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General Comment

The carve-outs contained in the proposed definition of fiduciary (80 FR 21927) appear capable of being interpreted to give a pass to an organization which provides information to or withholds information from the person who advises the retirement investor. Here are two examples from my experience as a Registered Representative of a broker-dealer, advising non-expert investors, some of them with self-directed IRAs.

My small broker-dealer contracted with a larger broker-dealer for stock analysis. The larger firm provided a weekly "Focus List". I was orally instructed that I was allowed to recommend only the stocks on this list, because the firm had analysis capabilities which I did not have. I was not specifically ordered to recommend them. After several months of telephone communication with someone at the larger firm's HQ, he and I became phone friends. He then told me that there was a "morning email" sent to selected people, containing a summary of the analysis teams' expectations for the stocks they covered. He offered to put me on the distribution list, and I gladly accepted. I immediately noticed that stocks with the greatest expectations were not on the Focus List, but stocks with low but not negative expectations were. I compared the Focus List and the emails over a period of time. I noticed that, when a

stock got close to its expected price, it appeared on the Focus List. I deduced that insiders were buying the best stocks and were putting them on the Focus List when they wanted to dump them, so that unsuspecting Representatives would recommend them to clients, and clients would buy them through the firm, thereby avoiding the necessity for the insiders to sell through the exchanges, which would have driven down the prices they would obtain. Both I and my clients were to be the suckers.

In the 1990's, a large telephone company offered contracts in which the investor would own a pay phone and the phone company would maintain it. The prospectus supplied data showing that pay phones were very profitable. The prospectus also claimed that the phone company needed the cash to build out its fiber optic network. Since fiber networks were being built at that time, this was plausible. However, the prospectus did not mention something relevant which I learned much later: that the cell phone had been invented, had been test-marketed somewhere (Hong Kong, I think) with great success, and had almost eliminated the use of pay phones. The phone company was dumping pay phones on unsuspecting investors, using unsuspecting Representatives. Not only would the investor have a worthless asset, he would be stuck with a long-term contract paying the phone company to maintain it. A double whammy!

Under your proposed regulation, the Registered Representative would be a fiduciary. The broker-dealers and the phone company might be able to wiggle out by finding a court sympathetic to their interpretation of your carve-outs.