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July 21, 2015

FILED ELECTRONICALLY

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

Re: Proposed Conflict of Interest Rule (RIN 1210-AB32)

Vanguard appreciates the opportunity to comment on the Department of Labor's (the "Department") April 2015 proposed Conflict of Interest Rule defining fiduciary investment advice under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") (the "Proposal"). Because Vanguard's core purpose is to take a stand for all investors, treat them fairly and give them the best chance for investment success, Vanguard agrees that retirement investors should be able to rely on investment professionals and financial institutions to act in their best interests when providing investment advice.

Vanguard is one of the world's leading asset managers, managing over $3 trillion for institutional and retail investors. Vanguard manages over $775 billion in defined contribution ("DC") and defined benefit ("DB") plan assets and provides recordkeeping and administrative services for over 4 million participants in over 6,100 DC and DB plans. We also manage over $475 billion in assets for over 9.7 million individual retirement account ("IRA") investors.

Vanguard agrees that the Department should update the definition of an investment advice fiduciary to reflect the current retirement plan and IRA marketplace. Without question, those who provide investment advice should be required to act in the best interest of their clients. However, the fiduciary standard under ERISA brings with it extraordinary complexity due to ERISA's prohibited transaction rules and duties of prudence and loyalty and any changes must be carefully crafted to avoid detrimental outcomes. We are concerned that the Proposal, as written, could curtail access to important educational and advisory services for plans, participants and IRA investors (collectively, "Retirement Investors"). If the Department defines investment advice too broadly, the attendant costs of a fiduciary level of service are likely to result in increased costs to Retirement Investors for basic investment counseling or even the termination of important investor services.

Vanguard appreciates the Department's efforts in developing the proposed Best Interest Contract Exemption (the "BICE") and recognizes that the Department intends the exemption to allow beneficial advice services and compensation arrangements to continue. However, administrative exemptions cannot provide relief from the prudence standard and the duty of loyalty, which require extensive procedural due diligence and expertise. The Proposal would reclassify many common investment-related conversations and generic communications as fiduciary investment advice. As a result, providers would be forced to develop extensive due diligence procedures and enhance their documentation and record retention practices simply to demonstrate satisfaction of prudence requirements, separate and apart from any additional records needed to demonstrate technical satisfaction of the conditions of the BICE and other exemptions. The cost of providing such a level of service could lead to cost increases or elimination of services even where there is no reasonable customer expectation of a fiduciary level of service. Vanguard encourages the Department to adopt a more targeted definition of fiduciary investment advice and to adopt expanded carve outs from the definition for sales activity and investment education, coupled with a substantially simplified BICE.[1]

Vanguard supports a consistent fiduciary standard for individualized investment advice provided with respect to specific securities to any Retirement Investor, regardless of the type of account they hold. Vanguard appreciates the Department's efforts to reflect existing guidance from the Securities and Exchange Commission ("SEC"), where appropriate, in its development of the Proposal. We encourage ongoing coordination between and among the Department, the SEC and the Financial Industry Regulatory Authority ("FINRA") as each moves forward with fiduciary guidance. Because investors benefit from a consistent experience regardless of account type, each agency should strive to apply consistent principles wherever possible.

Executive Summary

1. The definition of "investment advice" is overly broad, including sales activities and factual information. The Proposal classifies as fiduciary advice many informational communications that, in our view, should not be considered fiduciary investment advice, such as sales and marketing communications to small plan sponsors, participants and IRA investors, statements of fact about investment alternatives and targeted participant education materials.

2. A Retirement Investor's reasonable expectations should be an element of fiduciary status. An investment professional or financial institution should not be a fiduciary unless the Retirement Investor reasonably believes that he or she is receiving investment advice. A definition that reflects investor expectations based on the totality of the circumstances would minimize the potential for abuse while permitting investment professionals and financial institutions to provide meaningful investment information to Retirement Investors.

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[1] Vanguard is concurrently submitting a separate comment letter on the new and amended prohibited transaction exemptions that the Department proposed in conjunction with the Proposal.

3. Only individualized communications should qualify as investment advice. Individualization of investment communications is a key aspect of whether a Retirement Investor may reasonably believe he or she is receiving investment advice. In contrast, communications of a more general nature—whether sent to an individual or a large group of investors—would not be interpreted by an individual as investment advice. A fiduciary definition that includes non-individualized communications "specifically directed to" a Retirement Investor would discourage targeted educational communications that could improve retirement outcomes.

