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July 21, 2015

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The Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655/RIN 1210-AB32
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

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Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: **RIN 1210-AB32; Conflicts of Interest Rule**
ZRIN 1210-ZA25; Proposed Class Exemption

To Whom it May Concern:

Lincoln Financial Network (LFN) is the marketing name for Lincoln Financial Group's two dually-registered broker-dealer/investment adviser entities: Lincoln Financial Advisors Corp. and Lincoln Financial Securities Corp.[1] LFN appreciates the opportunity to comment on the Department of Labor's (Department's) proposed regulation on the definition of the term "Fiduciary" and the Conflict of Interest Rule – Retirement Investment Advice (Proposal).[2]

I. Summary of Position

LFN maintains an affiliation with over 8,200 financial advisors, including registered representatives, investment advisor representatives, insurance brokers and agents. Our financial advisors play an important role in providing advice and comprehensive financial planning to consumers across America. Their advice and financial planning recommendations help consumers save and invest for retirement, build a stream of retirement income so that they do not outlive their assets, and identify solutions for coping with financial stress in the event of a family tragedy. They utilize a variety of commissionable, fee-based and fee-only investment products. These products include securities (stocks, bonds, mutual funds and variable annuities) and non-securities (fixed annuities and life insurance), as well as advisory services.

[1] Lincoln Financial Group is the marketing name for Lincoln National Corporation (LNC) and its affiliated companies. LFN is an affiliate of LNC, whose other affiliated companies act as issuers of insurance, annuities, retirement plans and individual account products and services. The affiliates include, but are not limited to, The Lincoln National Life Insurance Company (LNL); Lincoln Life and Annuity Company of New York (LLANY) and Lincoln Financial Distributors, Inc. (LFD), Lincoln's wholesaling arm, a broker-dealer registered with the SEC and a member of FINRA.
[2] 80 Fed. Reg. 21,927 (April 20, 2015). Lincoln Financial Group is also submitting its own comment letter to the Proposal.

As independent broker-dealers, our investment and advisory platforms give our financial advisors the ability to offer clients comprehensive financial planning and a wide spectrum of both insurance and investment products, including Lincoln's own products to ensure that the clients' financial needs are met. LFN's financial advisors work with more than 400,000 clients and advise nearly 400,000 qualified accounts with approximately $54 billion in assets. LFN's broker-dealer and investment adviser entities are subject to primary regulatory oversight by the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA) and the States.

At LFN, we believe retirement investors should have the right to seek comprehensive financial planning and advice to help save for retirement on their terms. Research has proven the majority of American consumers value choice and are satisfied with commissionable advice. Limiting this choice will disadvantage retirement investors, particularly for the vast majority of middle-income Americans looking for retirement products to help solve for gaps in lifetime income beyond their working years. In addition, without access to commissionable advice on qualified retirement assets, millions of Americans will no longer be able to seek professional guidance for their assets as they near retirement.

LFN believes that it is important to continue to provide a full spectrum of advice to consumers in the future and we agree with the Department's goal of helping retirement investors receive advice that is in their best interest. We also agree with the Department's equally, if not more important, goal of helping these same retirement investors prepare for retirement. These goals do not compete with each other and both can be met if the Department makes targeted changes to the Proposal, including the following:

- Modify the definition of "best interest" and "impartial conduct" standards.
- Amend the Best Interest Contract Exemption (BICE) to: (1) not require a contract until an account is opened; (2) make the disclosures less burdensome and consistent with existing securities law; and (3) eliminate the asset class restrictions.
- Limit penalties for unintended violations.
- Harmonize the fiduciary rule with existing securities law.
- Make application of the final regulation prospective and extend the transition timeline to at least 36 months.

In recent remarks, the Secretary of Labor recalled President Obama's analogy of "retirement as a three-legged stool."[3] The first leg is Social Security and the second two legs are personal savings and employment-based savings. The Secretary commented that the private sector is critical in helping to ensure that these second two legs of the stool are fortified. We agree. Americans are living longer, their wages are stagnating and the future of Social Security is uncertain. Now, more than ever, Americans need to continue receiving access to financial planning and advice that the private sector offers. Americans need access to the products and solutions that the private sector offers. Handicapping a financial advisor's ability to bring important protections and solutions to retirement investors weakens, rather than strengthens, the three-legged stool.

With these substantive changes, including access to advice and comprehensive planning, the Department will help fortify the stool and create a standard of advice that consumers can understand

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[3] Department of Labor Secretary, Thomas E. Perez, Remarks from Brookings Institution, The Hamilton Project, *Forum on Promoting Financial Well-Being in Retirement* (June 23, 2015) *available at* <http://www.dol.gov/_sec/media/speeches/20150623_Perez.htm>

and deserve – a best interest standard of care – one that will ensure Americans can continue to receive the products, solutions and services necessary to prepare for retirement.

II. The Importance of Financial Advisors, Comprehensive Financial Planning and Commissionable Product Solutions for Retirement Investors

Financial advisors and comprehensive financial planning are crucial for investors, especially retirement investors. Eight in 10 consumers who work with a financial advisor believe their advisor helps them in ways they would not have been able to achieve on their own.[4] In fact, consumers who work with a financial advisor are almost twice as likely to contribute to a retirement plan (78% vs. 41%).[5] They are also more likely to save a larger percentage of their income for retirement (61% vs. 38%) and are more confident in their retirement security (71% vs. 43%).[6] Working with a financial advisor is critical for consumers' preparedness and positive outlook for retirement.

However, only half of all households (53%) indicate that they have a formal retirement income plan.[7] This percentage decreases substantially (down to 44%) for households with fewer investable assets (between $100K-$250K).[8] To improve these statistics, financial advisors are essential partners and the Department should take steps to make it easier, not harder, for retirement investors to work with advisors.

LFN's financial advisors play an important role in bringing holistic financial planning services to American consumers. They live by a *Serve First, Last and Always*℠ philosophy. The essence of this philosophy is that, in all client relationships, regardless of the circumstances, LFN advisors are committed to putting clients' interests first to assist clients with their financial affairs. By taking the time to learn the individual needs and financial situations of each potential investor, LFN advisors are able to provide information, advice and alternatives to help these individuals make appropriate decisions for their financial futures.

This philosophy is evident in LFN's financial planning process. Our financial advisors engage in thoughtful and thorough planning to fully understand the client's goals and objectives, needs, and risk tolerance. They also provide the education and financial literacy to help clients take control and prepare for their futures. LFN's six-step financial planning and consultative process includes 1) gathering client information, 2) establishing goals and objectives, 3) analyzing the current financial situation, 4) developing a plan and discussing strategies and solutions, 5) implementing recommendations, and 6) monitoring and reviewing progress with the client.

This planning process validates that advisors help clients with many things – saving for retirement, budgeting, investing, building a stream of retirement income, long-term care planning in the event of a family tragedy and financial estate planning. Human advisors do many things that robo-advisors, computers and pamphlets cannot. They spend significant amounts of time with their clients in face-to-face meetings, addressing fears, anxieties and questions they have about the future, such as:

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[4] See, e.g., Matthew Drinkwater, Ph.D., Life Insurance and Market Research Association (LIMRA) Secure Retirement Institute Study, *Finding the Right Mix: LIMRA Retirement Income Attitudes and Preferences* (2014).
[5] See, e.g., Alison Salka, Ph.D., LIMRA *Retirement Research 2012 Findings and Trends: Use of and Impact of Advisors* (2012).
[6] Id.
[7] See, e.g., Cerulli Associates, The Cerulli Report, *U.S. Retail Investor Products and Platforms 2014: Matching Product and Distribution Strategy to Client Demands* (2014).
[8] Id. (recognizing that households who undertake retirement planning are more likely to express confidence that they know how much money is needed for retirement (85% vs. 49%)).

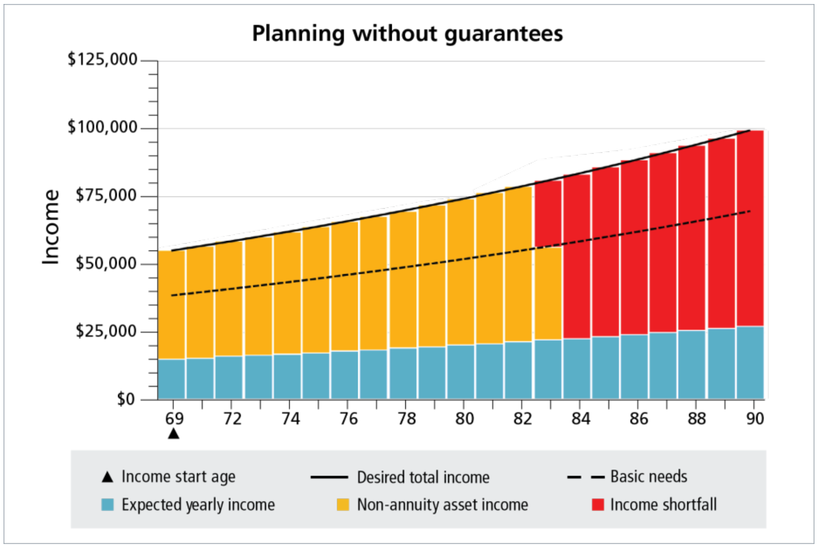
"Have I saved enough for retirement?"
"Will I outlive my savings?"
"Will I be a burden on my children?"
"Will Social Security still exist when I retire?"
"Will my Social Security payments decrease over time?"

