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By regulations.gov and email: e-OED@dol.gov

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW, Room N-5655
Washington, D.C. 20210

Attention: RIN 1210-AB32; ZRIN 1210-ZA25

Re: Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice; Proposed Best Interest Contract Exemption

To Whom It May Concern:

The PNC Financial Services Group, Inc. (“PNC”) appreciates this opportunity to provide comments on the proposed regulation by the Department of Labor (“Department”) under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), which is intended to redefine the term “fiduciary” under section 3(21) of ERISA and section 4975(e) of the Internal Revenue Code of 1986, as amended (the “Code”), and on the Best Interest Contract Exemption (“BIC Exemption”), and other proposed exemptions and revisions to current exemptions (collectively referred to in this letter as the “Proposal”).¹ We share the Department’s goal of protecting retirement plan participants and beneficiaries and individual retirement account (“IRA”) owners. However, we believe that revisions to the proposed definition of “fiduciary” and to the BIC Exemption are essential to ensure that retirement investors continue to have access to the investment education, advice and services that are essential to achieving retirement security.

PNC is a diversified financial services company with \$353.9 billion in assets and \$239.7 billion in deposits, as of June 30, 2015. PNC is a main street banking organization focused on domestic business activities in retail banking, corporate and institutional banking,

¹ Department of Labor, Employee Benefits Security Administration, Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 80 *Federal Register* 21,928 (April 20, 2015) (“Fiduciary Proposal”); Proposed Best Interest Contract Exemption, 80 *Federal Register* 21,960 (April 20, 2015) (“BIC Exemption Proposal”).

asset management, retail brokerage, and residential mortgage banking. PNC provides many of its products and services nationally and others in the primary geographic markets of PNC Bank, National Association, (“PNC Bank”), which currently operates in 19 states and the District of Columbia in the Northeast, Midwest and Southern United States. We provide deposit, lending, cash management and investment services to more than 6 million consumer and small business customers.

PNC provides trust, custody, recordkeeping, asset management, brokerage, banking and other services to more than 1,500 ERISA-governed employee benefit pension plans, more than 75,000 trust accounts and more than 580,000 IRAs through PNC Bank, as well as PNC Investments, LLC (“PNCI”), PNC’s dually registered retail broker-dealer/investment adviser, and other affiliates. Our clients span the spectrum of small to large, but we focus on main street investors, mid-size companies, municipal governments, and small to mid-size ERISA plans. With regard to ERISA plans, PNC provides a wide range of services, which include:

- Traditional trust and custody services
- 401(k) plan recordkeeping and other support services
- Asset management and general brokerage
- Traditional banking services

With regard to IRAs, PNC Bank serves as IRA custodian for our retail banking Traditional and Roth IRAs, and as custodian and investment manager for our wealth management Traditional, Roth and SEP IRAs (with a self-directed option available). PNCI focuses on helping PNC’s banking customers meet their long-term investing goals and offers Traditional, Roth, SEP and SIMPLE IRAs (with custody and clearing provided through an unaffiliated custodian). IRAs are available both in transactional brokerage accounts and in several managed account “wrap” programs.

In addition, PNC operates as the custodian of Health Savings Accounts (“HSAs”), but does not operate in a fiduciary capacity with respect to HSAs.

1. Support of Best Interest Standard and General Concerns with the Proposal

PNC shares the public policy goals of the Department in amending the definition of “investment advice” in section 2510.3-21 of the Department’s regulations to ensure financial institutions are working in the best interests of retirement investors.² PNC has a long history of acting as a fiduciary for retirement investors when we provide trust and investment management services to customers, whether such status is imposed by ERISA, the Code, or another legal regime. Even when not acting as a fiduciary, we strive to act in the best interest of customers in what we do every day, even during the sales process, across all of our businesses for all of our

² Fiduciary Proposal at 21,956 amending 29 C.F.R. 2510.3-21.

customers. Accordingly, we welcome the opportunity to work with the Department to clarify the meaning of “fiduciary” as it pertains to retirement investors, and to clearly distinguish where it is appropriate for financial institutions to be held to a “best interest of the customer” standard and the circumstances that give rise to fiduciary status.

The Proposal, if adopted in its current form will be transformative in the way PNC interacts with customers across many lines of business. Retirement investors, institutional clients and ERISA plans have long looked to PNC for our banking products, investment products, retirement planning, investor education, and brokerage and advisory services in order to achieve financial security in retirement for themselves and their participants. The regulations will impact a range of services we provide retail customers, including the retail brokerage services provided by PNCI, the wealth management and trust services provided through our Asset Management Group (“AMG”), and, potentially, the deposit products we provide through our retail bank. Furthermore, the Proposal will impact the services we provide to institutional and corporate customers, including the services we provide to institutional customers through AMG and the deposit services we provide to labor unions, company pension plans and other corporate customers through our corporate and institutional bank.

