July 16, 2015

VIA EMAIL (e-ORI@dol.gov and e-OED@dol.gov)

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments on Department of Labor Proposed Redefinition of "Fiduciary" (RIN 1210-AB32); Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25); and Proposed Amendment to Prohibited Transaction Class Exemption 84-24 (ZRIN 1210-ZA25)

Dear Sir or Madam:

Voya Financial, Inc. (Voya)[1] appreciates the opportunity to comment on the recent Department of Labor (the "Department") proposal to revise the definition of the term "investment advice" under the "fiduciary" definition," the proposed new Best Interest Contract exemption, and the proposed amendment to Prohibited Transaction Class Exemption 84-24 (collectively, the "Proposal").[2] As one of the leading financial institutions serving the United States retirement markets through multiple channels and services, Voya shares the Department's concerns regarding the need for retirees across America to receive sound guidance on saving and

[1] Voya Financial, Inc. (NYSE: VOYA) is composed of premier retirement, investment and insurance companies serving the financial needs of approximately 13 million individual and institutional customers in the United States. A *Fortune 500* company, Voya's vision is to be America's Retirement CompanyTM and its guiding principle is centered on solving the most daunting financial challenge facing Americans today — retirement readiness. Working directly with clients and through a broad group of financial intermediaries, independent producers, affiliated advisers and dedicated sales specialists, Voya provides a comprehensive portfolio of asset accumulation, asset protection and asset distribution products and services. With a dedicated workforce of approximately 6,500 employees and an independent sales force of approximately 2200 registered representatives, Voya is grounded in a clear mission to make a secure financial future possible — one person, one family, one institution at a time.

[2] 80 Fed. Reg. 21927 (Apr. 20, 2015); 80 Fed. Reg. 21960 (Apr. 20, 2015); and 80 Fed. Reg. 22010 (Apr. 20, 2015).

planning for a more secure retirement. We share the Department's goal of expanding access to quality retirement planning and asset management for America's workers and retirees.

One of the biggest challenges in serving defined contribution plans and individual retirement accounts (IRAs) is helping participants and IRA owners understand their needs—whether they be determining proper savings rates, appropriate retirement income levels, diversification and asset allocation, or establishing realistic planning goals—and implementing actions. Through its activities as a recordkeeper, administrator, financial intermediary and investment manager, among others, Voya's mission is to help millions of participants and owners with these important steps. **However, as explained more fully in this letter, while we share the Department's goals and understand it is the Department's stated intent to better protect workers and retirees, <u>we are very concerned that the Proposal would likely do the opposite, jeopardizing retirement income, accelerating leakage from retirement plans and limiting participants' and IRA owners' access to information.</u>** The broad scope of the Proposal, its unduly complicated provisions and its proposed new restrictions on educational information will make it *more* difficult and costly for service providers to reach and help participants and IRA owners, an outcome that is not in the participants' and IRA owners' best interests.

One primary reason is that the Proposal would impose procedural burdens on even very basic communications resulting from recasting many of these communications as ERISA fiduciary "investment advice." Rather than erecting barriers, the Proposal should facilitate these vital discussions. Otherwise, the combination of burdens in the Proposal as well as the substantial penalties and other legal liabilities that can result from inadvertent fiduciary status may have the unintended effect of *decreasing* the level of professional assistance and the range of retirement products and services available to many plan participants, particularly terminated plan participants and IRA owners.

Because we expect many other comment letters will focus on numerous aspects of the Proposal, such as the contours of the "investment advice" definition, our submission concentrates on those areas of particular concern to the plans, participants, IRA owners and advisers we serve and with whom we work.

* * *

1) *The Proposed Broader Scope of Fiduciary Conduct Will <u>Reduce</u> Services Available to Participants and IRA Owners*

We believe that the proposed formulation of when a person is rendering "investment advice"—and, thus, is acting as a fiduciary—is too broad and vague. More specifically, an "understanding" that a "recommendation" is "directed to" a plan is too subjective. The proposed formulation is expected to raise more questions than answers in practical application.