In response to these personalized questions, LFN's financial advisors follow their six-step planning process and implement their financial planning recommendations with a comprehensive range of fee-based and commissionable solutions. Insurance products, including annuities with guaranteed living income benefits, investments, and long-term care insurance are essential tools to help American consumers properly prepare for retirement.

LFN advisors use advanced planning tools ("visualizers") that are personalized to compare investment options and income streams available for various products. A hypothetical illustration, similar to below, has been used by many LFN advisors as part of the comprehensive planning process to demonstrate how a variable annuity can secure a reliable and adequate income stream that cannot be outlived:

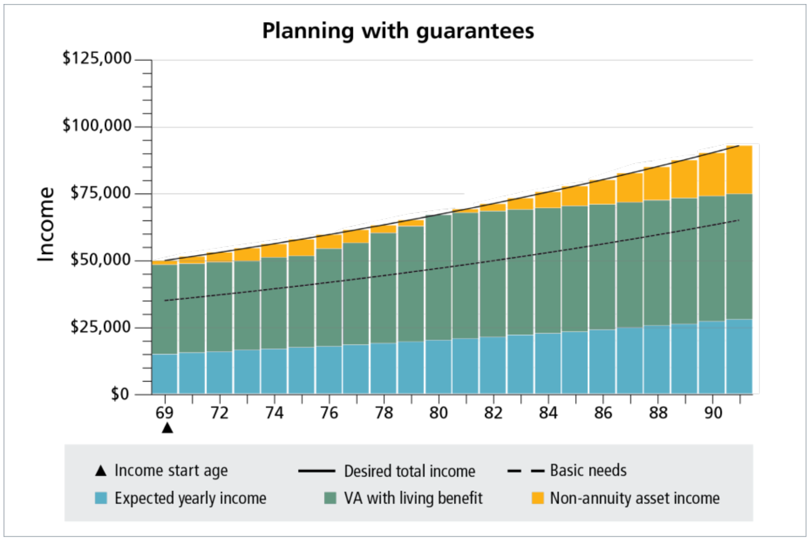
- Bob and Harriett were 64 years old. They wanted to retire in 4 years and plan for income that would cover their life expectancy.
- They were most concerned about having enough income throughout their retirement that would cover both their basic needs and, if possible, life's extras.
- They needed at least $40,000 a year to cover their basic needs and it needed to keep pace with inflation. They were hoping to have $10,000 to $15,000 additional each year as a cushion to protect against unknown events.

As the visualizer below illustrates, Bob and Harriett would run out of income if they simply relied on two legs of the stool: (1) Social Security, reflected as "expected yearly income" and (2) personal savings, reflected as "non-annuity asset income."



However, when Bob and Harriett engaged in comprehensive financial planning with an advisor, they had a professional guiding them towards solutions, like variable annuities, which can guarantee a lifetime income stream.

As the visualizer illustrates below, Bob and Harriett could purchase a variable annuity which guarantees a certain level of income so that their basic needs are completely covered and they would be able to fund their "cushion" with a combination of the guarantees and their personal savings.



Variable annuities are an example of a product that is essential for fortifying the third-leg of the retirement stool. These products are primarily commission-based and are critical to ensuring that retirement investors receive the solutions they need to achieve a secure retirement.

In the 2013 study shown below, 40% of the households surveyed preferred to work with their advisor through a commission-based relationship versus 30% who preferred an asset-based relationship.[9]

Clients' Preferred Fee Structure by Investable Assets, 2013

Sources: Phoenix Marketing International, Cerulli Associates

Analyst Note: Participants are asked: If you had to choose a way to compensate your provider, how would you prefer to compensate your primary provider for the services you receive?

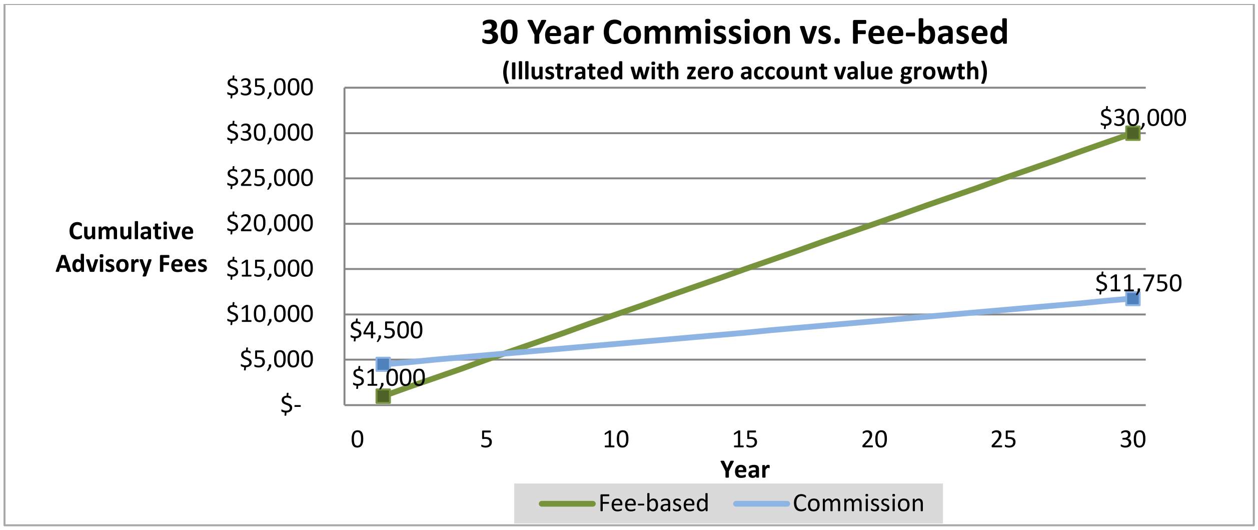
- *I would prefer my provider is paid each time I make a transaction (e.g., a commission)*
- *I would prefer to pay my provider a percentage fee based on my level of assets*
- *I would prefer to pay my provider a retainer fee for a set amount*
- *I would prefer to pay my provider an hourly fee*

	Household Investable Assets					
Preferred Fee Type	**≤ $100K**	**>$100K-$500K**	**>$500K-$2m**	**>$2m-$5m**	**>$5m**	**All Households**
Commission	38%	41%	43%	38%	29%	40%
Asset-based fee	28%	31%	28%	33%	32%	30%
Retainer fee	23%	19%	20%	19%	27%	21%
Hourly fee	11%	9%	10%	9%	13%	9%

[9] See, e.g., Cerulli Associates, The Cerulli Report, *U.S. Retail Investor Products and Platforms 2013: Matching Product and Distribution Strategy to Client Demands* (2013). The number of households surveyed who preferred commission-based relationships to an asset based relationship grew to 44% in 2014.

As stated below, there are many legitimate reasons why investors choose to pay for advice through commissions rather than fees. Commissionable investments are generally buy-and-hold investments. For many long-term investors, commissions are preferred as a more cost-efficient and less expensive way of paying for ongoing advice.[10]

In the case of long-term purchases, financial advisors often earn less, and investors often pay less, under the commission-based model. As an example, a $100,000 purchase of a typical B-share class variable annuity provides an upfront 4.5% advisor commission and a 25 basis point ongoing advisor commission for service, compared to the typical fee-based advisor compensation of 1%. For simplicity, this illustration shows a zero rate of return. The commission-based model pays higher compensation in year one, but the fee-based model pays much higher compensation over the long-term.



The exact point at which a buy-and-hold investor pays less than in a comparable fee-based arrangement depends on a variety of factors, including the cost of the fee-based program, investment returns and the level of annuity commissions. However, there is no real question that paying a financial advisor for investment advice through commissions is a reasonable choice for many. It is not simply a mechanism for maximizing advisor compensation, as the Department appears to assume. Instead, commissions are often the compensation model that best reflects the services provided and are the most fair to the consumer.

This is not to suggest that paying for advice with an ongoing asset-based fee is improper. Rather, compensation for each investment should be evaluated based on a variety of factors and ultimately, how a retirement investor pays for their products, solutions, investments and advice should be a matter of choice for the investor. This choice is necessary because different types of financial products and compensation models provide different benefits, have different consumer impacts, and meet different consumer needs. To assume they are all alike and develop rules around a single preferred, fee-based model fails to recognize this reality and ultimately harms consumers by limiting their choices. Investor

[10] See, e.g., Cerulli Associates, The Cerulli Report, *U.S. Retail Investor Products and Platforms 2013: Matching Product and Distribution Strategy to Client Demands* (2013).

choice is important and should not be taken away by the Department because of overly prescriptive regulations and exemptions that simply do not work.