While we broadly share the Department’s policy goals, we believe it is of paramount importance that the Department significantly revise several aspects of the Proposal before issuing final regulations. We are concerned that the expanded definition of “investment advice” has the potential to chill unnecessarily the healthy, upfront discussions and interactions financial institutions ordinarily have today with retirement investors. Furthermore, while we appreciate that the Department has proposed the BIC Exemption as way to permit financial institutions to continue to collect third-party and/or differential compensation, the exemption is in several respects unworkable as proposed. Failure to address the issues associated with the BIC Exemption will reduce its effectiveness as a way for financial institutions to continue to provide retirement investors with a range of high quality products and services at an efficient price.

The Proposal also is not clear on its applicability to, or treatment of, bank savings accounts, certificates of deposit, and other deposit products and sweep services we regularly offer to retail customers, businesses and labor unions. We believe the Department needs to clarify the Proposal’s applicability to such products, and to the banking services that are regularly provided to HSAs, Archer Medical Savings Accounts (“MSAs”), and Coverdell Education Savings Accounts (“CESAs”).

The Department proposes several helpful carve-outs to the definition of “investment advice” that will help financial institutions comply with the expanded definition. However, we recommend several revisions to the proposed platform provider, investment education, and valuation carve-outs in order to ensure the more effective delivery of services to retirement investors.

We also believe the timeline for implementation of the Proposal announced by the Department is unworkable if the regulation and exemptions are adopted as proposed. Given the administrative and operational challenges that this transformational rule would present, we recommend that the Department adopt an implementation period of at least 18 months.

Finally, we recognize and appreciate that the Department has engaged in extensive consultation with other Federal agencies, including the Securities and Exchange Commission (“SEC”), Internal Revenue Service, and the Commodity Futures Trading Commission.³ However, it is important to underscore that the Proposal would not result in the highly desirable outcome of a coordinated fiduciary standard applicable to the provision of investment advice in all circumstances. The SEC has authority to impose new fiduciary standards on broker-dealers that provide investment advice and SEC Chair Mary Jo White has announced her support for such a standard. The manner in which financial institutions provide advice to investors under revised and expanded fiduciary standards should be consistent, regardless of whether the particular customer – or, importantly, one account of several maintained by the same customer – is subject to the Department’s authority. Absent coordination with the SEC, the Proposal is likely to result in substantial customer confusion. PNC agrees with the recommendation made by the Financial Services Roundtable (“FSR”) in its comment letter on the Proposal that any expansion of fiduciary standards by the Department should be informed by the information the SEC’s Office of Compliance Inspections and Examination will gather through its Retirement-Targeted Industry Reviews and Examination Initiative.⁴

2. Upfront Marketing, Sales, Rollover and Distribution Discussions

PNC personnel across multiple lines of business regularly engage in in-depth conversations with customers to help identify appropriate retirement investing products and services and make referrals across lines of business as needed to best meet the customer’s needs.⁵ When engaging in such conversations, we endeavor always to act in the best interest of our customers. However, the Proposal is unclear as to whether, and to what extent, these types of conversations with customers and prospective customers would trigger fiduciary status under ERISA or the Code. In particular, the Proposal seems to apply earlier in the sales process than would be beneficial to or reasonably expected by our customers.

³ See Fiduciary Proposal at 21,937-38.

⁴ Letter from the Financial Services Roundtable, dated July 21, 2015, Appendix A, Section XII (“FSR Comment Letter”).

⁵ The American Bankers Association (“ABA”) raises concerns in its comment letter that referrals by employees of a bank and its affiliates could constitute fiduciary activities under the Proposal. Letter from the American Bankers Association, dated July 21, 2015, Section III.A.2.d (“ABA Comment Letter”). We concur with ABA’s position that such referrals should not give rise to fiduciary status, and the Department should clarify this in the final rule.

As a result, conversations that are not deemed fiduciary conversations today, and that would typically be viewed more as a part of a customer's comparison shopping and preliminary due diligence, may be deemed actionable fiduciary advice under the Proposal, subject to all of the ensuing requirements, limitations and liability. Conversations that could be potentially subject to fiduciary requirements include:

- Sales conversations in which PNC describes its products and services to a retirement plan fiduciary, IRA owner, or investor considering opening an IRA;
- Responses to requests for proposal ("RFPs") from small employer-sponsored plans;
- Investor-initiated conversations with our call centers;
- Delivery of neutral and factual educational information regarding plan distribution and rollover options upon retirement or death of a retirement plan participant or IRA owner; and
- Presentation of required minimum distribution options.

We are concerned that fiduciary liability may also attach to certain of our advertising materials, product brochures, lists of investments and financial research.