Any new rule should include some concept of **mutuality of understanding** and some degree of tailoring or **individualization of the advice**; otherwise, the potential for an after-the-fact, open-ended dispute is enormous. As an example, under the Proposal simply providing investment-related information[3] could be alleged by a recipient to have been investment advice, resulting in disputes and litigation. This is especially a concern with the "specifically directed to" language as it could be construed to include a mailing discussing an investment product addressed to the recipient by name. The upshot may be a *narrowing* of useful information available to participants, as service providers will not want routine communications and education materials to draw them into being a fiduciary.

In the similar vein, enrolling a new participant in an employer's retirement plan often involves offering that individual an opportunity to transfer funds from a prior 401(k) plan to a new plan where permitted; this reduces "leakage" from the retirement system and the likelihood of "lost" accounts. The Proposal would likely make these discussions fiduciary advice, requiring an analysis of the prior plan and the current plan to develop specific advice to engage in the transfer. As a consequence, these services would be dramatically reduced or eliminated and the effect—more leakage from retirement plans—would be directly contrary to the Department's goals and the best interests of plan participants **Such plan-to-plan retirement asset allocation discussions should not be deemed fiduciary advice.**

In addition, the Department should clarify that, where a person performs an actuarial, accounting, legal function, or acts as a ministerial service provider merely making participants aware of services, benefits, rights and features available under a plan, **the services will not be deemed to be "investment advice" or give rise to fiduciary status.**[4]

Finally, we note with concern the potential for additional, costly liabilities in connection with the expansion of the definition of fiduciary. One example is the penalty with respect to IRAs. If a fiduciary under the Proposal makes what amounts to a technical misstep (for example, not complying with all of the aspects of the Best Interest Contract exemption), then the IRA will potentially be subject to disqualification and/or an excise tax. That is unnecessarily punitive to both the adviser and the IRA account holder. We encourage the Department to use its interpretive authority to clarify that technical violations of the new rules will not result in such drastic penalties absent material deficiencies. In addition to the potential punitive tax consequences, the Proposal would subject advisers to significantly greater enforcement and litigation liability than is currently the case with IRAs. Following effectiveness of the Proposal, an adviser working with an IRA customer will now be subject to Internal Revenue Service actions, FINRA actions, SEC actions, class-action liability, and FINRA arbitrations. This panoply of potential liability appears disproportionate to the putative benefits of the Proposal and will very likely have a chilling effect on the amount of advice provided to IRA owners.

[3] For example, information regarding basic asset allocation strategies that do not refer to a person's specific assets or needs.

[4] Consistent with the approach taken in other contexts, the determining factor should not be the title, but rather the function, being performed. For example, a person may play different roles at different times, such as providing investment advice or financial planning while also practicing as an accountant. While the financial planning or investment advisory services may constitute fiduciary conduct, the accounting services typically should not.

2) The Seller's Carve-Out Should be Expanded so that All Plans, Participants and IRA Owners can Receive Necessary Information

As currently written, the Seller's Carve-Out would apply only to certain large plans as defined by asset size or number of participants. However, the logic underlying the Seller's Carve-Out applies to all plans, regardless of size or number of participants. As the proposing release notes, "[t]he overall purpose of this carve-out is to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser…." Like larger plans, smaller plans benefit from more, not less information; restricting the Seller's Carve-Out will lead to less information being provided to them.