III. Suggested Changes to the Proposal

A. The DOL's "best interest" and "impartial conduct" standards should be modified.

The Department's proposed "best interest" standard requires that an "Adviser and Financial Institution 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 the needs of the Retirement Investor, when providing investment advice to them."[11] This language is consistent with existing ERISA fiduciary standards. However, the Department's Proposal would take the requirement further and require that the Adviser and Financial Institution act without regard to the financial or other interests of the Adviser, Financial Institution or their Affiliates or any other party.[12] This creates a standard that is higher than today's current standard of care under ERISA and limits investor choice. Instead, the Department should not require advisors and financial institutions to completely disregard any economic interest they may have in a transaction, but rather substitute language to reflect a requirement to put their own financial interests secondary to that of their client.[13]

Financial advisors consider a wide variety of fee-based and commissionable solutions when they make recommendations to retirement investors. To the extent that the financial planning process did not completely ignore the financial interest or compensation received by the advisor, the advisor would violate the "best interest" standard – even if the advisor's recommendation would have resulted in the retirement investor's purchase of the lowest-fee product. To remedy this, the Department should modify the language and allow the advisor to consider the business and economic reality of the transaction, again, as long as the advisor's own interests are secondary to those of the retirement investor.

The Department's "reasonable compensation" language also needs further clarification. As written, a financial advisor cannot make an asset recommendation unless the total compensation is reasonable. To comply with this standard, an advisor must determine whether compensation is "reasonable," a term that has yet to be defined by the Department. The Department does not offer any guidance or factors that advisors might use to determine reasonable or excessive compensation. To validate reasonableness, it appears that an advisor must have an in-depth understanding of the competitive landscape and then structure his own compensation accordingly. This approach is impractical. Instead, the Department should define "reasonable" or outline all factors to be considered when evaluating the reasonableness of compensation.

[11] 80 Fed. Reg. 21,970 (April 20, 2015).
[12] 80 Fed. Reg. 21,970 (April 20, 2015) (emphasis added).
[13] Alternative language is proposed in the mark-up attached as Appendix A.

B. The BICE should work for advisors and financial institutions providing full-service financial planning.

1. The contract should not be required until an account is opened and should not be necessary for existing accounts.

The BICE requires that an advisor execute a written contract with the retirement investor "prior to recommending that the Plan, participant or beneficiary account, or IRA purchase, sell or hold the Asset."[14] This requirement fails to recognize that an informed retirement investor "shops around" and conducts due diligence on advisors and investment strategies before entering into an advisor-client relationship. Due diligence often involves discussions with multiple advisors about specific investments and strategies.

Requiring the retirement investor to enter into a contract with each of the prospective advisors is awkward and impractical. This onerous contract requirement may actually dissuade a retirement investor from the very "shopping around" that the Department's proposal seeks to encourage. As such, the Department should eliminate the "prior to" obligation and not require a written agreement until the advisor/client relationship is formalized and an actual account is opened.[15] This approach is more consistent with customary practices and current regulations within the broker-dealer and investment advisory industry.

Also, requiring existing accounts to comply with the BICE would harm retirement investors. Because of the compressed time-frame for compliance, firms will be unable to comply with the BICE requirements. Instead, the Department should expand its "grandfathering" provisions to include all accounts that were opened before the effective date of the regulation.

The lack of a grandfather provision would essentially mean that commission-based accounts have only two feasible options: (1) shift to a fee-based relationship or (2) end the relationship. Unfortunately for investors with smaller account balances, the last option is the most-likely outcome because fee-based advisory arrangements are simply not viable. These investors may not meet the minimum asset levels required for advisory accounts or they will not be willing to assume such a high fee for their limited asset base. Even if a particular investor opts to move forward and pay an asset-based advisory fee, because of the migration to a managed account, the retirement investor may need to sell the current investments, causing an enormous investment churn because of potential distribution and surrender charges.

Given the magnitude of accounts and the compressed time for implementation, the Department should grandfather existing accounts and not require the BICE for existing accounts.

2. The required disclosures should be less onerous and consistent with existing securities laws.

Disclosure is a well-established method for identifying and mitigating conflicts of interest. However, excessive disclosure is counterproductive because it can overwhelm or confuse recipients. Today, if an LFN client wants to open a basic, non-discretionary managed IRA account, the client receives disclosures

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[14] 80 Fed. Reg. 21,984 (April 20, 2015) (emphasis added).

[15] In the event a retirement investor refuses to enter into a contract, variable compensation or commissions should be permissible. The Department should address this regulatory gap by clarifying that compliance with the BICE is still possible without an executed client contract.

in 11 documents and 149 pages that are necessary to comply with existing FINRA and SEC guidance and requirements.[16] Under the Proposal, this client will have to receive additional point of sale disclosures, website disclosures and annual disclosures on top of the disclosures and documents already identified. Instead of creating additional and duplicative requirements, which will exacerbate the excessive disclosure problem, the Department should modify its proposed disclosure requirements in a few specific ways.

First, the disclosures must not violate existing securities laws. The BICE requires individualized, point-of-sale "projections" (in a specific dollar amount) of the total cost of the investment and "reasonable assumptions" regarding investment performance.[17] These requirements should be eliminated because the projections and assumptions requirements may violate the antifraud provisions of the federal securities laws and conflict with existing SEC rules[18] and FINRA rules.[19]

Second, the Department should conform all BICE disclosure requirements (e.g., contract, point-of-sale, website, annual, etc.) with its already effective fee disclosure requirements for ERISA plans. Regulations under section 408(b)(2) of ERISA require service providers to disclose detailed information on direct and indirect compensation earned in connection with services provided to ERISA plans. The 408(b)(2) regulations became effective in 2012 and caused financial institutions to incur significant costs to comply with these requirements.[20] The Department has not identified any evidence that these disclosures are inadequate for investment advice services and should do so before imposing another costly disclosure regime. Retirement investors also have access to extensive fee and compensation information through prospectuses and Form ADV disclosure brochures. Rather than create yet another

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[16] The disclosures and documents include the following:

- Wealth Management Financial Services Agreement (9 pages)
- New business transmittal form (1 page)
- Client profile form (7 pages)
- IRA Application Kit (69 pages)
- Investor Guide to IRA Rollovers (2 pages)
- Client Disclosure Document (6 pages)
- Wrap Fee Program Brochure (16 pages)
- Guide to Understanding Your Investment Advisory and Brokerage Relationships (2 pages)
- Form ADV Part 2A (25 pages)
- Form ADV Part 2B (4 pages)
- Fee and Commission Schedule (8 pages)

This list does not include additional disclosures available on the LFN websites or the hundreds of mutual fund or annuity prospectus pages that are required based on the underlying IRA account investments.

[17] Section III(a) of the BICE.

[18] See, e.g., 17 C.F.R. § 230.482(d)(3)(i); see also Form N1-A (Registration Statement Under The Securities Act of 1933 and/or Registration Statement Under The Investment Company Act of 1940) to be used by funds except insurance company separate accounts; see also Form N-4 (Registration Statement Under The Securities Act of 1933 and/or Registration Statement Under The Investment Company Act of 1940) to be used by all separate accounts offered under variable annuity contracts.

[19] See, e.g., FINRA Rule 2210(d)(1)(C), prohibiting communications that "predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast," with limited exceptions.

[20] Lincoln estimates that the costs incurred to comply with the 404-a5 and 408(b)(2) disclosure requirements implemented in 2012 exceeded $4 million (excluding ongoing annual costs). Lincoln is one of thousands of financial institutions that incurred significant costs to comply with these disclosure requirements. Extrapolating from the costs incurred by Lincoln, we believe that the collective industry costs to comply with both of these regulatory changes far exceeded the Department's prior estimates. As such, we are concerned that the current cost estimates for this proposal are similarly inadequate.

disclosure regime (and require service providers to maintain the attendant additional data[21]), the Department should focus on improving existing disclosures.

Without reasonable disclosure requirements, providing advice and complying with the BICE may be so expensive that many retirement investors (and advisors) are priced out of the market. This impact will create an "advice gap" for retirement investors who cannot afford to pay level fees for advice. More importantly, those retirement investors who have the greatest need for advice (the middle class and those with fewer investable assets) will be the very investors most impacted.

Consider Melissa, a 30-year old kindergarten teacher from Delaware. Melissa began working with her advisor when she was 22 years old. Through holistic financial planning, Melissa has developed a budget, established a 529 account for her newborn and learned about the advantages of retirement accounts (both 403(b) and Roth IRA accounts). Because of the financial planning she and her husband received from their financial advisor, Melissa and her husband have more than doubled their retirement contributions since they first began contributing. The LFN advisor was able to help this young couple establish a solid foundation for retirement and college savings for their newborn daughter. Melissa and her husband benefited from a commission-based relationship. Had the couple needed to engage in a fee-only relationship with the advisor, they would not have been able to afford the ongoing annual fees with their modest incomes.

