John Hancock Financial Services

601 Congress St.,
13th Floor
Boston, MA 02210-2805

(617) 663-2126
Fax: (617) 663-3096
jdgallagher@jhancock.com

James D. Gallagher
Executive Vice President
General Counsel &
Chief Administrative Officer

July 17, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N–5655

U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: John Hancock's Comments on the Department's Fiduciary Definition Re-Proposal; RIN 1210–AB32

Ladies and Gentlemen:

On behalf of John Hancock Life Insurance Company (U.S.A.) (collectively referred to along with its affiliates and subsidiaries as "John Hancock")[1], this comment letter responds to the request by the U.S. Department of Labor ("Department") for comments to the proposed Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, published in the Federal Register on April 20, 2015 (the "Fiduciary Proposal" or "Proposal"). A separate letter regarding the Department's related exemption proposals is being sent simultaneously to the Office of Exemption Determinations.

[1] John Hancock Life Insurance Company (U.S.A.) and its subsidiary John Hancock Life Insurance Company of New York manufacture and issue fixed and variable annuities, life insurance, and long-term care insurance that may be issued to employer pension and welfare plans. John Hancock's U.S. affiliates also include: John Hancock Retirement Plan Services LLC (recordkeeping service provider); John Hancock Trust Company LLC ; John Hancock Investments (registered investment companies); John Hancock Distributors LLC (U.S. broker-dealer); John Hancock Funds, LLC (U.S. broker-dealer); John Hancock Advisers, LLC (U.S. investment adviser); Hancock Capital Investment Management LLC (U.S. investment adviser); Hancock Natural Resource Group, Inc. (U.S. investment adviser); Declaration Management & Research LLC (U.S. investment adviser); John Hancock Investment Management Services, LLC (U.S. investment adviser); Manulife Asset Management (US) LLC (U.S. investment adviser); John Hancock Personal Financial Services LLC (U.S. investment adviser); and Signator Investors, Inc. (U.S. broker-dealer and investment adviser). John Hancock completed the acquisition of New York Life's Retirement Plan Services business on April 14, 2015.

I. Executive Summary

John Hancock shares the Department's focus on and concern regarding Americans' retirement readiness and financial literacy. We applaud the Department's effort to craft the Proposal and its willingness to continue to improve the Proposal through the comment process. The Department's willingness to adopt meaningful changes to the Proposal was recently articulated by Secretary of Labor Thomas Perez, as follows: "I want to assure all stakeholders, including Congress, that the Department is very open to input to further refine, clarify, and improve this rule."[2] In our view, certain changes are necessary to the Proposal in order to maximize the benefits of the rule to Retirement Investors and to avoid unintended consequences that could harm plans, participants, beneficiaries, IRA owners, and plan sponsor fiduciaries (collectively referred to herein as "Retirement Investors").

Below, we outline our major comments and concerns, each of which is discussed in more depth, in section III.

A. Summary of Key Recommendations:

- **Narrow the Fiduciary Definition.** The definition contained in the Proposal is too broad and covers almost all sales, informational, and educational activity throughout every level of the financial services distribution chain.
  - Because the Proposal captures information provided to an investment advice fiduciary, fiduciary status would cascade outward such that any person providing information to an investment advice fiduciary would themselves be an investment advice fiduciary. This cascade effect amplifies the already broad definition in a way that would result in numerous providers of products and services, far removed from any Retirement Investor, being swept into fiduciary status.
  - Under the Proposal, Retirement Investors will likely receive less information than they currently do regarding investing concepts and plan features, including information that is intended to help them avoid common investing mistakes, such as investing in multiple target date funds. This lack of information will result in more confusion and uncertainty for Retirement Investors, who will receive less help, from less well-informed advisors, even though there is a widely recognized need for support and assistance, especially to small plans and individuals. Moreover, the broad definition would sweep in numerous activities that the Department has not identified particular concerns with regarding potential unfairness to Retirement Investors.
  - The definition of fiduciary in the Proposal should also be meaningfully narrowed to allow sales conversations to take place, including responses to RFPs and other

[2] Statement of Thomas E. Perez, Secretary, U.S. Department of Labor before the Health, Employment, Labor and Pensions Subcommittee, Committee on Education and the Workforce, U.S. House of Representatives, June 17, 2015.

conversations intended to make Retirement Investors aware of the existence of certain products or services.

- The definition of fiduciary in the Proposal is too broad and does not contemplate the education-based services offered by some recordkeepers (such as John Hancock). Many of today's Retirement Investors rely on these types of "non-advisory" services to make an informed decision about what to do with their 401(k) balance, including IRA rollovers. Under the Proposal, these types of educational services would become fiduciary activities and thus would be subject to significantly expanded cost, effort and resource allocations. As a result of the Proposal, providing distribution and rollover education would become so difficult for recordkeepers that these valuable resources would be eliminated, especially for Retirement Investors with smaller account balances.