The conditions of the Seller's Carve-Out, most notably disclosure that the information provided is not impartial investment advice and that the adviser cannot receive a fee directly from the plan for providing the advice, should be sufficient to put any plan representative or IRA owner on notice that he or she is receiving a sales or marketing pitch. It does not require a sophisticated understanding of financial services to distinguish between sales activity and advice activity where the status is clearly disclosed**. The Department wisely included such a carve-out in its 2010 proposal and should retain that concept**.[5]

If the Department does not accept this recommendation to permit adviser choice for all plans, participants and IRA owners, we urge it to consider alternative means of assessing the recipient's understanding of the information provided by the adviser. The Seller's Carve-Out not only precludes smaller plans and IRA owners from obtaining timely and important information, but the practical application of a rigid 100-participant threshold would be complicated by participants joining or separating from the plan. Moreover, were a 100-participant threshold employed as a measure for relying on the Seller's Carve-Out, there are practical challenges of how to handle a plan with close to 100 participants, which may go above and then below the threshold—if this happened, would fiduciary status stop and then start again vis-à-vis the plan? The most logical and practical approach in this case would be that, once a plan hits the 100–participant level,[6] it should be able to rely on the Seller's Carve-Out indefinitely; a sponsor's sophistication and ability does not diminish if the number of participants in the plan later falls.[7] **An arbitrary threshold for participant headcount bears no obvious relationship to financial sophistication**.

In the event that the Department decides to retain the 100-participant threshold as one possible benchmark, it should also provide plan sponsors with an alternative avenue to rely on the Seller's Carve-Out. In particular, regardless of the number of participants in a plan, **plan sponsors, participants or IRA owners should be able to certify their own expertise or represent that they have retained and been advised by an experienced adviser**. This

[5] 75 Fed. Reg. 65263 (Oct. 22, 2010).

[6] The Department should confirm that, in calculating the number of plan participants, retirees and former employees who are still participants in the plan would be counted.

[7] A second, less optimal means of addressing this issue might be to follow the 80/120 rule used for Form 5500 reporting purposes.

certification approach has proven workable and effective in other contexts, such as the "accredited investor" standard under the federal securities laws.

Finally, the language currently in the Seller's Carve-Out covers only a sale, purchase, loan or bilateral contract. While this language would encompass most situations, it may leave other interactions somewhat ambiguous, including information provided to a plan sponsor as an integral part of a Request for Proposal (RFP) by a prospective service provider or as part of an on-going service model geared to facilitate the plan sponsor's fulfilment of its fiduciary responsibilities. As one example, an adviser managing a fixed income portfolio for a plan—for which it clearly accepts fiduciary status—may also provide the plan with information on other topics, such as asset allocation, derivatives or other investment matters. If these additional activities are not specified in the bilateral contract between the plan and the adviser (which they likely would not be), a question could arise as to whether they constitute fiduciary acts (which, under these circumstances, they should not be since they are intended merely as useful additional information for the recipient). For these reasons, **the language in the Seller's Carve-Out should be broadened** to cover any services and other interactions with plans where the terms of the carve-out are otherwise met, including, for example, where services are pursuant to a service agreement with a plan sponsor for ministerial services for a reasonable fee to ensure the orderly administration of a plan.

3) Sales and Marketing Activities Are Not Fiduciary Activities, but Rather Essential Information Sources

The proposed definition of "investment advice" is unnecessarily broad, potentially encompassing activities that are clearly marketing or sales in nature—a consequence not intended by either the provider or the recipient of information. Most sales and marketing activities by their nature should not rise to the level of "investment advice" nor be deemed fiduciary actions; **simply making consumers and others aware of information is not fiduciary conduct.**

As a simple example, if a service provider furnishes sales literature to, and has meetings with, a current client (e.g., a small plan sponsor) describing potential additional services and products, there is ambiguity as to whether these descriptions may be deemed "investment advice," particularly since the service provider receives compensation from and has a relationship with the client (albeit relating to entirely different services). Likewise, if a service provider discusses the features of its products, the current language in the Proposal could sweep these discussions into "investment advice"—even though both parties understand them to be basic marketing activities. This concern is especially acute for service providers responding to an RFP, since an RFP is literally a request for information about the services and products a provider makes available, and answering questions in the RFP should not constitute fiduciary advice. To find otherwise would defeat the purpose of a plan's primary means of gathering comparable information with which to make informed decisions, as responses will be generic and guarded in order to avoid inadvertent fiduciary status.