PNC by no means suggests that these interactions should not be subject to a standard of care, but, to be workable, the standard applicable to these interactions should be mutually understood and appropriate for the activity. For example, it is not possible for a financial advisor to adhere to a fiduciary standard that requires acting in the sole interest of a customer (to the exclusion of the firm's interest) while suggesting that a customer purchase her firm's products or services. Furthermore, when a financial institution understands it will be acting in a fiduciary capacity, it can take appropriate steps (i.e., consent, disclosures, fee leveling, etc.) to address any prohibited transaction concerns.⁶ However, the Proposal includes only a limited carve out for investment education and no carve out for sales conversations with small retirement plans and IRA owners. Moreover, the Proposal includes all retirement plan and IRA rollover and distribution conversations under its definition of "fiduciary advice" – seemingly including a conversation about changing IRA custodians, because it involves a distribution and rollover or transfer between IRAs (typically the threshold question before an investment discussion is even

⁶ FSR presents the crux of this issue well, stating: "[t]he breadth of the Proposal is such that one could assert that any seller of any good, product or service is providing 'investment advice.' It is likely that, in the context of negotiating the sale, the seller of the good or product would make suggestions as to why it would be beneficial for the purchasing Retirement Investor to effect the purchase. Such person would receive consideration in connection with the transaction that could be sufficient to meet the conditions of the proposal. If the purchaser makes its decision in part in reliance on the suggestions made by the seller, the seller might be providing investment advice. Ordinarily, the provisions of Section 408(b)(2) would provide a prohibited transaction exemption for the provision of services, and Section 408(b)(17) might apply to the sale of a good. However, if the person is providing investment advice as a fiduciary, which would appear to be the case under the Proposal, then these exemptions would not be available." FSR Comment Letter at Appendix A, Section XII b.

initiated) – with no exemptive relief for fees or compensation. Consequently, the Proposal would severely limit the type of helpful guidance PNC could provide during the sales process, leaving customers to sort through a series of complex products and rules on their own, with potentially detrimental results from a retirement savings, investment and tax perspective if the customer makes inappropriate choices.

We believe it is important to address these concerns for a number of reasons. First, a large portion of PNC’s client base falls outside of the large plan definition under the “seller’s exception” – even in our institutional business. Many plans for which PNC provides services (including plans with less than 100 participants or whose fiduciary manages less than \$100 million in assets, so called “small” plans under the Proposal) will issue RFPs to identify potential investment managers and other service providers and obtain sufficient information from those potential investment managers and service providers to enable the plan fiduciaries to make informed decisions. The RFPs generally require us to submit information about our capabilities, service standards, and suggested investment strategy (which may require sample portfolios), as well as costs. Similarly, individual retirement customers often seek to engage us in a detailed discussion regarding potential investment strategies and rollover or distribution options, as well as costs, prior to making a hiring the decision. Additionally, we may engage in general cash management discussions with our deposit/business banking clients without necessarily specifically discussing that the customer may include its employee benefit plans among the assets that will benefit from the advice. In each of these circumstances, PNC operates in the best interests of the prospective customer and we would not object to working with the Department on a regulation that imposes a best interest standard on financial institutions during these upfront interactions.

It is important to recognize, however, that prospective customers are not commonly relying on the sales information as “advice” and would not expect financial institutions to adhere to the extremely high standard applied to fiduciary, which might absurdly require the financial institution to compare its own products and services to those provided by other financial institutions. Instead, they are considering whether they will choose PNC to obtain the advice. Absent such detailed sales discussion, potential customers cannot make informed hiring decisions.

We believe that FSR’s proposed Simple Investment Management Principles and Expectations Proposal (the “SIMPLE PTE”) is a good start to achieving a workable standard. The SIMPLE PTE incorporates the ERISA prudence standard but not ERISA’s “solely in the interest” fiduciary standard, which as we have discussed above is very problematic, particularly in the marketing and sales context.⁷ We also recommend that the Proposal be revised to retain the standards of “mutual understanding” and “reliance” from the current regulatory definition of investment advice. In eliminating three of the five elements in the current five-prong test for an

⁷ FSR Comment Letter at page 9 and Appendix A, Section XII.

ERISA investment advice fiduciary, the Proposal significantly expands the categories of business activities that would result in fiduciary status, to the potential detriment of our customers (and potential customers), as described above. We believe that the definition of “fiduciary” instead should relate to situations where the parties agree that the recommendations will play a significant role in the investor’s decision-making.⁸

Furthermore, PNC strongly urges the Department to broaden the seller’s exception to include sales activities to retail investors, including IRAs and other retail accounts, and to cover *all* retirement plans (including small plans). We also believe the Department should include services, in addition to assets, under the seller’s exception. Under the Proposal, a financial institution offering its services to a retirement investor likely would be deemed to be offering investment advice simply by virtue of offering its services to the investor. This does not appear to be consistent with the Department’s intent under the exception.

In addition, we make the following recommendations:

- The proposed definitions of “recommendation” and “fee or other compensation, direct or indirect” should be revised consistent with SIFMA’s suggestion in its comment letter on the Proposal;⁹
- The regulation should permit a fair and balanced discussion of plan and IRA distribution and rollover options subject to a best interest standard, consistent with FINRA’s guidance, set forth in Regulatory Notice 13-45; and
- The regulation should include a time proximity standard between a recommendation and a sale.¹⁰

⁸ The Securities Industry and Financial Markets Association (“SIFMA”) also discusses the importance of keeping these standards in the definition of investment advice. Letter from The Securities Industry and Financial Markets Association regarding the Fiduciary Rule Itself, July 20, 2015, at 27-33 (“SIFMA Fiduciary Letter”). PNC supports SIFMA’s comments on retaining these standards and, in particular, we agree with SIFMA’s comment that the “. . . elimination of the concept of a meeting of the minds opens the door to potentially false but nearly indefensible claims. This standard would allow a person who has not received fiduciary advice to later claim that he “understood” that it was investment advice, or that the financial professional ‘understood’ that the information was targeted to the person, leaving the financial firm with an impossible task of proving that the claimant could not have so understood the statement.” *Id.* at 28. We would expect that the cost of compliance with the proposed re-definition would result in a significant reduction in available products and services and increased costs passed to customers.