❖ **Expand the Seller's Carve-out.** Sales activity is fundamentally different from fiduciary investment advice, and the carve-outs available for sales should permit the marketing of services and provision of investment information to the full spectrum of Retirement Investors, including small plan fiduciaries, participants in 401(k) plans, and IRAs in addition to the large plan fiduciaries already covered.

- Without access to sales and marketing information:
  - Individuals may not know or appreciate the adverse tax consequences, or the impact on their future retirement income stream, of cashing out and may not know about available products and services, increasing the likelihood of "leakage" (*i.e.*, the use of retirement funds for purposes other than retirement income) of assets out of the retirement system;
  - Plan sponsors will miss opportunities to benchmark current service providers and products against others available in the marketplace.

- Reasonable disclosure requirements to ensure the sales relationship and expectations are clearly established can address any concerns the Department may have about confusion on the part of small and individual Retirement Investors.

❖ **Clarify and Expand the Platform Carve-Out.** The Department should clarify that any platform "carve-out" is a safe harbor, and should apply this safe harbor equally to platforms available to plans and to IRAs. In addition, to avoid raising costs for small plans by ensuring that the Platform carve-out is applicable to all platform offerings typical in the small plan market, the Department should:

- Specify that a platform includes a group annuity contract through which plan sponsors and their advisors may select plan investment options. A group annuity contract is the functional equivalent of other platforms and should not be treated differently merely because it involves a different type of contract; and

- Clarify that a distributor marketing a platform of an unaffiliated service provider is covered by the platform carve-out (as an affiliate would be).

❖ **Expand the Education Carve-Out.** Investment education without the identification of investment options that match asset allocation recommendations is simply not helpful to Retirement Investors. Interpretive Bulletin 96-1 has been in place for almost 20 years and Retirement Investors have come to rely on investment education provided under the bulletin. Pulling back the information available will not contribute to better decision making, but in fact will have the opposite effect. A related concern is that the education carve-out, as currently proposed, serves to bolster the implication already contained in the Proposal's fiduciary definition that any discussion of a specific product or service will involve a "recommendation." Service providers need the ability to enhance Retirement Investors' overall financial literacy and comprehension of the consequences of their decisions without such conduct being construed as fiduciary advice.

❖ **Focus on Fighting Leakage, not Fighting Rollovers or Roll-ins.** A more workable solution for the movement of retirement assets from an employer sponsored plan to an IRA (a "rollover") and for the movement of retirement assets from one employer sponsored plan to another (a "roll-in") is needed in order to prevent increased retirement asset leakage due to lack of financial support by call in centers. This solution should recognize that plan participants are frequently motivated to sever all ties with their employer on separation from employment, and many are looking to exercise control over their plan account balance, often by taking a distribution. Under these very real circumstances, it is false to assume a rollover to an IRA is always detrimental to the participant, particularly when the likely alternative is a taxable cash-out. It can also often be important for participants to receive specific product or service information relevant to their distribution choices. For example, John Hancock offers retirement plan clients a guaranteed income for life investment option that is portable for participant IRA rollovers, thus extending the accumulated benefit guarantee following separation from the employer's plan. Similarly, roll-in transactions may provide a valuable opportunity for participants to consolidate retirement accounts that might otherwise be lost or neglected by the participant, and for plan sponsors to lower overall plan costs, benefitting each participant.

II. <u>John Hancock Clients and Services</u>

John Hancock was established in Boston in 1862. Since 2004, our parent company has been Manulife Financial Corporation, a global financial services group founded in 1887 that serves millions of customers in 22 countries and territories. As of December 31, 2014, Manulife Financial and its affiliates had $597 billion under management; of that, $343.5 billion is under management by John Hancock and its U.S. affiliates. Founded as a life insurance company, and still a leader in that field, John Hancock now offers a broad range of financial services, almost all of which are offered to Retirement Investors, among others. Those services include:

- Insurance: John Hancock continues to offer a wide range of life insurance products, and is a market leader in the field of long-term care insurance.
- Annuities: Although John Hancock stopped selling almost all annuities in 2011, we still have an in-force block of 543,100 contracts with $51.4 billion invested. Of those, there are approximately 285,000 variable annuity contracts with $27 billion invested issued to IRAs.
- Plan Recordkeeping and Administration: John Hancock offers recordkeeping and other administrative services to approximately 55,000 U.S. pension plans covering 2.5 million participants, with approximately $135 billion in assets.
- Mutual Funds: John Hancock offers a wide range of mutual funds and closed-end funds. We function as a "manager of managers," with rigorous manager selection criteria utilizing affiliated and non-affiliated subadvisors. We currently offer 211 funds, with approximately $193.9 billion under management.
- Investment Management: John Hancock has a number of affiliated investment managers. Some of these managers are retained to manage assets of the general account of an affiliated insurance company. Others may manage assets for John Hancock mutual funds. Finally, some of them manage assets for unrelated institutional investors, including large defined benefit plans.
- Broker-Dealer and Investment Advisory Services: Signator Investors, Inc. ("SII") and Signator Financial Services ("SFS") (collectively referred to as "Signator") are U.S. broker-dealers and registered investment advisors. Signator has 350 offices and 1,600 representatives. Signator provides a broad range of investment products and investment advisory services as well as insurance products, including proprietary and non-proprietary fixed and variable annuities, among others. Among the clients served by Signator are 41,000 pension plans and over 150,000 IRA accounts. Signator provides clients with comprehensive information regarding products and services available through Signator, and the compensation received by Signator and its representatives. Signator representatives work with plan sponsor clients, including those that may elect one of the John Hancock recordkeeping platforms. Signator client plans may also utilize unaffiliated investment platforms. Signator also works with IRA owners in both a brokerage and investment advisory capacity.