4. Carve-outs from the definition of investment advice should be broadened and clarified.
   - The counterparty (seller) carve-out should be available with respect to all Retirement Investors if the counterparty is clearly not undertaking to provide investment advice. Plans of all sizes are subject to the same fiduciary standard and the same counterparty exception should apply equally to all of them. Absent relief, small plans, participants and IRA investors will see a reduction in services.
   - The investment education exception should be available for communications that reference specific investment alternatives and should reflect existing FINRA guidance. Plan sponsors and providers can improve retirement outcomes by providing investment education with actionable information about investments and any conflicts of interest can be managed by including information about all investment options available in each recommended asset class. FINRA's distinction between education and advice is a logical basis for the same distinction under ERISA and will allow institutions to design services with a clear understanding of whether those services will or will not be considered fiduciary in nature.
   - The platform and monitoring exceptions should be available with respect to Retirement Investors of all sizes. As a matter of administrative practicality, every financial institution must limit the number of investment options it offers. The financial institution should also be permitted to restrict its platform to proprietary options as long as that fact is disclosed to investors. Similarly, financial institutions should not be prohibited from suggesting selection and monitoring criteria that are consistent with generally accepted investment principles. The Department should expand the selection and monitoring exception to permit financial institutions to suggest factors Retirement Investors may consider using to evaluate investments if consistent with generally accepted investment principles.
   - The Department should add a carve-out for all communications made to a Retirement Investor's consultant or other professional expert. Many plans and even some participants and IRA investors now rely on professional advisors to deal with financial institutions on their behalf. When communicating with a professional advisor, the financial institution should not be deemed to be providing a recommendation directly to the underlying Retirement Investor.

5. The Department should reserve the status of valuations as investment advice for a future rulemaking. Valuation is conceptually different from the other types of investment advice

defined under the Proposal. The Proposal provides little guidance to clarify what constitutes valuation advice, nor does it include any carve-outs with respect to reporting of valuations provided by other persons. The Department should address all valuation-related matters, including the definition of adequate consideration, in a single and separate comprehensive rulemaking.

I. The Department's proposed definition of fiduciary investment advice is overly broad and encompasses sales and factual information that is not fiduciary in nature.

We agree that the Department should update the definition of an investment advice fiduciary to reflect the current retirement plan and IRA marketplace. Unquestionably, those who provide investment advice should be required to act in the best interest of their clients. We also agree that removing certain elements of the current five-part definition, such as the requirement that advice be provided on a regular basis, would enable the Department to apply ERISA fiduciary standards to a broader array of arrangements that Retirement Investors are likely to consider advisory. The Proposal, however, would define investment advice too broadly. An overly broad definition may reduce Retirement Investors' access to beneficial services or make those services available only at much higher cost. The Proposal's carve-outs from investment advice are useful in clarifying and limiting the scope of fiduciary investment advice, but the definition itself encompasses too much activity that should not reasonably be considered fiduciary in nature. Vanguard encourages the Department to modify the definition of investment advice as follows.

A. The criteria for fiduciary status should reflect the Retirement Investor's reasonable expectations.

In light of the significant consequences of fiduciary status for advisors and financial institutions, the definition of fiduciary investment advice must include the concept of a Retirement Investor's reliance on a recommendation in the reasonable belief that an investment professional is providing investment advice. What should matter is the context in which the communication is delivered and how a reasonable person would perceive it.

The Department has expressed concern that under current law investment professionals may call themselves "advisors" to induce trust in prospective Retirement investors, yet avoid fiduciary status by disclaiming fiduciary status in account agreements.[2] To address that concern, the Department should provide a more targeted definition that bases fiduciary status on whether, under the totality of the circumstances, a reasonable person would believe that the person making a recommendation was offering to provide investment advice. The key factors for determining the reasonableness of that expectation would include the degree to which the investment recommendation is individualized to the Retirement Investor's circumstances, whether the nature

[2] "Investment professionals in today's marketplace frequently market retirement investment services in ways that clearly suggest the provision of tailored or individualized advice, while at the same time disclaiming in fine print the requisite 'mutual' understanding that the advice will be used as a primary basis for investment decisions." The Proposal, 80 Fed. Reg. 21928, 21934 (Apr. 20, 2015).

of the discussion was advisory or informational,[3] disclosure to the investor about the type of services being provided and whether the investor relied on the guidance to take action. No single factor would be conclusive under this standard, but a list of relevant factors in the definition would provide greater certainty in application of the definition. At the same time, this broader test would allow the Department and investors to challenge disclaimers of fiduciary status if an investment professional otherwise acts in a way that caused the Retirement Investor to believe that he or she was receiving investment advice.