⁹ SIFMA urges the Department to revise the definition of “recommendation” to mean “a communication that, based on its content, context, and presentation, would reasonably be viewed as a call to action or specific endorsement that the advice recipient engage in or refrain from taking a particular course of action. Recommendation does not include communications that merely suggest actions or course of actions for consideration with no call to action to engage in the action or course of action. A communication that would not be a recommendation within the meaning of applicable FINRA rules will not be deemed a recommendation under this section.” SIFMA Fiduciary Letter at 59-60. PNC agrees with this recommendation.

¹⁰ We agree with the proximity test recommended by SIFMA when it says that “[i]f a financial professional unsuccessfully attempts to sell an IRA to a plan participant, but months or years later, the participant on his or

3. Best Interest Contract Exemption

As the Department notes in the notice proposing the BIC Exemption, a variety of forms of compensation commonly received by retail broker-dealers and their financial advisers are prohibited under ERISA and the Code.¹¹ PNC appreciates the Department's proposal of the BIC Exemption as a way to permit retail broker-dealers and other financial institutions to continue providing transactional services to retirement investors, as defined in the BIC Exemption Proposal, without completely restructuring their relationships with third-party product providers and the longstanding forms of compensation paid to their financial advisers. We believe, however, that certain features of the BIC Exemption, as proposed, could result in a reduction in the services available to retirement investors or be detrimental to the overall investing experience for customers seeking to invest their retirement assets.

We focus below on a few aspects of the proposed BIC Exemption with respect to which PNC may offer a unique perspective. Numerous other aspects of the proposed exemption are troubling, however. For example, we agree with SIFMA that the point of sale disclosure required by the BIC Exemption Proposal would be extremely difficult to accomplish for firms and could slow execution for customers.¹² Moreover, as FSR notes in its letter, the extensive detailed compensation disclosures required under the proposed exemption would be exceedingly costly and burdensome to comply with.¹³ We also question whether the point of sale disclosures would truly benefit retirement investors. It seems equally, if not more likely, that such disclosures, along with the lengthy new contract that would be added to the stack of paperwork and disclosures investors currently receive at account opening, would simply exacerbate further an already significant information overload problem facing retail investors.¹⁴ We embrace the comments of SIFMA and FSR on these aspects of the proposed BIC Exemption.

her own, opens an IRA at the financial institution (not through that same financial professional) and that financial institution receives a fee, the future looking receipt of compensation definition is drafted to make the financial institution into a fiduciary without any exceptions or carve-outs." *Id.* at 10, footnote 9.

¹¹ BIC Exemption Proposal at 21,961.

¹² Letter from The Securities Industry and Financial Markets Association regarding the Proposed Best Interest Contract Exemption, July 20, 2015, at 27-30 ("SIFMA BIC Exemption Letter"). As discussed in more detail below, PNCI has expanded its ability to provide high quality investment services to customers by developing several call centers. It is unclear how the point of sale disclosure requirement could be satisfied through this important service delivery channel.

¹³ FSR Comment Letter, Appendix A, Section VII.

¹⁴ SEC Chair White described this phenomenon in a 2013 speech: "When disclosure gets to be 'too much' or strays from its core purpose, it could lead to what some have called 'information overload' – a phenomenon in which ever-increasing amounts of disclosure make it difficult for an investor to wade through the volume of information she receives to ferret out the information that is most relevant." Mary Jo White, Chair, "The Path Forward on Disclosure," Speech before the National Association of Corporate Directors – Leadership Conference 2013 (Oct. 15, 2013).

A. The structure of the contract could make certain service channels unavailable to retirement investors

PNCI has for several years worked to develop new ways to deliver investment services to all of our retail customers. In particular, PNCI has sought ways to deliver high quality investment services, including investment advice, to customers with relatively low levels of investable assets. In this vein, PNCI has expanded the investment services available to retail investors through the creation and continued development of the PNC Investment Center. The PNC Investment Center is comprised of three separate call centers through which teams of investment professionals provide brokerage and advisory services to hundreds of thousands of retail investors. By servicing accounts with centralized teams of investment professionals – rather than assigning each account to a single financial adviser in a branch office – PNCI has been able to increase the level of service provided to customers with relatively low levels of investable assets.