There is evidence that the cost of advice increased and the number of investment advisors decreased in the United Kingdom following the implementation of the Retail Distribution Review (RDR), a regulatory requirement conceptually similar to the Department's Proposal.[22] The Department needs to ensure that the same unintended consequences and resulting "advice gap" do not happen in the United States so all retirement investors, including Melissa and her husband, have continued access to individualized advice, products and solutions.

3. Additional asset classes should be permitted in IRAs.

In the BICE, the Department limits the types of investments available to retirement investors by mandating which assets must be purchased within a retirement account to fall within this exemption. Excluded from the list of eligible assets are options, certain alternative investments and other types of privately offered securities. Many financial advisors use these types of asset classes as a hedge against the general market. By excluding investments in certain assets, the Department further impedes the ability of holistic financial advisors to act in the best interest of retirement investors.

In 2011, Robert, a 63-year old resident of Maryland, was nearing retirement. Having worked with his advisor to build a comprehensive financial plan, Robert was in the process of implementing the recommendations. He worked with his LFN advisor to determine the proper asset allocation for his IRA assets. Robert needed a certain percentage of income-producing investments. However, the bond

[21] Introducing broker-dealers (i.e., those broker-dealers that rely on clearing firms to custody client assets) are not in the best position to directly obtain and maintain complete and accurate disclosure data. Introducing broker-dealers, like LFN's broker-dealers, rely on clearing firms to collect this information because they have the more direct relationships with investment providers like mutual fund companies. If the data collection is required, the Proposal should contain requirements for clearing firms to make this information available to introducing broker-dealers. Alternatively, the Proposal should contain a safe harbor, similar to the one found in the Section 408(b)(2) regulations, so that financial institutions that do not custody client assets are able to rely on information obtained from third parties.

[22] See, e.g., Professor Andrew Clare, et al., *The Impact of the RDR on the UK's Market for Financial Advice*, Cass Consulting, Cass Business School - City University of London (June 2013).

market had been suffering significantly because of the low-interest rate environment. As an alternative to bonds and bond-funds, Robert and his advisor discussed investing approximately six percent (6%) of his retirement assets in non-traded Real Estate Investment Trusts (REITs).[23] Non-traded REITs offer investors the potential for income (because they distribute rent received from commercial real estate like retail stores, hotels, industrial complexes and office buildings) and capital appreciation (as the underlying commercial property values grow).

Retirement investors need choice. If this asset class was unavailable, Robert and other similarly situated retirement investors would lose the ability to make investment selections that are in their best interest. A retirement investor would be forced into a fixed-income asset class (like low-interest rate bonds) because the Department removed their investment choice. Limiting asset class choices would disadvantage retirement accounts to other investment accounts because of inconsistent regulatory requirements. The Department's approach to asset limitations is unnecessary in light of an exemption's foundational requirement that financial advisors only recommend investments that are in the client's best interest. At the very least, the Department has not adequately justified these limitations. Unless it can be specifically supported, the asset eligibility section of the BICE should be eliminated.

C. Prohibited Transaction penalties and class action liability should be limited.

A significant concern created by expanding the ERISA fiduciary status is prohibited transaction liability. While the prohibited transaction rules and related exemptions serve an important purpose, the penalties imposed for violations are severe and can be significantly disproportionate to the nature of the violation.

Several types of liability can arise from a prohibited transaction. First, the fiduciary that caused a prohibited transaction can be personally liable for either the client's losses or the fiduciary's profits associated with the transaction and an additional civil penalty of up to 20% if the Department becomes involved in a lawsuit or settlement involving the transaction. Second, the fiduciary can be liable for an excise tax to the IRS of 15% of the "amount involved" in the transaction. This excise liability recurs each year until the transaction is corrected and can increase to 100%.

LFN is concerned that an inadvertent violation of one of the new or amended exemptions would have significant economic impacts to both the advisor and the firm, including exposure to class action liability. As an example, if LFN sought to rely on the BICE and failed to maintain clean data for the six years required under BICE, a prohibited transaction has occurred and LFN can no longer rely on the exemption. Or, if LFN identified a minor disclosure item that was inadvertently excluded from quarterly website updates, a prohibited transaction has occurred and LFN can no longer rely on the exemption. In today's world, it is not unusual for minor technology errors to occur that may affect the quality of data. Minor data challenges would result in sweeping prohibited transactions and make BICE no longer available as an exemption. The impacted firms would then be required to forfeit revenues and pay significant excise taxes – a result that is entirely disproportionate under the circumstances.

To avoid this problem, the Department should include a means to correct inadvertent or minor instances of non-compliance in the exemptions. The correction mechanism could be modeled on the

[23] Non-traded REITs are not appropriate for all investors, but they are for those who can assume some risk and meet the eligibility requirements. Many investors, who meet the annual salary and net worth requirements set forth in the prospectus, prefer this type of an investment because of the income yield. A prospectus accompanies these registered securities and sets forth all disclosures that are pertinent for a retirement investor to consider.

disclosure errors provision in the Section 408(b)(2) regulation.[24] This provision permits service providers to continue to qualify for the Section 408(b)(2) exemption in the event that, acting in good faith and with reasonable diligence, they nevertheless make a disclosure error or omission, so long as the disclosure is corrected.[25] This concept could be applied to any type of disclosure, contracting, notice or reporting error under BICE or the other exemptions. Doing so would encourage financial institutions to work with the detailed conditions of the BICE and mitigate the risk of "advice gaps" for retirement investors.

Another significant concern is exposure to class action liability due to the "warranty" requirements in the BICE. The BICE requires financial institutions to enter into a written contract with IRA owners. At its core, the contract requires the financial institution to promise that it will put the client's interests first and not make any misleading statements. The Proposal also requires the contract to include numerous other warranties or guarantees. These warranties include affirmative statements that the financial institution will (1) comply with all state and federal laws, (2) adopt appropriate conflict mitigation policies, (3) identify material conflicts of interests and (4) adopt compensation policies that eliminate any compensation practices that may encourage an individual advisor to make a recommendation that is not in the best interest of the investor.

Taken to the extreme, if an advisor violates state law by failing to renew a license in a timely manner, this unrelated state law violation would subject the advisor and financial institution to prohibited transaction and potential class action liability for breach of the BICE warranty. It seems patently unfair to convert unrelated state or federal law violations into both prohibited transactions and class action claims. Doing so only benefits the plaintiffs' trial bar and renders the BICE useless. For these reasons, we urge the Department to remove the warranty provisions from the BICE contract requirements.

As an alternative, LFN suggests that the Department require firms to establish policies and procedures which are reasonably designed to achieve compliance with federal retirement laws (ERISA and Internal Revenue Code). The Department might also require firms to implement policies and procedures to identify and mitigate conflicts of interests. These suggestions are consistent with existing federal securities laws for broker-dealers and investment advisers that require policies and procedures reasonably designed to achieve compliance with securities laws.[26] This alternative approach would avoid the perverse result of encouraging class-action litigation against advisors and financial institutions.

D. The Department should harmonize its fiduciary rule with securities laws to avoid conflicting regulatory framework.

The existing regulatory environment for dually registered broker-dealers and investment advisers is complex and robust. LFN's broker-dealers and investment advisers are regulated by the SEC through the rules and regulations promulgated under the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940. LFN's broker-dealers are also subject to FINRA rules and regulations. Adherence to these requirements cannot be satisfied through client disclosures alone and these requirements cannot be waived by clients. LFN's broker-dealers and investment advisers are also

[24] 29 C.F.R. § 2550.408b-2(c)(1)(vii).
[25] Existing regulations require correction as soon as practicable, but not longer than thirty (30) days after the error is discovered. Given the significant data and disclosure requirements under BICE, the Department should lengthen the correction time period to at least ninety (90) days. The sheer volume of disclosure data and other requirements imposed by the BICE necessitates a longer time period for correction.
[26] See, e.g., 17 C.F.R. § 275.206(4)-7.

generally subject to regulatory oversight by each State.[27] These rule differences result in advice being delivered to investors in different ways.

FINRA: Registered representatives:	*vs*	*SEC: Investment Advisor Representatives:*
• Conduct themselves in accordance with the just and equitable principles of trade[28] • Adhere to high standards of commercial honor • Recommend suitable investments		• Put client's interest first • Act in good faith • Provide full and fair disclosure • Do not mislead clients • Disclose conflicts of interest

Most consumers do not appreciate today's differences in the delivery of advice. If the Proposal is finalized, advice to retirement investors will be delivered in yet another way and under a different standard of care. This will exacerbate an already confusing and bifurcated regulatory regime.

Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act directed the SEC to study and make recommendations as to whether a uniform fiduciary standard of care for investors was warranted. The SEC published its Study on this topic in 2011 and found that a uniform standard of care was indeed warranted. The SEC cautioned, however, that a uniform standard should be "business model neutral" so that investor choice as to accounts, products, services and relationships is not limited. The SEC has recognized how critical investor choice is as it continues its important work by evaluating the methodology to advance its recommendations. Importantly, the SEC's recommendations do not distinguish between retirement investors and other investors and it is clear that a single standard should apply to all investors, regardless of account type.

