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Submitted Electronically – eORI@dol.gov; e-OED@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655 (RIN 1210-AB32) and Suite 400 (ZRIN 1210-ZA-25)
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Definition of the Term "Fiduciary" (RIN 1210-AB32)
Best Interest Contract Exemption (ZRIN 1210-ZA-25)
Principal Transactions in Certain Debt Securities Exemption (ZRIN 1210-ZA-25)

Dear Sir or Madam:

Charles Schwab & Co., Inc., ("Schwab"),[1] on behalf of itself and its affiliates, appreciates the opportunity to provide comments on the Department of Labor's ("Department") regulatory proposal published on April 20, 2015, that would expand the definition of fiduciary investment advice and propose new or modified prohibited transaction exemptions (the "Proposal").[2] Schwab agrees with the Department that it is time to update the definition of fiduciary investment advice under the Employee Retirement Income Security Act of 1974 ("ERISA") to better protect retirement savers from conflicts of interest that can erode savings, while still preserving choice and access to a broad range of investing services necessary to meet diverse individual plan and investor needs.

[1] The Charles Schwab Corporation provides services with respect to retirement and other benefit plans and accounts, as well as to the participants and beneficiaries in such plans and to the account owners, through its separate but affiliated companies and subsidiaries, including Charles Schwab & Co., Inc., Charles Schwab Bank, and Schwab Retirement Plan Services, Inc. Brokerage products and services are offered by Charles Schwab & Co., Inc. (Member SIPC). Trust and custody products and services and deposit products are offered by Charles Schwab Bank. Schwab Retirement Plan Services, Inc. provides recordkeeping and related services with respect to retirement plans and the participants in those plans. Charles Schwab Investment Management, Inc., a separate affiliate, is the investment advisor for Schwab's proprietary funds.

[2] Notice of Proposed Rulemaking –Definition of the Term "Fiduciary"; Conflict of Interest Rule--Retirement Investment Advice, 80 Fed. Reg. 21928 (Apr. 20, 2015).

We are concerned, however, that without making some key changes in the final rule the benefits of the Proposal will not be realized and instead there will be a dramatic reduction in the assistance available to retirement savers to make smart retirement planning and investing decisions and in the information available to plan sponsors to make informed plan decisions. This would result in much larger than anticipated negative impacts and costs, harming the very retirement savers that the Department intends to protect through the Proposal. To make sure this does not happen, the Proposal should be re-proposed with changes, adopted as an interim final rule, or published in some other meaningful way for stakeholders to review before a rule is final and effective.

I. About Schwab, Our Clients, and Our Concerns

Schwab is one of the largest financial institutions in the United States with over $2.5 trillion under custody. Schwab's business model offers high-value, low-cost investment services to retirement savers and the independent investment advisors, employers, and third party administrators who serve them. Together with its affiliates including Charles Schwab Bank and Schwab Retirement Plan Services, Inc., Schwab provides a full range of advisory, brokerage, recordkeeping and trust/custodial services for retirement plans, participants and beneficiaries, and IRA owners. Schwab's affiliates Charles Schwab Investment Management, Inc. and Charles Schwab Bank, offer mutual fund, exchange traded fund and collective trust fund investment vehicles.

Schwab serves a wide range of retirement savers including 3.2 million IRAs in our retail business alone. Sixty percent of all retail households at Schwab have at least one IRA. Over 7,000 independent registered investment advisors and their clients choose Schwab to custody their brokerage and retirement accounts and to provide trading and investment services. Schwab websites with thousands of pages of information and resources, over 300 branch offices, and national call centers provide 24 x 7 service to retirement savers and the advisors and third party administrators who provide support to them. While a majority of our clients are self-directed investors who rely on online tools, research, and education to make their own informed investment decisions, a substantial and growing number seek occasional individualized guidance or ongoing investment advice for a reasonable fee.

Of critical importance is that the final rule preserve: (1) access to fiduciary investment management services that help millions of retirement savers achieve better retirement outcomes today and are already subject to the full protections of ERISA and the Investment Advisers Act ("Advice Programs") and (2) access to online tools and resources that millions of retirement savers rely on today to make informed investment decisions on their own.[3]
We describe below Schwab's support for key elements of the Proposal, and then the specific measures we recommend be adopted to ensure that negative, unintended consequences are avoided:

[3] The changes we recommend below and in the attached redline mark-ups of the Proposal's text harmonize the new rule with the Investment Advisers Act disclosure requirements and FINRA's rules governing IRA rollover conversations and online tools for self-directed investors, thereby avoiding inconsistent standards.

A. The final rule must enable recommendation of Advice Programs in the client's best interest, without imposing unnecessary burdens (page 6);

B. The final rule must preserve online tools and resources for self-directed investors, without such assistance being viewed as fiduciary investment advice (page 8);

C. The final rule must permit providers to make clients aware of services, including rollovers, without such information being viewed as fiduciary investment advice (page 10);

D. A clearer line should be drawn between sales and advisory activities, so that plan sponsors and retirement savers can make informed decisions in selecting service providers (page 14);

E. The Department should allow customary investment platform and fund assistance practices to continue without fiduciary implications (page 15);

F. The Department should clarify that routine valuation practices are ministerial rather than fiduciary activities (page 16); and

G. The Department should remove unnecessary and burdensome elements of the Principal Transaction Exemption (page 17).

We conclude by suggesting certain pragmatic measures for implementation in light of the Proposal's complexity.

II. Schwab Supports the General Intent of the Proposal

We agree with the Department on many issues of critical importance.

- **We agree with the Department regarding the importance of tax-deferred retirement savings to the retirement security of U.S. workers, and the importance of education and expert advice in helping guide the decisions necessary to a successful retirement.**[4]

For many American workers, their retirement plan is their only or primary source of retirement savings.[5] Alarmingly, a sizeable portion of American workers have virtually no money in

[4] U.S. Department of Labor, "Fiduciary Investment Advice Regulatory Impact Analysis" ("Regulatory Impact Analysis"), available online at http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf at 1, 108 (Apr. 14, 2015). The Regulatory Impact Analysis is summarized at 80 Fed. Reg. 21951.

[5] In a 2010 survey 7 out of 10 survey participants reported that their current 401(k) plan was either the only source or the largest source of retirement savings. Schwab Retirement Plan Services, Inc. in conjunction with Koski Research Inc., *The New Rules of Engagement for 401(k) Plans* (2010).

savings and investments; understandably, American workers are very concerned about this issue.[6] Studies show that when plan participants receive help, they do significantly better in saving and investing for retirement.[7] The Department understands this. When announcing the Final Rule implementing the Pension Protection Act of 2006 investment advice provisions, the Department recognized the significant losses associated with flawed investment decisions that are at least partially caused by ERISA prohibitions.[8] To encourage more retirement savings for all Americans, Schwab fully endorses regulatory initiatives that serve to expand access to guidance and education services to help investors.

- **We support a new definition of fiduciary investment advice that "better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty."[9]**

We agree with the Department that it is critical to address conflicts of interest that result in quantifiable harms to retirement savers, including "underperformance of broker-sold mutual funds…due to loads that are taken off the top and/or poor timing of broker sold investments" and "excessive trading and associated transaction costs and timing errors (such as might be associated with return chasing)…."[10] We agree that parties providing fiduciary investment advice to retirement plans, to the participants and beneficiaries in such plans, and to IRA owners

[6] Nearly 80% of participants in the Schwab/Koski study lacked confidence that they will have enough money for retirement. *Id.* According to the 2015 Retirement Confidence Survey conducted by the Employee Benefit Research Institute, almost two-thirds of workers reported that they felt behind schedule regarding planning and saving for retirement, although the Survey noted that "this assessment may not be based on a careful analysis of their individual circumstances." Employee Benefit Research Institute (EBRI), *The 2015 Retirement Confidence Survey: The Importance of Having a Retirement Plan* (March 2015).

[7] A 2014 paper from Morningstar Investment Management showed that approximately 87% of participants enrolled in an advisory program increased their savings deferral rates after receiving recommendations to save more, and on average, participants increased their savings deferral rates by approximately 2% of salary. The percentage of participants that increased their savings deferral rates was determined by comparing each participant's savings deferral rate prior to and after using the Morningstar® Retirement Manager℠ service. David Blanchett, Morningstar, Inc., *The Impact of Expert Guidance on Participant Savings and Investment Behaviors"* (Aug. 20, 2014).

[8] The Department stated as follows in 201l: "With the growth of participant-directed retirement savings accounts, the retirement income security of America's workers increasingly depends on their investment decisions. Unfortunately, there is evidence that many participants of these retirement accounts often make costly investment errors due to flawed information or reasoning…these participants may make financial mistakes which result in lower asset accumulation, and thus final retirement account balances, for these individuals and/or result in less than optimal levels of compensated risk. Financial losses (including foregone earnings) from such mistakes likely amounted to more than $114 billion in 2010…These losses compound and grow larger as workers progress toward and into retirement. Such mistakes and consequent losses historically can be attributed at least in part to provisions of the Employee Retirement Income Security Act of 1974 that effectively preclude a variety of arrangements whereby financial professionals might otherwise provide retirement plan participants with expert investment advice." 76 FR 66136 at 66151 (Oct. 25, 2011).

[9] 80 Fed. Reg. at 21929.

[10] *Id.* at 21930.

should act in the best interest of their clients and be held responsible if they fail to do so. Retirement savers deserved to be protected from the abuses of bad financial providers.

- **We agree with the Department's goal of preserving beneficial business models for the delivery of investment advice.**

The Department states that it seeks to:

> preserve beneficial business models for delivery of investment advice…as long as they are willing to adhere to basic standards aimed at ensuring that their advice is in the best interest of their customers. Rather than create a highly prescriptive set of transaction-specific exemptions, the Department instead is proposing a set of exemptions that flexibly accommodate a wide range of current business practices, while minimizing the harmful impact of conflicts of interest on the quality of advice.[11]

We appreciate the Department's acknowledgment that many current business models work well and should not be disrupted. It is critical that variations in business structures be preserved to give retirement plans and investors choice and access to different products, services and fee models based on their own unique situation and goals. Not all retirement investors are the same, and they should not all receive the same services nor pay for services in the same way. The Department has recognized the importance of such variations in service and fee models, stating that "investment firms may be more willing to differentiate the level of services and charge fees accordingly…This is likely to positively affect investors…because investors can have more choices on the level of services and fees based on their needs."[12] For example, we agree that the "difference in comparative advantage makes robo-advisers and traditional adviser firms complement rather than substitute [for] each other."[13] Recently Schwab launched a "robo-advice" service for those clients for whom it is appropriate, and makes a variety of other solutions available to investors who would like more traditional forms of advisory services.