With the exception of products sold by Signator, almost all of John Hancock's products and services are sold through unrelated third parties. That is to say, our internal sales force is made up of "wholesalers," who work to engage these third parties and educate them as to the

ways that our products and services may be appropriate for their clients. For example, the wholesalers for our plan recordkeeping business educate unrelated broker-dealers and retirement plan consultants about the services we offer; it is those third-party financial advisors who then work with plan sponsors to select a recordkeeper for a plan. Similarly, wholesalers for John Hancock mutual funds work to get other recordkeepers to offer our mutual funds on their investment platforms and then work to educate the salespeople for those recordkeepers as to when and whether a John Hancock mutual fund might be right for their plan clients.

John Hancock focuses on customer centricity, which simply means finding ways of serving end customer needs and leaving them satisfied, and ideally, delighted. Customer centricity includes understanding customer needs, providing good products at an appropriate price, servicing customers, providing them with other solutions and unearthing new needs, relating to their dreams and aspirations. Customer centricity recognizes that some customers prioritize lower prices and strives to build service models consistent with that customer value. We suggest changes be made to the rule proposed by the Department in order to better achieve and maintain our customer centricity and the consumer choice it permits.

III. Comments and Recommendations

Below, we provide detailed comments on the Proposal, focusing on five key areas, including: (A) the operational terms of the fiduciary definition; (B) the seller's carve-out; (C) the platform carve-out; (D) the educational carve-out; and (E) ensuring that the Proposal does not exacerbate the problem of leakage of assets out of the retirement system.

A. Definition of Fiduciary

1. Background

Section (a) of the Proposal redefines investment advice fiduciary status broadly so that any person who provides any of four categories of "covered advice" for a fee (broadly defined) and either acknowledges fiduciary status, or satisfies a streamlined functional test, is a fiduciary. The four categories of advice are:

i. Recommendations on securities or other property, including recommendations on distributions and rollovers to IRAs
ii. Recommendations on the management of securities or other property, including recommendations on amounts to be rolled over or distributed
iii. Appraisal or fairness opinion, verbal or written, concerning value of securities or other property in connection with a specific transaction(s) involving the plan or IRA
iv. Recommendation of a person who provides covered investment advice (*e.g.* recommending an investment advisor or manager, including oneself (or an affiliate)).

The Proposal defines the term "recommendation" broadly, to include a "communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."

The "functional test" requires only that a person (a) provide one of the four categories of advice, (b) pursuant to written or verbal agreement or understanding, (c) the advice must be either individualized or "specifically directed" to the individual, (d) for consideration in making investment or management decisions.

Under the Proposal, ordinary sales and support activities, where coupled with any kind of discussion, comparison or identification of available investment options, strategies, advisors or managers, could reasonably be viewed as a recommendation. Moreover, since a recommendation need not be individualized if it is "specifically directed to" a recipient, many communications that are not tailored to the needs of an individual or a plan may nevertheless be considered by the recipient in some way.

2. <u>Definition of Fiduciary Comments and Proposed Changes</u>

Treating sales as a fiduciary act will be to the detriment of Retirement Investors. The scope of the proposed fiduciary advice definition does not currently make it clear that sales and marketing are still permitted in the Retirement Investor space.

<u>Wholesale Distribution Not Taken into Account</u>:

John Hancock does not market its recordkeeping services or insurance and investment products and services directly to the end purchaser. Like many other providers, John Hancock instead, through its "wholesale" workforce, provides information about its products and services to "distributors." For example, John Hancock wholesalers market John Hancock mutual funds to unaffiliated plan recordkeepers in an effort to ensure that John Hancock funds are available on multiple recordkeeping platforms. Similarly, John Hancock provides information and support to representatives or investment advisors who assist plan sponsors in selecting from among the available platforms, and, once on a platform, in selecting investment options and other available plan features and services.

This wholesale distribution approach is an efficient means of accessing groups of buyers for products and services. In addition, wholesalers are experienced financial services professionals who only succeed through long term relationships with quality distributors who protect the interests of the end consumer. Therefore, they are uniquely situated to encourage and share responsible sales activities that provide long term value to the end consumer. In this regard, John Hancock provides a variety of information, services and support to financial advisors that are intended to enhance the advisor's ability to professionally engage and support clients in all facets of retirement savings and general investment advisory services. John Hancock is concerned that this business model is not adequately addressed in the Proposal and that Retirement Investors will be substantially harmed if the Proposal is not clarified to fix this problem.