FINRA has also been moving towards a "best interest" standard and has been vocal about refining its definition of "suitability" under FINRA Rule 2111. More recently, FINRA issued guidance related to IRA rollovers and FINRA's expectation that any recommendations by an advisor must put the client's best interests ahead of the advisor's interests.[29] FINRA's CEO, Richard G. Ketchum, recently articulated the following alternatives and improvements that can ensure regulatory harmonization, but also advance the Department's Proposal:[30]

- The "best interest" standard should be clear that a customer's interests come first and any conflicts should be disclosed and consented to by the client. And, no standard should be implemented without sufficient workable guidance to permit compliance with its requirements.
- Any proposal should require financial firms to establish structures to manage conflicts of interests.
- A "best interest" standard should align with the "know your customer" and "suitability" standards.

[27] Broker-dealers and investment advisers are also subject to examination by the SEC, FINRA and the States, often on an annual or bi-annual basis. These regulators often review for compliance with ERISA requirements as they relate to the firm's business activities.
[28] See, e.g., FINRA Rule 2010 (*Standards of Commercial Honor and Principles of Trade*).
[29] See FINRA Regulatory Notice 13-45 (December 2013).
[30] FINRA Chief Executive Officer, Richard G. Ketchum, Remarks from the *2015 FINRA Annual Conference* (May 27, 2015) *available at* <http://www.finra.org/newsroom/speeches/052715-remarks-2015-finra-annual-conference>.

- Broker-dealers should provide clients with Form ADV-like disclosures in plain English. This disclosure would simply and clearly explain product and administrative fees, forms of compensation and conflicts of interests.
- Conflicts created by compensation incentives across product lines should be mitigated.

The Department has an opportunity to truly collaborate with the SEC and FINRA instead of simply receiving technical feedback on rule drafting. This suggested collaboration should focus on jointly developing and implementing a harmonized and uniform standard of care for all investment accounts. Without a harmonized standard of care, individuals will likely be confused by inconsistent disclosure documents and contractual requirements that vary based on the type of account. Similar confusion will occur for providers, such as LFN's financial advisors, who offer clients holistic financial planning services that span both retirement and non-retirement assets. Because of the comprehensive nature of planning, it may not be clear at the beginning of a client relationship whether a particular client will trigger the Department's rules or simply the disclosure requirements of the SEC and FINRA. Uniform rules and regulations are critical to ensure that compliance with one set of regulations does not cause non-compliance with another.

Indeed, collaborating with the SEC and FINRA to develop a uniform and harmonized fiduciary standard of care and a single disclosure standard is entirely consistent with the spirit of President Obama's 2011 Executive Order, which emphasized the following:

- "Sometimes, rules have gotten out of balance. . ."[31]
- "[W]e are seeking more affordable, less intrusive means to achieve the same ends—giving careful consideration to benefits and costs. This means writing rules with more input from experts, businesses and ordinary citizens. It means using disclosure as a tool to inform consumers of their choices, rather than restricting those choices;"[32] and,
- "We're looking at the system as a whole to make sure we avoid excessive, inconsistent and redundant regulation."[33]

President Obama's 2011 Executive Order identified the right issues, and the Department's final regulation must be tailored and consistent with this Executive Order.

E. The transition period should be at least 36 months and application of the new rules should be prospective.

In recent remarks, Labor Department Secretary Thomas Perez stated that "completing this rule is one of the single most important things we can accomplish in the remaining . . . days [of the Obama Administration]."[34] The Proposal is enormous and arguably the most significant in the history of ERISA. Even if the Department makes substantial modifications to ensure the final rules are workable, compliance will be a monumental undertaking and cannot be accomplished in the remaining months of the Obama Administration, as Secretary Perez suggests.

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[31] Op-Ed, President Barak Obama, *Toward a 21st Century Regulatory System*, Wall Street Journal (Jan. 18, 2011). The President's Op-Ed coincided with his issuance of Executive Order 13,563, which set strict standards for cost-benefit analysis in federal agency rulemaking.
[32] *Id.*
[33] *Id*.
[34] See Patrick Temple-West, *Perez Says Technology Companies Support Labor Department's Proposed Fiduciary Rule*, (June 23, 2015), *available at* <https://www.politicopro.com/financialservices/whiteboard/?wbid=56096>.

For example, in the United Kingdom (UK), the Financial Services Authority (FSA),[35] the regulator of all financial services in the UK, began a conceptually similar regulatory change in 2006. The Retail Distribution Review (RDR) made it clear that "it is not, and should not be, the job of a regulator to dictate business models or market solutions."[36] Rather, the FSA engaged stakeholders from across the industry (banks, insurers, advisers, etc.), senior FSA staff and consumers to influence the RDR rulemaking process. The FSA published a "Discussion Paper" titled *A Review of Retail Distribution* to shape the dialogue and encourage collaboration among stakeholders. The FSA then set timetables for feedback and, at the end of this initial consultation phase, published an *Interim Report* in April 2008 outlining challenges within the regulatory landscape.

In November 2008, the FSA published its comprehensive *Feedback Statement* outlining the high-level changes that the FSA would implement, as well as the impact to the capital markets. The FSA continued to consult with stakeholders on all details of the new requirements and then released a *Consultation Paper* in June 2009 describing the proposed changes and draft rules. In March 2010 and then in January 2011, the FSA issued its *Policy Statements* containing final policy and rules. The new policy and rules went into effect in January 2013, <u>six-and-a-half years</u> after collaboration with the industry and other stakeholders began.

Importantly, when the FSA released the proposed changes and draft rules, it did not, like the Department's Proposal, contain <u>in excess of 99 questions</u> with multiple sub-parts that must be answered and incorporated into a final rule, all in a matter of months. Instead, the FSA collaborated with stakeholders across the industry over multiple years to address questions and issues and released reports, statements and other consultation papers throughout the rule-making process. Even with this level of collaboration, the FSA permitted an implementation period of almost three (3) years (from March 2010 to January 2013). LFN respectfully requests that the Department, who has relied heavily on the FSA process to validate the need for this rule-making, follow the lead of the UK and allow for an implementation period of at least 36 months.

We also urge the Department to make application of the final regulation prospective only. Put another way, the Proposal would only apply to advice for retirement accounts opened after the compliance date. This application is particularly important for existing commission-based accounts where retirement investors have already paid for their current investments and advice.

A real danger exists that firms will be unable to comply with the onerous exemptions proposed by the Department when the rules are finalized. If this occurs, the only way that retirement investors can receive and pay for advice will be an asset-based fee. Fee-based retirement accounts are the only vehicles currently available to advisors which comply with the ERISA fiduciary framework. Unfortunately, an industry-wide mass-migration to fee-based accounts could be very costly for retirement investors, especially since these retirement investors have already incurred commissions to purchase the investments they currently hold.

To illustrate, assuming the brokerage account termination, an IRA account owner who holds a mix of mutual funds, stocks and an annuity in his IRA would likely have to pay deferred sales charges to

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[35] The Financial Services Authority is now known as the Financial Conduct Authority (FCA).

[36] <u>See</u>, FSA Managing Director (Retail Markets), Clive Briault, Remarks at *FSA Cazalet Consulting Conference* (November 2, 2006) *available at* FINRA Chief Executive Officer, Richard G. Ketchum, Remarks from the *2015 FINRA Annual Conference* (May 27, 2015) *available at* <http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2006/1102_cb.shtml>.

liquidate the mutual funds, commissions to sell the stocks and surrender charges to surrender the annuity. Then, the IRA owner would need to reinvest in new holdings and pay an asset-based fee going forward. Such an increase in costs counters the very intent of the Proposal.

Worse yet, if the Proposal is applied retroactively, retirement investors may no longer receive any advice if firms and advisors are unwilling to assume ERISA fiduciary status or cannot comply with the BICE or other provisions of the Proposal. This latter outcome is likely if the transition period is retroactive or so short that firms and advisors do not have the time to make the changes necessary to comply.

The Department should agree that none of these negative outcomes is in the best interest of retirement investors.

IV. Conclusion

Millions of Americans rely on their financial advisors to help them plan for retirement and other important life events. Robo-advisors and computers simply cannot replace financial advisors or serve the needs of all retirement investors. Further, retirement investors need to have choices – in products, solutions, advisors, and the manner in which they pay for these products and services. Modifications to the Proposal are critical so that retirement investors maintain their ability to make these important choices. LFN appreciates the opportunity to comment on the Proposal and is willing to assist the Department with any further guidance or modifications necessary to accomplish the overarching goals of (1) ensuring investors receive advice that is in their best interest and (2) preparing investors for retirement.

If you have any questions or if we can be of further assistance, please do not hesitate to contact me at 484-583-2441.

