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

Re: *Improving Investment Advice for Workers & Retirees, 85 FR 40834 (ZRIN 1210-ZA29); Conflict of Interest Rule – Retirement Investment Advice: Notice of Court Vacatur, 85 FR 40589 (RIN 1210-AB96) (July 7, 2020).*

Ladies and Gentlemen:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to comment on the Department of Labor's recent rulemaking concerning investment advice to plan sponsors, participants and beneficiaries and IRA owners. The rulemaking includes a technical amendment that restores the 1975 regulation setting forth the five-part test defining an ERISA investment advice fiduciary, removes two prohibited transaction exemptions and returns six others, and reinstates Interpretive Bulletin 96-1.[2] It also includes a Notice entitled "Improving Investment Advice for Workers & Retirees" that proposes a new prohibited transaction class exemption available to investment advice fiduciaries ("the Proposed Exemption"); introduces a new interpretation of the five-part test; and indicates that the Department no longer intends to apply Advisory Opinion 2005-23A (collectively, the "Notice").[3] The Notice also contains a useful history of the Department's previous approaches to defining investment advice fiduciaries under ERISA and the Code as well as a summary of the significant efforts of financial services regulatory bodies to develop standards of conduct related to investment recommendations and advice.

As one of the nation's leading retirement plan 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. 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 thirty million plan participants and beneficiaries. Fidelity is the largest provider of

[1] Fidelity was founded in 1946 and is one of the world's largest providers of financial services.
[2] *Conflict of Interest Rule – Retirement Investment Advice: Notice of Court Vacatur*, 85 FR 40589 (July 7, 2020).
[3] *Improving Investment Advice for Workers & Retirees,* 85 FR 40834 (July 7, 2020). Capitalized terms not otherwise defined have the meaning ascribed to them in the Notice.

individual retirement accounts ("IRAs") with more than nine million accounts under administration. Fidelity also provides brokerage, operational, and administrative support to approximately 13,500 third party, unaffiliated financial services firms (including investment advisers, broker-dealers, banks, insurance companies and third-party administrators) that may in turn provide investment recommendations to plans, participants, and IRA owners.

We support the Department's restoration of the five-part test defining ERISA investment advice fiduciaries.[4] The carefully crafted five-part test has long served as the appropriate definition of when a fiduciary relationship has been established. As the Fifth Circuit stated in *U.S. Chamber of Commerce v. U.S. Department of Labor* when vacating the Department's 2016 effort to replace the five-part test: "The [five-part test] captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client."[5]

We also applaud the Department's efforts to align the Proposed Exemption with the rules, requirements, and interpretations of other financial services regulators. Acknowledging the efforts of various other regulators that similarly have an interest in strong investor protection is a solid foundation on which to build the Department's new Proposed Exemption. Retirement Investors receiving recommendations related to their retirement accounts deserve to know that Financial Institutions do so in their best interest. Aligning the Department's Proposed Exemption to the other efforts in this area is also a significant step toward creating uniform standards and regulation of advice to Americans with respect to their retirement and non-retirement accounts. All investors, including Retirement Investors, will appreciate and benefit from the increased simplicity that results from regulatory alignment.

However, we do not believe that the Department should depart from the interpretation of the 1975 regulation that has stood for over four decades. The new interpretations of that regulation set forth in the preamble to the Proposed Exemption would significantly change how investment recommendations may be provided to Retirement Investors as well as create significant uncertainty as to how Financial Institutions may provide non-fiduciary assistance to customers. We therefore request the Department withdraw its reinterpretation of the five-part test and expressly confirm that the prior, long-standing interpretation applies. In the event the Department determines not to do so, we urge the Department to clarify and modify the reinterpretation in several significant respects.

Similarly, despite welcome steps toward alignment, the Proposed Exemption would overlap and conflict in many respects with the regulations of Financial Institutions' primary financial regulators. Accordingly, we believe that the Department should further simplify its Proposed Exemption to more

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[4] The five-part test provides that "for advice to constitute 'investment advice,' a financial institution or investment professional who is not a fiduciary under another provision of the statute must—(1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the Plan, Plan fiduciary or IRA owner that (4) the advice will serve as a primary basis for investment decisions with respect to Plan or IRA assets, and that (5) the advice will be individualized based on the particular needs of the Plan or IRA." 85 FR at 40834.

[5] *U.S. Chamber of Commerce v. U.S. Department of Labor*, 885 F.3d 360, 363 (5th Cir. 2018).

fully align it with the Securities and Exchange Commission's Regulation Best Interest ("Reg. BI") and the corollary regulations of other financial services regulators. In the event the Department determines not to do so, we recommend several modifications to the Proposed Exemption to reduce confusion and unnecessary burdens that will be imposed on investment advice fiduciaries and that will not benefit Retirement Investors.

I. The Department Should Withdraw Its Reinterpretation of the Five-Part Test and Expressly Confirm that the Prior, Long-Standing Interpretation Applies

As indicated above, we support the Department's restoration of the five-part test and agree that the test is the appropriate benchmark to define ERISA investment advice fiduciary status. However, the Department attempts to do more than simply restore the test that has been in place for nearly 45 years. In the preamble to the Proposed Exemption, the Department significantly reinterprets the five-part test in a manner that undermines its appropriateness as a benchmark of fiduciary status and raises questions as to what activities are fiduciary and non-fiduciary under ERISA.