One concern about the Proposal is that John Hancock, in its wholesaler role, may not know, in any given interaction, whether a distributor, such as a plan recordkeeper or investment advisor, is acting in a fiduciary capacity. Yet under the Proposal, any person providing covered advice that is specifically directed to a fiduciary for consideration in making investment or management decisions is themselves an advice fiduciary. This "cascade" effect is unworkable. It will simply be impossible for John Hancock wholesalers to know the extent to which they are communicating with persons who may (or may not) be themselves acting in a fiduciary activity. The problem is amplified by the fact that under the Proposal instances of "unintentional" fiduciaries are likely to be common. For example, if a recordkeeper unaffiliated with John Hancock fails to meet the requirements of a platform exemption, and therefore becomes a fiduciary with respect to all of its recordkeeping clients, and John Hancock has marketed John Hancock mutual funds to the unaffiliated recordkeeper, John Hancock could itself be a fiduciary under the Proposal. We do not think that the Department intended this result.

Proposed Change to Address Wholesale Distribution:

We request that the Department address this problem by narrowing the fiduciary definition so that it does not capture information provided to distribution partners (who may or may not choose to act as non-discretionary advice fiduciaries). This could be done by specifying that statements directed to non-discretionary investment advice fiduciaries are not considered investment advice. The Department's expressed concerns regarding consumer protection should not apply to communications with professionals who are fiduciaries solely by reason of providing investment advice for a fee. This is a logical break in the unintended "cascade" of fiduciary status that would otherwise flow from the Proposal.

Educational Materials Are Often "Specifically Directed To":

In addition to not knowing whether its distribution partners are acting as fiduciaries, John Hancock is concerned that under the Proposal it may be difficult to know whether information could be viewed as "specifically directed" to a Retirement Investor, and therefore that such persons will simply receive less information – including information that may be very helpful. As an example, plan recordkeepers may send out mailers that discuss the functions of a target date fund to investors who may have overlapping investments in multiple target date funds (thinking this constitutes greater diversification), or a mailer may be sent encouraging diversification or an increase in contribution rate to max-out an employer match. These generic investment behavior alerts could be considered "specifically directed" to a Retirement Investor and may not clearly fall within the education carve-out. Rather than rely on the burdensome Best Interest Contract Exemption, most recordkeepers will simply stop sending out this information. This sort of harm to participants cannot have been intended by the Proposal. We also note that it is not always possible to prevent a recipient from using advice given in the context of a non-retirement account in connection with a retirement account. As a result, the uncertainty introduced by the "specifically directed to" requirement could impact even non-retirement conversations.

Proposed Change to Facilitate Targeted Education:

Requiring the advice to be individualized to the Retirement Investor rather than simply specifically directed to such an investor would reduce the likelihood that participants would be deprived of helpful and unconflicted communications.

Marketing and Generic Investment Information Materials Should Not Be Fiduciary:

John Hancock does not believe that providing a research report that discusses a potential investment, or a select list, to a plan sponsor (whether directly or indirectly) should be a fiduciary activity because it is not intended as a recommendation, but only to make the sponsor or distributor aware of information that may be relevant or helpful to them. Similarly, a brochure discussing a platform with an advisory program option (*e.g.*, an independent advisory tool to create a plan line-up) should not be fiduciary advice. Finally, presenting a sample 401(k) menu or a proposed set of investment guidelines in connection with a response to a Request For Proposals ("RFP") should not result in fiduciary status of the potential provider.

Proposed Change to Permit Sales Activity:

Fundamentally, the information described above is part of a sales process that is clearly identifiable as such. The Department should revise the proposal to ensure Retirement Investors have access to basic information and to allow financial firms to educate, inform and sell products and services. These changes should include requiring a materiality standard such that the Retirement Investor must actually take into account and rely on the advice given as something other than simply generic education or marketing. If the Department uses elements of FINRA guidance as a definition of recommendation (as it currently proposes to do), then the Department should also adopt the rest of FINRA's interpretive guidance, that effectively limits the scope of the definition. The Department should clearly indicate that whether a communication constitutes a recommendation is a facts and circumstances inquiry to be determined on a case-by-case basis. These facts and circumstances take into account how individualized the communication is and whether a "call to action" has been made such that a reasonable person under similar circumstances would understand that advice is being provided rather than a sale. Specific items, such as information requested by an investor are generally excluded from the scope of what constitutes a "recommendation".[3]

Rollover Assistance Should Not Be Fiduciary:

John Hancock does not believe that providing distribution education to terminating and retiring 401(k) participants or providing information about proprietary rollover IRA solutions should be deemed a fiduciary activity. Nor does it believe that helping a participant willingly self-direct into a proprietary IRA should be considered a fiduciary activity. Small balance participants (those with less than $10,000) accounted for 62% of all rollover eligible distributions from John Hancock guaranteed annuity 401(k) plans in 2014. Many of these individuals rely on the educational services provided by recordkeepers like John Hancock for help with distributions and rollovers, as these Retirement Investors in particular do not have sufficient assets to make them of interest to most financial advisors. That said, John Hancock recommends clarifying the definition to ensure valuable educational resources, information and services are not inadvertently "shut off" by the expanded fiduciary definition.