Regards,

David S. Berkowitz

David S. Berkowitz, President
Lincoln Financial Network

APPENDIX A

Proposed Exemption

Section I – Best Interest Contract Exemption

(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 and~~,~~ Financial Institutions~~, and their Affiliates and Related Entities~~ to receive otherwise prohibited compensation for services provided in connection with 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~~ initial or ongoing 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.[i]

For purposes of prohibiting receipt of compensation that varies based on investment advice, ERISA and the Internal Revenue Code permit compensation received by an Affiliate or Related Entity to vary based on the investment advice of the Adviser, provided the advice is in the Best Interest of the Retirement Investor.~~This exemption also permits Affiliates and Related Entities of the Adviser and Financial Institution to receive compensation as a result of the Adviser's advice to Retirement Investors, if it is otherwise prohibited because the Adviser has a financial interest in the Affiliate's or Related Entity's receipt of such compensation that that could affect the exercise of the Adviser's best judgment as a fiduciary in rendering advice to a Retirement Investor regarding an Asset.~~[ii]

As detailed below, parties seeking to rely on the exemption must contractually agree to adhere to Impartial Conduct Standards in rendering advice regarding Assets; ~~warrant that they~~ have adopted policies and procedures designed to mitigate the dangers posed by Material Conflicts of Interest; and disclose important information relating to fees, compensation, and Material Conflicts of Interest~~; and retain documents and data relating to investment recommendations regarding Assets~~.[iii] 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 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 website in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the website 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 recommending that the Plan, participant or beneficiary account, or IRA purchase, sell or hold the Asset, t~~The Adviser and Financial Institution will enter into a written contract with the Retirement Investor that incorporates the terms required by Section II(b)-(c) ~~(e)~~ to formalize the Adviser / Retirement Investor relationship after both parties have assented to the advisory services, including payment for those services.[iv] The Adviser and Financial Institution will adopt policies and procedures in accordance with terms required by Section II(d).[v] ~~The Adviser and Financial Institution will adopt policies and procedures in accordance with terms required by Section II(d).~~

(1) Failure to Execute a Written Contract. In the event a Retirement Investor does not enter into a written contract, the Adviser, Financial Institution and their Affiliates and Related Entities

are permitted to receive otherwise prohibited compensation so long as they otherwise comply with all of the other terms and conditions of this exemption.[vi]

(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 made to the Retirement Investor.

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

(1) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will provide investment advice 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, by placing the interest of the Retirement Investor before the interests of the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party);[viii] ~~without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party);~~

(2) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will not recommend an Asset if the total amount of compensation anticipated to be received by the Adviser~~,~~ and Financial Institution~~, Affiliates and Related Entities~~ in connection with the purchase, sale or holding of the Asset by the Plan, participant or beneficiary account, or IRA, will exceed that which is

reasonable and customary for the products and~~compensation in relation to the total~~ services ~~they~~ provided to the Retirement Investor; and[ix]

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

(d) Policies and Procedures ~~Warranties~~. The Adviser and Financial Institution ~~affirmatively warrant~~ will adopt the following policies and procedures:

(1) The Adviser, Financial Institution, and Affiliates will adopt policies and procedures reasonably designed to prevent violations of ~~will comply with all~~ applicable provisions of ERISA and the Internal Revenue Code ~~federal and state laws~~ regarding the rendering of the investment advice, the purchase, sale and holding of the Asset, and the payment of compensation related to the purchase, sale and holding of the Asset;

(1~~2~~) The Financial Institution ~~has~~ will adopt~~ed~~ 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); and

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

~~(4) 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).~~ [x]

(e) Disclosures. The written contract must specifically:

(1) Identify and disclose any Material Conflicts of Interest;

(2) Inform the Retirement Investor that the Retirement Investor has the right to obtain complete information about all the fees currently associated with the Assets in which it is invested, including all of the direct and indirect fees paid payable to the Adviser, Financial Institution, and any Affiliates; and

(3) Disclose to the Retirement Investor whether the Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the purchase, sale or holding of any Asset~~, and of the address of the website required by Section III(c) that discloses the compensation arrangements entered into by Advisers and the Financial Institution~~.[xi]

(f) Prohibited Contractual Provisions. The written contract shall not contain ~~the following:~~ ~~(1)~~ any ~~Exculpatory~~ exculpatory provisions disclaiming or otherwise limiting liability of the Adviser or Financial Institution for a violation of the contract's terms. Notwithstanding the foregoing, the written contract may limit the scope of the services or advice provided to the Retirement Investor (e.g., an Adviser may limit services provided to a Retirement Investor to one particular investment, one Asset class, or to a single recommendation).[xii] ~~; 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

(a) ~~Transaction~~ Compensation Disclosure.[xiii] ~~.~~ Prior to the execution of the purchase of an Asset by the Plan, participant or beneficiary account, or IRA, the Adviser and Financial Institution must furnish to the Retirement Investor a disclosure of compensation required by this paragraph (a) of Section II.

(1)~~-~~ Direct Compensation. A description of all Direct Compensation, either in the aggregate or by service, that the Adviser and Financial Institution reasonably expect to receive in connection with the contract described in Section II(a). For this purpose, ''Direct Compensation'' is compensation received directly from the Retirement Investor~~Disclosure. Prior to the execution of the purchase of the Asset by the Plan, participant or beneficiary account, or IRA, the Adviser furnishes to the Retirement Investor a chart that provides, with respect to each Asset recommended, the Total Cost to the Plan, participant or beneficiary account, or IRA, of investing in the Asset for 1 , 5- and 10-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the Adviser and reasonable assumptions about investment performance that are disclosed. The disclosure chart required by this section need not be provided with respect to a subsequent recommendation to purchase the same investment product if the chart was previously provided to the Retirement Investor within the past twelve months and the Total Cost has not materially changed~~.

(2)- Indirect Compensation. A description of all Indirect Compensation that the Adviser and Financial Institution reasonably expect to receive in connection with the contract described in Section II(a); identification of the payer of the Indirect Compensation; and a description of the arrangement between the payer and the Affiliate and Financial Institution, as applicable, pursuant to which such Indirect Compensation is paid. For this purpose, ''Indirect Compensation" is compensation received from any source other than the Retirement Investor, Affiliate or Related Entity~~Total Cost. The "Total Cost" of investing in an Asset means the sum of the following, as applicable:~~

~~(A) Acquisition costs. Any costs of acquiring the Asset that are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or that reduce the amount invested in the Asset (e.g., any loads, commissions, or mark-ups on Assets bought from dealers, and account opening fees, if applicable).~~

~~(B) Ongoing costs. Any ongoing (e.g., annual) costs attributable to fees and expenses charged for the operation of an Asset that is a pooled investment fund (e.g., mutual fund, bank collective investment fund, insurance company pooled separate account) that reduces the Asset's rate of return (e.g., amounts attributable to a mutual fund expense ratio and account fees). This includes amounts paid by the pooled investment fund to intermediaries, such as sub-TA fees, sub-accounting fees, etc.~~

~~(C) Disposition costs. Any costs of disposing of or redeeming an interest in the Asset that are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or that reduce the amounts received by the Plan, participant or beneficiary account, or IRA (e.g., surrender fees, back-end loads, etc., that are always applicable (i.e., do not sunset), mark-downs on assets sold to dealers, and account closing fees, if applicable).~~

~~(D) Others. Any costs not described in (A)-(C) that reduce the Asset's rate of return, are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or reduce the amounts received by the Plan, participant or beneficiary account, or IRA (e.g., contingent fees, such as back-end loads that phase out over time (with such terms explained beneath the table))~~.

(3) Compensation paid among related parties. A description of any compensation that will be paid among the Adviser, Financial Institution, Affiliate and Related Entity in connection with the contract described in Section II(a) if such compensation is set on a transaction basis (e.g., commissions, soft dollars, finder's fees or other similar incentive compensation based on business placed or retained) or is charged directly against the Retirement Investor's Asset and reflected in the net value of the Asset (e.g., Rule 12b–1 fees); including identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation. This paragraph shall not apply to compensation received by an employee from his or her employer on account of work performed by the employee ~~Model Chart. Appendix II to this exemption contains a model chart that may be used to provide the information required under this Section III(a). Use of the model chart is not mandatory. However, use of an appropriately completed model chart will be deemed to satisfy the requirements of this Section III(a)~~.

(4) Compensation for termination of contract or arrangement. A description of any compensation that the Affiliate or Financial Institution reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.

(5) Compensation description. A description of compensation may be expressed as a monetary amount, formula, percentage of the Retirement Investor's Assets under

management in the contract described in Section II(a) or, if the compensation cannot reasonably be expressed in such terms, by any other reasonable method. The description may include a reasonable and good faith estimate if the Adviser and Financial Institution cannot otherwise readily describe compensation and the Adviser and Financial Institution explain the methodology and assumptions used to prepare such estimate. Any description must contain sufficient information to permit evaluation of the reasonableness of the compensation.