While PNC embraces a duty to act in the best interest of its customers and, we believe, meets this standard in providing services through the PNC Investment Center, we are concerned that the proposed structure of the BIC Exemption would stifle our ability to creatively expand the range of investment services available to retirement investors. As proposed, the contract required under the BIC Exemption would be a three-party agreement among the retirement investor, the financial institution, and the adviser. This three-party contract structure is completely inconsistent with the design of service delivery channels like the PNC Investment Center, which is premised on the idea that high quality investment services can be provided at greater convenience and lower cost to more investors by assigning accounts to a team of investment professionals, rather than an individual adviser. Moreover, and importantly, this method of service delivery is the preferred method of many of our customers, who prefer to speak with an advisor at a time and from a location of their choosing, rather than scheduling an appointment and in many cases traveling to a branch office to meet with an adviser.

While we focus here on the reduction in services offered through call centers that could result from the three-party structure of the proposed Best Interest Contract, we note that the structure gives rise to numerous other questions and would seem to create a variety of significant problems. As discussed in SIFMA's comment letter, these include questions about providing service to accounts when the adviser who signed the contract is out of the office or unavailable, reassignment of accounts when an adviser's employment with the financial institution ends, and team coverage of accounts outside the call center context.¹⁵

B. The warranties required in the contract could force broker-dealers to offer a reduced range of products to retirement investors

¹⁵ SIFMA BIC Exemption Letter, pages 11-13.

Section IV(a) of the proposed BIC Exemption requires firms that offer a limited range of investment options to retirement investors to meet certain requirements. For example, firms would be required to make a specific written finding that any limitations do not prevent the firm or its financial advisers from making recommendations in the best interest of their retirement investor customers. Clear written notice of any limitations would need to be provided to retirement investors before any recommendations are made. While we appreciate the Department's effort to provide a means for firms to offer a scaled-down menu of investment options to retirement investors, we are concerned that such scaled-down offerings are likely to become the rule, rather than the exception, as a result of the warranties proposed to be included in the Best Interest Contract, resulting in a reduction of investment options for retirement investors.

The proposed BIC Exemption would require firms to warrant to customers that they have policies and procedures in place that include "specifically identified Material Conflicts of Interest and adopted measures to prevent violations of the Impartial Conduct Standards," and that neither they, nor their affiliates or related entities use any compensation structures that "would tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor."¹⁶ While the Department stated its intention to permit broker-dealers and advisers to continue to receive "compensation common in the retail market, such as brokerage or insurance commissions, 12b-1 fees and revenue sharing payments,"¹⁷ the required warranties described above would leave firms and advisers at substantial risk if they retain any element of differential compensation (to the broker-dealer or the adviser) across products. The Department pointed favorably to "level-fee" structures, but stopped short of mandating them.¹⁸ Anything short of such a "level-fee" structure, however, would leave firms and advisers at risk that any recommendation other than the lowest cost product (or the product that pays the lowest fee to the firm and the adviser) could be second-guessed as a violation of the warranties made by the firm and the adviser.

To mitigate this risk, firms are likely to consider ways to level the compensation they and their advisers receive across the range of products offered to retirement investors. Because this would be an enormous exercise to undertake with respect to the broad range of products offered

¹⁶ Proposed BIC Exemption, Sections II(d)((3), (4). We note that the Department also expressed a favorable view of asset-based compensation. We agree that, in many circumstances, asset-based fees are a good way to align the interests of the firm, the adviser, and the retirement investor. To that end, PNCI offers several managed account programs to retirement investors in its capacity as a registered investment adviser. Asset-based fees are not the best option for all retirement investors, however. Depending on their needs and financial circumstances, some customers, particularly those with low levels of investable assets and no need to effect regular transactions, are best served by paying a one-time transaction fee, rather than a recurring asset-based fee. *See, e.g.*, National Association of Securities Dealers Notice to Members 03-68 (Nov. 2003) (reminding members that fee-based accounts are not appropriate for all customers in all circumstances).

¹⁷ BIC Exemption Notice at 21,961.

¹⁸ *Id.* at 971.

by full-service broker-dealers,¹⁹ a likely result is that firms will dramatically reduce the range of products offered to retirement investors. A limited menu of products for retirement investors would give firms a manageable universe of products for which they could ensure that both the firm and the advisers receive level compensation.

We think it would be possible to create such a limited menu and comply with the requirement that the range of options still “enable an Adviser to make recommendations to the Retirement Investor with respect to all of the asset classes reasonably necessary to serve the best interest of the Retirement Investor in light of the Retirement Investor’s objectives, risk tolerance and specific financial circumstances.”²⁰ We question, however, whether this outcome – reducing the range of choices available to retirement investors in order to eliminate perceived conflicts of interest – is truly in the best interest of retirement investors. Furthermore, we are concerned about the customer confusion that would likely result. If, for example, an adviser believes purchasing a financial instrument excluded from the limited menu is in a customer’s best interest, how will the adviser explain that he recommends the customer purchase the financial instrument, but that it can only be sold to the customer outside of his or her IRA?²¹

For these reasons, we urge the Department to strike these proposed warranties in the Best Interest Contract. We believe that recommendations made to retirement investors should be judged on their merits. While we recognize that differential compensation may be evidence that a financial institution or adviser had interests other than the retirement investor’s in mind when making a recommendation, it is certainly not always dispositive evidence. The proposed BIC Exemption unnecessarily prescribes both a standard of conduct –by requiring financial institutions to act only in their customers’ best interests – and, for all intents and purposes, the means achieve that standard – by essentially forcing firms to eliminate all conflicts of interest that might arise from their compensation structures. This approach would largely undermine the Department’s declared goal of allowing broker-dealers to retain longstanding forms of compensation.