III. Key Concerns with the Proposal

Although Schwab agrees with the Department's laudable goals, we have significant concerns, and therefore provide a number of suggestions for changes that would address conflicts arising from the provision of fiduciary investment advice to plans and retirement savers, while ensuring that those in need of education and advice are not harmed as a result of unintended consequences.

[11] *Id.* at 21929.

[12] Regulatory Impact Analysis at 231 (Apr. 14, 2015).

[13] *Id.* at 231.

A. The final rule must enable recommendations of Advice Programs in the client's best interest, without imposing unnecessary burdens

Under the Proposal, a recommendation as to the management of securities and a recommendation of a person who gives investment advice would be fiduciary activities.

With an expanded definition of fiduciary activities, it is critical to still be able to offer retirement savers a choice of advice products and services to meet their individual needs, from simple and low cost to more complex and higher cost. Many service providers such as Schwab offer an array of fee-based programs: discretionary and nondiscretionary advice services, and affiliated and third party money managers who help clients invest in diversified or tactical allocation portfolios of ETFs, mutual funds and/or individual stocks and bonds. This includes referrals to independent investment advisors for discretionary management services that are already subject to the full protections of ERISA and the Investment Advisers Act. This also includes managed account or "wrap" programs which combine investment management with brokerage commissions for one asset-based fee. Collectively, these can be referred to as "Advice Programs." Schwab alone offers 201 different portfolios or strategies (many managed by third party advisors) on 5 platforms for retirement savers to choose from, plus the opportunity to be referred to 178 independent registered investment advisors. With this choice comes the necessity for a financial consultant to assess the client's needs to recommend the Advice Program that is best for that particular client. Recommendations to and under these programs are already subject to the Investment Advisers Act of 1940 and its fiduciary best interest standard.

In addition, independent registered investment advisors, typically small businesses who serve clients in their local communities, provide financial planning and investment management services that integrate retirement accounts with a household's other accounts and assets for holistic wealth management. They often recommend that a new or existing client consolidate retirement assets, for example by rolling over 401(k) plan holdings into an IRA, to enable comprehensive management of the client's retirement and non-retirement accounts in one overall portfolio or household view. As fiduciaries, independent investment advisors' financial planning and investment management activities are also subject to the Investment Advisers Act of 1940 and its fiduciary best interest standard. These too can be referred to as "Advice Programs" for purposes of considering an appropriate carve-out or exemption under the Proposal.

Schwab agrees with the Department that the recommendation of an Advice Program should be in the client's best interest. However, the Proposal does not provide a clear carve-out or appropriate prohibited transaction exemptive relief necessary for the direct and indirect compensation a fiduciary or an affiliate receives as a by-product of a retirement saver entering an agreement for or enrolling in an Advice Program.

The newly proposed Best Interest Contract ("BIC") exemption[14] only covers compensation received for services provided "in connection with a purchase, sale or holding of an Asset."[15] Recommendations with respect to Advice Programs would not constitute advice with respect to

[14] Notice of Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960 (Apr. 20, 2015).

[15] *Id.* at 21987.

an Asset, so the BIC exemption is not on its face available in this context. Even if the BIC exemption was available, certain of its requirements would be impossible to satisfy in the context of Advice Program recommendations. For example, advisors are required to disclose under the BIC exemption a detailed amount of information to retirement savers regarding the "Total Costs" of each Asset—the acquisition, ongoing and sales costs with respect to the Assets and the price at which these were purchased or sold. This information is not relevant to Advice Programs. In fact, consistent with their fiduciary duty, discretionary money managers cannot disclose publicly ahead of time the investment they are planning for the accounts that they manage.

Similarly, the Pension Protection Act exemption under ERISA Section 408(g),[16] is not available on its face, as it only specifically extends to the provision of nondiscretionary investment advice (i.e., securities buy and sell recommendations) and not recommendations as to management or referrals to Advice Programs.[17]

If simply carving-out recommendations of Advice Programs from the definition of "investment advice" is not feasible, Schwab suggests two non-mutually exclusive alternatives to address this gap. First, a modified BIC exemption could be adopted that is more tailored and relevant to the recommendations of Advice Programs. To address potential conflicts, the proposed exemption would reflect the same "Impartial Conduct Standards" and other contractual requirements as contained in the BIC exemption, to be incorporated into the investment management or Advice Program agreement that must be executed after the recommendation for investment management occurs, but prior to the actual investment through the advisory program.[18] As a further mitigation measure to address potential conflicts, this tailored exemption could require that any representatives making an Advice Program recommendation be compensated on a level basis, to remove the incentive to recommend an advisory solution that would produce higher compensation to the party delivering the advice recommendation. Investment Advisers Act disclosures (the Form ADV Part Two) that already mandate disclosures of advisory fees and conflicts, would substitute for the Asset-based and product-related disclosures of the current BIC.

Schwab's proposed modified BIC exemption, showing changes to the proposed BIC exemption as tailored to reflect recommendations of Advice Programs, is attached as Exhibit 1.

[16] Public Law 109-280, 120 Stat. 780 (Aug. 17, 2006), Sec. 601.

[17] Schwab relies on this Pension Protection Act exemption today for the advice it delivers within its fee-based non-discretionary advisory program.

[18] We recommend that the Department clarify that under both the proposed BIC exemption and a modified BIC exemption, the advisory agreement be entered into between the advice provider and the advice recipient. The Department should further clarify that the advice recipient would be the plan sponsor, rather than the participant, in the case of participants defaulted into an investment option that is a qualified default investment alternative under ERISA Section 404(c)(5) and 29 CFR 2550.404c-5 ("QDIA"). A QDIA is an investment option selected by a plan sponsor under a retirement plan to invest the assets of a plan participant who makes no investment decision. Plan sponsors complying with DOL QDIA regulations will avoid liability for losses resulting from a participant's investment in the QDIA. Due to the nature of a QDIA (i.e. that participants do not select the option, but rather default into it as a result of their inaction), the plan sponsor should be the party entering into the advisory agreement.

Second, the Department could revise its regulation under 29 CFR 2550.408g-1, promulgating the statutory prohibited transaction exemption under ERISA Section 408(g). ERISA sections 408(b)(14) and 408(g) provide an exemption for the receipt of compensation resulting from ERISA section 3(21)(A)(ii) advice recommendations made as part of an eligible investment advice arrangement. At the time these statutory provisions were enacted in 2006, the current definition of investment advice – which refers to investment (but not management) recommendations – had been in place for more than 20 years. Accordingly, the Department's final rule under ERISA section 408(g) tailored the scope of relief available to non-discretionary investment recommendations.[19] In light of the Department's proposal to expand the 3(21)(A)(ii) definition of fiduciary investment advice to include management recommendations (such as Advice Programs), we urge the Department to update the 408(g) regulation to reflect this change.

Our suggestion is for the regulation to track the new investment advice definition under the Proposal by covering (1) investment recommendations (as it does today), (2) investment management recommendations and (3) recommendations of persons to provide investment advice for a fee or to manage plan assets. This can be accomplished by clarifying and expanding the meaning of a "designated investment option" and of an "investment option" to include both a designated investment alternative and an "Advice Program." The term Advice Program captures a service arrangement where someone recommends to a plan participant or beneficiary or IRA owner a fee-based nondiscretionary or discretionary investment management service. Collectively, these changes preserve the protections currently in place for retirement savers while providing relief for recommendations of Advice Programs.[20]

Schwab's proposed modification to 29 CFR 2550.408g-1 is attached as Exhibit 2.

B. The final rule must preserve online tools and resources for self-directed investors, without such assistance being viewed as fiduciary investment advice

Many investors do not wish or cannot afford to pay for advisory services and elect to make their own investment decisions. Millions of retirement savers are included in this large category of self-directed investors who rely on online tools such as calculators, screeners, portfolio analyzers, planning tools and investment research on stocks, bonds, mutual funds and ETFs. The research tab on schwab.com alone averages 95,000 page views a day.

The current Proposal's expansive definition of recommendation, without clarification through the investment education carve-out, could place at risk the availability of these online tools and resources for self-directed investors.

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[19] Final Rule, Investment Advice—Participants and Beneficiaries; 29 CFR 2550.408g-1; 76 Fed. Reg. 66136 (Oct. 25, 2011).

[20] A recommendation to enroll in an Advice Program such as a wrap account or to hire a registered investment advisor to manage retirement assets is non-discretionary, meaning that the retirement saver can choose whether or not to accept the advisory service. In this way the suggested change is consistent with Section 408(g).

Subsection (6)(iv) of the investment education carve-out for "interactive investment materials" excludes materials that "include or identify any specific investment alternative available or distribution option available under the plan or IRA, unless such alternative or option is specified by the participant, beneficiary or IRA owner."[21] Because the "unless" clause could be read narrowly, 6(iv) should be harmonized with the education carve-out for Plan information under subsection (6)(i), which provides that only references "to the appropriateness of any individual investment alternative…for the plan or IRA, or a particular participant or beneficiary or IRA owner"[22] fall outside of the carve-out.

Failure to make this clarification effectively would bar millions of retirement savers from using valuable "do it yourself" tools that provide investment ideas, making it more likely that they would need to pay a fee for advice or rely on product sellers.[23] It will seem nonsensical to investors that they can use such tools to make informed investment decisions in their taxable accounts but not their retirement accounts.

Harmonizing the carve-out for online resources and tools also would be consistent with the FINRA guidance the Department has borrowed for its new definition of "recommendation," NASD Notice to Members 01-23 ("Online Suitability").[24] For well over a decade FINRA members such as Schwab have provided self-directed investment tools pursuant to this longstanding interpretive guidance that distinguishes an individual recommendation from a general communication. The Department states in the Proposal that the FINRA guidance "provides useful standards and guideposts for distinguishing investment education from investment advice under ERISA."[25] The Proposal specifically solicits comments on whether the Department should adopt some or all of the FINRA standards "in defining communications that rise to the level of a recommendation for purposes of distinguishing between investment education and investment advice under ERISA."[26] Schwab urges the Department to do so.

Many of the online tool examples provided under the 01-23 guidance are not recommendations because they are not particularized communications to individual investors. Similarly, other FINRA rules treat equity research and ratings for individual stocks, whether online or otherwise, as educational and not investment advice because such research is not individualized to the needs of any participant or account holder.[27] In contrast, because such communications may list

[21] 80 Fed. Reg. at 21959.

[22] *Id.* at 21958.

[23] These tools are not product sales and do not purport to make individualized recommendations. Investors often use the online tools in one session and make their investment trading decisions in another. The protections and disclosures the BIC exemption mandates, therefore, are neither feasible nor necessary. The result would be that firms like Schwab, citing inability to comply with the Department's rule, would have to exclude IRAs and other retirement accounts from using these tools intended for self-directed investors.

[24] 80 Fed. Reg. at 21938 (adopting FINRA's definition of "recommendation").

[25] *Id.* at 21938.

[26] *Id.* at 21938.