(b) Annual Disclosure. The Adviser or Financial Institution must provide~~s~~ a ~~the following~~ written description of compensation in this Section III ~~information~~ to the Retirement Investor, annually, within 45 days of the end of the applicable year~~, in a succinct single disclosure:~~

~~(1) A list identifying each Asset purchased or sold during the applicable period and the price at which the Asset was purchased or sold;~~

~~(2) A statement of the total dollar amount of all fees and expenses paid by the Plan, participant or beneficiary account, or IRA (directly and indirectly) with respect to each Asset purchased, held or sold during the applicable period; and~~

~~(3) A statement of the total dollar amount of all compensation received by the Adviser and Financial Institution, directly or indirectly, from any party, as a result of each Asset sold, purchased or held by the Plan, participant or beneficiary account, or IRA during the applicable period~~.

(c) ~~Webpage~~Reliance on 29 C.F.R. §2550.408b-2 Disclosure. An Adviser may rely on disclosures provided to a Plan under 29 C.F.R. §2550.408b-2 to satisfy the disclosure requirements of this Section III. Reliance on 29 C.F.R. §2550.408b-2 does not alleviate the requirement to make an annual disclosure in accordance with paragraph (b) of this section.

~~(1) The Financial Institution maintains a webpage, freely accessible to the public, which shows the following information:~~

~~(A) The direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate for services provided in connection with each Asset (or, if uniform across a class of Assets, the class of Assets) that a Plan, participant or beneficiary account, or an IRA is able to purchase, hold, or sell through the Adviser or Financial Institution, and that a Plan, participant or beneficiary account, or an IRA has purchased, held, or sold within the last 365 days. The compensation may be expressed as a monetary amount, formula or percentage of the assets involved in the purchase, sale or holding; and~~

~~(B) The source of the compensation, and how the compensation varies within and among Assets.~~

~~(2) The Financial Institution's webpage provides access to the information in (1)(A) and (B) in a machine readable format.~~

Section IV – Range of Investment Options

(a) General. The Financial Institution offers for purchase, sale or holding, and the Adviser makes available to the Plan, participant or beneficiary account, or IRA for purchase, sale or holding, a range of Assets that is broad enough to enable the Adviser to make recommendations with respect to all of the asset classes reasonably necessary to serve the Best Interests of the Retirement Investor in light of its investment objectives, risk tolerance, and specific financial circumstances.

(b) Limited Range of Investment Options. Section (a) notwithstanding, a Financial Institution may limit the Assets available for purchase, sale or holding based on whether the Assets are Proprietary Products, generate Third Party Payments, or for other reasons, and still rely on the exemption, provided that:

~~(1) The Financial Institution makes a specific written finding that the limitations it has placed on the Assets made available to an Adviser for purchase, sale or holding by Plans, participant and beneficiary accounts, and IRAs do not prevent the Adviser from providing advice 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 Investoror otherwise adhering to the Impartial Conduct Standards;~~[xiv]

(1~~2~~) Any compensation received in connection with a purchase, sale or holding of the Asset by a Plan, participant or beneficiary account, or an IRA, is reasonable and customary for the products and ~~in relation to the value of the specific~~ services provided to the Retirement Investor~~ in exchange for the payments and not in excess of the services' fair market value~~;

(2~~3~~) Before giving investment recommendations to Retirement Investors, the Adviser or Financial Institution gives the Retirement Investor clear written notice of the limitations placed on the Assets that the Adviser may offer for purchase, sale or holding by a Plan, participant or beneficiary account, or an IRA. Notice is insufficient if it merely states that the Financial Institution or Adviser "may" limit investment recommendations based on whether the Assets are Proprietary Products or generate Third Party Payments, or for other reasons, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis; and

(3~~4.~~) The Adviser notifies the Retirement Investor if the Adviser does not recommend a sufficiently broad range of Assets to meet the Retirement Investor's needs.

(c) ERISA plan participants and beneficiaries. Some Advisers and Financial Institutions provide advice to participants in ERISA-covered participant directed individual account Plans in which the menu of investment options is selected by an Independent Plan fiduciary. In such cases, provided the Adviser and Financial Institution did not provide investment advice to the Plan fiduciary regarding the composition of the menu, the Adviser and Financial Institution do not have to comply with Section IV(a)-(c) in connection with their advice to individual participants and beneficiaries on the selection of Assets from the menu provided. This exception is not available for advice with respect to investments within open brokerage windows or otherwise outside the Plan's designated investment options.

~~**Section V - Disclosure to the Department and Recordkeeping**~~[xv]

~~(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 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 VI – Insurance and Annuity Contract Exemption

(a) In general. In addition to prohibiting fiduciaries from receiving compensation from third parties and compensation that varies on the basis of the fiduciaries' investment advice, ERISA and the Internal Revenue Code prohibit the purchase by a Plan, participant or beneficiary account, or IRA of an insurance or annuity product from an insurance company that is a service provider to the Plan or IRA. This exemption permits a Plan, participant or beneficiary account, or IRA to purchase an Asset that is an insurance or annuity contract in accordance with an Adviser's advice, from a Financial Institution that is an insurance company and that is a service provider to the Plan or IRA. This exemption is provided because purchases of insurance and annuity products are often prohibited purchases and sales involving insurance companies that have a pre-existing party in interest relationship to the Plan or IRA.

(b) Covered transaction. The restrictions of ERISA section 406(a)(1)(A) and (D), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) and (D), shall not apply to a fiduciary's causing the purchase of an Asset that is an insurance or annuity contract by a ~~non-participant-directed~~ Plan subject to Title I of ERISA ~~that has fewer than 100 participants~~,[xvi] participant or beneficiary account, or IRA, from a Financial Institution that is an insurance company and that is a party in interest or disqualified person, if:

(1) The transaction is effected by the insurance company in the ordinary course of its business as an insurance company;

(2) The combined total of all fees and compensation received by the insurance company and any Affiliate is not in excess of reasonable compensation under the circumstances;

(3) The purchase is for cash only; and

(4) The terms of the purchase are at least as favorable to the Plan, participant or beneficiary account, or IRA as the terms generally available in an arm's length transaction with an unrelated party.

(c) Exclusion.~~:~~ The exemption in this Section VI does not apply if 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 and 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.

Section VII – Exemption for Pre-Existing Accounts and Contracts~~Transactions~~

(a) In general. ERISA and the Internal Revenue Code prohibit Advisers, Financial Institutions and their Affiliates and Related Entities from receiving variable or third-party compensation as a result of the Adviser's and Financial Institution's advice to a Plan, participant or beneficiary, or IRA owner. Some Advisers and Financial Institutions did not consider themselves fiduciaries within the meaning of 29 CFR section 2510-3.21 before the applicability date of the amendment to 29 CFR section 2510-3.21 (the Applicability Date). Other Advisers and Financial Institutions entered into transactions involving Plans, participant or beneficiary accounts, or IRAs before the Applicability Date, in accordance with the terms of a prohibited transaction exemption that has since been amended. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities, to continue to receive compensation, such as 12b-1 fees, on and after the Applicability Date in connection with the purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or an IRA, as a result of the Adviser's and Financial Institution's advice, that occurred prior to the Applicability Date, as described and limited below.

(b) Covered transaction. Subject to the applicable conditions described below, 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), shall not apply to the receipt of compensation on or after the Applicability Date by an Adviser, Financial Institution, and any Affiliate and Related Entity, for services provided in connection with the purchase, holding or sale of an Asset, as a result of the Adviser's and Financial Institution's advice, that was purchased, sold, or held by a Plan, participant or beneficiary account, or an IRA before the Applicability Date if:

(1) The compensation is not excluded pursuant to Section I(c) of the Best Interest Contract Exemption; and

(2) The compensation is received pursuant to an agreement, arrangement or understanding that was entered into prior to the Applicability Date~~;~~

~~(3) The Adviser and Financial Institution do not provide additional advice to the Plan regarding the purchase, sale or holding of the Asset after the Applicability Date; and~~

~~(4) The purchase or sale of the Asset was not a non-exempt prohibited transaction pursuant to ERISA section 406 and Code section 4975 on the date it occurred~~. [xvii]

Section VIII – Definitions

For purposes of these exemptions:

(a) "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 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) "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, but is not limited to, ~~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 section 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.~~[xviii]

(d) Investment advice is in the "Best Interest" of the Retirement Investor when the Adviser and Financial Institution providing the advice 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, by placing the interest of the Retirement Investor before the interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.[xix] ~~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 USC 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 USC 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 USC 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 material[xx] financial interest that could affect the exercise of its best judgment as a fiduciary in 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.[xxi]

(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 by a Plan, participant or beneficiary account, or IRA.

