does not have enforcement jurisdiction.[32]

To the extent that the Department believes an annual review and certification should be required, it should not require that the certification come from someone higher within an organization than the organization's Chief Compliance Officer. Chief Executive Officers may set a compliance based agenda and implement a culture of compliance, but no Chief Executive Officer at a major financial institution is sufficiently involved in sales activity and its oversight to be able to certify to the items requested. Financial Institutions provide a wide array of products and services in the United States, and many, if not most of these do not involve retirement accounts. Moreover, as you know, Chief Executive Officers' responsibilities touch every aspect of a Financial Institution operations, from the development of products and services and marketing, to internal staffing and human resources issues. For that reason, while a Chief Executive Officer could sign a document that makes the required certifications, the certification

[32] *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360, 364 (5th Cir. 2018) ("Title II [of ERISA] did not authorize DOL to supervise financial service providers to IRAs in parallel with its power over ERISA plans.").

would be much more meaningful if it were supplied by an official who is personally involved in compliance matters.

Moreover, the specific findings to be certified go beyond the policy and procedure requirements of the Proposed Exemption. To ensure internal consistency and reduce uncertainty regarding the requirements of the Proposed Exemption, the Group respectfully requests that the Proposed Exemption be modified to conform with the policies and procedures condition as follows:

> (B) The Financial Institution has in place policies and procedures ***that are reasonably designed to be compliant with Section II(c).***[33] ~~prudently designed to achieve compliance with the conditions of this exemption; and~~
> ~~(C) The Financial Institution has in place a prudent process to modify such policies and procedures as business, regulatory and legislative changes and events dictate, and to test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with the conditions of this exemption~~.

Additionally, the Department has broad investigatory powers under ERISA section 504 to determine compliance, including the power to issue subpoenas in connection with investigations. To condition the availability of an exemption on rapidly providing the Department with access to materials that it is already generally entitled to through its investigatory process is inappropriate. We are concerned that courts could view this provision as an impermissible attempt to expand the Department's investigatory powers beyond what Congress granted to it under ERISA section 504.

Finally, if the Department rejects our suggestion that the exemption should eliminate the requirement that the annual reviews be provided at the request of the Department, we would ask that the Department modify the proposed "10 business days of a request" requirement. Financial Institutions may have legitimate difficulties meeting the 10-day requirement in cases where the request is not delivered to an employee with knowledge of the annual review or with the authority to approve delivery to the Department. It may take time for the Department's request to be directed to the appropriate individuals.

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[33] If the Department does not decide to make the changes we have recommended above, then the Department should revise the condition to harmonize with FINRA annual compliance requirements. FINRA rules require that broker-dealers engage in an annual review to confirm that compliance policies and procedures are in place, not whether the policies and procedures were followed in specific transactions. FINRA Rule § 3130(c)(3). As a result, the requirement to engage in a "retrospective" review that includes scrutiny over specific transactions should be removed.

C. Ability to Exclude Financial Institutions from the Proposed Exemption

Section III of the Proposed Exemption describes circumstances by which an Investment Professional and Financial Institution may lose eligibility to rely on the Proposed Exemption. Investment Professionals and Financial Institutions would become ineligible for a period of ten years following conviction of a crime described in section 411 of ERISA or upon the Department Office of Exemption Determinations' declaration that the Financial Institution or Investment Professional has (A) engaged in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally violated the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or (C) provided materially misleading information to the Department.[34] Should one Financial Institution lose eligibility, all other Financial Institutions in the same Control Group lose eligibility.[35]

1. Section III Should Be Removed

The Group respectfully requests that Section III of the Proposed Exemption be removed for the following reasons.

a. The Office of Exemption Determination Should Not Be Given the Power to Exclude Entities from Relying on the Exemption

The potential for the Department's Office of Exemption Determinations to make Financial Institutions ineligible through an informal process raises serious questions about the viability of the Proposed Exemption. As you are well aware, Financial Institutions will need to expend significant resources enhancing their compliance systems and procedures to satisfy the terms and conditions of the Proposed Exemption. These efforts will be predicated on regulatory certainty. The creation of a new informal process outside of well-established enforcement mechanisms makes the circumstances under which Financial Institutions rely on the Proposed Exemption uncertain. The same goals can be achieved through reliance on well-established enforcement mechanisms. For example, the Department or IRS could enter into settlement agreements with Financial Institutions requiring them to structure their advice programs in reliance on other exemptions (or so as to not engage in prohibited transactions), or pursue judgments or consent decrees requiring them to do so.