[27] In 2002, the NASD adopted Rule 2711 (Research Analysts and Research Reports) to improve the objectivity of analyst research and to mitigate potential conflicts of interest. The Rule remains fully in effect and has been

individual securities they appear not to be covered by the Department's proposed education carve-out for interactive investment materials.

Under FINRA's guidance a recommendation is distinguished from a general communication based on whether the content, context, and manner of presentation indicate a call to action for the particular investor. Merely generating a list or mentioning specific investments or securities – which is common to many tools such as screeners, portfolio analyzers, and research – is not the test. Including tools that an investor can use to produce a list of securities or to research stocks, mutual funds, and ETFs in the education carve-out (provided that an individualized recommendation is not directed at the particular investor) is critical to allow self-directed investors to continue to make informed decisions on their own.

Consistent with FINRA's guidance under 01-23, the Department should clarify that the education carve-out includes research and self-directed tools that list potential investments as investment education provided that they do not make "reference to the appropriateness of any individual investment alternative for the plan or IRA, or a particular participant or beneficiary or IRA owner" consistent with (6)(i).

Schwab's proposed revision to the investment education carve-out reflecting this and other necessary modifications (described below) is attached as Exhibit 3.[28]

C. A final rule must permit providers to make clients aware of services, including rollovers, without such information being viewed as fiduciary investment advice

Education is critical to informing retirement savers about a variety of important issues, including the need to save for retirement, how much to save, whether to roll over a distribution, and the savings and investment options available through their employer retirement plan or IRA. One of the most problematic aspects of the Proposal is whether such general, informative communications will be treated as a "recommendation" and fiduciary advice, even where

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incorporated into FINRA's rulebook. It applies to "research reports," which are defined as written communications that include "an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision." Rule 2711, amongst other requirements, places restrictions on the relationship between research departments and investment banking departments, prohibits the promise of favorable research as well as certain forms of research analyst compensation, requires disclosures of ownership and material conflicts of interest in research reports, and restricts personal trading by research analysts, including participation in securities which are the subject of published recommendations. In November 2014, FINRA proposed adopting NASD Rule 2711 with some modifications as new FINRA Rule 2241. The proposed rule is pending as of June 22, 2015, but would encompass debt research and analysts, would require member firms to adopt written policies and procedures designed to enforce the requirements of the rule, and would further restrict interactions between research and investment banking departments.

[28] Many firms provide online bond market access for self-directed investors. This service combines screeners, research, tools, inventory availability, and trading ability. The ability of firms to deal with their clients on a principal basis is necessary to maintain inventory, provide access to a range of bond issues, and deliver best execution. The final rule should make clear that the proposed exemption for principal transactions in debt securities is not needed for online tools for investing in fixed income securities, provided that the service does not provide an individualized recommendation to a particular plan, participant, or IRA account owner.

specific recommendations are not provided regarding a distribution or rollover or how to invest plan or IRA assets.

We agree with the Department when it states that the Proposal has the potential to define more clearly the "boundaries between fiduciary advice and education [which] may improve access to plan participant and IRA investor educational services."[29] Further, the Department explains that the intention of the "new proposal [is to] exclude from fiduciary status education that does not include personal recommendations.…" [30] With respect to call center delivery of educational information on an individual basis, the Department states that guidance from call center representatives that "doesn't include a specific recommendation and is limited to education"[31] would continue not to be fiduciary advice and therefore "the new proposal is likely to make call center guidance more available and robust, not less."[32]

Unfortunately details of the Proposal itself contradict this laudable goal by substantively reducing the educational information that can be provided:

- Under subsection (ii) ("General financial, investment and retirement information"), materials must not address "specific investment products, specific plan or IRA alternatives or distribution options available…or specific alternatives or services offered outside the plan or IRA."

- Under subsection (iii) ("Asset allocation models"), the models must not "include or identify any specific investment product or specific alternative available under the plan or IRA."

- Under subsection (iv) ("Interactive investment materials"), the materials must not "include or identify any specific investment alternative available or distribution option available under the plan or IRA… unless specified by the participant, beneficiary or IRA owner."

Failure to facilitate the provision of factual information about investment products as non-fiduciary education will erode retirement savers' ability to make informed distribution, rollover, and investment decisions.

The Department's intent is to protect retirement savers from conflicts of interest "in connection with one of the most significant financial decisions they [participants] make with respect to their retirement income security."[33] Schwab agrees wholeheartedly. The Department should take note that other regulatory requirements already serve this purpose. Brokerage firms that communicate

[29] Regulatory Impact Analysis at 214 (Apr. 14, 2015).

[30] *Id.* at 223.

[31] *Id.* at 224.

[32] *Id.* at 226.

[33] *Id.* at 189 .

the availability of IRA services and assist retirement savers with respect to distribution options are already subject to FINRA rules, including Regulatory Notice 13-45.[34] This Notice mitigates conflicts in providing rollover assistance, by requiring representatives of member firms to provide information in a fair and balanced manner under a variety of FINRA rules. Notice 13-45 states that participants have four distribution options available (e.g. maintain assets in the plan, roll over to an IRA, roll over to a successor plan if possible or receive a cash distribution) and lists seven factors that may be of importance to a rollover decision. Conformity with these practices is subject to FINRA regulatory examination.

FINRA recognizes that "[s]ome firms and their associated persons provide educational information to plan participants concerning their retirement choices. Firms that permit educational information only should adopt measures reasonably designed to ensure that the firm and its associated persons do not make [individualized] recommendations."[35] Schwab is one of those firms. Under our policy and procedures, Schwab representatives provide rollover assistance without making a recommendation. They describe each of the four distribution options available upon the participant's termination of employment and discuss the seven factors listed by FINRA in Notice 13-45, as applicable to the terminated participant's situation. A service provider like Schwab can also mention that it has an IRA product and describe the features of such an IRA. The Department should clarify that fiduciary advice does not result under a fact pattern such as this one, where the provider does not make an actual recommendation regarding the sale of specific plan assets and/or the investment of specific IRA assets.

In the context of model portfolios, the Department's rationale is that "specific asset allocations that identify specific investment alternatives function as tailored, individualized investment recommendations, and can effectively steer recipients to particular investments, but without adequate protections against potential abuse."[36] We question the value of model asset allocation information that provides participants and IRA owners with information on diversified asset classes, but does not explain how particular investment alternatives (which in the plan context, are selected by the plan sponsor or other authorized fiduciary) fit within such asset classes. We are also concerned that educational materials could no longer describe the benefits of certain plan, distribution and IRA features that have been found to improve retirement savings—such as the benefit of third party savings and investment services that help participants plan to reach their retirement goals or the benefit of not cashing out a distribution upon termination of employment.

Communications regarding available services, when done in a fair and balanced manner, provide important information for plan sponsors and IRA owners to compare options and providers. Changes to the education carve-out under the Proposal are necessary to ensure that retirement plan sponsors and retirement savers can continue to receive the information regarding plan and account services and options, including distribution and rollover information, necessary in order to make informed decisions, consistent with the Department's goal of improving access to educational services.

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[34] FINRA Regulatory Notice 13-45 ("Rollovers to Individual Retirement Accounts") (Dec. 2013).

[35] *Id.* at 5.

[36] 80 Fed. Reg. at 21945.

We make two suggestions to balance the benefits of continued provision of important educational information, with the Department's concern that such information be distinguished from specific, individualized recommendations on the investment of plan and IRA assets that should be governed by the conflict of interest rules.

First, the education carve-out (or the preamble to the final rule) should draw a clearer line between education and advice. It should provide concrete examples of situations where education, rather than fiduciary advice, is provided, such as the following (which are not intended to be all inclusive):

i. Factual information is provided to terminated employees with respect to their distribution options in a balanced manner describing the four distribution options available, listing the factors that may be of importance to a rollover decision, and describing the features of IRAs offered by the firm.

Negative consequence that will result if not deemed education: Service providers will reduce or eliminate distribution support. Without this information, terminated employees will be more likely to make poor distribution decisions, such as taking a cash distribution rather than retaining their retirement savings in a tax-deferred plan or account.

ii. Factual information is provided to plan sponsors and retirement savers regarding plan and IRA investment offerings, including performance information and asset values, where such information is not individualized based on the plan sponsor's or retirement saver's own individual situation.

Negative consequence that will result if not deemed education: Plan sponsors and retirement savers will not have the information necessary to make wise investment decisions. The adverse consequences resulting from uninformed investment decisions will outweigh the remote potential for conflict arising out of investment informational content.

iii. Factual information is provided about the products and services available through a third party administrator or other service provider to retirement plans and the participants and beneficiaries in such plans, including investment products and services, where such information is not individualized based on the particular plan or participant/beneficiary circumstances.

Negative consequence that will result if not deemed education: Service providers will reduce or eliminate investment support and services, and plan participants and beneficiaries will have less assistance in planning and saving for retirement.

Second, we recommend that consistent with the language in subsection (i) of the education carve-out, the language in subsections (ii), (iii) and (iv) of the carve-out be revised to state that information and materials regarding investment products or alternatives and distribution options are educational as long as the information and materials are "without reference to the

appropriateness of any individual investment alternative or any individual benefit distribution option for the plan or IRA, or a particular participant or beneficiary or IRA owner."[37]

The modifications described above under the second recommendation are reflected in Exhibit 3.

D. A clearer line should be drawn between sales and advisory activities, so that plan sponsors and retirement savers can make informed decision in selecting service providers

We appreciate the Department's intent to not disrupt "a wide range of common business practices".[38] However, the Proposal's broad definition of "recommendation" could encompass customary, non-fiduciary sales and marketing activities, where there is no expectation of a fiduciary relationship. This would have serious consequences.

The seller's carve-out[39] does not resolve this issue. First, it is not clear that it is applicable to the sale of services—under its terms, it is available only with respect to a "sale, purchase, loan or bilateral contract."[40] Therefore, the marketing and sales activities of service providers such as brokerage firms, investment managers, plan recordkeepers and trustees that include information or Request for Proposal ("RFP") responses describing investment options, plan or account features, advisory services and rollover and distribution assistance available if the service provider is retained, may not qualify for the carve-out.

Second, the carve out is only available with respect to plan fiduciaries that the Department concludes have sufficient "financial expertise" to understand that a sales pitch is being made, as contrasted to a fiduciary recommendation in the plan's best interest. The Department bases its test of "financial expertise" on the size of the plan, extending the carve-out only to larger plans—those with at least 100 participants or $100 million in assets. The Department states that "the 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, but the seller is making representations about the value and benefits of proposed deals"[41] and that it "does not believe such a carve-out can or should be crafted to cover recommendations to retail investors, including small plans, IRA owners and plan participants and beneficiaries"[42] because in part these parties "are unable effectively to assess the quality of the advice they receive."[43]

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[37] *Id.* at 21958.