C. The definition of “Asset” limits choice for retirement investors

As proposed, the BIC Exemption would be available only with respect to advice relating to certain “Assets.” We believe the proposed definition is too narrow and would disadvantage

¹⁹ Even focusing only on mutual funds, PNCI, for example, offers many hundreds of mutual funds in various share classes offered by an extremely large array of fund companies.

²⁰ BIC Exemption Notice at 21,975.

²¹ While PNC’s focus in this letter is on the impacts of the Proposal on retirement investors, we note that to be subject to entirely different and duplicative sets of paperwork and disclosure requirements, policies and procedures, compensations structures, asset restrictions and systems requirements, depending on whether or not the customer, in the context of a particular account relationship, is a retirement investor, is an exceedingly burdensome, costly and confusing approach, both for broker-dealers, and more importantly, for customers who have multiple accounts with the institution.

retirement investors by limiting the range of financial instruments in which they could invest their retirement assets. Retail broker-dealers provide advice to a wide variety of retirement investors who have very divergent needs. Whether a particular investment product is appropriate for any particular retirement investor depends on a variety of factors, and a product that may be inappropriate for one retirement investor may be ideal for another retirement investor. We see no reason why the BIC Exemption should be available for some assets and not for others. As with the impact of the proposed warranties discussed above limiting the benefits of the BIC Exemption, the limited definition of Asset also would likely cause customer confusion.

We echo the views expressed by SIFMA²² and FSR²³ that the Department should not create a pre-determined list of assets it believes to be appropriate for retirement investors. If investment advisers are to be required to act in their customers' best interests, they ought to be tasked with determining whether a particular class of investments is appropriate for a particular retirement investor (or retirement investors generally). In addition, the exclusion of unit investment trusts from the definition of "Asset" is troublesome. Unit investment trusts are widely used vehicles that can be entirely appropriate for retirement investors who are made fully aware of their features and risks. More generally, PNC would be concerned that a static list of permissible investments might not be readily amended to keep up with innovations expanding the universe of available products, to the detriment of retirement investors.

4. Bank products

A. Bank Deposits.

PNC Bank's personnel routinely engage in dialog with retail customers and prospective customers about the deposit products we offer (e.g., savings account, certificates of deposit), including customers who want to invest retirement assets into deposit accounts. This sometimes includes providing a list of bank products, discussing investment yield and answering procedural questions. Bank personnel do not, however, discuss individual retirement needs or provide recommendations as to investments, account type or disposition – but they may refer customers to personnel at AMG, PNCI or others at PNC to discuss the benefits of retirement savings. The Proposal is not clear on its applicability to, or treatment of bank deposit products.

We ask that the Department confirm that a bank's disclosures and communications in connection with deposit products offered by a bank to its IRA and other customers are within section 408(b)(4) of ERISA and, provided the conditions of that section are met, are excluded from the scope of the Proposal. Absent such exemption, banks may deem the burden and cost of compliance to be too onerous, leaving customers with only higher priced investment

²² SIFMA BIC Exemption Letter at pages 6-11.

²³ FSR Comment Letter, Appendix A, Section VII(b).

management accounts for their IRA and other retirement savings (versus more modestly priced bank deposit accounts).

B. Sweep Products

In a similar fashion, PNC provides our corporate and other business clients with bank deposit-related products, which we refer to as “treasury management services.” Included are products designed to assist our business clients with their liquidity needs, such as overnight investment sweeps into money market mutual funds and other short term investments. If such products are not expressly excluded from the scope of the Proposal, banks may cease offering sweep services to covered account types (as not administratively feasible/cost effective), which could leave employee benefit plans with a narrower set of liquidity alternatives with potentially less favorable short-term rates than those available to other corporate clients, or to the same client, in their non-ERISA accounts.²⁴

C. HSAs, MSAs, and CESAs

PNC offers HSAs through various channels, including to the employees of its Treasury Management clients, and to individuals via the PNC HSA website. PNC operates as the custodian of the HSA, but does not operate in a fiduciary capacity. The HSA is comprised of an interest bearing FDIC-insured bank account portion and an investment portion that involves a menu of mutual funds which the account owner can access once a minimum account balance of \$2,000.00 is achieved. The account owner has exclusive responsibility for and control over the investments in the HSA. We do not currently offer MSAs or CESAs to customers; however, our advisors may need to consider these account types in overall wealth or financial planning.