Importantly, this definition would allow normal nonabusive marketing practices to continue. For example, prospective investors usually contact a firm's call center for information about the firm's products. In such a situation, the investor does not expect the firm to market any products but its own or the call center representatives to provide investment advice unless the call center representative makes statements to the caller suggesting that the representative will present a broader range of investments or provide investment advice. Similarly, plan sponsors of all sizes commonly solicit bids from investment firms with respect to either specific investment mandates or for entire sample plan line-ups (for example, in connection with a bid to provide recordkeeping services). Under such circumstances, the plan sponsor generally expects that bidder will actively promote only its own products, though it may make other products readily available upon request.

While we understand why the Department is seeking to remove the regular basis element from the current five-part definition, we believe that fiduciary status should be dependent on more than whether an investment professional has made an isolated "recommendation." As drafted, the Proposal defines a "recommendation" as a "communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." We agree that this definition is appropriately consistent with FINRA's definition of a recommendation. However, we are concerned that the Proposal's definition of investment advice starts with a general presumption that marketing of investment products is fiduciary investment advice and that, as described above, is not consistent with the expectations of either the Retirement Investor or the investment professional in many cases. A totality-of-the-circumstances test that more clearly details relevant factors and is based on the reasonable expectations of the Retirement Investor more accurately captures what Retirement Investors and providers alike are likely to view as investment advice.

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[3] For example, under FINRA Notice 13-45, FINRA member firms and their representatives have an obligation when discussing rollover options with a prospective client to provide information that is "fair, balanced, and not misleading." The Notice also states that a broker-dealer's marketing of its IRA rollover services "must be balanced by a discussion of other available options and how they compare to the IRA offered, particularly with regard to fees." If an investment professional has such a balanced conversation and does not conclude by specifically recommending one of the options as the "best" option for the investor, that factor should militate against the discussion being classified as investment advice.

B. Only recommendations that are individualized to the specific needs of the recipient should be considered fiduciary in nature.

The Department should only classify individualized recommendations as potentially constituting investment advice and should eliminate from the definition communications that are "specifically directed to" Retirement Investors. A Retirement Investor can only reasonably believe that an investment professional or financial institution is undertaking to provide investment advice when the recommendation is individualized to the recipient and directs the recipient to take a specific investment action. General communications, including marketing communications, do not meet this standard. The Department acknowledged this principle in the Preamble with regard to proxy voting, noting that fiduciary status would generally not result from providing proxy voting guidelines to a broad class of investors without regard to the investors' individual interests and investment policy.[4] The same principle suggests that investment communications that do not consider a Retirement Investor's specific investment goals, interests or risk tolerance should not be considered fiduciary investment advice.

In particular, the classification of recommendations that are "specifically directed to" a Retirement Investor as fiduciary investment advice encompasses too many general marketing and educational communications that should not legitimately be considered investment advice. This language suggests that any communication targeted to a participant population or participant subgroup would be picked up in this definition, potentially even legally required communications that may mention investments (for example, communications such as participant fee disclosures, Qualified Default Investment Alternative notices, or Internal Revenue Code section 402(f) notices).

More practically, by categorizing all communications directed to specific participants and participant groups as investment advice the Department would discourage plan sponsors and providers from identifying participants in need of more specific investment education, targeting communications to them and measuring whether such communications advance retirement readiness. Many recordkeepers provide significant value to participants by issuing targeted communications to groups of participants with common characteristics. For example, a provider may send a targeted educational mailing to participants who are heavily invested in company stock to explain the benefits of diversification. Such communications may include information about the plan's default investment and other investment options in the plan. As such, they could not qualify under the carve-out for investment education under the Proposal.