Proposed Change To Allow Rollover Assistance:

[3] *See* FINRA Regulatory Notice 11-02 and NASD Notice to Members 01-23.

Clarify that the expanded fiduciary definition applies specifically to financial advisors, registered representatives making point-in-time recommendations, and insurance agents, and not to recordkeepers and/or individuals providing distribution education and/or self-directed rollover services. Meanwhile, specifically state that the definition does not include education-based, self-directed service models designed to help terminating and retiring participants understand their distributions options, including proprietary IRAs, as referenced in FINRA Notice 13-45 (Dec., 2013). This would ensure that large numbers of Retirement Investors – particularly those with smaller balances – would continue to have access to the information and resources they very much need.

B. Carve-Outs

The breadth of the proposed definition of investment advice fiduciary makes expansion of the carve-outs, including providing coverage for advice given to small employers and to IRAs, essential in order for services to continue to be available.

1. Seller's Carve-Out

The seller's carve-out found in section (b)(1) of the Proposal is available with respect to transactions with plans represented by a fiduciary with responsibility for managing at least $100 million in employee benefit plan assets (provided that the advisor/counterparty confirms the fiduciary's "size" qualification either by relying on the plan's most recently filed Form 5500 or by obtaining a written representation from the fiduciary regarding its assets under management). For transactions with plans represented by fiduciaries having less than $100 million in assets under management, the advisor/counterparty must obtain a written representation from the plan fiduciary that: (i) it exercises authority and control with respect to the management and disposition of plan assets; (ii) the plan has 100 or more participants; and (iii) the fiduciary will not rely on the person to act in the best interest of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity. Regardless of the size of the plan or its assets, the fiduciary must be independent of the seller, and the seller must inform the fiduciary of the "existence and nature of the person's financial interests in the transaction" and must not receive a fee for the provision of investment advice.

Marketing To Distributors Should Be Covered:

While it is critical that the definition itself be changed to permit non-fiduciary sales activities, to the extent that a sales carve-out continues to be a part of the final rule, there is no reason to believe that sales to distributors, who could become fiduciaries under the Proposal, should not be covered under a sales carve-out. In the proposal, the Department characterizes the seller's carve-out as being available for advice provided to an "expert plan investor" in circumstances involving the sale of a product or service.[4] Distributors are, by definition, experts

[4] 80 Fed. Reg. 21928, 21941 (Apr. 20, 2015). In the Proposal, the Department also explains that small plan sponsors typically lack the sophistication necessary to manage financial investments and lack access to investment advisors. In practice, John Hancock believes that many small sponsors, while quite sophisticated in investment matters, decide that it is efficient and helpful to utilize the services of an advisor or other financial expert to help guide the sponsor through various plan-related decisions.

with a sophisticated understanding of the financial services marketplace. John Hancock requests that the Department take this expertise into account in re-designing the seller's carve-out.

Proposed Change To Facilitate Distribution:

We request that the Department expand the seller's carve-out to cover sales activities to other investment advice fiduciaries as defined in section 3(21) of ERISA (as interpreted by the final regulation). We suggest that the "assets under management" requirement should be inapplicable to advice fiduciaries, and that the carve-out should apply to fiduciaries (whether advice or discretionary) who represent an aggregate of over 100 Retirement Investors whether through one or more plans or multiple IRAs. In addition, any representations required under the carve-out should be required before the transaction occurs, not before a recommendation is made. This would allow for a more natural interaction between the recipient of the information and the seller.

IRA Owners and Plan Participants Need a Carve-Out:

We also suggest that some form of carve-out should be available for certain IRA owners or plan participants involving rollovers or roll-ins.

Proposed Change Expanding Coverage of Seller's Carve-out:

While this could be part of the seller's carve-out, we discuss it separately in section III.B.4, below, as we think it may be best addressed in a separate carve-out.

2. Platform Carve-out

Section (b)(3) of the Proposal includes a "carve-out" from fiduciary status for those who market and make available platforms from which a plan fiduciary can select investment alternatives that are offered to participants and beneficiaries, provided that the person acknowledges in writing that they are not providing investment advice to the plan. Moreover, in connection with those platform provider services, a platform provider may avoid fiduciary status if the person "merely identifies investment alternatives that meet objective criteria specified by the plan fiduciary (*e.g.,* stated parameters concerning expense ratios, size of fund, type of asset, credit quality)"; or "merely provides objective financial data and comparisons with independent benchmarks to the plan fiduciary."[5]

Platform Creation Is Not A Fiduciary Act:

Even under the Proposal's broad fiduciary definition, the offering of a platform should not typically be viewed as a fiduciary act, and therefore should not require a "carve-out." Platforms are created without a particular plan in mind and are not individualized. Therefore, they should not be viewed as involving any sort of "recommendation."

Proposed Change to Utilize Platform Safe-Harbor:

[5] *Id* at 21957-8.