The Department has informally committed to clarifying that activities of this nature will not be deemed "investment advice;" additional clarity and flexibility on this point would be warranted and welcome. One of the Department's stated concerns is that advisers may advertise their general availability as a source of trusted adviser, but disclaim fiduciary status in fine print; clear disclosure to the recipient is one way to address this perceived issue, without adding undue complication and unwarranted fiduciary status to the adviser. For example, as noted elsewhere in this comment letter, one possible means of addressing any remaining concerns would be use of a basic disclosure document that clearly informs the recipient that the information is sales material, not investment advice, and that the adviser would be receiving compensation.

4) *The Platform Provider Carve-Out Should be Clarified and Expanded to IRAs*

The current language in the Proposal arguably extends fiduciary liability to IRA providers offering on-line IRA products with virtually no product or investment selection support provided to an IRA owner, other than to display the investment menu options available for selection by the IRA owner. In essence, the imposition of fiduciary liability in this case may limit the availability of on-line product selection for millions of Americans who wish to self-direct their IRA choices from doing so in the future. Many Americans believe they have sufficient investment expertise and prefer to go to online marketplaces, choose their IRA platform and choose their investment options, without investment advice provided by a third party. These customers generally do not wish to receive any assistance from an IRA provider in selecting to rollover retirement savings into an IRA nor do they wish to confer with anyone regarding investment options available in an IRA product. Importantly, they do not seek to enter into a contractual arrangement with an investment advice provider, nor incur the additional expenses. As discussed elsewhere in this comment letter, we believe that the Proposal will inhibit the provision of investment advice to IRA customers in unnecessary ways.

5) *There Must be a Link Between Fees and Advice for Fiduciary Status to Arise*

Part of the uncertainty in the fiduciary status of advisers and other service providers under the Proposal results from ambiguity regarding the receipt of fees "incident to the transaction." In general, if advice or other services are outside the scope of the arrangement for which fees are paid, the conduct should not be considered "investment advice" for purposes of the definition of a fiduciary—**fees for unrelated services should not be imputed to the advice**.

As a simple example, a service provider receiving fees only for non-fiduciary services should not be deemed a fiduciary because it answers a client's question that could be viewed as recommending an adviser. Likewise, initial screening of participant calls at a call center that helps identify a participant's needs better and directs the participant to appropriate services should not be deemed fiduciary advice—there is no fee for the information. Finally, where a personal wealth adviser reviews plan and IRA assets to make recommendations regarding non-retirement assets, there should be no presumption that the review constitutes an implicit recommendation regarding retirement plan assets, especially since any fee for advice does not relate to retirement assets.

For all of these reasons, the Department should clarify that **"investment advice" has not been provided until a transaction has been entered into and fees for such advice are received under the arrangement**. Discussions that could lead to services for which fees will be charged are not fiduciary in nature unless such a transaction occurs, because no obligation to pay a fee "incident to the transaction" has been incurred. Further, the Department should clarify how waivers or similar unique situations are handled. For example, an adviser or service provider may waive fees (e.g., under an initial 30-day "try out" period). We submit fiduciary status should attach only after such fees start to accrue or are paid.

6) The Best Interest Contract Exemption Should be Simplified to Ensure it Benefits Participants and IRA Owners

While we appreciate that the Department recognizes the need for an exemption to permit beneficial participant activity that might nonetheless be a prohibited transaction due to the broad scope of the Proposal, **the complexities and practical challenges of applying the "Best Interest Contract" (BIC) exemption to day-to-day activities of many financial advisers render it unworkable and would ultimately prove counterproductive**. As an example, if an individual calls for basic guidance, under the BIC exemption the adviser would apparently need to avoid any discussion of specific investment alternatives or courses of action, end the call and send the individual a contract before any additional discussions could occur. The individual would not welcome such a drawn-out sequence of steps. Moreover, the individual may be uncomfortable signing a contract when all he or she desires is some basic guidance. Finally, in those cases where the individual is comparison shopping—which is common and which should be encouraged—he or she could experience multiple scenarios such as this, with a corresponding number of contracts that must be signed before actually receiving any specific information or guidance.