These communications are most effective when they are targeted to relevant participant populations and when they provide actionable investment information. If a provider must send every such communication to the entire plan population to avoid triggering the "specifically directed to" element of the investment advice definition, participants could be saturated with communications and ultimately view them as junk mail, making it difficult to influence

[4] 80 Fed. Reg. at 21939.

participant behavior positively. In addition, targeted communications about participants' investment allocations generally must also include information about other investment alternatives available under the plan to be effective. Participants most often take action to implement changes when the communications include actionable information about specific investment alternatives for their consideration.[5]

If providers are subject to potential fiduciary liability under ERISA's prudence standards for general communications explaining prudent diversification principles and providing information about plan investments, providers likely will stop delivering those materials. In the example above, the Proposal would make a financial institution a fiduciary due to sending communications explaining the benefits of diversification, including identification of the plan's default fund, to those participants who could benefit most from the diversification message—those heavily invested in a single security. As a result, ERISA's prudence standards would require the financial institution to engage in a thorough and documented analysis of the investment prospects of the individual security relative to the default fund before sending the communication. If the financial institution does not do so, it could be liable for a breach of the fiduciary duty of prudence if the participant diversifies based on the communication and the security outperforms the default fund. The reverse situation could equally apply, for example where a recordkeeper happens to send targeted communications suggesting that young participants who are heavily invested in fixed-income investments consider diversifying into more growth-oriented investments shortly before a market decline.

These concerns are far from theoretical. The Department has argued, and courts have repeatedly held, that fiduciaries seeking to fulfill their duty of prudence must engage in a "reasoned decision-making process" to avoid liability.[6] Thus, once the Proposal's expansive definition of fiduciary status attaches to a previously nonfiduciary activity, such as targeted education, those individuals and institutions will have to increase their level of service to meet this standard—which inevitably will lead to higher fees for investors—or discontinue or degrade the level of service so that it is no longer deemed fiduciary investment advice.

In our view, there is little room for debate in either scenario that most participants would be better served long-term through more broadly diversified portfolios. ERISA's prudence standards, however, do not permit a fiduciary to rely on such general principles as a defense. Instead, the prudence standard would require the fiduciary to analyze each participant's current investments and financial circumstances in detail, compare it to the alternative(s) being mentioned in the letter and document that analysis—and all for a communication that is intended primarily to help the participant think about his or her investment allocations, not to provide specific advice. Facing these risks and burdens, financial institutions are likely to produce much more generic investment education communications and, to compensate for the risks and costs of fiduciary status, charge higher fees to participants who want more detailed help. An overly broad

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[5] See below for our comments regarding the education carve-out.

[6] *See, e.g., Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 369 (4th Cir. 2014). The Department submitted an amicus brief in support of the plaintiff participants in this case.

definition of fiduciary investment advice would result in more Retirement Investors paying direct fees for formal investment advice programs or continuing to make their own investment decisions based on less specific and less helpful educational communications.

II. The Department should expand its carve-outs from the definition of investment advice.

A. The counterparty carve-out should cover all situations in which a Retirement Investor should not expect to receive investment advice.

The Department should make the counterparty (marketing) carve-out available for marketing activities to Retirement Investors of all sizes as long as it is clear to the Retirement Investor that the representative of the financial institution is not undertaking to provide unbiased and individualized investment advice. As described above, we believe that the distinction between marketing activities and fiduciary investment advice should be addressed through the general definition of fiduciary investment advice. However, if the Department determines to proceed with the Proposal's general definition as currently structured, it should revise the counterparty carve-out to permit legitimate marketing activity to all Retirement Investors. Although we agree with the Department that there is a need to protect Retirement Investors from financial advisors who inaccurately present themselves as unbiased or disinterested and recommend products that are not in an investor's best interest, categorizing all sales activities to smaller plans, participants and IRAs as fiduciary investment advice is not the right solution. Instead, FINRA and the SEC are the most appropriate agencies to address advisors' sales practices.

We also believe that the Department should modify the marketing carve-out in a number of technical respects. First, the carve-out apparently covers only sales of investment products. We would encourage the Department to expand the carve-out to also cover the sale of services (such as investment advisory services).[7] Financial institutions and advisors should be able to provide information about their services and to market them to Retirement Investors without being considered fiduciaries. This is particularly true in the case of investment advisory services—if an institution is willing to agree to a fiduciary standard in its provision of investment advice, it should be able to market that service to prospective clients without satisfying an exemption in connection with the sales conversation. It is unclear how an institution could even adhere to a fiduciary standard in the context of marketing or selling its own services.