[38] *Id.* at 21929.

[39] *Id.* at 21957.

[40] *Id.* at 21957.

[41] *Id.* at 21941.

[42] *Id.* at 21942.

[43] *Id.* at 21942.

We respectfully request that the Department reconsider its reasoning. In our experience, it is not reasonable to assume that small plan sponsors or retirement savers are any less financially sophisticated and need any more protection than large plan sponsors. For example, some small plan sponsors and retirement savers are in the financial services, accounting, or legal professions. In addition, financial expertise is not necessary to understand when a sales or marketing pitch is being made as compared to an individualized investment recommendation. Any gap in such expertise can be addressed by requiring a clear, prominent disclosure that states impartial advice or advice in a fiduciary capacity is not being provided. Also, all retirement plans covering employees are subject to ERISA's fiduciary standards, whether the plans are large or small, so the carve-out from fiduciary advisor status in the plan context should not make a distinction based on plan size.

The limitation of the carve-out to large plan sponsors is likely to have a harmful, disparate impact on small plans and retirement savers. They will not have access to the same competitive market information as large plans and will face difficulty comparing services and fees across providers, likely resulting in uninformed and adverse decisions with respect to provider selection. In the plan context, larger plans will have access to a wider array of providers and fee structures than smaller plans. There is in fact a strong likelihood that service providers will be unwilling to engage in sales conversations with or respond to RFPs of smaller plans, as such conversations and activities would be subject to fiduciary status. In the retirement saver context, individual account holders will be disadvantaged by the inability to receive information and compare account features and costs across providers. In this case, it is our belief that the conflicts and consumer protections the Department intends to address by limiting the seller's carve out to "large" plans is outweighed by the potential harm this would cause to small plans and retirement savers. Instead, a clear, prominent disclosure can be required to mitigate the risk.

On this basis, Schwab recommends that the Department modify its approach to accommodate reasonable marketing and business development activities by financial services firms and their representatives for <u>all</u> plans and retirement savers. This can be pursued in two ways. Under the first alternative, we propose modifying the definition of "recommendation" to exclude "hire me" conversations. In the second alternative, we propose a new carve-out from the definition of fiduciary advice. Under both alternatives, a service provider would be permitted to describe the products and services it offers as long as there is no statement about the appropriateness of any specific investment product based on the individual circumstances of the recipient. The service provider would also be allowed to encourage prospective new clients to consider a professional relationship by providing information about the service provider's qualifications, expertise and experience. The carve-out could include a required disclaimer that the service provider is not providing impartial investment advice or giving advice in a fiduciary capacity.

Our proposed language is attached as Exhibit 4.

E. The Department should allow customary investment platform and fund assistance practices to continue without fiduciary implications

We agree with the Department's position that service providers should be able to market and make available a platform of investment options for plan fiduciary selection, as well as assist with respect to such investment selection and monitoring, without such activities being classified

as fiduciary advice. However, we urge the Department to make several modifications to address certain gaps in the Proposal.

The platform and fund selection and monitoring carve-out should apply to all plans, not just participant investment-directed defined contribution plans. Plan fiduciaries of defined benefit plans (and similar non-participant-directed plans) need the same assistance in this context for their direct investment selections as fiduciaries of participant-directed plans. The Department does not explain the reason for this distinction other than referring to the growth of participant-directed individual account plans.[44]

We assume that (4)(i) of the "selection and monitoring assistance" carve-out (permitting the identification of investment alternatives that meet objective criteria specified by the plan sponsor)[45] includes service provider suggestions of sample or hypothetical fund line ups, based on objective criteria specified by the plan fiduciary or its consultant. The term "objective criteria" should include information concerning the plan's existing fund menu For example, this is relevant where the plan sponsor is considering a new service provider and must evaluate and compare different providers' investment platforms, including fees and expenses associated with platform investment options. The Department should expand this carve-out to permit the identification of investment alternatives (and creation of sample or hypothetical fund line ups) based on a service provider's client base and trends in the marketplace, as long as it is clear that: (i) the service provider is not providing such information based on the individual circumstances of the plan, (ii) the plan fiduciary must consider its own circumstances and needs in selecting plan investments, and (iii) the service provider is not given impartial investment advice or advice in a fiduciary capacity.

F. The Department should clarify that routine valuation practices are ministerial rather than fiduciary activities

Valuations are frequently performed as part of routine administrative and investment functions. For example, plan benefit calculations are required to process plan loans and distributions, including qualified domestic relations orders. Retirement savers and plan sponsors can access daily benefit valuation information with respect to account and plan assets, and reports are furnished on a routine basis that incorporate such valuation information. We are concerned that these types of ministerial functions[46] may inadvertently be treated as fiduciary investment advice. Sponsors of and service providers to collective trust funds, mutual funds and other investment vehicles calculate and communicate net asset values to participants and plan fiduciaries as part of routine investment information. In these situations, the valuations are not limited just to ESOPs, investment funds, or situations where disclosure is necessary to comply with regulatory reporting or disclosure requirements, as under the Proposal's financial reports and valuation carve-out.[47] The Department should expand this carve-out to clarify that routine

[44] *Id.* at 21943.

[45] *Id.* at 21958.

[46] *See* 29 CFR Section 2509.75-8 (D-2).

[47] 80 Fed. Reg. at 21958.

valuation functions necessary and appropriate to plan or account administrative or operational functions or integral to the offering, reporting and communication of investment products, are not fiduciary investment advice.

G. The Department should remove unnecessary and burdensome elements of the Principal Transaction Exemption

The fixed income market is largely a principal market, with firms like Schwab either holding bonds in inventory to satisfy customer demand or being willing to go out to the market on a "riskless principal" basis to obtain or sell a bond to meet a client's order. This occurs whether a client orders a bond on his or her own online[48] using self-directed tools, calls a representative to place an order, or receives a recommendation from a representative. In addition, the principal market has the advantage of being a long-tested model which has consistently provided efficiencies and access to multiple market participants and thus reliable liquidity.

While reliable liquidity has historically been one of the benefits of the principal markets, since the financial crisis we have seen many firms reduce their willingness to buy or hold fixed income products, thus reducing market liquidity. By further restricting the ability for firms to act as liquidity providers, there is the potential that retirement plan participants will be forced to sell their fixed income retirement holdings into a less favorable market environment. As such, it is imperative that firms be able to maintain the ability to act as principal in the fixed income market for retirement accounts.

The proposed principal trading exemption (the "PT Proposal")[49] could bar access by plans and IRAs to important categories of securities that are generally considered staples of a well-diversified investment portfolio. By prescribing only a short list of investments that may be bought and sold on a principal basis,[50] the PT Proposal would deny plans and IRAs from holding securities that may be unavailable for purchase or sale on an agency basis or available only at a worse price. Foremost among the commonly and appropriately held assets excluded by the PT Proposal are municipal securities, agency debt securities and brokered certificates of deposit. In addition to harming the retirement plan participants and IRA holders it was intended to help, the prescriptive approach of the PT Proposal is also inconsistent with a fiduciary standard that rightly obliges firms and advisers to make recommendations in the best interests of retirement investors.

We also urge the Department to eliminate from the PT Proposal the requirement that purchases and sales of debt securities subject to the exemption occur at a price at least as favorable as the contemporaneous price for the same or a similar security offered by two ready and willing counterparties that are not affiliates of the financial institution.[51] This requirement would likely

[48] See the discussion above in footnote 28.

[49] Notice of Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, 80 Fed. Reg. 21989 (Apr. 20, 2015).

[50] *Id.* at 22004.

[51] *Id.* at 22003.

lead to repeated and frustrating attempts to synchronize the recommendation, client approval and still-valid counterparty prices in fast- and ever-moving markets. It would have the unintended consequence of providing worse execution prices and lower liquidity for retirement accounts than is available in the market generally. Under the current regulatory structure, market participants are held to strict standards related to pricing and best execution. These existing standards have proved effective over the years, and the PT Proposal would complicate an area that already has effective regulatory oversight.

The PT Proposal should also be amended to eliminate the requirements that debt securities subject to the exemption have no more than moderate credit risk and be sufficiently liquid to permit sale at or near its fair market value within a reasonably short period of time. "Moderate credit risk" is too vague to permit uniform implementation and may force firms to error on the side of caution and deny access to investments readily available to non-retirement accounts and perfectly appropriate for some retirement investors. "Sufficiently liquid" is not implementable due to the focus on fair market value, because the sale price of any security is, by definition, its fair market value at the time of sale.

A well-regulated fiduciary standard is far more likely to appropriately balance the risks and rewards of various investments and protect retirement investors than a complex set of prescriptive and proscriptive rules that favor certain qualities (e.g., liquidity) even in products – like highly-rated bonds intended to be held to maturity – that are intended to serve different purposes in a well-diversified retirement portfolio.

IV. Implementation Issues – Pragmatic Measures in Light of the Proposal's Complexity

Reasonable Compliance Date. The final rule would become effective sixty days after publication in the Federal Register, and the requirements would generally become applicable eight months from publication of the final rule, subject to certain exceptions.[52] From Schwab's perspective, this is not enough time. We urge the Department to extend the compliance deadline to at least 18 months after the effective date to give Schwab and other firms an opportunity to carefully implement the complex set of new requirements.

The Proposal would significantly alter the retirement services landscape with respect to well established practices in place since 1975. Review of its implications across complex affiliate structures, analysis of and business determinations with respect to changes to existing business models, development of software and technology, revision and renegotiation of existing contracts as well as drafting of new forms and agreements, evaluation of relationships with other providers and development of compliance policies and procedures all will require a material investment of personnel, resources and technology. Despite the Department's articulated goal that established business practices not be disrupted, it may have seriously underestimated the time and effort necessary to comply with the new provisions if adopted as proposed.

[52] 80 Fed. Reg. at 21950.

Clear Scope of Fiduciary Duty. Schwab is pleased that the Proposal includes a limitation on the scope of fiduciary duty when it comes to non-discretionary investment advice under Section 2510.3-21(c). It would be helpful to clarify further that fiduciary responsibility only applies to the specific context in which non-discretionary advice is provided: (i) to specific accounts of the retirement saver and not to other accounts; (ii) within such accounts, to the specific assets and securities positions for which the advice is provided and not to other assets and positions; (iii) at the time of the recommendation and not on an ongoing basis; (iv) for the specific purpose for which the non-discretionary advice is provided. In addition to clarifying the scope of fiduciary obligations for firms as they consider compliance and implementation, this clarification will also serve well retirement savers and plans that otherwise would be forced to pay for extended fiduciary services they do not want or need.

Grandfather Pre-existing Transactions. We appreciate that the Department proposes relief for pre-existing transactions in the context of the new proposed "Best Interest Contract" exemption. This relief recognizes that investment providers may have provided services prior to the applicability date of the new provisions without considering themselves ERISA fiduciaries or may have entered into transactions prior to such date under the terms of prohibited transaction exemptions that may, under the final rule, now be amended. Absent relief, the continued receipt of compensation associated with such "pre applicability date" transactions could constitute a prohibited transaction.