As a procedural matter, providing a significant reinterpretation of a longstanding regulation in a preamble to a proposed prohibited transaction class exemption does not adequately provide the opportunity for notice and comment that such a material revision of an existing regulation warrants. In that regard, this reinterpretation is contrary to the President's recent executive order.[6]

As a substantive matter, and as further described below, the Department's reinterpretation of the five-part test causes it to extend beyond relationships of trust and confidence that are the hallmark of fiduciary status. As noted above, the Fifth Circuit concluded that one of the 2016 fiduciary rule's flaws was that it "dispense[d] with the 'regular basis' and 'primary basis' criteria used in the regulation for the past forty years".[7] Similarly, and as further discussed below, the reinterpretation set forth in the Notice has substantively modified these two prongs of the test – as well as the mutual understanding prong. The Fifth Circuit also specifically noted the reluctance of courts to defer to "newly found" agency interpretations: "Moreover, that it took DOL forty years to 'discover' its novel interpretation further highlights the Rule's unreasonableness."[8] There, as here, the reinterpretation departs from forty-plus years of the five-part test and the common law's well-settled principle that fiduciary status requires a special relationship of trust and confidence. As noted by the Fifth Circuit, when Congress adopted ERISA, "Congress codified the touchstone of common law fiduciary status—the parties' underlying relationship of trust and confidence—and nothing in the statute 'requires' departing from the touchstone."[9] Only by withdrawal of the reinterpretation will the Department's actions here become fully consistent with the Fifth Circuit's opinion.

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[6] Executive Order 13891, *Promoting the Rule of Law Through Improved Agency Guidance Documents*, intends to prevent agencies from regulating without following the notice-and-comment rulemaking procedures of the Administrative Procedure Act. 84 FR 55235 (Oct. 15, 2019).
[7] 885 F.3d at 366.
[8] 885 F.3d at 380 (citing *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).
[9] 885 F.3d at 369 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)).

Accordingly, we urge the Department to withdraw entirely the portion of the Notice that reinterprets the five-part test and expressly confirm that the prior long-standing interpretation continues to apply. Only a withdrawal and re-confirmation will restore the test so that it will function as intended as a barometer of whether a Financial Institution has achieved the position of trust and confidence that makes a designation of fiduciary status appropriate. The five-part test as historically interpreted is premised on the concept that each of the parts of the test are important factors in determining whether this relationship of trust and confidence exists. Each part of the test must be independently satisfied.

II. At a Minimum, The Department Should Modify Its Reinterpretation of the Five-Part Test in Several Significant Respects

Absent a complete withdrawal of the Department's reinterpretation, we believe there are a number of specific changes to the reinterpretation of the test that, at a minimum, are necessary to clarify the scope of the definition and to ensure that it does not apply beyond relationships of trust and confidence between Financial Institutions and Retirement Investors.

A. Clarify the "Regular Basis" Prong of the Five-Part Test

The Department's reinterpretation erodes the "regular basis" prong of the five-part test. The Department appears to suggest that a relationship between a Financial Institution and Retirement Investor – even if structured to be non-fiduciary in nature -- can lead to fiduciary status through longevity or volume of interactions.

Mere longevity of a relationship and the volume of interactions occurring in that relationship are not sufficient to establish that fiduciary advice is provided on a regular basis within the meaning of the regulation. Rather, what must occur on a "regular basis" in order to establish a fiduciary relationship is "advice as to the value of securities or other property, or … recommendations as to the advisability of investing in, purchasing, or selling securities or other property". It is irrelevant to establishing the "regular basis" prong of the five-part test whether an adviser repeatedly, over a long period of time, or even regularly provides other communications or information to a Retirement Investor, such as investment education, rather than "advice" and "recommendations" as described above.

Accordingly, the Department should clarify that interactions with a Retirement Investor such as servicing, educational or non-investment-oriented relationship interactions, which do not consist of the kind of "advice" and "recommendations" described above, should not be considered when determining whether a Financial Institution meets the "regular basis" prong of the five-part test. Rather, only when the specific "advice" and "recommendations" in the above quoted language are provided on a "regular basis" should the "regular basis" prong of the five-part test be deemed satisfied.

That said, in the event that the Department determines not to withdraw its new reinterpretation of the five-part test, we believe that it is important for the Department's reinterpretation to ensure that Retirement Investors are able to equally access the services of Financial Institutions, irrespective of

when the Retirement Investor develops a relationship with the Financial Institution. In particular, the Department has taken the view that "advice to roll assets out of the Plan into an IRA where the advice provider will be regularly giving financial advice regarding the IRA in the course of a more lengthy financial relationship would be the start of an advice relationship that satisfies the 'regular basis' requirement."[10] We agree with this view and with the Department's statement that "for an investment advice provider who establishes a new relationship with a Plan participant and advises a rollover of assets from the Plan to an IRA, the rollover recommendation may be seen as the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test depending on the facts and circumstances."[11] If that were not the case, then advice providers without prior relationships with a plan or a participant would much more readily be able to claim that this prong was not met, and approach rollover discussions with Retirement Investors in a manner materially different than advice providers with a prior relationship. This disparate application of the "regular basis" prong, moreover, would occur even where the advice providers were otherwise having exactly the same rollover recommendation conversation with the plan participant. The Department's interpretation in this regard would serve to apply the "regular basis" prong to all advice providers in the same way, irrespective of whether the Retirement Investor is at the beginning of a relationship with the Financial Institution or has had some prior relationship with the Financial Institution.