Second, the Department should apply the same conditions in the carve-out for interactions between advisors or financial institutions and Retirement Investors of all sizes. With respect to plans, the statutory fiduciary standard does not vary based on the size of the plan and, therefore, there is no basis for distinguishing among small and large plans in a provider's communications. Congress determined that all plan sponsors, regardless of plan size, have a fiduciary obligation to either possess the requisite expertise or obtain it. The Department should rely on this statutory

[7] Notably, the solicitation of investors for investment advisory services is subject to regulation by both the SEC and state securities regulators. *See, e.g.*, SEC Rule 206(4)-1 and FINRA Rule 2210.

construct and not create different standards based on size. Further, the additional condition requiring sellers to plans with fewer than 100 participants to determine that the plan sponsor is sophisticated is too subjective. There is no way for providers to determine the plan sponsor's level of sophistication on a consistent basis. Providers seeking to rely on the marketing carve-out will not want to make assumptions about the plan sponsor's level of sophistication and risk being second-guessed by plaintiffs or the Department later. They will likely respond to this "sophistication" condition by requesting form certifications or questionnaires of limited utility.

Unless the Proposal is revised, a would-be counterparty to a smaller plan would have another difficult burden to satisfy. For example, it is unreasonable to expect a recordkeeping or investment provider to review the most recent Form 5500 to determine whether a plan has over $100 million in assets or over 100 participants every time the provider wants to have a discussion with the plan sponsor that may address plan investments. It is also unclear what the provider can do if, for example, the plan sponsor had more than 100 participants at the time of the parties' initial conversation but later falls below 100 participants. It appears that the investment professional must either terminate the relationship or assume fiduciary status not because of any change in the level or nature of investment services provided, but merely because of a change in the size of the plan. The provider cannot also rely on the BICE as a back-up because the BICE requires the fiduciary to acknowledge fiduciary status in advance, preventing reliance on the counterparty carve-out (which conversely mandates disclaimer of fiduciary status).

Placing providers to small plans in such a "Catch-22" will lead to a decrease in the creation of small plans. For economic reasons, small employers are often reluctant to incur out-of-pocket costs to hire fee-only advisors. Instead, they rely on recordkeepers to provide substantial assistance with the creation of the plan and the presentation of potential investment alternatives for the plan's investment line-up while assuming final responsibility themselves to select and oversee the plan's investment provider. These small business owners understand that they are dealing with financial institutions that offer proprietary products and often solicit competing bids from a number of firms before selecting a provider. If they are forced to hire a professional advisor to provide a fiduciary level of service with respect to all plan service and investment decisions or to pay substantially more to a recordkeeper in order for that recordkeeper to act in a fiduciary capacity, many may choose not to do so—and not offer a plan at all.

B. The investment education exception should be available when information about specific investment alternatives is presented and should reflect existing FINRA guidance.

The Department should continue to permit plan sponsors and providers to discuss specific investments in the context of education communications without assuming fiduciary status. In our view, general asset allocation models that are not accompanied by specific information about investment options are not likely to effectively educate participants and IRA investors about the choices before them. For example, participants who receive a suggested asset allocation as a result of completing an investment questionnaire often will not have all the education they need

to prepare them for decision-making unless they are given additional information about the funds in the plan's line-up that meet each of the investment categories listed. Confronted by the need to analyze the plan's complete investment line-up to determine which investment options match each suggested asset class, most participants will take no action at all, making the asset allocation education worthless.

The Department can minimize the potential for abuse by requiring that investment education communications mention all plan or platform investments in the asset class under consideration. For example, if upon completing an interactive investment questionnaire an IRA investor discovers he or she should have exposure to large-cap U.S. stocks, the questionnaire should then identify available investment alternatives through the IRA platform that are invested principally or solely in large-cap U.S. stocks. Alternatively, the Department should at least permit educational materials to mention specific investments in the plan context (regardless of size) where the plan sponsor fiduciary has already approved the investments of the plan. In these cases, the plan sponsor will already have determined that the investment alternatives are prudent and charge only reasonable fees, which can operate as an additional layer of oversight.

Vanguard appreciates that the Department is concerned about participants, IRA investors and smaller plans possibly being unable to distinguish between education and investment advice. An outright prohibition on discussion of specific investment alternatives, however, would be harmful to all Retirement Investors. If faced with assuming fiduciary status for mentioning specific investment alternatives, financial institutions are likely to either cut back the level of education that they offer to Retirement Investors or offer only a fee-based advice service. In particular, many participants and IRA investors, unable or simply unaccustomed to paying separately and substantially for such education about investments, likely will reject a formal fee-based advice service and try to make their own investment decisions based on more limited information.