It would be helpful for the Department to confirm that such transition relief covers compensation received after the effective date resulting from the following common practices prior to the effective date:

- Compensation received as a result of prior investment advice provided to a retirement saver, without differentiation based on the manner of delivery (whether in person or through a computer).

- Compensation received resulting from recommendations acted upon prior to the effective date regarding management of retirement assets, such as referrals to investment advisors or investment advisory solutions (Advice Programs).

- Compensation received resulting from ongoing administrative actions necessary to implement investment instructions received prior to the effective date, such as "rebalancing" portfolio functions and investments made as part of an automatic savings and investment program or dividend reinvestment program.

Negative Consent to Agreement Amendments Required by the Proposal. Many service providers such as Schwab provide services to a significant number of retirement plans, participants and beneficiaries and IRA accounts. For example, Schwab currently custodies approximately 3.2 million retail IRAs. Even assuming the Department extends the compliance date and grandfathers existing arrangements, the costs, resources and time allocation necessary to determine which retirement products and services will continue to be offered, evaluate the agreements governing such IRAs to determine whether amendments will be necessary, and obtain client consent to any such amendments, will be very large. The Department should allow a negative consent approach, whereby plan sponsors and retirement savers receive notification

and disclosure of changes to their agreements, including notice that they will be deemed to have consented to such changes through their continued use of the service provider's products and services and that they can terminate such services without penalty if they object to the amendment. The Department has approved or allowed this approach in other contexts and should do so here as well.[53]

I. Conclusion

Retirement savers are entitled to investment advice in their best interest at a reasonable price. This is Schwab's business model today. We support the Department's objective to assure this basic fiduciary protection for all retirement savers. Schwab's proposed changes are designed to ensure that in protecting retirement savers from conflicts of interest, final rules do not inadvertently harm them by unduly restricting the transmission of important information and guidance to plan sponsors, participants and beneficiaries, and IRA owners. In addition to protecting retirement savers, the goal must be to facilitate informed investing and retirement decisions by preserving choice and access to a wide range of self-directed tools and Advice Programs that meet individual needs.

Schwab appreciates the opportunity to comment on the Proposal and may provide additional comments following the Department's hearing. We welcome the opportunity to work with the Department more on this critically important initiative, and would be pleased to respond to questions or provide any additional information. Should you have any questions, please contact the undersigned.

Very truly yours,

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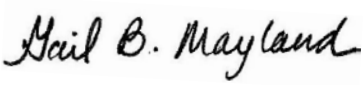

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[53] *See, e.g.,* DOL Advisory Opinion 97-16A (May 22, 1997).

Exhibit 1
(proposed changes to existing draft in redline)

Section I--Best Interest Contract Exemption for Recommendations of Advice Programs [***Tracks BIC***]

(a) In general. ERISA and the Internal Revenue Code prohibit fiduciary advisers to employee benefit plans (Plans) and individual retirement plans (IRAs) from receiving compensation that varies based on their investment recommendations. Similarly, fiduciary advisers are prohibited from receiving compensation from third parties in connection with their advice. This exemption permits certain persons who provide investment advice to Retirement Investors, and their associated financial institutions, affiliates and other related entities, to receive such otherwise prohibited compensation as described below.

(b) Covered transactions. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities to receive compensation for services provided in connection with recommending an Advice Program ~~a purchase, sale or holding of an Asset by~~ a Plan, participant or beneficiary account, or IRA, as a result of the Adviser's and Financial Institution's advice to any of the following "Retirement Investors:"

(1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution;

(2) The beneficial owner of an IRA acting on behalf of the IRA; or

(3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof) of a non-participant-directed Plan subject to Title I of ERISA with fewer than 100 participants, to the extent it acts as a fiduciary who has authority to make investment decisions for the Plan.

As detailed below, parties seeking to rely on the exemption must contractually agree to adhere to Impartial Conduct Standards in ~~rendering advice regarding~~when recommending Advice Programs~~Assets~~; warrant that they have adopted policies and procedures designed to mitigate the dangers posed by Material Conflicts of Interest; disclose important information relating to fees, compensation, and Material Conflicts of Interest; and retain documents and data relating to ~~investment~~ recommendations ~~regarding Asset~~of Advice Programs. The exemption provides relief from the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F). The Adviser and Financial Institution must comply with the conditions of Sections II ~~V~~ and III to rely on this exemption.

(c) Exclusions. This exemption does not apply if:

(1) The Plan is covered by Title I of ERISA, and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser or Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide advice to the Plan by a fiduciary who is not Independent;

(2) The compensation is received as a result of a transaction in which the Adviser is acting on behalf of its own account or the account of the Financial Institution, or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution (i.e., a principal transaction);

(3) The compensation is received as a result of investment advice to a Retirement Investor generated solely by an interactive Web site in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the Web site without any personal interaction or advice from an individual Adviser (i.e., "robo advice"); or

(4) The Adviser (i) exercises any discretionary authority or discretionary control respecting management of the Plan or IRA assets involved in the transaction or exercises any authority or control

respecting management or disposition of the assets, or (ii) has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA.

Section II--Contract, Impartial Conduct, and Other Requirements

(a) Contract. Prior to any investment in the recommended Advice Program~~recommending that the Plan, participant or beneficiary account, or IRA purchase, sell or hold the Asset~~, the ~~Adviser and~~ Financial Institution enters into a written investment management contract with the Retirement Investor that incorporates the terms required by Section II(b)-(e).

(b) Fiduciary. The written contract affirmatively states that the Adviser and Financial Institution are fiduciaries under ERISA or the Code, or both, with respect to ~~any investment recommendations to the Retirement Investor~~recommending the Advice Program.

(c) Impartial Conduct Standards. The Adviser and the Financial Institution affirmatively agree to, and comply with, the following:

(1) When providing a recommendation ~~investment advice~~ to the Retirement Investor regarding the Advice Program~~Asset~~, the Adviser and Financial Institution will provide ~~investment advice~~a recommendation that is in the Best Interest of the Retirement Investor (i.e., advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party);

(2) When providing a recommendation ~~investment advice~~ to the Retirement Investor regarding the Advice Program~~Asset~~, the Adviser and Financial Institution will not recommend an Advice Program~~Asset~~ if the total amount of compensation anticipated to be received by the Adviser, Financial Institution, Affiliates and Related Entities in connection with the recommended Advice Program ~~purchase, sale or holding of the Asset~~ by the Plan, participant or beneficiary account, or IRA, will exceed reasonable compensation in relation to the total services they provide to the Retirement Investor; and

(3) The Adviser's and Financial Institution's statements about the Advice Program~~Asset~~, fees, Material Conflicts of Interest, and any other matters relevant to a Retirement Investor's investment decisions, will not be misleading.

(d) Warranties. The Adviser and Financial Institution affirmatively warrant the following:

(1) The Adviser, Financial Institution, and Affiliates will comply with all applicable federal and state laws regarding the ~~rendering of the investment advice, the~~ recommendation of the Advice Program~~purchase, sale and holding of the Asset~~, and the payment of compensation related to ~~the purchase, sale and holding of the Asset~~investments under the Advice Program;

(2) The Financial Institution has adopted written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest and ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c);

(3) In formulating its policies and procedures, the Financial Institution has specifically identified Material Conflicts of Interest and adopted measures to prevent the Material Conflicts of Interest from causing violations of the Impartial Conduct Standards set forth in Section II(c); and

(4) ~~Neither t~~The Financial Institution will compensate Advisers under the same formula for all Advice Programs the Financial Institution makes available to Retirement Investors so that no Adviser will have a financial incentive to recommend one Advice Program over another. In addition, neither the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor. Notwithstanding the foregoing, the contractual warranty set forth in this Section II(d)(4) does not prevent the Financial

Institution or its Affiliates and Related Entities from providing Advisers with differential compensation based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent such compensation would not encourage advice that runs counter to the Best Interest of the Retirement Investor (e.g., differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible).

(e) Disclosures. [*See Section III.*]

(f) Prohibited Contractual Provisions. The written contract shall not contain the following:

(1) Exculpatory provisions disclaiming or otherwise limiting liability of the Adviser or Financial Institution for a violation of the contract's terms; and

(2) A provision under which the Plan, IRA or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution.

Section III--Disclosure Requirements [***New Language***]

(a) Prior to or at the time the investment management contract for the Advice Program is offered to the Retirement Investor, the Adviser or Financial Institution must –

(1) Provide the Retirement Investor with the brochure required by Advisers Act Rule 204-3; and

(2) Unless otherwise provided in the brochure, furnish the Retirement Investor with a written description of the firm's Adviser compensation practices relating to Advice Programs which includes compensation rates for the Advice Programs the Financial Institution makes available to the Adviser.

Section IV--Disclosure to the Department and Recordkeeping [***Tracks BIC***]

(a) EBSA Disclosure. Before receiving compensation in reliance on the exemption in Section I, the Financial Institution notifies the Department of Labor of the intention to rely on this class exemption. The notice will remain in effect until revoked in writing by the Financial Institution. The notice need not identify any Plan or IRA.

(b) Data Request. The Financial Institution maintains the data that is subject to request pursuant to Section IX in a manner that is accessible for examination by the Department for six (6) years from the date of the transaction subject to relief hereunder. No party, other than the Financial Institution responsible for complying with this paragraph (b), will be subject to the taxes imposed by Code section 4975(a) and (b), if applicable, if the data is not maintained or not available for examination as required by paragraph (b).

(c) Recordkeeping. The Financial Institution maintains for a period of six (6) years, in a manner that is accessible for examination, the records necessary to enable the persons described in paragraph (d) of this Section to determine whether the conditions of this exemption have been met, except that:

(1) If such records are lost or destroyed, due to circumstances beyond the control of the Financial Institution, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party, other than the Financial Institution responsible for complying with this paragraph (c), will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or are not available for examination as required by paragraph (d), below.

(d) (1) Except as provided in paragraph (d)(2) of this Section, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in paragraph (c) of this Section are unconditionally available at their customary location for examination during normal business hours by:

(A) Any authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of a Plan that ~~engaged in a purchase, sale or holding of an Asset~~invested in an Advice Program after receiving a recommendation described in this exemption, or any authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by a Plan described in paragraph (d)(1)(B), or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of a Plan described in paragraph (B), IRA owner, or the authorized representative of such participant, beneficiary or owner; and

(2) None of the persons described in paragraph (d)(1)(B)-(D) of this Section are authorized to examine privileged trade secrets or privileged commercial or financial information, of the Financial Institution, or information identifying other individuals.