B. Restore the "Mutual Understanding" Prong of the Five-Part Test

The Department has introduced ambiguity and uncertainty by stating that "the determination of whether there is a mutual agreement, arrangement, or understanding that the investment advice will serve as a primary basis for investment decisions is appropriately based on the *reasonable* understanding of each of the parties, if no mutual agreement or arrangement is demonstrated."[12] This could be read to suggest that even if "no mutual agreement or arrangement is demonstrated," the subjective understanding of the Retirement Investor can be sufficient to meet this prong of the five-part test. If so, this interpretation effectively eliminates the requirement that the understanding be "mutual". It is imperative that this relationship of trust and confidence be based on a <u>mutual</u> understanding of the relationship rather than the subjective belief of one of the parties.

The preamble further undermines the "mutuality" requirement and creates uncertainty by stating that "[w]ritten statements disclaiming a mutual understanding or forbidding reliance on the advice as a primary basis for investment decisions are not determinative, although such statements are appropriately considered in determining whether a mutual understanding exists."[13] However, the Department does not describe under what circumstances a communication clearly setting forth the understanding of one party, the Financial Institution, would be insufficient to establish that party's understanding. How else should a party demonstrate its own understanding of the relationship in which it finds itself if not by communicating that understanding to the other party? Where the Financial Institution clearly communicates to the Retirement Investor the nature of their interaction, it

[10] 85 FR at 40839.
[11] 85 FR at 40840.
[12] 85 FR at 40840.
[13] 85 FR at 40840.

should be possible to demarcate for the Retirement Investor that the mutual relationship is not fiduciary in nature.

Furthermore, this reinterpretation of the "mutual understanding" prong of the test significantly increases the risk for a Financial Institution that desires to provide useful information as non-fiduciary education. Assume the Financial Institution has determined that it will provide non-fiduciary education in a specific interaction, and it has structured the interaction accordingly by accompanying the interaction with clear communication indicating its non-fiduciary status. If the Financial Institution's clear communication is not determined to have been sufficient in hindsight, it will likely be deemed to have been acting as an investment advice fiduciary. Therefore, the Department's reinterpretation has created risk and uncertainty: the Financial Institution cannot be certain that by making clear disclosure of its non-fiduciary status that it has avoided fiduciary status.

There should be a clear path for entities that wish to provide information to Retirement Investors that is not ERISA fiduciary investment advice and we ask that the Department clarify that a Financial Institution can establish through clear communication to the Retirement Investor when there is no "mutual understanding" that information provided to the Retirement Investor is fiduciary in nature. We would agree that where a Financial Institution states that it will act in a fiduciary capacity, the Financial Institution cannot adequately disclaim fiduciary responsibility through a buried disclaimer in a lengthy disclosure document. However, where a Financial Institution clearly communicates to the Retirement Investor that it is not acting as an investment advice fiduciary, that communication should be dispositive.

C. Restore the "Primary Basis" Prong of the Test

The Department indicates that Reg. BI recommendations can automatically form the basis for a mutual understanding that the advice will be a primary basis for investment decisions. This effectively turns the five-part test into a three-part test for Financial Institutions subject to Reg. BI. To the contrary, the Department should state squarely that compliance with Reg. BI does not automatically satisfy the mutual understanding or primary basis prongs of the five-part test.

We disagree with the Department's language in the Notice that indicates that recommendations made under Reg. BI automatically meet the primary basis prong:

> When financial service professionals make recommendations to a Retirement Investor, particularly pursuant to a best interest standard such as the one in the SEC's Regulation Best Interest, or another requirement to provide advice based on the individualized needs of the Retirement Investor, the parties typically should reasonably understand that the advice will serve as at least a primary basis for the investment decision.[14]

A Reg. BI recommendation is structured to meet the requirements of Reg. BI. That does not necessarily mean that the recommendation is intended to be a fiduciary recommendation under ERISA.

[14] 85 FR at 40840.

Surely, for example, a broker-dealer should not be precluded from providing a non-fiduciary recommendation to a Retirement Investor, notwithstanding that it may act in the investor's best interest while doing so pursuant to Reg. BI. The Department should preserve the ability to provide non-fiduciary recommendations by expressly confirming that compliance with Reg. BI does not automatically satisfy any of the prongs of the five-part test.

D. Absent a Withdrawal of the Reinterpretation, Financial Institutions Must Be Given Adequate Time to Adjust to the Reinterpretation of the Five-Part Test

Even if the Department determines not to withdraw its reinterpretation in its entirety, and whether or not it undertakes to make the modifications described above, the Department should make explicit that any reinterpretation solely has prospective application after at least an eighteen-month transition period. We believe the Department should expressly state that the reinterpretation applies only prospectively in order to avoid any potential misunderstanding that Financial Institutions that had structured their relationships with Retirement Investors based on the existing regulation had inadvertently acted as investment advice fiduciaries. Similarly, an implementation time period is warranted because the reinterpretation's significant overhaul of the five-part test will cause Financial Institutions that had structured their relationships based on the long-standing interpretation to modify those relationships. Some Financial Institutions may be deemed to be ERISA fiduciaries under the reinterpreted five-part test when that was not the intended relationship. These Financial Institutions will need to consider making many significant changes to maintain their existing non-fiduciary relationship or they will need to have time to modify their service model and update their policies, procedures, governing account documents and customer communications to comply with the Proposed Exemption.