The Department should also explicitly adopt FINRA's existing guidance to help determine whether a particular communication constitutes nonfiduciary investment education or fiduciary investment advice. Many retirement plan and IRA service providers are subject to and already comply with FINRA's guidance to distinguish investor education from recommendations. In light of the serious implications of fiduciary status under ERISA, particularly ERISA's prohibited transaction rules, the investment advice definition under ERISA should not be broader than the definition of a recommendation applied by FINRA to determine when advisors must engage in a suitability analysis. FINRA's guidance provides a logical basis for institutions to design services with a clear understanding of whether those services will or will not be considered fiduciary in nature. For example, FINRA Notice 13-45 provides a comprehensive list of information that must be provided to investors to assist them in evaluating distribution options without providing investment advice. This Notice has allowed financial institutions to continue providing helpful education to investors considering the critical question of what to do with a retirement account, while helping to ensure that investors receive a complete, fair and balanced

explanation of their choices and the ramifications of each option.[8] The Department may choose to incorporate FINRA's guidance as part of the education carve-out, as we propose here, or as part of the definition of investment advice itself.

C. The platform carve-out and the selection and monitoring carve-out should be available with respect to all Retirement Investors.

The Department should make the platform and selection and monitoring exceptions available to participants and IRA investors in addition to employee benefit plans. Additionally, in both cases, the Department should condition relief on the financial institution clearly disclosing that it is not undertaking to provide impartial investment advice, and should clarify that this disclosure may be provided through paper or electronic communications.

By confining the platform exception to employee benefit plans under the Proposal, the Department appears to conclude that a financial institution may become a fiduciary to an IRA by offering only a limited universe of investments. Vanguard does not believe that this was the Department's intent and we urge the Department to expand the platform carve-out to include IRAs. Courts have already generally recognized that a financial institution does not act as a fiduciary to a plan when it merely provides a platform of investments and provides factual information about the platform to current and prospective investors.[9] This position reflects not only a proper application of law but also of economic and operational reality. As a matter of administrative practicality, a financial institution must be able to limit the type and number of its investment offerings to a reasonable number in order to offer IRA investors economical IRA services.

The Department should also clarify that a financial institution may define its platform as its proprietary investment products, even when other investments may be available for purchase in an account. Otherwise, the Department could discourage financial institutions from offering open-source platforms through which Retirement Investors may purchase a firm's proprietary products along with individual stocks, bonds and a "supermarket" of nonproprietary funds from a single source. Without clarification from the Department, it appears that the "platform" in this case would consist of the entire universe of publicly traded securities and the mutual fund supermarket, which could be viewed as requiring a firm to address the characteristics of all investments equally, whether proprietary or not, in client conversations. That would not be consistent with investors' expectations. Many IRA investors contact a financial institution specifically because they are interested in that firm's mutual funds or other investment offerings

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[8] Specifically, FINRA Notice 13-45 requires firms to review the following factors with investors considering a rollover to avoid providing investment advice: investment options, fees and expenses, available services, withdrawal options and potential penalties associated with those options, protection from creditors and legal judgments, application of required minimum distribution rules, and tax consequences (including taxation of employer stock holdings).

[9] *See, e.g., Santomenno v. John Hancock Life Insurance Company*, 2014 WL 4783665 (3d Cir. 2014); *Leimkuehler v. American United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013).

and do not expect the institution to actively market nonproprietary funds or other investments available through the brokerage service. In such a case, an IRA investor is likely to consider the institution's proprietary investments as the platform and any additional investments available through a brokerage account as a "side-car" to the IRA. At the same time, enabling financial institutions to consolidate proprietary and nonproprietary products through a single system would benefit participants and IRA investors by allowing them to hold all investments through a single institution and receive a single statement covering all investments, making it much easier for the investor to monitor his or her investments as a whole. Accordingly, the Department should revise the platform exception to clarify that financial institutions may define a "platform" to be limited to certain products, even when other products are accessible through an account, as long as it is clearly disclosed.

Similarly, the Department should expand the selection and monitoring exception to permit financial institutions greater leeway to suggest to Retirement Investors criteria for evaluating platform investments. As proposed, the exception only permits financial institutions to provide limited factual data about specific investments on the platform to plans and only in reaction to specific requests by the plan fiduciaries. This approach is not consistent with current marketplace practices, however, and could lead to a decrease in the information that financial institutions provide plan sponsors to help them fulfill their fiduciary duty to oversee plan investments.