We request clarification that the platform "carve-out" is meant as a safe harbor and that it is not the exclusive means for avoiding fiduciary status when offering or making available a platform.

Distributors Should Be Able to Market Segmented Platforms:

John Hancock maintains two separate platforms intended to meet the needs of different market segments. One platform is typically utilized by the small and micro plan market (generally under $10 million assets in the plan). A second platform is typically utilized by mid-size and large plans (generally having at least $10 million of plan assets). As proposed, the platform carve-out is limited to marketing *by* the platform provider *to* a plan. There is no reason why the platform carve-out (and the safe harbor analysis discussed above) should not apply equally to: (a) marketing by the platform provider to a third party distributor who may (or may not) be acting on behalf of a specific plan; and (b) marketing by such third party distributors of platforms to plans on behalf of an unaffiliated platform provider. Unless this carve-out is extended, the Department will unfairly disadvantage certain providers (*i.e.*, those who utilize a wholesale model), thus harming plans and participants.

Proposed Change to Permit Third-Party Marketing of Segmented Platforms:

This safe-harbor should be expanded to clearly permit marketing of multiple platforms that are segmented based upon market characteristics. We also seek clarification that the platform carve-out covers marketing to a distributor and by such distributor to Retirement Investors.

Group Annuity Contracts Are Platforms:

Group annuity contracts should be considered to be a platform for purposes of this carve-out. A group annuity contract is a bundle sold to a plan sponsor that wraps together services and investments allowing the sponsor to select various separate accounts with specified investment strategies, much like electing a mutual fund on a traditional recordkeeping platform.

Proposed Change Clarifying Group Annuity Contracts Are Platforms:

We ask that the Department confirm that a group annuity contract would be considered a "platform or similar mechanism" for purposes of the carve-out or any similar safe-harbor established by the Department in the final rule.

Exclusion of IRAs Disadvantages Individuals:

The Proposal's failure to apply the platform carve-out to IRAs may well have unintended consequences that harm plan participants. Just as plan sponsors and participants find it helpful to have a limited number of investment choices, IRA owners do as well. So long as the contours and limits of the platform of investments available are clearly noted, IRA owners should be able to learn about such platforms. As discussed further, in section III.B.4, below, lack of options for participants considering a rollover, particularly low-balance participants, is a real concern that the Department should not ignore. One approach to addressing this concern would be to allow the platform exception to be available in connection with communications with IRA owners and plan participants.

Proposed Change To Include IRA Platforms:

The Department should consider expanding the platform carve-out to apply to communications to all Retirement Investors.

***<u>Generic Fund Line-ups Assist Sponsors</u>*:**

In connection with the selection and monitoring elements within the platform carve-out, the Department should consider specifically allowing generic sample line-ups in an RFP process. We believe that this would be especially helpful in the context of marketing an open architecture platform. John Hancock appreciates the Department's recognition of the assistance that a platform provider can give in creating a line-up from a platform. However, we believe that this assistance should also be able to be provided by distributors, not just the platform sponsor.

<u>Proposed Change To Permit Generic Line-ups</u>:

We request the selection and monitoring portion of the platform carve-out be expanded to distributors, and that sample line-ups be permitted in the marketing process so long as they are generic in nature or respond to a specific request by the Retirement Investor. Again, we see no reason that the individual account owners who contribute to IRAs should not be covered by this carve-out as well and ask for this expansion.

3. <u>Education Carve-out</u>

Section (b)(6) of the Proposal includes a carve-out to exclude from the definition of fiduciary advice the provision of investment education ("Investment Education"). This carve-out would supersede and replace commonly used Investment Bulletin 96-1, 29 CFR 2509.96-1 (IB 96-1). IB 96-1 generally permits the furnishing of (1) plan information, (2) general financial, investment and retirement information, (3) asset allocation models, and (4) interactive investment material by a plan sponsor to its participants (but has been widely understood to apply more broadly to other persons). While the Investment Education carve-out largely mirrors the provisions of IB 96-1, the Proposal also specifically permits certain information to be provided to Retirement Investors to help them assess their needs past retirement and certain risks that may affect retirement readiness. While John Hancock applauds these changes, we think the Department should allow asset allocation models to identify specific investment products.

***<u>Identification of Specific Investments Is Beneficial To Retirement Investors</u>*:**

Retirement Investors need basic information about how to construct a diversified portfolio. Investment education without help in identifying investment funds and options that meet a Retirement Investor's needs is simply not helpful and will result in poor decisions by Retirement Investors (or, just as likely, the avoidance of any decision-making at all). Financial literacy is not a skill many individuals feel that they have.[6] Many Retirement Investors have come to rely on asset allocation models and accompanying information identifying available investment options that meet certain criteria.

<u>Proposed Change Allowing Identification Of Investment Options</u>:

[6] A 2014 study found that 41% of Americans would give themselves a grade of C, D, or F in terms of their knowledge about personal finance, while 73% agree that they would benefit from advice from a professional. "<u>The 2014 Consumer Financial Literacy Survey</u>", prepared by the National Foundation for Credit Counseling.