(3) Should the Financial Institution refuse to disclose information on the basis that the information is exempt from disclosure, the Financial Institution must, by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

Section V--Definitions [***Tracks BIC***]

For purposes of these exemptions:

(a) "Advice Program" means any program or arrangement where a registered investment adviser agrees in writing with a Retirement Investor to provide discretionary or nondiscretionary advice including but not limited to an eligible advice arrangement under ERISA section 408(g) and a "wrap fee program" defined in Rule 204-3 of the Investment Advisers Act of 1940.

(b) "Adviser" means an individual who:

(1) Is a fiduciary of a Plan or IRA solely by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B), or both, and the applicable regulations, with respect to the recommendation of an Advice Program~~Assets involved in the transaction~~;

(2) Is an employee, independent contractor, agent, or registered representative of a Financial Institution; and

(3) Satisfies the applicable federal and state regulatory and licensing requirements of insurance, banking, and securities laws with respect to the covered transaction.

(~~b~~c) "Affiliate" of an Adviser or Financial Institution means--

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution. For this purpose, ``control" means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, employee, agent, registered representative, relative (as defined in ERISA section 3(15)), member of family (as defined in Code section 4975(e)(6)) of, or partner in, the Adviser or Financial Institution; and

(3) Any corporation or partnership of which the Adviser or Financial Institution is an officer, director or employee or in which the Adviser or Financial Institution is a partner.

~~(c) An "Asset," for purposes of this exemption, includes only the following investment products: Bank deposits, certificates of deposit (CDs), shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(l) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts, guaranteed investment contracts, and equity securities within the meaning of 17 CFR 230.405 that are exchange-traded securities within the meaning of 17 CFR 242.600. Excluded from this definition is any equity security that is a security~~

~~future or a put, call, straddle, or other option or privilege of buying an equity security from or selling an equity security to another without being bound to do so.~~

(d) an ~~i~~investment advice recommendation is in the "Best Interest" of the Retirement Investor when the Adviser and Financial Institution providing the ~~advice~~recommendation act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.

(e) "Financial Institution" means the entity that employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or under the laws of the state in which the adviser maintains its principal office and place of business;

(2) A bank or similar financial institution supervised by the United States or state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)), but only if the advice resulting in the compensation is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by federal or state banking authorities;

(3) An insurance company qualified to do business under the laws of a state, provided that such insurance company:

(A) Has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended,

(B) Has undergone and shall continue to undergo an examination by an Independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state's insurance commissioner within the preceding 5 years, and

(C) Is domiciled in a state whose law requires that actuarial review of reserves be conducted annually by an Independent firm of actuaries and reported to the appropriate regulatory authority; or

(4) A broker or dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).

(f) "Independent" means a person that:

(1) Is not the Adviser, the Financial Institution or any Affiliate relying on the exemption,

(2) Does not receive compensation or other consideration for his or her own account from the Adviser, the Financial Institution or Affiliate; and

(3) Does not have a relationship to or an interest in the Adviser, the Financial Institution or Affiliate that might affect the exercise of the person's best judgment in connection with transactions described in this exemption.

(g) "Individual Retirement Account" or "IRA" means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(h) A "Material Conflict of Interest" exists when an Adviser or Financial Institution has a financial interest that could affect the exercise of its best judgment as a fiduciary in recommending an Advice Program ~~rendering advice~~ to a Retirement Investor ~~regarding an Asset~~.

(i) "Plan" means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code.

(j) "Proprietary Product" means a product that is managed by the Financial Institution or any of its Affiliates.

(k) "Related Entity" means any entity other than an Affiliate in which the Adviser or Financial Institution has an interest which may affect the exercise of its best judgment as a fiduciary.

(l) "Retirement Investor" means--

(1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution,

(2) The beneficial owner of an IRA acting on behalf of the IRA, or

(3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof), of a non-participant-directed Plan subject to Title I of ERISA that has fewer than 100 participants, to the extent it acts as a fiduciary with authority to make investment decisions for the Plan.

(m) "Third-Party Payments" mean sales charges when not paid directly by the Plan, participant or beneficiary account, or IRA, 12b-1 fees and other payments paid to the Financial Institution or an Affiliate or Related Entity by a third party as a result of ~~the purchase, sale or holding of an Asset~~a transaction involving plan assets in connection with an Advice Program by a Plan, participant or beneficiary account, or IRA.

Section VI--Data Request [***New language***]

Upon request by the Department, a Financial Institution that relies on the exemption in Section I shall provide, within a reasonable time, but in no event longer than six (6) months, after receipt of the request, the following information for the preceding six (6) year period:

(a) Referrals to Advice Programs. At the Financial Institution level, for each Advice Program offered to Retirement Investors, for each quarter:

(1) The aggregate dollar amount invested and the number of Plan, participant or beneficiary accounts, or IRAs enrolled in each Advice Program; and

(2) The gross management fee received by the Financial Institution and any Affiliate in connection with the investment in each Advice Program.

(b) Outflows from Advice Programs. At the Financial Institution level for each Advice Program offered to Retirement Investors, for each quarter:

(1) The aggregate number of accounts closed by a Plan, participant or beneficiary account, or IRA, and the assets associated with the closings; and

(2) The revenue received by the Financial Institution and any Affiliate in connection with the account closings under each Advice Program.

(c) Overall Enrollment. At the Financial Institution level for each Advice Program available at any time during each quarter:

(1) The aggregate value of Plan, participant or beneficiary accounts, or IRAs, at the end of such quarter; and

(2) The revenue received by the Financial Institution and any Affiliate in connection with the accounts enrolled in Advice Programs during such quarter for each Advice Program disaggregated by Advice Program; and

Exhibit 2
(proposed changes to existing rule text in redline)

Sec. 2550.408g-1 Investment advice--participants and beneficiaries.

(a) In general. (1) This section provides relief from the prohibitions of section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), and section 4975 of the Internal Revenue Code of 1986, as amended (the Code), for certain transactions in connection with the provision of investment advice to participants and beneficiaries. This section, at paragraph (b), implements the statutory exemption set forth at sections 408(b)(14) and 408(g)(1) of ERISA and sections 4975(d)(17) and 4975(f)(8) of the Code. The requirements and conditions set forth in this section apply solely for the relief described in paragraph (b) of this section and, accordingly, no inferences should be drawn with respect to requirements applicable to the provision of investment advice not addressed by this section.

(2) Nothing contained in ERISA section 408(g)(1), Code section 4975(f)(8), or this regulation imposes an obligation on a plan fiduciary or any other party to offer, provide or otherwise make available any investment advice to a participant or beneficiary.

(3) Nothing contained in ERISA section 408(g)(1), Code section 4975(f)(8), or this regulation invalidates or otherwise affects prior regulations, exemptions, interpretive or other guidance issued by the Department of Labor pertaining to the provision of investment advice and the circumstances under which such advice may or may not constitute a prohibited transaction under section 406 of ERISA or section 4975 of the Code.

(b) Statutory exemption. (1) General. Sections 408(b)(14) and 408(g)(1) of ERISA provide an exemption from the prohibitions of section 406 of ERISA for transactions described in section 408(b)(14) of ERISA in connection with the provision of investment advice to a participant or a beneficiary if the investment advice is provided by a fiduciary adviser under an ``eligible investment advice arrangement.'' Sections 4975(d)(17) and (f)(8) of the Code contain parallel provisions to ERISA sections 408(b)(14) and (g)(1).

(2) Eligible investment advice. For purposes of section 408(g)(1) of ERISA and section 4975(f)(8) of the Code, an ``eligible investment advice arrangement'' means an arrangement that meets either the requirements of paragraph (b)(3) of this section or paragraph (b)(4) of this section, or both.

(3) Arrangements that use fee leveling. For purposes of this section, an arrangement is an eligible investment advice arrangement if--

(i)(A) Any investment advice is based on generally accepted investment theories that take into account the historic risks and returns of different asset classes over defined periods of time, although nothing herein shall preclude any investment advice from being based on generally accepted investment theories that take into account additional considerations;

(B) Any investment advice takes into account investment management and other fees and expenses attendant to the recommended investments;

(C) Any investment advice takes into account, to the extent furnished by a plan, participant or beneficiary, information relating to age, time horizons (e.g., life expectancy, retirement age), risk tolerance, current investments in designated investment options, other assets or sources of income, and investment preferences of the participant or beneficiary. A fiduciary adviser shall request such information, but nothing in this paragraph (b)(3)(i)(C) shall require that any investment advice take into account information requested, but not furnished by a participant or

beneficiary, nor preclude requesting and taking into account additional information that a plan or participant or beneficiary may provide;

(D) No fiduciary adviser (including any employee, agent, or registered representative) that provides investment advice receives from any party (including an affiliate of the fiduciary adviser), directly or indirectly, any fee or other compensation (including commissions, salary, bonuses, awards, promotions, or other things of value) that varies depending on the basis of a participant's or beneficiary's selection of a particular investment option; and

(ii) The requirements of paragraphs (b)(5), (6), (7), (8) and (9) and paragraph (d) of this section are met.

(4) Arrangements that use computer models. For purposes of this section, an arrangement is an eligible investment advice arrangement if the only investment advice provided under the arrangement is advice that is generated by a computer model described in paragraphs (b)(4)(i) and (ii) of this section under an investment advice program and with respect to which the requirements of paragraphs (b)(5), (6), (7), (8) and (9) and paragraph (d) are met.

(i) A computer model shall be designed and operated to--

(A) Apply generally accepted investment theories that take into account the historic risks and returns of different asset classes over defined periods of time, although nothing herein shall preclude a computer model from applying generally accepted investment theories that take into account additional considerations;

(B) Take into account investment management and other fees and expenses attendant to the recommended investments;

(C) Appropriately weight the factors used in estimating future returns of investment options;

(D) Request from a participant or beneficiary and, to the extent furnished, utilize information relating to age, time horizons (e.g., life expectancy, retirement age), risk tolerance, current investments in designated investment options, other assets or sources of income, and investment preferences; provided, however, that nothing herein shall preclude a computer model from requesting and taking into account additional information that a plan or a participant or beneficiary may provide;

(E) Utilize appropriate objective criteria to provide asset allocation portfolios comprised of investment options available under the plan;

(F) Avoid investment recommendations that:

(1) Inappropriately favor investment options offered by the fiduciary adviser or a person with a material affiliation or material contractual relationship with the fiduciary adviser over other investment options, if any, available under the plan; or

(2) Inappropriately favor investment options that may generate greater income for the fiduciary adviser or a person with a material affiliation or material contractual relationship with the fiduciary adviser; and

(G)(1) Except as provided in paragraph (b)(4)(i)(G)(2) of this section, take into account all designated investment options, within the meaning of paragraph (c)(1) of this section, available under the plan without giving inappropriate weight to any investment option.