The Proposed Exemption appears to recognize that due process rights would attach to the Department's decision to make an Investment Professional or Financial Institution ineligible.

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[34] Proposed Exemption § III(a)(2).

[35] Proposed Exemption § III(b)(2).

But the informal process the Proposed Exemption creates is not sufficient to satisfy even minimal notions of due process. Traditional notions of due process require that decisions be made by an independent, disinterested decision-maker. The Office of Exemption Determinations is not an independent decision-maker. Assignment of responsibility for making decisions regarding compliance with the Proposed Exemption to the Office of Exemption Determinations would be akin to the United States Congress, rather than the Federal Courts, adjudicating disputes concerning the construction of federal statutes. Additionally, the Office of Exemption Determinations is not equipped to fulfill this new role. Last year, the Government Accountability Office specifically faulted the Office of Exemption Determinations for failure to maintain documented policies and procedures regarding its decisions on whether to issue administrative exemptions that would reduce the risk of inconsistent decision-making.[36]

Further, to the extent that the Office of Exemption Determinations decides to make an Investment Professional or Financial Institution ineligible based on services provided to IRAs, the Department would exceed its enforcement jurisdiction. The IRS, rather than the Department, retains enforcement jurisdiction over IRAs.[37]

Similarly, placing non-officers of the United States (i.e., career staff who have not been appointed by the President) in a position where they would be adjudicating disputes between a government agency and a regulated entity would raise serious Constitutional concerns. In *Lucia v. SEC*, 585 U.S. __, 138 S.Ct. 2044 (2018), the Supreme Court recently struck down a similar structure.

b. The Department Should Permit Entities that Have Been Penalized Under ERISA Section 411 to Rely on the Exemption

Moreover, the exclusion of a Financial Institution or Investment Professional based on a crime described in ERISA section 411 is unnecessary and exceeds the Department's regulatory authority. Financial Institutions and Investment Professionals already have sufficient incentive to avoid conviction of such a crime because ERISA section 411 would generally make it impossible to provide services, including the provision of investment advice for a fee, to ERISA plans following conviction. ERISA has penalties for non-exempt prohibited transactions and Congress has created penalties for violation of other laws (including the penalties under ERISA Section 411). Congress has not granted the Department the ability to bar a Financial Institution from relying on an exemption that is generally available to all members of the public. We

[36] Individual Retirement Accounts, Formalizing Labor's and IRS's Collaborative Efforts Could Strengthen Oversight of Prohibited Transactions, GAO-19-495 (June 2019), *available at* https://www.gao.gov/assets/700/699575.pdf.

[37] *Chamber of Com. of U.S. of Am.*, 885 F.3d at 364.

believe the Department erred in QPAM, and we ask the Department to not make the same error in this exemption.

Additionally, the Department cannot through an exemption impose ERISA Title I standards on service providers to IRAs. The Fifth Circuit specifically found that the Department's impermissibly ignored that "ERISA Titles I and II distinguish between DOL's authority over ERISA employer-sponsored plans and individual IRA accounts" when it issued the Best Interest Contract Exemption.[38] By requiring IRA service providers to comply with ERISA section 411, the Department would be impermissibly applying Title I of ERISA to IRAs when Congress decided that only Title II should apply.

2. If the Department does not Remove Section III, the Scope of the Condition Should Be Narrowed.

To the extent the Department does not agree with removal of Section III, the Group respectfully requests that the Department remove the Control Group provisions from Section III of the Proposed Exemption. We do not believe that the conduct of a Financial Institution's affiliates reflects on the investment recommendations that a Financial Institutions' Investment Professionals may provide. Such conduct by the Financial Institution's affiliates may not relate to investment advice, or conduct involving ERISA plans or IRAs. Pursuant to the Proposed Exemption, the Financial Institution is required to maintain and enforce policies and procedures for Investment Professionals to follow in meeting the Impartial Conduct Standards. However, affiliates typically maintain different compliance policies procedures. Additionally, a Financial Institution and its affiliates are managed on a day-to-day basis by different officers, and compliance staff is typically separate. As a result, a Financial Institution's loss of the exemption would reduce Retirement Investors' access to personalized investment advice without concomitant protection for Retirement Investors.