III. The Department Should Finalize the Proposed Exemption with Significant Simplifications or Modifications

One question posed for comment in the Notice is whether the Proposed Exemption is preferable to the "no new exemption" option that the Department considered.[15] We agree with the Department that the Proposed Exemption is better than no new exemption for the reasons cited in the Notice: the Proposed Exemption provides greater flexibility than existing exemptions available for investment advice fiduciaries, and the Proposed Exemption's alignment with other regulatory regimes will help reduce redundancy and potential confusion for Retirement Investors.

Nevertheless, we believe the Proposed Exemption should be significantly simplified or modified as set forth below.

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[15] 85 FR at 40856.

A. The Proposed Exemption Should be Substantially Simplified to Solely Require Compliance with the Rules of the Financial Institution's Primary Financial Regulator

For over two years, since the Department released Field Assistance Bulletin 2018-02, the Department has maintained a non-enforcement policy based on compliance with the Impartial Conduct Standards. We have not seen widespread problems or issues arising under this approach and the Department has not suggested that FAB 2018-02 has resulted in abuse by advice providers or in Retirement Investors receiving poor investment advice. As the Department has noted, a significant new regulatory regime issued by the SEC, Regulation Best Interest, has just become effective as well. This regime expressly applies to recommendations to plan participants and IRA owners, including rollover recommendations.

Given that many Financial Institutions have structured their compliance around FAB 2018-02 without a discernable negative impact on Retirement Investors and given the significant new regulation of advice to plan participants and IRA owners, the optimal approach for the Proposed Exemption is a simple one. The exemption should solely require that a Financial Institution acting as an investment advice fiduciary meet all applicable requirements of its primary financial services regulator when providing fiduciary investment advice to a Retirement Investor. This would be the best approach to achieve the Department's objective of alignment with other financial service regulators and providing a uniform set of rules governing investment advice to Americans for both their retirement and non-retirement accounts.

The Department has limited the Proposed Exemption to only a class of defined Financial Institutions which are either "registered", "supervised" "qualified to do business" or "supervised" by federal or state regulators.[16] These primary regulators have rules regarding fair conduct and antifraud provisions in addition to more specific rules related to investment recommendations. It is these rules that would be best suited to protecting Americans with respect to their retirement accounts as well as their non-retirement accounts.

For example, the SEC has thoughtfully addressed standards of conduct, appropriate disclosures, policies and procedures, and recordkeeping requirements for broker-dealers making a covered recommendation. The SEC has done this in a comprehensive manner through its Reg. BI rulemaking. A Financial Institution that is a broker-dealer must meet all of the component obligations of Reg. BI when making a recommendation of an investment, investment strategy, or account type, including rollover recommendations, to a retail customer. The scope of Reg. BI covers the scope of the Proposed Exemption. In fact, each of the component obligations of Reg. BI track the conditions laid out in Section II of the Department's Proposed Exemption. By tracking each of these areas of Reg. BI generally, yet simultaneously veering from its component pieces in small ways, the Department creates needless additional burdens, compliance traps for the unwary and confusion for the Retirement Investor.[17] We request the Department to instead provide an exemption based on the sole condition of

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[16] Section V(d)(1)-(4) of the Proposed Exemption. 85 FR at 40865.
[17] In substance the requirements of Reg. BI are essentially the same as the Proposed Exemption. For example, Reg BI's Care Obligation requires that the broker have a reasonable basis to believe that their recommendation is in the customer's best interest based on that customer's "investment profile", which includes the retail customer's age, other investments,

compliance with the Financial Institution's primary financial regulator's applicable general conduct standards as well as rules applying to investment recommendations.

B. At a Minimum, the Department Should Modify the Proposed Exemption

If the Department determines not to adopt the simplified approach described above, we urge the Department to modify the Proposed Exemption as set forth below.

1. The Proposed Exemption's Condition that Requires "Written Acknowledgment" of Fiduciary Status is Unnecessarily Confusing and Should be Eliminated

The Proposed Exemption would require that prior to engaging in a transaction pursuant to the Exemption, the Financial Institution provide the Retirement Investor with "[a] written acknowledgement 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."[18] This acknowledgement requirement would lead to unnecessary Retirement Investor confusion about what the acknowledgment means and should be removed from the Exemption before it is finalized.

While drawing on key fiduciary principles, the SEC did not use the term "fiduciary" in Regulation Best Interest for a number of reasons. Some related to the specific fiduciary duties applicable to investment advisers under the Advisers Act. Another reason is that after much consideration and various investor studies, the Commission determined that "using the term ''fiduciary'' to describe the standard may not sufficiently convey meaning regarding the specific

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financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information. 17 CFR 240.15l-1(a)(2)(ii). The Proposed Exemption requires advice that reflects the care, skill, prudence, and diligence that a prudent person would use "based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor". Proposed Exemption Section II(a)(1). 85 FR at 40862.