~~Section IX – Data Request~~[xxii]

~~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) Inflows. At the Financial Institution level, for each Asset purchased, for each quarter:~~

~~(1) The aggregate number and identity of shares/units bought;~~

~~(2) The aggregate dollar amount invested and the cost to the Plan, participant or beneficiary account, or IRA associated with the purchase;~~

~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the purchase of each Asset disaggregated by source; and~~

~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(b)~~ Outflows~~. At the Financial Institution level for each Asset sold, for each quarter:~~

~~(1) The aggregate number of and identity of shares/units sold;~~

~~(2) The aggregate dollar amount received and the cost to the Plan, participant or beneficiary account, or IRA, associated with the sale;~~

~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the sale of each Asset disaggregated by source; and~~

~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(c)~~ Holdings~~. At the Financial Institution level for each Asset held at any time during each quarter:~~

~~(1) The aggregate number and identity of shares/units held at the end of such quarter;~~

~~(2) The aggregate cost incurred by the Plan, participant or beneficiary account, or IRA, during such quarter in connection with the holdings;~~

~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the holding of each Asset during such quarter for each Asset disaggregated by source; and~~

~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(d)~~ Returns~~. At the Retirement Investor level:~~

~~For purposes of this subparagraph (d), "Portfolio" means the Retirement Investor's combined holding of assets held in a Plan account or IRA advised by the Adviser.~~

~~(1) The identity of the Adviser;~~

~~(2) The beginning-of-quarter value of the Retirement Investor's Portfolio;~~

~~(3) The end-of-quarter value of the Retirement Investor's Portfolio; and~~

~~(4) Each external cash flow to or from the Retirement Investor's Portfolio during the quarter and the date on which it occurred.~~

~~(e) Public Disclosure. The Department reserves the right to publicly disclose information provided by the Financial Institution pursuant to subparagraph (d). If publicly disclosed, such information would be aggregated at the Adviser level, and the Department would not disclose any individually identifiable financial information regarding Retirement Investor accounts.~~

Signed at Washington, DC, this 14th day of April, 2015

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Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

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[i] As drafted, the BICE is not available for advice provided to small participant-directed plans or large plans of any kind. The Department requested comments on the appropriateness of this limitation. Lincoln believes to the extent an Adviser and Financial Institution can meet the BICE requirements, the BICE should be available for advice provided to participant-directed plans of any size. Lincoln respectfully disagrees with the Department's statement that "including large plans within the definition of Retirement Investor could have the undesirable consequence of reducing protections provided under existing law to these investors, without offsetting benefits." Provided the Department makes meaningful changes to the BICE to make it workable, Lincoln believes the BICE should be available to Advisers to ensure all participant-directed plans, especially small participant-directed plans, have access to advice that is in their best interest.

[ii] This change is necessary to make clear that an Affiliate's or Related Entity's (such as an affiliated insurance company's) receipt of compensation is not prohibited under ERISA section 406(b) or Code section 4975(c)(1)(D), (E) and (F) if the Adviser does not have a conflict of interest with respect to the Affiliate or Related Entity that would affect the exercise of his best judgment in providing advice to the Retirement Investor.

[iii] For supporting arguments related to this change, please see end note (xiii) below.

[iv] An essential element to forming a contract is both parties assenting to the terms of the contract. (*Murray on Contracts*, 3rd Edition (1990.) Entering into a contract before a retirement investor has determined to engage an advisor is awkward, impractical and counter to U.S. customary practices and contract law. Retirement investors understandably would be hesitant to enter into a contract for services when they have not even been informed of what those services will entail. Likewise, an advisor would be negligent in entering into a contract prior to ensuring the advisor is able to commit to the services proposed. Therefore, 'hire me' discussions must take place before a contract for services is entered into under the Proposal. As such, the BICE should be amended to provide a contract is required to formalize the Adviser / Retirement Investor relationship at the point when both parties assent to the advisor's services, including payment of compensation.

[v] For supporting arguments related to this change, please see Section III.C. of the Lincoln Financial Network Comment Letter, at 11-12. Please note, Lincoln Financial Group (the marketing name for Lincoln National Corporation and its affiliates) submitted a comment letter regarding the Department's proposed fiduciary advice regulation and related prohibited transaction exemptions (Lincoln Financial Group Comment Letter).

[vi] For supporting arguments related to this change, please see Section III.B.1 of the Lincoln Financial Network Comment Letter, at 8.

[vii] For supporting arguments related to this change, please see Section III.A. of the Lincoln Financial Network Comment Letter, at 7.

[viii] For supporting arguments related to this change, please see Section IV of the Lincoln Financial Group Comment Letter and Section III.B.1 of the Lincoln Financial Network Comment Letter, at 8.

[ix] Consistent with 29 C.F.R. §2550.408g-1, the BICE should be revised to provide an Affiliate or Related Entity's receipt of compensation is not taken into account in determining whether the total amount of compensation anticipated to be received by the Adviser and Financial Institution is reasonable. Forcing the Adviser and Financial Institution to take into account compensation of an Affiliate or Related Entity (such an affiliated insurance company's) would unintentionally place proprietary Assets at a disadvantage. For example, assume two manufacturers receive the same compensation for a similarly situated annuity contract. An Adviser would be required to take into account the compensation of his or her Affiliate or Related Entity in determining the reasonableness of the compensation if a proprietary Asset is recommended, but would not be required to take into account the compensation of the unrelated manufacturer if the non-proprietary Asset is recommended. To avoid a bias against proprietary Assets, the BICE should be amended to provide an Affiliate or Related Entity's receipt of compensation is not taken into account in determining whether the total amount of compensation anticipated to be received by the Adviser and Financial Institution is reasonable.

[x] For supporting arguments related to this change, please see Section V of the Lincoln Financial Group Comment Letter.

[xi] For supporting arguments related to this change, please see end note (xiii) below.

[xii] Fiduciary status under ERISA is functional in nature. It has long been understood that an Adviser can limit the scope of its services to a portion of assets so that Adviser would a fiduciary over specific assets, but is not deemed a fiduciary for the remaining plan assets. See 29 C.F.R. §2510.3-21(c)(2). As written, Section II(f)(1) appears to

prohibit an Adviser from limiting the scope of his or her services. Therefore, Section II(f)(1) should be clarified to reflect the tenants of 29 C.F.R. §2510.3-21(c)(2) and long standing ERISA jurisprudence.

xiii The disclosure requirements of Section III are excessive and unnecessary. The SEC has already regulated Asset disclosure in the form of prospectuses successfully for many years. A prospectus provides a retirement investor with information about the Asset's investment objectives, risks, past performance, and expenses in a standardized format across the industry. In addition, the SEC has carefully crafted and honed the prospectus format to account for differences in Assets such as registered annuities. If the Department believes prospectus disclosure is somehow deficient, the Department should raise its concerns with the SEC. Lincoln is also concerned that the Department did not take into account the significant regulatory disclosure regime it recently implemented in 29 C.F.R. § 2550.408b-2 in drafting Section III's disclosure requirements. For plan sponsors, the compensation disclosures under Section III appear to duplicate compensation disclosures under DOL Regulation § 2550.408b-2 and thus are unnecessary. For participants and IRA owners, Section III duplicates the tenants of 29 C.F.R. § 2550.408b-2 for such Retirement Investors. As such, Lincoln recommends revising Section III to reflect the compensation disclosure requirements of 29 C.F.R. § 2550.408b-2 for Retirement Investors and clarify that an Adviser may rely on a 408b-2 disclosure previously provided to a plan sponsor to satisfy Section III disclosure requirements. Finally, Section III disclosure requirements appear to violate securities laws and place Advisers in an untenable position of having to violate one federal law to comply with another. See also, Section III.B.2. of the Lincoln Financial Network Comment Letter, at 8-10.

xiv Section IV(b)(1) should be deleted in its entirety. The Adviser and Financial Institution already must provide investment advice that is in the Best Interest of the Retirement Investor in accordance with Section II(c) and applicable federal laws regarding investment advice. If an Adviser believed he or she is prevented from providing advice that is in the Best Interest of the Retirement Investor because of the limited range of investments, the Adviser and Financial Institution would not be able to comply with Section II(c). Therefore, Section IV(b)(1) is unnecessary, excessive and should be deleted.

xv Sections V and IX should be deleted in their entirety. The stated purpose of the Sections is to "assist the Department in assessing the effectiveness of the exemption." The Department provides no justification for the amount and type of data requested and does not provide any analysis of how the data would be helpful in assessing the effectiveness of the BICE. In addition, as evidenced by the recent Office of Personnel Management data breach, Lincoln is concerned that the Department may not have adequate privacy controls in place to ensure safeguarding of the data provided. Finally, the Department has reserved the right in Section IX to publically disclose the information without adequately explaining or justifying the purpose or need for public disclosure of confidential business information.

xvi For supporting arguments related to this change, please see end note (i) above.

xvii The Department should grandfather all accounts that were opened before the Applicability Date and ensure that application of the final regulation is prospective only. For supporting arguments related to this change, please see Lincoln Financial Network Comment Letter Section III.B.1, at 8.

xviii For supporting arguments related to this change, please see Section III.B.3 of the Lincoln Financial Network Comment Letter, at 10-11.

xix For supporting arguments related to this change, please see Section IV of the Lincoln Financial Group Comment Letter.

[xx] The definition of Material Conflict of Interest should be clarified to focus on *material* financial interests. Without clarification, the definition will lead to numerous, frivolous law suits that are without merit and serve only the interests of class action plaintiff attorneys.

[xxi] For supporting arguments related to this change, please see end note (i) above.

[xxii] For supporting arguments related to this change, please see end note (xiii) above.