Finally, Section III(d) of the Proposed Exemption states that an Investment Professional or Financial Institution who become ineligible to rely on the Proposed Exemption may instead rely on a statutory exemption or seek an individual exemption from the Department. This statement implies that an Investment Professional or Financial Institution could not rely on other class prohibited transaction exemptions issued by the Department, but we do not believe such an extreme result was the Department's intent. Therefore, the Group respectfully requests that the Department clarify that any other prohibited transaction exemption could be relied upon if available.

[38] *Chamber of Com. of U.S. of Am.*, 885 F.3d at 381.

D. Policies and Procedures Requirement

The Proposed Exemption would require that Financial Institutions create policies and procedures "prudently designed" to comply with the Impartial Conduct Standards of the Proposed Exemption.[39] However, the Financial Institution's policies and procedures with respect to covered principal transactions must be "reasonably designed" to meet specified goals.[40] To align and harmonize with the text of SEC Regulation Best Interest, the requirement for policies and procedures under the Proposed Exemption should be to "reasonably design."[41] In terms of designing policies and procedures to regulate the financial services industry, "reasonably designed" procedures are what a prudent person acting with similar aims would develop. There is no reason to use new wording.

E. Exclusion of Robo Advice

Under Section I(c)(2), the Proposed Exemption does not apply if the transaction is a result of investment advice generated solely by an interactive website in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the website, without any personal interaction or advice with an Investment Professional (*i.e.,* Robo Advice). We do not believe there is a good reason to exclude Robo Advice from the Proposed Exemption. Robo Advice provides an opportunity for the delivery of personalized investment advice to Retirement Investors compliant with the Impartial Conduct Standards. Although the Department points to section 408(b)(14)/(g) of ERISA as available to cover Robo Advice, the Department did not apply similar logic to limit the exemption where existing exemptions could also provide relief. For example, the Proposed Exemption applies to recommendations of mutual funds and annuities even though PTE 77-4 and PTE 84-24, respectively, are available in connection with these types of investments.

F. Recordkeeping Requirements

Section IV of the Proposed Exemption requires that Financial Institutions make available records demonstrating compliance with the Proposed Exemption to the Department, plan fiduciaries, any contributing employer and any employee organization whose members are covered by a Plan that engaged in an investment transaction pursuant to this exemption, and participants and beneficiaries. Aside from rollover recommendations and disclosures that must already be provided to Retirement Investors, most of the records required to be produced under

[39] Proposed Exemption § II(c)(1).

[40] Proposed Exemption § IV(c)(1)(B).

[41] 17 C.F.R. § 240.15*l*–1(a)(2)(iii).

the Proposed Exemption do not relate to specific transactions involving Retirement Investors. The record request conditions therefore are not helpful or protective to Retirement Investors.

Moreover, the Department should not be permitted to request documents regarding advice regarding IRAs, where it does not have enforcement jurisdiction. By trying to usurp enforcement authority in the IRA space, the Department would be creating another rule vulnerable to legal challenge under even a narrow reading of the Fifth Circuit's decision in *Chamber of Commerce v. U.S. Department of Labor*. However, the Department could, as it did with the Best Interest Contract Exemption, revise the Proposed Exemption to permit the IRS to request documents concerning advice provided to IRAs.[42] Accordingly, the Group respectfully requests the Proposed Exemption be modified to provide that only the Department or IRS, as may be applicable, may request records.

G. Independence Requirement and Pooled Employer Plans

In order to rely on the Proposed Exemption in connection with recommendations to an ERISA Plan and its participants, the Financial Institution and its affiliates could not be an employer with respect to the plan and could not be a named fiduciary or administrator with respect to the plan, unless the Financial Institution or its affiliates was selected to provide advice by an independent fiduciary.[43] In the preamble to the Proposed Exemption, the DOL includes a 2% revenue test as one component of the independence definition, which is lower than DOL definitions of "independence" in numerous other contexts.[44] Additionally, it is unclear whether the Proposed Exemption could be used in connection with a Pooled Employer Plan, where a Financial Institution or its affiliate would serve as the Pooled Plan Provider, meaning it would be a named fiduciary and administrator with respect to the plan.