Reg BI's Disclosure Obligation requires that the broker provides the customer, in writing, full and fair disclosure of all material facts relating to the scope and terms of the relationship, including: "(1) That the broker, dealer, or such natural person is acting as a broker, dealer, or an associated person of a broker or dealer with respect to the recommendation; (2) The material fees and costs that apply to the retail customer's transactions, holdings, and accounts; and (3) The type and scope of services provided to the retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer; and (B) All material facts relating to conflicts of interest that are associated with the recommendation." 17 CFR 240.15l-1(a)(2)(i)(A). The Proposed Exemption requires a written acknowledgement of fiduciary status and a "written description of the services to be provided and the Financial Institution's and Investment Professional's material Conflicts of Interest that is accurate and not misleading in all material respects." Proposed Exemption Section II(b)(1)-(2). 85 FR at 40863.

Reg BI's Compliance Obligation requires that the broker "establishes, maintains, and enforces written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest." 17 CFR 240.15l-1(a)(2)(iv). The Proposed Exemption requires that the "Financial Institution establishes, maintains and enforces written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards in connection with covered fiduciary advice and transactions." Proposed Exemption Section II(c)(1). 85 FR at 40863.

[18] Proposed Exemption Section II(b)(1) at 85 FR 40863.

substance of the standard."[19] Moreover, the SEC determined that "using the term [fiduciary] in the context of a different relationship may introduce further legal or compliance ambiguity."[20]

As a result of the SEC's determination, a Retirement Investor working with a broker-dealer may have recently received disclosure materials describing the broker's capacity, services, and conflicts expressly providing that the broker was not acting in a fiduciary capacity. Under the Proposed Exemption, that Retirement Investor would now have to receive a "written acknowledgement" of fiduciary status. This type of disclosure back-and-forth would be both confusing and frustrating to Retirement Investors trying to make sense of it all.

In addition to Retirement Investor confusion, this condition should also be eliminated because of its potential collateral effects under other laws and regulations, including state fiduciary laws and regulations. For example, in its adopting release for the final Massachusetts fiduciary regulations, the Massachusetts Securities Division indicated that a "contractual obligation that imposes a fiduciary duty" could lead to an ongoing duty to monitor the customer's account beyond the point of the specific recommendation made. While the Department has indicated that it does not intend for the requirements of the Proposed Exemption to create a private cause of action, it is not entirely clear whether a written acknowledgement of fiduciary status might not be interpreted in some circumstances to create a duty to monitor under the Massachusetts fiduciary rule. This is the type of collateral consequence that the Department has otherwise attempted to avoid through the Proposed Exemption and the express decision not to impose contractual obligations on Financial Institutions seeking to use the Proposed Exemption.[21] For these reasons, we urge the Department to eliminate the condition requiring "written acknowledgement" of fiduciary status.

If some type of written acknowledgement is deemed to be necessary by the Department as a condition of the Proposed Exemption, an alternative approach would be that the Financial Institution provide a written acknowledgement to the Retirement Investor of its obligations under the Impartial Conduct Standards. In this way, there is no conflict with other laws or rules or self-governing certification bodies, thereby reducing investor confusion in this area. In addition, it should minimize the potential collateral effects of the acknowledgement in a manner consistent with the Department's stated objectives. Most importantly, this approach will provide assurance to the Retirement Investor that the substantive protections of the Impartial Conduct Standards will apply to the investment advice that the Retirement Investor receives.

[19] 84 FR at 33333.
[20] 84 FR at 33333.
[21] 85 FR at 40842. Footnote 49 states that: "As noted above, the Department does not intend the exemption to expand Retirement Investors' ability, such as by requiring contracts and/or warranty provisions, to enforce their rights in court or create any new legal claims above and beyond those expressly authorized in ERISA. Neither does the Department believe the exemption would create any such expansion." In addition, the Notice indicates that while account monitoring services are permitted by the Proposed Exemption, they are not required: "Neither the best interest standard nor any other condition of the exemption would establish a monitoring requirement for Financial Institutions or Investment Professionals; the parties can, of course, establish a monitoring obligation by agreement, arrangement, or understanding". 85 FR at 40843.

2. The Proposed Exemption Should be Expanded to Cover Online Investment Advice Interactions

The Proposed Exemption excludes what the Department describes as "online" "robo-advice" arrangements that do not involve an Investment Professional. We believe this exclusion is unnecessary and should be eliminated from the Proposed Exemption when it is finalized. In our view, there is no sound reason for this exclusion or for otherwise distinguishing online investment advice from investment advice delivered through a live Investment Professional. The protective elements of the Proposed Exemption would adequately protect Retirement Investors regardless of whether the advice is delivered online or through a live human being. Instead, the exclusion of online advice merely means that, if an Investment Professional were sitting with her Retirement Investor client in front of a computer containing an advice program, the exemption could apply if the Investment Professional read the advice program screens to the Retirement Investor, but the exemption could not apply if the Retirement Investor read the screens and operated the program himself. This distinction is unsupportable and we request that the exclusion for online advice be removed.[22]

Moreover, the existing computer model exemption does not cover rollover recommendations delivered by an investment advice fiduciary. The computer model exemption is designed for in-plan investment advice rather than plan distribution or rollover recommendations. The criteria of the computer model exemption are not aligned with rollover advice criteria.[23] If the Department does not extend the Proposed Exemption to cover online investment advice generally, we would strongly urge that the Department broaden the computer model exemption to cover computer models that can be used to provide online plan distribution or rollover advice.