We are concerned that the Proposal explicitly covers HSAs via its definition of IRA, which is defined as “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.” We believe that this definition of IRA is too broad. HSAs are established to address medical and educational needs, with generally much short investment time horizons and very different considerations than retirement accounts, and should be excluded from coverage under the Proposal. By the same token, while PNC does not offer MSAs and CESAs, we believe they too should be excluded from the Proposal for the same reasons.²⁵

5. Retirement Plans

PNC provides trust, custody, investment, education, recordkeeping and other administrative services to clients who sponsor employee benefit plans, including corporations, non-profits, municipalities and labor unions. PNC acts in a fiduciary or non-fiduciary capacity

²⁴ See ABA Comment Letter at section III.A.1.

²⁵ See *id.* at section III.A.6.

depending on the particular service being provided, but always endeavors to act in the best interests of its customers. PNC, through its sales conversations, service agreements, and disclosures, makes clear to its customers which of the aforementioned services PNC provides as a fiduciary (e.g., discretionary trustee and investment management services) and which services it provides in a non-fiduciary capacity (e.g., custody, plan recordkeeping, and education services). Although the Proposal includes several carve-outs intended to be helpful to retirement plan service providers, we believe those carve-outs require a number of revisions and/or clarifications in order to ensure that PNC can continue to provide the most effective and efficient services to our retirement plan customers.

A. Platform Provider and Selection and Monitoring Carve-outs

The Department has carved-out from the general definition of fiduciary a platform provider that markets and makes available a platform of investment alternatives for participant-directed plans. Further, the Proposal provides that the identification of investment alternatives that meet objective criteria specified by a plan fiduciary or the provision of objective financial data and comparisons with independent benchmarks by a platform provider to assist the plan fiduciary with its investment selection and monitoring duties will not be treated as investment advice.

PNC provides recordkeeping and directed trustee services to retirement plans, many of which are small to mid-sized plans. PNC offers these customers a platform of investments that includes hundreds of mutual funds from which plan fiduciaries can build a diversified menu of investment options for their retirement plans. While PNC does not provide investment advice to these customers, it does help plan fiduciaries narrow the universe of investment options that are available on the platform through the use of objective third-party tools that rely on quantitative data. We recommend that the Department revise the Proposal to permit the use of these objective tools by platform providers to help make the investment selection and monitoring process more manageable for plan fiduciaries.

PNC also provides services to retirement plans that are not participant-directed and participant-directed plans that include contribution sources (e.g., employer nondiscretionary contributions) that are invested by plan fiduciaries. We see no reason for these types of plans and contribution sources to be treated differently than participant-directed plans for purposes of the platform provider and selection and monitoring carve-outs, and it would be difficult for PNC to continue to service some of these plans if they are not included in the carve-outs. Therefore, we ask that the Department extend the platform provider and selection and monitoring carve-outs to cover non-participant directed plans and contribution sources.

B. Investment Education Carve-out

PNC differentiates itself as a retirement plan service provider by offering a suite of robust employee education services for retirement plan participants. These services are valued by plan

sponsors who recognize the importance of helping their employees achieve retirement readiness and by the plan participants who directly benefit from the investment education PNC provides. This education comes in the form of newsletters, targeted mailings, webinars, on-site meetings, one-on-one sessions, and interactive investment tools, all of which are geared toward encouraging retirement planning and plan participation. These tools have been developed within the framework of the Department's existing guidance on investment education under Interpretive Bulletin 96-1.²⁶ This guidance has served retirement plan participants and sponsors well for nearly 20 years, yet the Proposal aims to significantly narrow the current definition of investment education in a manner that will be harmful to retirement investors.

In a departure from current guidance, the proposed carve-out for investment education provides that education materials may not reference "specific investment products, specific investment managers or the value of particular securities or other property" and investment allocation models may not identify specific investment products available under a retirement plan or IRA. While we believe that useful investment education materials should be broadly available to all retirement investors, this limitation is particularly confounding as it relates to participant-directed retirement plans. It makes no sense to prohibit the identification of the specific investment funds that comprise the menu of investment options selected by a plan's fiduciaries. Today, plan participants who receive PNC's employee education services have access to asset allocation models that are populated with the investment funds they may choose to invest in under the retirement plan offered by their employer. This is actionable, effective investment education that employees can use to help them make good retirement investing decisions.²⁷

Under the narrower definition of investment education in the proposed carve-out, employees could only be provided with a generic asset allocation model and would have to rely on their own, often limited, investment knowledge or other sources to identify the funds available under their retirement plan that fall into each asset category. We believe that employees who participate in the plans PNC services benefit greatly from the education PNC provides about the differences between the investment options available under their plans. If the

²⁶ 29 C.F.R. 2509.96-1.

²⁷ Relatedly, PNCI offers an online portfolio builder tool that enables customers to generate a tailored asset allocation, based on responses to a risk tolerance questionnaire. The tool assists customers in narrowing the universe of mutual funds available to populate the allocation by applying a series of objective screening criteria that is fully disclosed to the customer. We do not believe this screening tool results in a "recommendation" to the customer and FINRA staff has reviewed the tool and given no indication that they believe it generates recommendations to which FINRA's suitability rule applies. By indicating that an asset allocation tool that refers to *any* specific securities is providing investment advice, the Department has departed from the "useful standards and guideposts for distinguishing investment education from investment advice" provided by FINRA's guidance. (Fiduciary Proposal at 21938.) Whether or not a communication is a "recommendation" should not be judged by a different standard simply because the communication is made in connection with the provision of an asset allocation.