(2) A computer model shall not be treated as failing to meet the requirements of this paragraph merely because it does not make recommendations relating to the acquisition, holding or sale of an investment option that:

(i) Constitutes an annuity option with respect to which a participant or beneficiary may allocate assets toward the purchase of a stream of retirement income payments guaranteed by an insurance company, provided that, contemporaneous with the provision of investment advice generated by the computer model, the participant or beneficiary is also furnished a general description of such options and how they operate; or

(ii) The participant or beneficiary requests to be excluded from consideration in such recommendations.

(ii) Prior to utilization of the computer model, the fiduciary adviser shall obtain a written certification, meeting the requirements of paragraph (b)(4)(iv) of this section, from an eligible investment expert, within the meaning of paragraph (b)(4)(iii) of this section, that the computer model meets the requirements of paragraph (b)(4)(i) of this section. If, following certification, a computer model is modified in a manner that may affect its ability to meet the requirements of paragraph (b)(4)(i), the fiduciary adviser shall, prior to utilization of the modified model, obtain a new certification from an eligible investment expert that the computer model, as modified, meets the requirements of paragraph (b)(4)(i).

(iii) The term ``eligible investment expert'' means a person that, through employees or otherwise, has the appropriate technical training or experience and proficiency to analyze, determine and certify, in a manner consistent with paragraph (b)(4)(iv) of this section, whether a computer model meets the requirements of paragraph (b)(4)(i) of this section; except that the term ``eligible investment expert'' does not include any person that: Has any material affiliation or material contractual relationship with the fiduciary adviser, with a person with a material affiliation or material contractual relationship with the fiduciary adviser, or with any employee, agent, or registered representative of the foregoing; or develops a computer model utilized by the fiduciary adviser to satisfy this paragraph (b)(4).

(iv) A certification by an eligible investment expert shall--

(A) Be in writing;

(B) Contain--

(1) An identification of the methodology or methodologies applied in determining whether the computer model meets the requirements of paragraph (b)(4)(i) of this section;

(2) An explanation of how the applied methodology or methodologies demonstrated that the computer model met the requirements of paragraph (b)(4)(i) of this section;

(3) A description of any limitations that were imposed by any person on the eligible investment expert's selection or application of methodologies for determining whether the computer model meets the requirements of paragraph (b)(4)(i) of this section;

(4) A representation that the methodology or methodologies were applied by a person or persons with the educational background, technical training or experience necessary to analyze and determine whether the computer model meets the requirements of paragraph (b)(4)(i); and

(5) A statement certifying that the eligible investment expert has determined that the computer model meets the requirements of paragraph (b)(4)(i) of this section; and

(C) Be signed by the eligible investment expert.

(v) The selection of an eligible investment expert as required by this section is a fiduciary act governed by section 404(a)(1) of ERISA.

(5) Arrangement must be authorized by a plan fiduciary. (i) Except as provided in paragraph (b)(5)(ii) of this section, the arrangement pursuant to which investment advice is provided to participants and beneficiaries pursuant to this section must be expressly authorized by a plan fiduciary (or, in the case of an Individual Retirement Account (IRA), the IRA beneficiary) other than: The person offering the arrangement; any person providing designated investment options under the plan; or any affiliate of either. Provided, however, that for purposes of the preceding, in the case of an IRA, an IRA beneficiary will not be treated as an affiliate of a person solely by reason of being an employee of such person.

(ii) In the case of an arrangement pursuant to which investment advice is provided to participants and beneficiaries of a plan sponsored by the person offering the arrangement or a plan sponsored by an affiliate of such person, the authorization described in paragraph (b)(5)(i) of this section may be provided by the plan sponsor of such plan, provided that the person or affiliate offers the same arrangement to participants and beneficiaries of unaffiliated plans in the ordinary course of its business.

(iii) For purposes of the authorization described in paragraph (b)(5)(i) of this section, a plan sponsor shall not be treated as a person providing a designated investment option under the plan merely because one of the designated investment options of the plan is an option that permits investment in securities of the plan sponsor or an affiliate.

(6) Annual audit. (i) The fiduciary adviser shall, at least annually, engage an independent auditor, who has appropriate technical training or experience and proficiency, and so represents in writing to the fiduciary adviser, to:

(A) Conduct an audit of the investment advice arrangements for compliance with the requirements of this section; and

(B) Within 60 days following completion of the audit, issue a written report to the fiduciary adviser and, except with respect to an arrangement with an IRA, to each fiduciary who authorized the use of the investment advice arrangement, in accordance with paragraph (b)(5) of this section, that--

(1) Identifies the fiduciary adviser,

(2) Indicates the type of arrangement (i.e., fee leveling, computer models, or both),

(3) If the arrangement uses computer models, or both computer models and fee leveling, indicates the date of the most recent computer model certification, and identifies the eligible investment expert that provided the certification, and

(4) Sets forth the specific findings of the auditor regarding compliance of the arrangement with the requirements of this section.

(ii) With respect to an arrangement with an IRA, the fiduciary adviser:

(A) Within 30 days following receipt of the report from the auditor, as described in paragraph (b)(6)(i)(B) of this section, shall furnish a copy of the report to the IRA beneficiary or make such report available on its Web site, provided that such beneficiaries are provided information, with the information required to be disclosed pursuant to paragraph (b)(7) of this section, concerning the purpose of the report, and how and where to locate the report applicable to their account; and

(B) In the event that the report of the auditor identifies noncompliance with the requirements of this section, within 30 days following receipt of the report from the auditor, shall send a copy of the report to the Department of Labor at the following address: Investment Advice Exemption Notification, U.S. Department of Labor, Employee Benefits Security Administration, Room N-1513, 200 Constitution Ave., NW., Washington, DC 20210, or submit a copy electronically to InvAdvNotification@dol.gov.

(iii) For purposes of this paragraph (b)(6), an auditor is considered independent if it does not have a material affiliation or material contractual relationship with the person offering the investment advice arrangement to the plan or with any designated investment options under the plan, and does not have any role in the development of the investment advice arrangement, or certification of the computer model utilized under the arrangement.

(iv) For purposes of this paragraph (b)(6), the auditor shall review sufficient relevant information to formulate an opinion as to whether the investment advice arrangements, and the advice provided pursuant thereto, offered by the fiduciary adviser during the audit

period were in compliance with this section. Nothing in this paragraph shall preclude an auditor from using information obtained by sampling, as reasonably determined appropriate by the auditor, investment advice arrangements, and the advice pursuant thereto, during the audit period.

(v) The selection of an auditor for purposes of this paragraph (b)(6) is a fiduciary act governed by section 404(a)(1) of ERISA.

(7) Disclosure to participants. (i) The fiduciary adviser must provide, without charge, to a participant or a beneficiary before the initial provision of investment advice with regard to any Advice Program, security or other property offered as an investment option, a written notification of:

(A) The role of any party that has a material affiliation or material contractual relationship with the fiduciary adviser in the development of the investment advice program, and in the selection of investment options available under the plan;

(B) The past performance and historical rates of return of the designated investment options available under the plan, to the extent that such information is not otherwise provided;

(C) All fees or other compensation that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with--

(1) The provision of the advice;

(2) The sale, acquisition, or holding of any Advice Program, security or other property pursuant to such advice; or

(3) Any rollover or other distribution of plan assets or the investment of distributed assets in any Advice Program, security or other property pursuant to such advice;

(D) Any material affiliation or material contractual relationship of the fiduciary adviser or affiliates thereof in the Advice Program, security or other property;

(E) The manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed;

(F) The types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser;

(G) The adviser is acting as a fiduciary of the plan in connection with the provision of the advice; and

(H) That a recipient of the advice may separately arrange for the provision of advice by another adviser that could have no material affiliation with and receive no fees or other compensation in connection with the Advice Program, security or other property.

(ii)(A) The notification required under paragraph (b)(7)(i) of this section must be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and must be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(B) The appendix to this section contains a model disclosure form that may be used to provide notification of the information described in paragraph (b)(7)(i)(C) of this section. Use of the model form is not mandatory. However, use of an appropriately completed model disclosure form will be deemed to satisfy the requirements of paragraphs (b)(7)(i) and (ii) of this section with respect to such information.

(iii) The notification required under paragraph (b)(7)(i) of this section may, in accordance with 29 CFR 2520.104b-1, be provided in written or electronic form.

(iv) With respect to the information required to be disclosed pursuant to paragraph (b)(7)(i) of this section, the fiduciary adviser shall, at all times during the provision of advisory services to the participant or beneficiary pursuant to the arrangement--

(A) Maintain accurate, up-to-date information in a form that is consistent with paragraph (b)(7)(ii) of this section,

(B) Provide, without charge, accurate, up-to-date information to the recipient of the advice no less frequently than annually,

(C) Provide, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(D) Provide, without charge, to the recipient of the advice any material change to the information described in paragraph (b)(7)(i) at a time reasonably contemporaneous to the change in information.

(8) Disclosure to authorizing fiduciary. The fiduciary adviser shall, in connection with any authorization described in paragraph (b)(5)(i) of this section, provide the authorizing fiduciary with a written notice informing the fiduciary that:

(i) The fiduciary adviser intends to comply with the conditions of the statutory exemption for investment advice under section 408(b)(14) and (g) of the Employee Retirement Income Security Act and this section;

(ii) The fiduciary adviser's arrangement will be audited annually by an independent auditor for compliance with the requirements of the statutory exemption and related regulations; and

(iii) The auditor will furnish the authorizing fiduciary a copy of that auditor's findings within 60 days of its completion of the audit.

(9) Other conditions. The requirements of this paragraph are met if--

(i) The fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the Advice Program, security or other property, in accordance with all applicable securities laws,

(ii) Any sale, acquisition, or holding of an Advice Program, security or other property occurs solely at the direction of the recipient of the advice,

(iii) The compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the Advice Program, security or other property is reasonable, and

(iv) The terms of the sale, acquisition, or holding of the Advice Program, security or other property are at least as favorable to the plan as an arm's length transaction would be.

(c) Definitions. For purposes of this section:

(1) The term ``designated investment option'' means the eligible investment advice arrangement and any investment option, including an Advice Program, designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term “investment option” means any investment available to participants and beneficiaries under the plan or through an IRA including the eligible advice arrangement and an Advice Program. The term ``designated investment option'' shall not include ``brokerage windows,'' ``self-directed brokerage accounts,'' or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. The term ``designated investment option'' has the same meaning as the term ``designated investment alternative'' as defined in 29 CFR 2550.404a-5(h) except that the term also includes an Advice Program which is designated by a plan and generally made available to participants and beneficiaries or available through an IRA.