The Department has made an effort to align the Proposed Exemption with standards of conduct and related requirements formulated by other regulators. It has considered the standards of conduct enacted by others that establish robust protections that can be used for the benefit of Retirement Investors. The Department's approach is designed to leverage disclosures and other safeguards to avoid duplication and increase simplicity for Retirement Investors and Financial Institutions. The SEC did not differentiate between recommendations or advice that is provided through a website rather than

[22] A host of other examples similarly illustrate the arbitrariness of the exclusion. If a Retirement Investor called in to receive investment advice and was asked a series of questions and then advice was provided over the phone through an Investment Professional, that would be covered by the exemption. However, it is unclear if the exemption would apply if a Retirement Investor was presented with a paper version of questions that would be considered and factored into the provision of investment advice, that paper questionnaire was then mailed into the Financial Institution for processing, and then the Financial Institution mailed back a recommendation based on those inputs, since the interaction did not directly involve an Investment Professional in the delivery of the advice. This artificial channel distinction does not make sense in today's world, and that is before factoring in other technologies that might further support the provision of online investment advice and blur these channel distinctions. An online transaction with an Investment Professional on the phone is "hybrid" advice covered by the Proposed Exemption. A similar "hybrid" online interaction may occur where the Investment Professional is not on the phone but is available through a chat functionality. Is that an "online" interaction not covered by the Proposed Exemption? Or is the interaction covered because the Investment Professional is "chatting"? And if that chat is not with a live representative but is powered by automated artificial intelligence responses, is that now not covered by the Proposed Exemption?

[23] See DOL reg. § 2550.408g-1.

through a live Investment Professional in its Reg. BI framework. We believe that the protective provisions of the Proposed Exemption can be applied to online transactions effectively and that the online advice exclusion should be eliminated.

3. The Proposed Exemption's Condition Requiring that Certain Recommendations Be Documented Should be Eliminated

As the Department indicates in the Notice's Preamble, it intends for the Proposed Exemption to be founded on a "principles-based" approach. However, a specific requirement to document every rollover recommendation and every recommendation to change account type runs contrary to that intention and moves away from a broad and flexible principles-based approach. It is true that many Financial Institutions will document the factors used in formulating a rollover or account type recommendation. However, the documentation of such recommendations should be recommended or commended as a good practice rather than imposed as an exemption condition. Indeed, this approach is consistent with the approach described by the SEC in its Reg. BI adopting release: "While the Care Obligation does not require broker-dealers to document the basis for a recommendation, broker-dealers may choose to take a risk based approach when deciding whether or not to document certain recommendations."[24] And, as will be discussed further below, potentially losing the exemption entirely as the result of an occasional documentation failure seems to be an unduly harsh result. Given that this documentation condition provides no substantive protection for the Retirement Investor while increasing paperwork burdens, we would ask that this condition be eliminated.

4. The Proposed Exemption's Coverage of Principal Transactions Should be Expanded

Under the Proposed Exemption, a Financial Institution that provides fiduciary investment advice may engage in principal transactions for a limited number of security types. The Proposed Exemption's regulation of principal trading is layered onto a comprehensive existing legal framework covering principal trades, particularly for broker-dealers and investment advisers. Consistent with our suggestion above in Section III.A, we believe that the interests of Retirement Investors would be further advanced if the Proposed Exemption permitted Financial Institutions that provide fiduciary investment advice to engage in principal transactions across a broad range of security types subject to a sole condition that the Financial Institution comply with the applicable rules of the Financial Institution's primary regulator.

In the event that the Department does not pursue this approach, we provide comments requesting clarity on whether certain investments are covered in the Proposed Exemption's definition of "Covered Principal Transaction" and we urge the Department to include additional investments within the definition.

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[24] 84 FR at 33378.

Covered Principal Transactions are defined in the Proposed Exemption as principal transactions involving certain specified types of investments.[25] Only corporate debt registered under the ’33 Act is included in the definition of a Covered Principal Transaction. We understand that there are practical difficulties that may inhibit a dealer’s ability to systematically determine whether bonds trading in the secondary market were issued pursuant to a registration statement. For example, Section 3(a)(2) bank note offerings (which are generally rated investment grade notes issued by banks) are often not registered. These notes can be held in retirement accounts. We urge the Department to allow corporate debt to be principally traded in connection with investment advice regardless of whether it is registered under the ’33 Act as long as it is offered in a manner that complies with the other conditions of the Proposed Exemption.

The Department should also clarify that Brokered Certificates of Deposit (“CDs”) are included in the definition of Covered Principal Transactions for sales to a Plan or IRA. Brokered CDs and bank CDs both pay a set interest rate that is generally higher than a regular savings account and FDIC insurance applies to both. Unlike a bank CD, a Brokered CD can be traded on the secondary market, meaning that investors don’t necessarily have to hold them to maturity. Brokered CDs are offered as new issue offerings and from the secondary market. They are most often sold on a principal basis and are commonly held in IRAs.

The preamble to the Proposed Exemption states that “certain transactions would not be considered principal transactions for purposes of the exemption, and so could occur under the more general conditions.”[26] The preamble explains that this includes the sale of an insurance or annuity contract, or a mutual fund transaction. Mutual funds and exchange-traded funds (ETFs) are similar vehicles that facilitate access to underlying investments. We urge the Department to specifically clarify that ETFs, like mutual funds, would not be considered principal transactions and could occur under more general conditions outside of the Proposed Exemption, or, in the alternative, include ETF transactions in the definition of Covered Principal Transactions.

Finally, an equity security is not included in the definition of a Covered Principal Transaction. Equity investments are common in IRAs and many broker-dealers have principal trading desks that trade equity securities. More recently, brokerage firms such as Fidelity have established fractional share programs that allow a Retirement Investor to purchase a portion of a share of a national market system (NMS) equity security as a means to invest in certain higher-priced equity securities. Equity securities, particularly NMS equity securities, are liquid investments with full price transparency. We recommend that the Department include NMS equity securities in the definition of a Covered Principal Transaction so that a Financial Institution can trade it in a principal capacity in connection with offering investment advice.

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[25] Under the Proposed Exemption, Covered Principal Transactions are limited to transactions involving: corporate debt securities offered pursuant to a registration statement under the Securities Act of 1933 (“’33 Act”); U.S. Treasury securities; debt securities issued or guaranteed by a U.S. federal government agency other than the U.S. Department of Treasury; debt securities issued or guaranteed by a government-sponsored enterprise (GSE); municipal bonds; certificates of deposit; and interests in Unit Investment Trusts. Proposed Exemption Section V(c)(1)(A), 85 FR at 40864.
[26] 85 FR at 40840.

5. The Proposed Exemption's Retrospective Review Condition Should be Revised

The Proposed Exemption's condition requiring an annual retrospective review would seem to provide minimal incremental protection for Retirement Investors. [27] The Proposed Exemption requires that: "[t]he Financial Institution establishes, maintains, and enforces written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards in connection with covered fiduciary advice and transactions."[28] These policies and procedures must mitigate conflicts of interest in a manner that avoids misalignment of interests. These requirements to "establish, maintain, and enforce" written policies and procedures should provide adequate protection for Retirement Investors without the creation of an additional internal certification process. The requirement that the Financial Institution "enforce" their policies covers the substance of the retrospective review requirement in exactly the "principles-based" manner that the Department cites as a foundational principle for its Proposed Exemption. The condition requiring the "enforcement" of written policies and procedures will adequately protect Retirement Investors.[29]

Although we believe the retrospective review condition does not add substantive protection and could be eliminated without harm to the Retirement Investor, if the Department chooses to retain this condition, one issue that the review process raises is the question of what is the consequence of a non-material issue identified during the review? It is likely that from time-to-time the retrospective review may detect an instance where all of the specific procedural requirements will not be able to be evidenced in the course of the review. For example, the documentation related to a specific account type recommendation might not be found. As another example, assume that the Financial Institution has a reasonably designed process to deliver the written acknowledgement required by the Proposed Exemption prior to an investment advice interaction. If, in spite of the process, there is a one-time failure to provide the written acknowledgement to a Retirement Investor identified in the retrospective review, what would be the consequence? The loss of the entire exemption for the transaction and imposition of prohibited transaction penalties and excise tax would not seem appropriate in such examples. Rather, we suggest that the Department provide a path for the correction of good faith, non-material issues that are identified during the course of the review. In other words, we think that it would be beneficial for Financial Institutions and Retirement Investors for the Department to clarify that good faith, non-material errors uncovered during the retrospective review do not result in loss of the prohibited transaction exemption if these errors are appropriately mitigated after their discovery.

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[27] "Under the proposal, Financial Institutions would be required to conduct a retrospective review, at least annually, that is reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption." 85 FR at 40848.

[28] Section II(c)(1) of Proposed Exemption. 85 FR at 40863.

[29] We would state that the retrospective review is preferable to the independent audit that the Department had considered as a condition. 85 FR at 40856. An independent audit would require an even greater bureaucracy to support the audit process without enhancing in any way the Exemption's substantive protections for Retirement Investors. We would suggest, for example, that a retrospective review would be preferable to the annual audit that is required as a condition of the computer model exemption. ERISA Section 408(g); DOL Reg. Section 2550.408g-1.

We would also suggest that the retrospective review be certified by the Chief Compliance Officer (CCO) rather than the Chief Executive Officer. The CCO is the party best attuned to the Financial Institution's policies and procedures and the process to modify those policies and procedures. The Proposed Exemption specifically requires that the certification annually certifies that "the Financial Institution has in place a prudent process to modify [] 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 as required as part of the review".[30] This requirement is a core function of the compliance team, and the CCO is in the best position to review policies and procedures in light of this compliance obligation and to follow up on any issues that are identified in the most efficient and effective manner.

Lastly, we suggest that the frequency of the retrospective review be revised from an annual requirement to a requirement that the review is conducted once every three years. We anticipate that this review would be a resource-intensive process that Financial Institutions will engage in with a commitment of compliance and business resources. The Department itself states that a Financial Institution has six months from the end date of the review period to complete the review, indicating that this is a significant undertaking. That leaves only six months before the review process would start all over again for the next period. Requiring the review every three years rather than annually would not eliminate an ongoing requirement to maintain compliance with the Impartial Conduct Standards, but it would provide for a more appropriate review frequency given the intensive nature of the review.

6. The Proposed Exemption Should be Available to Plans that Cover the Employees of Financial Institutions

The Department's Proposed Exemption excludes plans that cover the employees of a Financial Institution. We believe that the protective elements of the Impartial Conduct Standards and the other conditions of the Proposed Exemption adequately protect plan participants in these plans. The Department is concerned that these plans should not be in a position to "use their employees' retirement benefits as potential revenue or profit sources, without additional safeguards".[31] However, the Department has not identified why the many protections in the Proposed Exemption would be insufficient to protect Financial Institution employees, and we do not believe that they would be insufficient. The application of the Impartial Conduct Standards and other provisions of the Proposed Exemption are sufficiently protective of the interests of all plan participants.