Proposal takes effect, these employees will likely have to turn to a Google search or guessing based on the names of the investment funds to make an investment decision. Surely many will take no action at all out of frustration, fear or lack of time. In our view, this would represent a giant step backwards in the evolution of employee investment education, severely undermining its value.²⁸

We ask that the Department revise the proposed carve-out for investment education so that it does not narrow the current definition of investment education under Interpretive Bulletin 96-1 that has served retirement investors well for nearly 20 years. At a minimum, we ask that the carve-out be expanded to permit those delivering investment education to retirement plan participants to reference in the investment education materials, including asset allocation models, those specific investment products chosen by the plan's fiduciaries as investment options under the plan.

C. Valuations Carve-out

The Proposal includes within the definition of investment advice statements concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange of such securities or other property by a plan or IRA. The Proposal also contains a carve-out for an appraisal, fairness opinion or a statement of value to an ESOP regarding employer securities, to a collective investment vehicle holding plan assets, or to a plan for meeting reporting and disclosure requirements. It is not clear whether the Department intends to include within the definition of investment advice routine statements of value provided by trustees, custodians and record keepers with respect to retirement plan and IRA assets. Because such statements of value are an integral part of every customer relationship, regardless of whether PNC is acting in a fiduciary capacity, we request that the Department clearly exclude from the definition of investment advice all routine statements of value delivered to retirement investors. In addition, we request that the Department clarify that the carve-out for providing statements of value to pooled funds covers the calculation of daily net asset values for single plan unitized investment pools within participant-directed plans.²⁹

²⁸ In this regard, we concur with the points made in the ABA Comment Letter on these issues. ABA Comment Letter, section II.C.4.

²⁹ In the SIFMA Fiduciary Letter, the organization states that "valuation information is not a recommendation and should not be fiduciary advice. The point of the regulation is to capture the person recommending the investment, not the person providing the market values from market sources." SIFMA Fiduciary Letter at 12. PNC agrees with the Department that investment advice should hinge on whether a recommendation or call to action or an explicit endorsement has been made. However, we also agree with the SIFMA that valuation opinions or information, by contrast, are not recommendations and therefore should not fall within this definition."

6. Timing of Implementation

The Department announced that the final rule would be effective 60 days after publication in the *Federal Register* and the requirements would generally become applicable eight months after publication of a final rule.³⁰ We believe that such a short implementation period is unworkable for regulations that would have wide-ranging impacts across financial institutions and transform the way investors and financial institutions interact today. As discussed above, the Proposal will have a direct and significant impact on multiple lines of business at PNC, including the operations, technology, human resources and risk organizations that support our businesses. Implementation of the Proposal will require significant revisions to business processes and compensation practices and possibly require substantial revision to existing and longstanding contracts with customers and product providers.

The Consumer Financial Protection Bureau (“Bureau”) and other Federal banking agencies that have authority to issue regulations relating to financial disclosures typically provide implementation periods of more than 18 months when requiring new financial disclosures. For example, the Bureau has provided an implementation period that will likely last almost 20 months for new disclosures relating to residential mortgage lending.³¹ Similarly, the SEC recently provided 1-year and 2-year implementation periods for two separate aspects of amendments to its rules governing disclosures related to asset-backed securities.³²

Given the transformational nature of the Proposal, we request that the Department provide no less than an 18 month implementation period from the date the final regulations are published in the *Federal Register*. We believe that any shorter implementation period runs the risk of financial institutions simply scaling back the advisory services they provide to investors. This outcome would make advisory services more expensive, a result that clearly would be counter to the Department’s objectives in issuing this regulation.

* * *

Thank you for your consideration of these comments. PNC hopes to have the opportunity to work with the Department to fashion standards that ensure that financial institutions are delivering investment services to retirement investors that are in their best interests while continuing to promote a diverse and deep marketplace of financial advisers and innovation in the delivery of retirement services to investors. We urge the Department to issue regulations that help make the conversations financial advisers have with retirement investors

³⁰ See Fiduciary Proposal at 29,950.

³¹ See Consumer Financial Protection Bureau, 2013 Integrated Mortgage Disclosures Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) and Amendments; Delay of Effective Date, 80 *Federal Register* 36,727 (June 26, 2015).

³² Securities and Exchange Commission, Asset-Backed Securities Disclosure and Regulation, 79 Fed. Reg. 57184 (Sep. 24, 2014).

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more valuable, but not more complicated and costly. Moreover, in crafting these new standards, we also believe that it is important that the Department consider carefully the impact its regulations have on not just the larger firms, but also main street financial advisers.

If you would like to discuss any aspect of this letter, please do not hesitate to call me at (215) 585-5670.

Sincerely,

A handwritten signature in cursive script that reads "Linda R. Manfredonia".

Linda R. Manfredonia
Chief Fiduciary Officer
PNC Asset Management Group