Today, plan sponsors are accustomed to requesting and receiving a significant amount of information about plan investments at no additional charge. They also generally expect their recordkeepers and investment providers to provide proactive investment assistance, for example by identifying gaps for the plan sponsor to consider in evaluating the asset classes offered in their plans' investment line-ups or by identifying for the plan sponsor criteria that the plan sponsor may consider using to evaluate plan investments. If financial institutions are subject to potential fiduciary liability for providing these services, it is likely that they will discontinue any proactive investment monitoring services or convert them into fee-based monitoring services. Specifically, the Department should modify the selection and monitoring exception to permit financial institutions to suggest factors that are consistent with generally accepted investment principles that investors may consider using to evaluate investments.

Regardless of whether the platform is open source or confined to proprietary investments, Vanguard agrees that the platform and the selection and monitoring exceptions should require the financial institution to disclose that it is not providing impartial investment advice. Additionally, the Department should allow institutions to provide this disclosure electronically or through paper. Many investors now open IRAs online instead of working through an individual representative or call center, and plan sponsors also tend to prefer the immediacy and convenience of electronic communications.

D. There should be a broad carve-out for all communications to the Retirement Investor's consultant or other professional expert.

The Department should add a carve-out for all communications (such as counterparty, education, and valuation) directed to a Retirement Investor's professional advisor or delivered in the advisor's presence. Currently, many plans, even relatively small plans, engage consulting firms or law firms to represent them in dealings with plan service and investment providers. For example, it is very common for plans to retain consultants to issue Requests for Proposal ("RFPs") and evaluate bidder proposals on behalf of the plan sponsor. Many such situations involve blind RFPs in which the financial institution and its representative might have no contact at all with the plan sponsor, or even know the plan's identity, unless and until the consultant determines to include that firm or institution as a finalist in the bid for business. Even at the finals stage, where the plan sponsor fiduciaries are engaged in discussions directly with the bidders, the plan's professional advisor continues to play a vital role in the plan's decision-making process and generally guides the discussions between the plan fiduciaries and the finalists. The consultant might also ultimately negotiate the terms of the Retirement Investor's agreement with the winning bidder. When the financial institution or investment professional is dealing solely or primarily with a plan's expert representative, it is unlikely that the institution or investment professional will have the level of influence over a plan's ultimate decision to rise to the level of fiduciary investment advice.

III. The Department should reserve the status of valuation as investment advice for a future rulemaking.

The Department should reserve the valuation section of the proposed regulation for future rulemaking that comprehensively considers all valuation-related questions associated with plans. Valuation as a service raises vastly different questions from the other fiduciary services under the Proposal. Valuation involves a question of fact—what a particular investment *is* worth. The other types of investment advice under the Proposal involve much more qualitatively-oriented judgments as to what investments a person *should* hold, how plan property *should* be managed and who *should* be hired to manage a Retirement Investor's assets. The Proposal and exemptions seem to be aimed almost entirely at these qualitative aspects of investing. Accordingly, given the very different focus of questions of valuation, we believe the Department should address it through a separate, focused rulemaking. In connection with such rulemaking, we would also urge the Department to update and finalize its regulations under ERISA section 3(18) defining adequate consideration.

If the Department determines to include valuations in this regulation, it should confirm that a number of common valuation-related services in the industry do not constitute investment advice within the meaning of the regulation. It should also reserve the question of valuation of all private investments, not just ESOP investments in private stock, for a future rulemaking. Specifically, the Department should make two changes to the general definition of investment advice or add them as additional carve-outs. First, the Department should clarify that those who

simply report valuations provided by other sources (such as recordkeepers reporting NAVs for mutual funds or individual securities prices from public databases or market sources) are not providing fiduciary advice valuations. Second, the Department should affirm that plan service providers and other entities that are calculating valuations for transaction purposes in accordance with policies and procedures approved by a plan fiduciary independent of the service provider are not acting as fiduciaries.

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Vanguard appreciates the opportunity to submit these comments and would welcome the opportunity for further discussion with the Department if we can be of additional assistance. If there are any aspects of our comments that you would like to explore in greater detail or if you have any questions, please do not hesitate to contact Ann Combs at 610-503-6305, John Schadl at 610-669-4011 or Scott Milne at 610-503-5833.

Sincerely

Martha G. King
Managing Director, Institutional Investor Group
The Vanguard Group, Inc.

cc: Office of Exemption Determinations
Employee Benefits Security Administration