Many employees of Financial Institutions desire to receive investment advice from colleagues who would be Investment Professionals under the Proposed Exemption. However, section I(c)(1) of the Proposed Exemption would force employees to obtain advice from the Financial Institution's competitors or forgo the receipt of investment advice altogether, despite the availability of potential discounts or other enhanced services that may be available. The condition would therefore limit significant numbers of Retirement Investors' choices and thereby

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[42] Final Best Interest Contract Exemption, 81 Fed. Reg. 21002, 21081 (Apr. 8, 2016).

[43] Proposed Exemption § I(c)(1).

[44] DOL Adv. Op. 2001-09A (Dec. 14, 2001). A registered investment adviser can rely on the "QPAM Exemption," PTE 84-14, if up to 20% of its assets under management come from the same plan. PTE 84-14, 70 Fed. Reg. 49305 (Aug. 23, 2005).

contradict the Administration's policy of "empower[ing] Americans to make their own financial decisions . . ."[45]

Accordingly, the Group respectfully requests that the Department raise the independence threshold to the 20% limit found in the QPAM Exemption, that it expressly allow Pooled Plan Providers to use the exemption, and that it allow employees of a Financial Institution to receive advice pursuant to the exemption.

H. Best Execution Requirement

Section II(a)(2)(B) of the Proposed Exemption would require that "as required by the federal securities laws, the Financial Institution and Investment Professional seek to obtain the best execution of the investment transaction reasonably available under the circumstances." This exemption condition merely re-states requirements already applicable to Financial Institutions and Investment Professionals under the securities laws. Because the condition would provide no additional meaningful protection to Retirement Investors, and could drive inconsistent interpretations of what is required, we respectfully request that it be removed.

I. Conflict of Interest Disclosures

The Proposed Exemption requires a written disclosure of the Financial Institution and Investment Professional's material conflicts of interests.[46] The Department should confirm that this requirement can be satisfied by, among other things, the provisions of disclosures required under Regulation Best Interest and Form CRS, applicable to broker-dealers, and Form ADV and Form CRS, applicable to registered investment advisers. These securities law requirements provide for significant conflict of interest disclosures that the SEC has determined to be appropriate based on the SEC's study of broker dealer and registered investment adviser business models.[47] The conflict of interest disclosure requirements encompass conflicts of interest associated with advice provided to ERISA plans and IRAs, such as rollover recommendations and additional, duplicative disclosures would result in investor confusion without adding any value.[48]

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[45] *See* Presidential Memorandum on Fiduciary Duty Rule for the Secretary of Labor (Feb. 3, 2017), published at 82 Fed. Reg. 9675 (Feb. 7, 2017)

[46] Proposed Exemption § II(b)(2).

[47] *See, e.g.*, 84 Fed. Reg. 33492, 33530 (July 12, 2019); 84 Fed. Reg. 33318, 33319 (July 12, 2019).

[48] 84 Fed. Reg. 33318, 33361 (July 12, 2019).

J. Good Faith Correction of Errors

The Group respectfully requests that the Proposed Exemption be revised to include a good faith method for error correction modeled off of the Department's compensation disclosure regulation at 29 C.F.R. § 2550.408b-2. That regulation provides that a good faith failure, following the exercises of reasonable diligence, to disclose the required information will not result in a loss of the section 408(b)(2) exemption, provided that the service provider discloses the information within 30 days of discovery of the error or omission.[49] Financial Institutions and Investment Professionals should similarly be permitted to rely on the Proposed Exemption if they exercise good faith and reasonable diligence and correct errors following discovery of the error.

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We appreciate the efforts of the Department in formulating a broad-based exemption. Please let us know if you have any questions related to the foregoing. We look forward to working with the Department in finalizing the Proposed Exemption.

Very truly yours,

Stephen M. Saxon

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cc:
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[49] 29 C.F.R. § 2550.408b-2(c)(1)(vii).