The carve-out should be revised to permit asset allocation models to identify funds that match an asset class as permitted currently by IB 96-1. At a minimum, the identification to Retirement Investors of investments on a particular product or platform which match allocation models needs to be permitted. Ideally, this could be narrowed to one or two funds, so long as the criteria used to identify the smaller set of funds is disclosed.

Selection & Monitoring Assistance Aides Retirement Investors:

Plan sponsors also require assistance that may not be covered by the selection and monitoring carve-out in creating a plan investment line-up. For example, a plan sponsor may require additional assistance in order to even generate the objective criteria needed under that carve-out. The recent U.S. Supreme Court decision *Tibble v. Edison International*, 575 U.S. ___ (decided May 18, 2015) also suggests plan sponsors need to periodically reassess their plans' fund alignments in order to meet their own fiduciary duties. These sponsors will not be well served if a result of the Department's fiduciary rule is to reduce access to evaluation tools for this purpose.

Proposed Change To Allow Analytical Tools To Assist Selection & Monitoring:

The Department should modify the proposal to clarify that making such analytical tools available to other plan fiduciaries does not constitute investment advice.

4. Create a Limited Rollover and Roll-In Carve-out

Rollovers & Roll-Ins Mitigate "Leakage":

In a recently released longitudinal study by the U.S., Bureau of Labor Statistics ("BLS") the average person born between 1957 and 1964 held 11.7 jobs from age 18 to age 48.[7] Roughly 6 of these jobs were held after these workers turned age 24. BLS has not published a similar study of younger workers, although BLS statistics indicate that in January 2014 the average tenure with the current employer for all workers 25 years and over was 5.5 years, which indicates that workers younger than the cohort studied in the BLS longitudinal study may change jobs more frequently than the studied workers. Assuming younger workers change jobs at the same rate as workers included in the longitudinal study, the average American worker over age 24 will likely have 5 to 6 decision points before retirement in which he or she may be called upon to decide whether to:

- Take a taxable distribution of account assets;
- Leave account assets with a former employer's plan (if permitted);
- Rollover to an IRA; or
- Rollover to a new plan (if permitted).

The consequences of taking a taxable distribution can be very damaging to a person's retirement readiness. For example, a participant who is age 35 and has $3,000 in their 401(k)

---

[7] Bureau of Labor Statistics, Number Of Jobs Held, Labor Market Activity, And Earnings Growth Among The Youngest Baby Boomers: Results From A Longitudinal Survey (March 31, 2015), http://www.bls.gov/news.release/pdf/nlsoy.pdf

and contributes $1,000 per year until age 65 could (conservatively) have as many as three years more of retirement income than a similar individual who takes a cash distribution of $3,000 at age 35 but then subsequently starts saving $1,000 per year in a tax deferred account until age 65 (assuming annual market growth of 8% and $20,000 annual income beginning at age 65 and adjusted for 3% inflation thereafter).

John Hancock submits that the consequences of the remaining three distribution options can vary widely among participants, and that participants may well be better off with a rollover or a roll-in. It is not always true that the average cost to a participant of investing through a 401(k) plan is less than the cost of investing in substantially similar underlying investments through an IRA.

It is also our experience that, rightly or wrongly, cost is just one factor that is important to plan participants faced with the options outlined above. In fact, many employees separating from service are highly motivated to completely disengage from their former employer, including removing their retirement assets from that employer's plan, and many are committed to cashing out and spending their balances. Statistics from the John Hancock rollover call center, which typically accepts in-bound calls only and makes no outbound calls soliciting IRA rollovers, illustrate this point. The majority (59%) of rollover eligible distributions from John Hancock's small market 401(k) plans are from terminating participants who took a cash distribution of their entire balance.

One of the key functions the John Hancock rollover education call center provides is educating participants about the tax consequences of taking cash, and how taking a full cash distribution can be detrimental to their long-term retirement goals. The preceding statistic corroborates the everyday experience in our rollover education center, whereby many participants call us with the intention of taking a full cash distribution because they need money to tide them over during a job transition or job loss and think that taking cash is their only choice. As such, we are concerned that the Proposal will make it even harder for us to help Retirement Investors. Having this educational discussion with participants without being able to explain how an IRA can help them better accomplish their long term goals will not help reduce leakage. In addition, in some cases it is necessary to provide additional information that may be unique to a participant or plan. For instance, some plans serviced by John Hancock offer guaranteed lifetime income features that are lost if the retirement investor cashes out of the plan or rolls into an IRA or new employer plan. John Hancock offers an IRA product for Retirement Investors in these plans to continue the guaranteed lifetime income option. Being able to identify this feature in a proprietary IRA product would be of benefit to the Retirement Investors who have previously indicated their desire for a guaranteed lifetime income option.