The end result may be that many individuals simply eschew seeking basic guidance, instead making decisions on their own or based on friends' or co-workers' guidance. Alternatively, individuals may decide simply to pull their money from tax-advantaged retirement vehicles altogether. Neither of these outcomes are the type of result aimed at by the Proposal.

Separately, **due to costs and complexities, many advisers will no longer be willing or able to service individual IRAs or small companies** that offer their employees IRA retirement vehicles. Alternatively, if an adviser determined to continue serving these accounts and plans, the fees for doing so would rise substantially, due to significantly increased fiduciary exposure, the additional time and resources to provide fiduciary services, and the cost and resources needed to provide the required new disclosures.

It is also not clear how the BIC exemption would address certain clear product differences or structural cost differences between institutional plans and IRAs. For example, the compensation to an adviser with respect to money market funds may be significantly lower than for international equity funds, due in part to the reduced effort involved in keeping abreast of money market fund developments. Likewise, the individualized advice and additional products and services in an IRA compared to a typical 401(k) plan usually cost more—they are different products for different purposes. For example, the BIC exemption does not apply to a rollover recommendation to an IRA managed account, leaving no clear means for an adviser to provide this valuable service. As a result, a recommendation to purchase a particular product or to engage in a rollover to an IRA for a given participant **may be prudent and in the participant's**

best interest, but could still be deemed a prohibited transaction for the adviser because of the fee difference.

Particularly with respect to rollover transactions, the BIC exemption does not provide a clear blueprint for permitting the adviser to "handle" a rollover for a participant despite its prudence. These rollovers may arise in a call center, where a participant approaches an adviser, in enrollment meetings involving 401(k) transfers to new plans, or in other contexts. The BIC exemption should specifically provide relief for different, and possibly higher, fees charged to rollover accounts; otherwise, **necessary and desirable rollover education assistance will be curtailed**. While the "neutral factors" identified by the Department in the BIC exemption, such as the time involved in evaluating different types of investments, may be well-intentioned, these **broad, principles-based approaches will not work in practice** and at best will frustrate investors and at worst lead to fewer providers willing to assist them. There are no safe harbors or guidelines in the exemption to provide clarity, and as a result, advisers and financial institutions face class action litigation in state court over differing interpretations of the "neutral factors."

We appreciated the Department's clarification that the BIC exemption does not replace, but is available as an alternative to, previous guidance issued by the Department. Specifically, in footnote 30 to the BIC exemption proposal, the Department notes the continued availability of Advisory Opinion 2001-09A (the "SunAmerica" opinion) and the statutory exemptions in ERISA §408(b)(14) and §408(g).[8] As the Proposal would create a new form of fiduciary advice regarding rollover recommendations—an activity that was not fiduciary advice when these alternatives were established—we request that the Department more clearly express its view that these available BIC exemption alternatives apply with respect to investment recommendations made in connection with various types of rollovers as well as to advice within a plan or IRA.

Potential Improvements to the Proposed BIC Exemption

There is an overarching need to simplify and streamline the BIC exemption. First, the proposed sequence of putting a contract in front of a potential customer or caller is impractical. Our understanding is that the Department recognizes this concern and is considering different approaches. Rather than requiring a document that must be executed and returned by potential customers—which will likely not occur in many situations, forestalling an informed conversation—the Department should consider a more user-friendly form of basic disclosures that would serve much the same purpose. This disclosure—**a customer's Bill of Rights**, if you will, receipt of which could be acknowledged by the recipient—could set out key disclosures, terms and the potential conflicts that an adviser faces (if applicable).[9] Such a disclosure document could be required to be delivered before money is invested or a fee is received.

Second, the point of sale, annual and Website disclosures are far too lengthy and complex, as well as requiring expense projections that will likely prove inaccurate, confusing and redundant to a participant or plan. At a minimum, the level of data and detail called for by these parts of the BIC exemption is daunting and will be expensive for providers to produce,

[8] 80 Fed. Reg. 21960 at 21971 (Apr. 20, 2015).

[9] A simple example of a potential "Bill of Rights" is attached as Exhibit A.

another factor driving advisers away from serving the small end of the market. From the recipient's perspective, these disclosures are likely to be of little use and potentially confusing.

Moreover, the Department already requires various fee disclosures for many plan sponsors and plan participants in at least two other documents called for by regulations 404a-5 and 408b-2.[10] Were the proposed new disclosure requirements implemented, some plan fiduciaries might now **receive or be directed to multiple different fee disclosure documents. This is costly, unwieldy and unnecessary.**

Given the proposed **customer's Bill of Rights** or a similar disclosure approach noted above, these types of quantitative disclosures would be unnecessary. In the event the Department views some type of quantitative disclosure to be warranted, however, then a much more effective and economical approach would be a dramatically scaled back and simplified set of disclosures, possibly through revising the scope and/or audience of the 404a-5 and/or 408b-2 disclosure documents noted above—the whole point is to put the potential client on notice of potential conflicts, and to encourage participants and IRA owners to compare available services and investment options, which can be easily done with a simpler, less data-intensive approach. The approach to disclosure in the BIC exemption is not a cost-efficient means of providing useful information regarding investment expenses, and **will result in significant costs ultimately borne by the participants and IRA owners.** A fee illustration, for example, would make the same point much more efficiently without resorting to speculation about the value of investments ten years into the future.

Finally, the **Department should make it clear that advice regarding proprietary products will not be deemed to violate any impartiality standards** so long as clear disclosure of the adviser's compensation is provided to the client before selection. In this regard, the current proposed language in the BIC exemption—most notably, that the investment advice must be "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity or other party"—is too open-ended and prone to confusion. Many if not most advisers or representatives will, by definition, be most familiar with the products offered by their respective financial institutions and may also benefit indirectly if the institution performs well. The vague language of the proposed BIC exemption invites after-the-fact second-guessing and unwarranted potential litigation exposure. Moreover, it would lead to a narrowing of investment choices since investors could be denied access to an excellent investment fund managed by their adviser's financial institution, needing instead to have multiple advisers to obtain access to that fund and other desirable investment options.

7) Amended Prohibited Transaction Class Exemption 84-24 Should Include Variable Annuities to Provide Clarity and Consistency for Investors

As a general matter, **retirement income products should be treated similarly when they serve the same purpose**. When advising a participant needing guaranteed retirement income, the Proposal would require two different exemptive processes (the BIC exemption and Prohibited Transaction Class Exemption 84-24) for advice regarding products that serve the

[10] 29 C.F.R. § 2550.404a-5 and 29 C.F.R. § 2550.408b-2.

same financial need. It is not practical or administratively feasible to have the same adviser provide two different answers, payment structures and sets of disclosures regarding products in the same guaranteed income family; the adviser will face unnecessary compliance costs and complexity not to mention how confusing this will be for investors. As such, over time one could imagine an adviser may gravitate to one product or the other mainly for administrative convenience and consistency, a result which is in no one's interest. Further, some annuity products contain both fixed and variable annuity features,[11] suggesting that a single product might have to rely on two separate exemptions with different conditions and requirements.

Second, as noted above with respect to the BIC exemption, the proposed language in the amended Prohibited Transaction Class Exemption 84-24—that the investment advice must be "without regard to the financial or other interests of the fiduciary, any affiliate or other party"—is too open-ended and prone to confusion. Here, as with the BIC exemption, such language is not needed and will only invite second-guessing and increased potential litigation exposure.

8) The Investment Education Carve-Out Should be Expanded or Interpretive Bulletin 96-1 Should be Retained to Preserve Access to Information

The proposed investment education carve-out seeks to cut back the current investment education safe harbor, set forth in Interpretive Bulletin 96-1, in a very crucial respect—the prohibition on recommendations regarding specific investment products. In the context of investment education, **this prohibition is unnecessary and would likely end up harming those very retirement investors it purports to serve**.

The current investment education safe harbor has been very successful and, over its almost 20-year life, there have been few if any instances of abuse or problems; rather, the safe harbor has served a very worthwhile and necessary role in providing useful investment information to plan participants. **The proposed narrowing of permissible investment education and information that can be provided serves no beneficial purpose for participants, but rather will deprive them of helpful information that can assist them in their retirement planning**.

While the most practical approach would be the retention of **Interpretive Bulletin 96-1,** if the Department determines to proceed with a new investment education carve-out, the language should be modified to make clear that companies and others can provide information regarding specific investment alternatives within asset allocation models and asset classes, while still being able to rely on the carve-out; when accompanied by the disclosures currently called for, plan participants and IRA owners would be adequately protected while still being able to receive this essential information.

[11] *See* IRS Private Letter Rulings 201519001 and 201515001 (Oct. 10, 2014).

9) *Deeming the Provision of Valuation and Pricing Information to be a Fiduciary Act is Unwarranted and Would Harm Participants and IRA Owners by Reducing Market Liquidity and Transparency*

The language in the Proposal regarding valuation and pricing services is too broad, likely leading to confusion and harming plans and their participants. Asset managers and other service providers often provide valuation and pricing information as an accommodation to plan clients; this information is not a recommendation or investment advice, but rather is an ancillary service that helps the client in its day-to-day operations. Similarly, where custodians and pricing services provide valuation and pricing information to clients (including plans), it is done so with the understanding that fiduciary responsibility does not result; this understanding is reflected in both the competitive fees charged as well as the willingness of these service providers to endeavor to assign prices to hard-to-value assets. Finally, on a regular basis, many times a day brokers and other intermediaries provide indicative prices to clients, including pension plans and/or their asset managers, thereby facilitating liquidity for plans and other market participants.

As an example, an asset manager may manage multiple accounts, including several pension plans. The manager is considering disposing of certain relatively illiquid fixed income positions (which do not trade on exchanges or established markets) and contacts several brokers and banks for indicative prices, hoping to gauge market interest and possibly enter into a transaction. Although the pricing or valuation information provided by the brokers and banks may often be in connection with a potential transaction, it is clearly not intended to be "investment advice" or fiduciary conduct. Unfortunately, the current language in the Proposal would cover those services.

There is no record of abuse with respect to these activities; rather, clients--including pension plans--have benefited enormously through more accurate pricing and corresponding market liquidity.[12] Any extension of fiduciary responsibility to these activities will result in many market participants (e.g., asset managers and brokers) being unwilling to provide information to clients regarding asset prices or values. If custodians and pricing services determine to continue providing this information, substantially increased fees will be charged, which will ultimately be borne by clients, including plans and participants; even then, custodians and pricing services may refuse to provide valuation or pricing information on illiquid or hard-to-value assets for fear of fiduciary liability.

Given the absence of abuse in this area, this part of the Proposal should be deleted as unnecessary—it seeks to fix what isn't broken. However, in the event this concept is retained in the final rule, the language and approach should be modified so that fiduciary status applies only where the parties mutually and affirmatively agree that the service provider is acting as a fiduciary in providing valuation/pricing information to the client. This approach would address those relatively infrequent situations where a plan (or its asset manager) retains a service provider to act essentially as a professional appraiser for assets and would avoid unnecessarily impairing the day-to-day operations and efficiency of the current market structure.

[12] Moreover, to the extent that challenges arise from time-to-time in the valuation or pricing of assets (e.g., due to a lack of a market price, operational error, etc.), the investment industry and its regulators already have well-developed and time-tested procedures and processes designed to address these situations.

10) Participants and IRA Owners May be Adversely Impacted by an Exemption for Low-Fee Products Since Many High-Quality Products Have Varying Fee Levels

The Department has asked specifically for comment on whether a streamlined exemption for "high-quality, low-fee" products should be developed. In our view, this approach would raise substantial challenges, set a potentially detrimental precedent and potentially have adverse unforeseen consequences. While costs and fees are important considerations for a fiduciary, neither ERISA nor the Department has generally taken the view that the lowest cost alternative in any situation is necessarily the most prudent course; **rather, costs and fees are important components of a broader set of factors that should be considered, such as quality of services, performance, and others**. In a publication for plan fiduciaries, the Department instructs that "Fees are just one of several factors fiduciaries need to consider in deciding on service providers and plan investments."[13] Similarly, the Department's regulation interpreting fiduciary investment duties under the statute requires the fiduciary to consider all facts and circumstances the fiduciary "knows or should know" are relevant.[14] Settling on a prescribed set of factors that connote "high-quality" would run counter to the Department's and plan participants' long-term goals; what is high-quality for certain participants or at a given point in time may not be so at other times or for other participants. This is particularly true for target date funds; as the Department has noted in its February 2013 publication of "Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries," there are a number of pertinent factors that must be taken into account to make a proper selection with fees being only one of many.

Finally, this proposed exemption would not eliminate the conflict where an adviser recommends inappropriate funds to garner a payment. If an adviser took advantage of this proposed exemption mainly to receive payments and only recommended "high-quality," low-fee products, the adviser could still be recommending inappropriate investments.

*   *   *

In a broader context, we would ask the Department to consider seriously the multiple unintended and potentially detrimental consequences of transforming scores of advisers into fiduciaries and thousands of interactions into newly deemed fiduciary acts. Many of these advisers are small businesses or solo operations. Will they have the financial wherewithal to assume fiduciary responsibility and liability for scores of clients? Will the Proposal force many into accepting fiduciary responsibility without the financial assets or adequate insurance to back it up? Not only the compliance and regulatory costs—noted above—but other costs, such as increased insurance premiums, may likewise be extremely burdensome for many. Further, the

[13] "Meeting Your Fiduciary Responsibilities," U.S. Department of Labor Employee Benefits Security Administration, February 2012, at 5, available at http://www.dol.gov/ebsa/pdf/meetingyourfiduciaryresponsibilities.pdf.

[14] A fiduciary making investment decisions must give "…appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved…." 29 C.F.R. §2550.404a-1(b)(1)(i).

expansion of fiduciary status in the Proposal, coupled with current penalties and the litigation exposure for inadvertent breaches, will over time reduce the number of providers willing to service participants and IRA owners. **The ultimate consequence will be less information, reduced competition, and a narrower set of investment alternatives for today's and tomorrow's retirees**.

We appreciate this opportunity to comment on the Proposal and would be happy to answer any questions or provide additional assistance to the Department.

Sincerely,

Charles Nelson
Chief Executive Officer, Retirement

Voya Financial, Inc.

Exhibit A

Customer's "Bill of Rights"

- As your adviser, [I/we] generally receive compensation for providing services or advice to you.

- In some cases, [I/we] may receive more compensation depending on the product or investment you select, which results in a potential conflict of interest to [me/us]. In particular, these conflicts may include [describe conflict generally or refer to Web page].

- The products that [I/we] may recommend may include proprietary products of [name of financial institution].

- Set forth below is the basic compensation [I/we] will receive from different investment alternatives [I/we] may recommend:

Investment Product	**Compensation to Adviser**	**Affiliate(s) Receiving Compensation**

- You have the right to obtain additional information about the fees associated with any investment product [I/we] may recommend.

- You have the right to ask [me/us] for additional information about the compensation [I/we] or our affiliates will receive for various different investment alternatives you may purchase.

- If you are not comfortable with the advice [I/we] are giving or with the potential conflict(s) [I/we] face, you should not engage in the recommended transaction.

- You can and should comparison shop with different providers.