Moreover, non-discretionary investment advice provided to plan participants benefits Retirement Investors, including Retirement Investors who happen to work for a Financial Institution. The most efficient way to provide this advice is to do so in a uniform manner that is fully protective of the interests of plan participants. In other words, utilize one prohibited transaction exemption so all Retirement Investors receive consistent advice in their best interest.

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[30] Proposed Exemption Section II(d)(3)(C). 85 FR at 40863.
[31] 85 FR at 40841.

The exclusion of use of the Proposed Exemption to provide investment advice to participants in a Financial Institution's own plans is also inconsistent with the Department's historical treatment of Financial Institutions as a plan sponsor. As an example, the Department stated in the preamble to the ERISA Section 404(c) regulation proposed in 1991:

> The stated Congressional policy underlying [exemptions permitting a bank to invest in deposits with the bank and insurance companies to issue contracts to its own plan] is that it would be "contrary to normal business practice" for a bank or insurer to purchase the products of another company for 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.[32]

Similarly, it would be contrary to normal business practice for a Financial Institution engaged in the business of providing advice to participants in retirement plans to seek advice services for its own employees from a competitor. There is no reason to exclude participants in a Financial Institution's plans from receiving investment advice. We urge the Department to eliminate this exclusion and allow for the Proposed Exemption to be used by these plans.

C. The Department Should Clarify Preamble Language that States that Certain Investments May Require Ongoing Monitoring

The Department's preamble to the Proposed Exemption indicates that certain investments may not be recommended under the Exemption's best interest standard absent ongoing monitoring:

> Moreover, Financial Institutions should carefully consider whether certain investments can be prudently recommended to the individual Retirement Investor in the first place without ongoing monitoring of the investment. Investments that possess unusual complexity and risk, for example, may require ongoing monitoring to protect the investor's interests.[33]

This statement is directly contrary to the earlier preamble statement that no general monitoring requirement exists in the Notice:

> Neither the best interest standard nor any other condition of the exemption would establish a monitoring requirement for Financial Institutions or Investment Professionals…[34]

[32] 56 FR 10724 (March 13, 1991).
[33] 85 FR at 40843.
[34] 85 FR at 40843.

The SEC's Reg. BI release does not require brokers to engage in any form of ongoing account monitoring, but it does clarify that brokers are permitted to engage in periodic account monitoring by voluntary agreement.[35] In the SEC's concurrent release interpreting the "solely incidental" prong of the broker-dealer exclusion from the definition of investment adviser, the Commission cautioned that a broker's continuous ongoing account monitoring may be considered an advisory service rather than a brokerage service that would be permitted under the broker-dealer exclusion. "However, [] policies and procedures [permitting ongoing periodic monitoring] should not permit a broker-dealer to agree to monitor a customer account in a manner that in effect results in the provision of advisory services that are not in connection with or reasonably related to the broker-dealer's primary business of effecting securities transactions, such as providing continuous monitoring."[36] We urge the Department to clarify its preamble language on this point to align with Reg. BI, and make it clear that ERISA does not impose a duty of ongoing monitoring where the Financial Institution clearly discloses that its services do not include such monitoring. Alternatively, the Department should clarify what investments are of such complexity and risk that ongoing monitoring would be required. [37]

D. The Department's Approach to Proprietary Products and Limited Menus of Investment Products is Correct

The Department has requested comment on its analysis of proprietary products and limited menus of investment products found in the Preamble. We agree with the Department's conclusions in this area. As the Department points out, limiting investment menus for the provision of investment advice will allow Investment Professionals to become more familiar with the options that may be recommended. In addition, practical considerations call for limiting the investment menu when thousands of mutual funds and securities exist on a Financial Institution's platform. This approach to limited menus of investment products also aligns with the SEC's analysis under Reg. BI that limited menus are appropriate provided that any material limitations are identified and disclosed and that the menu limitation does not impede the broker's ability to provide the customer with a recommendation that is in the customer's best interest. We would request that the Department clarify specifically that establishing and maintaining a limited investment platform or defining a limited investment product menu from which recommendations may be made is not itself a fiduciary function under ERISA. Rather, once the limited investment platform or menu has been defined, an adviser providing fiduciary investment advice under ERISA could only make a recommendation of an investment from the options available within the limited platform or menu if it could meet its fiduciary duties and the requirements of the exemption (if needed) with respect to such recommendation. If the adviser could not meet those

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[35] 84 FR at 33336, 33340.

[36] *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser*, 84 FR 33681 (July 12, 2019).

[37] We note that FINRA Regulatory Notice 12-03, *Complex Products*, January 2012, provides examples of complex products subject to enhanced compliance and supervisory procedures. Even there, however, the Notice indicates that monitoring would be to ensure that the product is suitable for future recommendations rather than imposing an ongoing duty to monitor the product after a purchase.

requirements, then it would not be permitted to make a recommendation from within the limited platform or menu.[38]

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

Sincerely,

James Barr Haines
SVP & Deputy General Counsel

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[38] As the Department indicates in the Preamble, in some cases the investment advice fiduciary may not be able to provide investment advice because of the menu's limitations. 85 FR at 40847.