John Hancock also offers a service that assists participants in consolidating their existing retirement accounts within the current employer's plan. These consolidation or "roll-in" services can allow participants to better track and manage retirement assets accumulated at numerous different jobs, or that have been forced out of the plan and into an IRA. Plan sponsors may elect to utilize this service for their participants for a number of reasons, including that roll-ins can help increase the total assets in the plan, which may result in helping the plan achieve fee break thresholds. Many participants are unaware that they have retirement accounts that they have not

been monitoring or tracking. Others are aware of such accounts, but do not understand the features of those plans and do not have any idea how to best consider those assets in retirement planning. Bringing those disparate assets together into a single plan makes it easier for plan participants to take advantage of tools that help them understand how much they need to save to prepare for retirement. Having their assets in a single plan also makes it easier for them to effectively respond to changing circumstances by making changes in their investment selections. In 2014, John Hancock's call center helped 19,550 individuals move approximately $740 million from other plans and IRAs into their current employers' plans, with an average transferrable balance from all sources of $37,859. Of those roll-ins, 28% were from a source with a balance under $5,000 (with an average balance of $2,205).

We are concerned that the Proposal does not offer sufficient flexibility to conduct rollover and roll-in activities in a manner that is not off-putting to the consumer. The Proposal would make it economically not viable for financial institutions to help the small balance individual Retirement Investors because of the increased compliance cost and risk associated with becoming a fiduciary. The Department should be strongly supportive of such educational services that reduce retirement asset leakage, rather than creating new procedural and liability risk hurdles.

As currently proposed, there is no clear channel for an IRA provider to inform a Retirement Investor about the existence of IRA products. This applies equally to all IRAs including those designed to invest in proprietary funds and lifetime income products plus those that are self-directed or advised. Given the breadth of the definition of "recommendation," once a specific product has been identified it is not clear that the education carve-out would apply, nor that the counterparty carve-out would apply.

Should the conversation be considered a recommendation, compliance with the BIC Exemption is ill-suited to rollover conversations. The service provider, usually a call center representative of the recordkeeper, is unlikely to have access to sufficient information about the plan from which the Retirement Investor is leaving nor about the full financial situation of the Retirement Investor to conclude that a rollover is in the best interest of the Retirement Investor rather than leaving the assets in the retirement plan. It is much more likely that the representative could conclude that cashing the assets out of the retirement savings system is not in the best interest of the Retirement Investor and that retention of those assets within the system by any means (IRA or employer plan) is better for the consumer. Attempting to perform a full investment analysis, as required under the BIC Exemption, between the employer plan and potential IRA is beyond the capabilities of an in-bound call center. Likewise, the call center representative is unlikely to be able to comply with the disclosure and contract conditions of the BIC Exemption as he or she will not know anything about the investment of the Retirement Investor's assets within the IRA and cannot execute a contract over the phone. In a majority of cases, John Hancock call center employees facilitate rollovers into a self-directed IRA, meaning that no John Hancock entity is providing investment advice regarding the investment allocation within the IRA. A dramatic change would need to occur if call center employees were expected to perform an economic analysis or enter into a fiduciary relationship with callers. This dramatic change would come at a cost that would make provision of this service unreasonable. Thus, the

very Retirement Investors whom the Proposal is designed to protect would likely no longer have access to these valuable services.

Proposed Change To Create Rollover & Roll-In Carve-out:

The Department should draft a limited carve-out that allows persons who do not receive differential compensation based upon rollovers to identify IRA product options (including proprietary options) without being considered to have made a fiduciary recommendation. Permissible discussion topics should include the benefits of not taking an early distribution, and the identity of proprietary IRA options. Persons providing such information could be required to inform the caller that rolling over into a new employer plan may be an option and that leaving the assets in the current plan may also be an option but could not make any statements about which of these options may be "better" than another.

Similarly, individuals, such as call center employees, who do not receive differential compensation, should be permitted to assist participants in identifying retirement accounts eligible to be consolidated or rolled-in to the participant's current plan without being considered to have made a fiduciary recommendation.

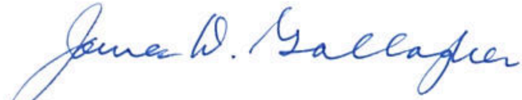
IV. Conclusion

John Hancock fully supports the Department's desire to hold true investment advice fiduciaries to a high fiduciary standard of care, but the overall breadth of the Proposal's fiduciary definition has pulled in too many activities that should not be considered advice in nature. The Proposal has the potential to greatly disrupt the sales, distribution, and service models prevalent in the retirement space in a manner that will not be to the benefit of Retirement Investors. With the modifications we have suggested above we believe that Retirement Investors will be afforded the opportunity to receive needed services and information without significantly increased costs. Without the suggested modifications many services will be unavailable, leaving Retirement Investors without needed information and help in an increasingly complex environment.

*　*　*

John Hancock is committed to its customers and appreciates the opportunity to provide these comments to the Department. If the Department has any questions or would like more information regarding this letter, please contact me or John Hancock's outside counsel, Jennifer Eller of Groom Law Group, at jeller@groom.com and 202-861-6604.

Sincerely,



James D. Gallagher,
General Counsel and Chief Administrative Officer

John Hancock Life Insurance Company (U.S.A.)

JH GR 1 2015