(2)(i) The term ``fiduciary adviser'' means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 3(21)(A)(ii) of ERISA by the person to the participant or beneficiary of the plan and who is--

(A) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(B) A bank or similar financial institution referred to in section 408(b)(4) of ERISA or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(C) An insurance company qualified to do business under the laws of a State,

(D) A person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(E) An affiliate of a person described in paragraphs (c)(2)(i)(A) through (D), or

(F) An employee, agent, or registered representative of a person described in paragraphs (c)(2)(i)(A) through (E) of this section who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of advice.

(ii) Except as provided under 29 CFR 2550.408g-2, a fiduciary adviser includes any person who develops the computer model, or markets the computer model or investment advice program, utilized in satisfaction of paragraph (b)(4) of this section.

(3) A ``registered representative'' of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

(4) ``Individual Retirement Account'' or ``IRA'' means--

(i) An individual retirement account described in section 408(a) of the Code;

(ii) An individual retirement annuity described in section 408(b) of the Code;

(iii) An Archer MSA described in section 220(d) of the Code;

(iv) A health savings account described in section 223(d) of the Code;

(v) A Coverdell education savings account described in section 530 of the Code;

(vi) A trust, plan, account, or annuity which, at any time, has been determined by the Secretary of the Treasury to be described in any of paragraphs (c)(4)(i) through (v) of this section;

(vii) A ``simplified employee pension'' described in section 408(k) of the Code; or

(viii) A ``simple retirement account'' described in section 408(p) of the Code.

(5) An ``affiliate'' of another person means--

(i) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting securities of such other person;

(ii) Any person 5 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person;

(iii) Any person directly or indirectly controlling, controlled by, or under common control with, such other person; and

(iv) Any officer, director, partner, copartner, or employee of such other person.

(6)(i) A person with a ``material affiliation'' with another person means--

(A) Any affiliate of the other person;

(B) Any person directly or indirectly owning, controlling, or holding, 5 percent or more of the interests of such other person; and

(C) Any person 5 percent or more of whose interests are directly or indirectly owned, controlled, or held, by such other person.

(ii) For purposes of paragraph (c)(6)(i) of this section, ``interest'' means with respect to an entity--

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation;

(B) The capital interest or the profits interest of the entity if the entity is a partnership; or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise.

(7) Persons have a ``material contractual relationship'' if payments made by one person to the other person pursuant to contracts or agreements between the persons exceed 10 percent of the gross revenue, on an annual basis, of such other person.

(8) ``Control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(9) “Advice Program” means any program or arrangement where a fiduciary adviser (including a discretionary fiduciary under section 3(21)(A)(i) of ERISA and section 4975(e)(3)(A) of the Code) agrees in writing to provide discretionary or nondiscretionary advice including but not limited to an eligible investment advice arrangement and a “wrap fee program” defined in Rule 204-3 of the Investment Advisers Act of 1940.

(d) Retention of records. The fiduciary adviser must maintain, for a period of not less than 6 years after the provision of investment advice under this section any records necessary for determining whether the applicable requirements of this section have been met. A transaction prohibited under section 406 of ERISA shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(e) Noncompliance. (1) The relief from the prohibited transaction provisions of section 406 of ERISA and the sanctions resulting from the application of section 4975 of the Code described in paragraph (b) of this section shall not apply to any transaction described in such paragraphs in connection with the provision of investment advice to an individual participant or beneficiary with respect to which the applicable conditions of this section have not been satisfied.

(2) In the case of a pattern or practice of noncompliance with any of the applicable conditions of this section, the relief described in paragraph (b) of this section shall not apply to any transaction in connection with the provision of investment advice provided by the fiduciary adviser during the period over which the pattern or practice extended.

(f) Effective date and applicability date. This section shall be effective December 27, 2011. This section shall apply to transactions described in paragraph (b) of this section occurring on or after December 27, 2011.

Exhibit 3
(proposed changes to existing draft in redline)

(6) ***Investment education***. The person furnishes or makes available any of the following categories of investment-related information and materials described in paragraphs (b)(6)(i) through (iv) of this section to a plan, plan fiduciary, participant or beneficiary, IRA or IRA owner irrespective of who provides or makes available the information and materials (e.g., plan sponsor, fiduciary or service provider), the frequency with which the information and materials are provided, the form in which the information and materials are provided (e.g., on an individual or group basis, in writing or orally, or via call center, video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of information and materials identified in paragraphs (b)(6)(i) through (~~i~~v), provided that the information and materials do not include (standing alone or in combination with other materials) recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations on investment, management, or value of a particular security or securities, or other property.

(i) ***Plan information***. Information and materials that, without reference to the appropriateness of any individual investment alternative or any individual benefit distribution option for the plan or IRA, or a particular participant or beneficiary or IRA owner, describe the investment product and services available, the terms or operation of the plan or IRA, inform a plan fiduciary, participant, beneficiary, or IRA owner about the benefits of plan or IRA participation, the benefits of increasing plan or IRA contributions, the impact of preretirement withdrawals on retirement income, retirement income needs, the benefits of varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (e.g., immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions, or describe investment objectives and philosophies, risk and return characteristics, historical return information or related prospectuses of investment alternatives under the plan or IRA.

(ii) ***General financial, investment and retirement information***. Information and materials on financial, investment and retirement matters that, without reference to the appropriateness of any individual ~~do not address specific~~ investment products, specific plan or IRA alternatives or distribution options for ~~available to~~ the plan or IRA or a particular ~~to~~ participant~~s,~~ or beneficiary ~~ies and~~or IRA owner~~s~~, ~~or specific alternatives or services offered outside the plan or IRA, and~~ inform the plan fiduciary, participant or beneficiary, or IRA owner about--

(A) General financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment;

(B) Historic differences in rates of return between different asset classes (e.g., equities, bonds, or cash) based on standard market indices;

(C) Effects of inflation;

(D) Estimating future retirement income needs;

(E) Determining investment time horizons;

(F) Assessing risk tolerance;

(G) Retirement-related risks (e.g., longevity risks, market/interest rates, inflation, health care and other expenses); and

(H) General methods and strategies for managing assets in retirement (e.g., systematic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits), including those offered outside the plan or IRA.

(iii) ***Asset allocation models***. Information and materials (e.g., pie charts, graphs, or case studies) that provide a plan fiduciary, participant or beneficiary, or IRA owner with models of asset allocation portfolios of hypothetical individuals with different time horizons (which may extend beyond an individual's retirement date) and risk profiles, where--

(A) Such models are based on generally accepted investments theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time;

(B) All material facts and assumptions on which such models are based (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) accompany the models;

(C) Such models do not ~~include or identify any specific investment product or specific alternative available under the plan or IRA~~reference the appropriateness of any individual investment products ~~-~~for the plan or IRA or a particular participant or beneficiary or IRA owner; and

(D) The asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual situations, participants, beneficiaries, or IRA owners should consider their other assets, income, and investments (e.g., equity in a home, Social Security benefits, individual retirement plan investments, savings accounts and interests in other qualified and non-qualified plans) in addition to their interests in the plan or IRA, to the extent those items are not taken into account in the model or estimate.

(iv) ***Interactive investment materials***. Questionnaires, worksheets, software, and similar materials which provide a plan fiduciary, participant or beneficiary, or IRA owners the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income; questionnaires, worksheets, software and similar materials which allow a plan fiduciary, participant or beneficiary, or IRA owners to evaluate distribution options, products or vehicles by providing information under paragraphs (b)(6)(i) and (ii) of this section; questionnaires, worksheets, software, and similar materials that provide a plan fiduciary, participant or beneficiary, or IRA owner the means to estimate a retirement income stream that could be generated by an actual or hypothetical account balance, where--

(A) Such materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time;

(B) There is an objective correlation between the asset allocations generated by the materials and the information and data supplied by the participant, beneficiary or IRA owner;

(C) There is an objective correlation between the income stream generated by the materials and the information and data supplied by the participant, beneficiary or IRA owner;

(D) All material facts and assumptions (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, rates of return and other features and rates specific to income annuities or systematic withdrawal plan) that may affect a participant's, beneficiary's or IRA owner's assessment of the different asset allocations or different income streams accompany the materials or are specified by the participant, beneficiary or IRA owner;

(E) The materials do not ~~include or identify~~ reference the appropriateness of any specific investment alternative available or distribution option available under the plan or IRA~~, unless such alternative or option is specified by the participant, beneficiary or IRA owner~~; and

(F) The materials either take into account other assets, income and investments (e.g., equity in a home, Social Security benefits, individual retirement account/annuity investments, savings accounts, and interests in other qualified and non-qualified plans) or are accompanied

by a statement indicating that, in applying particular asset allocations to their individual situations, or in assessing the adequacy of an estimated income stream, participants, beneficiaries or IRA owners should consider their other assets, income, and investments in addition to their interests in the plan or IRA.

(v) ***Portfolio tools for self-directed investors***. Securities research reports or ratings, investment screeners and planners, and portfolio analyzers ("portfolio tools"), whether made available through a "brokerage window," self-directed brokerage account or otherwise, that allow a plan fiduciary, participant or beneficiary, or IRA owner to analyze their current or potential investment alternatives to help them make their own investment decisions, provided that the portfolio tools do not make recommendations as to the appropriateness of any individual investment products for the plan or IRA or a particular participant or beneficiary or IRA owner.

(vi) The information and materials described in paragraphs (b)(6)(i) through (v) of this section represent examples of the type of information and materials that may be furnished to plans, plan fiduciaries, participants, beneficiaries and IRA owners without such information and materials constituting investment advice. Determinations as to whether the provision of any information, materials or educational services not described herein constitutes the rendering of investment advice must be made by reference to the criteria set forth in paragraph (a) of this section.

Exhibit 4

Marketing and Business Development Activities

Alternative 1: Modification to definition of term "recommendation" under Section 2510.3-21(f)(1) to add the following:
The term "recommendation" does not include a communication that: (i) describes the general availability and benefits of products and services offered by the service provider or (ii) suggests that a plan, plan fiduciary, participant or beneficiary, IRA or IRA owner consider entering into a professional relationship with a service provider including by describing the service provider's qualifications, expertise and experience (including examples), provided that in either case such communication does not describe the appropriateness of any specific investment, distribution or rollover alternative available based on the individual circumstances of the plan, plan fiduciary, participant or beneficiary, IRA or IRA owner and where in writing, includes a disclaimer that the communication is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity.

Alternative 2: Addition of a new carve-out to Section 2510.3-21(b):

(7) *Marketing and Business Development Activities*
A person provides a communication that: (i) describes the general availability and benefits of products and services offered by the person or (ii) suggests that a plan, plan fiduciary, participant or beneficiary, IRA or IRA owner consider entering into a professional relationship with a person including by describing the person's qualifications, expertise and experience (including examples), provided that in either case such communication does not describe the appropriateness of any specific investment, distribution or rollover alternative available based on the individual circumstances of the plan, plan fiduciary, participant or beneficiary, IRA or IRA owner and where in writing, includes a disclaimer that the communication is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity.