VIA http://www.regulations.gov

September 24, 2015

Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Supplemental Comments on Revised Definition of Investment Advice and Related Exemptions

Ladies and Gentlemen:

The Financial Services Roundtable ("FSR")[1] welcomes the opportunity to comment on the August 2015 hearing (the "Hearing")[2] conducted by the United States Department of Labor's Employee Benefit Security Administration (the "Department") on the proposed rule and exemptions to redefine the definition of "investment-advice fiduciary" under the Employee Retirement Income Security Act (the "Proposal").[3]

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[1] As *advocates for a strong financial future*™, FSR represents the largest integrated financial services companies providing banking, insurance, payment, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

[2] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Conflict of Interest Proposed Rule Public Hearing* (August 10-13, 2015), *available at* http://www.dol.gov/ebsa/regs/1210-AB32-2-Hearing.html.

[3] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Definition of Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice* [RIN: 1210-AB32], 80 Federal Register 21928 (Apr. 20, 2015) (the "Re-Proposing Release"), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08831.pdf; DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Best Interest Contract Exemption*, Application No. D-11712

FSR's comments in this letter are supplemental (this "Supplemental Comment Letter") to—and not in lieu of—FSR's comprehensive analysis and views as expressed in its comment letter dated July 21, 2015 ("FSR July 2015 Comments").[4]

In this regard, we note that by letter dated July 29, 2015, a bipartisan group of Members of the Committee on Financial Services of the United States House of Representatives asked Secretary Thomas E. Perez to re-propose this rule because "there is a strong possibility that a final rule may widely differ in its substance from the initial proposal or contain provisions that were not part of the proposed regulation."[5] In his August 7, 2015 response, however, Secretary Perez stated unequivocally that the Department "will move forward towards issuing a Final Rule that balances the input we

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[ZRIN: 1210-ZA25], 80 Federal Register 21960 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf; DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs*, Application No. D-11713 [ZRIN: 1210-ZA25], 80 Federal Register 21989 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08833.pdf; DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendment to Prohibited Transaction Exemption (PTE) 75-1, Part V, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Broker-Dealers; Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, Application No. D-11687 [ZRIN: 1210-ZA25] 80 Federal Register 22004 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08836.pdf; DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters*, Application No. D-11850 [ZRIN: 1210-ZA25], 80 Federal Register 22010 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08837.pdf; DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Proposed Partial Revocation of PTE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, Application No. D-11327 [ZRIN: 1210-ZA25], 80 Federal Register 22021 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08838.pdf; and DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1*, Application No. D-11820 [ZRIN: 1210-ZA25], 80 Federal Register 22035 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08839.pdf.

[4] FINANCIAL SERVICES ROUNDTABLE, *Comments on Revised Investment Advice Definition and Related Exemptions* (July 21, 2015), *available at* http://fsroundtable.org/fsr-letter-to-dol-comments-on-revised-definition-of-investment-advice-and-related-exemptions.

[5] The Honorable Ann Wagner (R-2nd/MO), *et al.*, Letter to the Honorable Thomas E. Perez, Secretary, United States Department of Labor (July 29, 2015), *available at* http://fsroundtable.org/wp-content/uploads/2015/03/Bipartisan-HFSC-letter-to-Perez.pdf.

have received."[6] We note that Secretary Perez committed to a "Final Rule" rather than a re-proposal prior to the commencement of the Hearings, which began on August 10, 2015. In accordance with the requirements of the Administrative Procedure Act,[7] FSR urges the Department to give full consideration to both the FSR July 2015 Comments and this Supplemental Comment Letter, as well as to the Hearing Transcript and extensive Public Comment File on the Proposal before determining to promulgate a final rule.

We further note that the Department recently posted several additional studies[8] examining the regulatory impact of the Proposal on its website.[9] Given that FSR and our members did not have access to these additional studies until very late in the rulemaking process, FSR and our members will require sufficient time to review and analyze the likely impact of these studies, and submit comments to the Department. Accordingly, FSR reserves the right to submit additional letters following the close of the official public comment period to reflect any comments that we and our members have on these additional studies.

FSR will address in this Supplemental Comment Letter the public policy concerns noted below.

I. FSR SIMPLE PTE REFLECTS DUTY OF LOYALTY

In a colloquy with Felicia Smith, who testified on behalf of FSR on August 10, 2015, Deputy Assistant Secretary Timothy Hauser asked for an explanation of how the fiduciary duty of loyalty is addressed in the FSR Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption (the "SIMPLE PTE").

> Mr. Hauser: "I don't see in the [S]imple PTE anything that's analogous to a duty of loyalty. I didn't see any language in there that . . . would preclude an

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[6] The Honorable Thomas E. Perez, Letter to the Honorable Ann Wagner (Aug. 7, 2015), *available at* http://fsroundtable.org/wp-content/uploads/2015/03/Perez-response-to-Bipartisan-HFSC-letter.pdf.

[7] Administrative Procedure Act, 5 U.S.C. § 553, *available at* http://www.archives.gov/federal-register/laws/administrative-procedure/553.html.

[8] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Additional Research Paper released Sept. 8, 2015*, *available at* http://www.dol.gov/ebsa/regs/conflictsofinterest.html#additionalresearchpapers.

[9] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Announcement of Transcript Availability and Comment Period Closing Date* (Sept. 8, 2015), *available at* http://www.dol.gov/ebsa/regs/1210-AB32-2-HearingTranscriptAnnouncement.html.

> advisor from putting his financial interests before the interests of the customer based on [the] pay out he stood to gain."[10]

Ms. Smith explained that the duty of loyalty was intended to be addressed in the prudence requirement, but expressed no objection to revising the terms of the SIMPLE PTE to clarify this point.[11] Accordingly, FSR has revised the SIMPLE PTE's "Impartial Conduct Standard and Other Requirements" to require, in relevant part, that "the Adviser and/or Financial Institution must . . . (z) conclude in its good faith judgment that the Recommendation is made with the primary purpose of promoting the financial objectives of the Retirement Investor . . . ."[12] As revised, the SIMPLE PTE provides the following interpretative guidance concerning application of the *best-interest standard* for purposes of the Impartial Conduct Standard:

> "[T]he Adviser and/or Financial Institution would satisfy its fiduciary duty of loyalty if the principal purpose of the Recommendation is to promote the Retirement Investor's particular investment goals. The *best-interest standard* in this Section II explicitly acknowledges that the Adviser and the Financial Institution are entitled to receive Reasonable Compensation for the services provided to the Retirement Investor."

We note that there will always be a conflict of interest under ERISA's *sole-interest standard* so long as any party that is deemed a fiduciary receives any direct or indirect compensation in respect of the advice. Thus, the purpose of the *best-interest standard* codified in the FSR SIMPLE PTE (and indeed, all prohibited transaction class exemptions the Department has issued) is to allow the advisor and financial institution to provide services that otherwise would be prohibited under ERISA absent an exemption. ERISA exemptions are intended to allow the conflict to exist with appropriate procedures to manage or mitigate the conflicts—not to create conditions that require the elimination of the conflict.

The FSR SIMPLE PTE relies on the presence of rigorous internal and compliance controls to conduct the appropriate monitoring and surveillance. We note that for securities broker-dealers that are members of FINRA, the terms of the FSR SIMPLE PTE would be another element in the required compliance toolkit. In this regard, we have clarified that, to the extent that the Retirement Investor believes that the adviser or

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[10] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *In re: Conflict of Interest Proposed Rule, Related Exemptions and Regulatory Impact Analysis Hearing Transcript of Proceedings* at 193 (Aug. 10, 2015), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript1.pdf.

[11] *Id*. at 194.

[12] *See*, "Section II(a), FSR's *SIMPLE PTE* (Revised as of Sept. 24, 2015), attached as **APPENDIX A** (the revisions to the FSR SIMPLE PTE are marked in **Appendix B)**.

financial institution has not met its obligation under the exemption, and fails to correct such failure after the Retirement Investor has brought such failure to the attention of the institution, the investor will have full recourse to the remedies that are otherwise available to the Retirement Investor under the agreements and arrangements governing the relationship between the investor and the institution. FSR believes that creating a new régime for enforcing compliance with the conditions of the FSR SIMPLE PTE that would reach above and beyond those rights and remedies already governing the relationship of the parties would be inefficient, confusing to the Retirement Investor and increase costs for all investors, and likely have the effect of delaying receipt by the Retirement Investor of any necessary relief.

II. MR. HAUSER PROFFERS A "SIMPLE" BIC EXEMPTION

In his testimony before the Department on August 13, 2015, Mr. Ron Kruszewski, Chairman and Chief Executive Officer of Stifel Financial Corporation summarized certain workability problems with the Proposal.[13]

In an extended colloquy with Mr. Kruszewski, Deputy Assistant Secretary Timothy Hauser described the parameters of a "simple best interest contract" as follows:

> "MR. HAUSER: And so I guess I'd just like to explore a little bit of this workability issue and maybe ask you just to take off the table the entirety of our best interest contract exemption and start from scratch. And I'll ask you about a few features that I think would be part of a simple best interest contract and you tell me if you think they're workable . . . . The first is a commitment, an upfront commitment to your customer . . . those recommendations will have been made in the customer's best interest in the sense that the advice will have been prudent and will put the customer's first. Would that create a workability problem?[14]
>
> "MR. HAUSER: And then similarly, if we add as a condition to that that you agree that your fees will be reasonable in relationship to the services you

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[13] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *In re: Conflict of Interest Proposed Rule, Related Exemptions and Regulatory Impact Analysis Hearing Transcript of Proceedings* at 1069 (Aug. 30, 2015), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript4.pdf (stating that "the best interest contract exemption is so operationally complex and cost of compliance, not to mention the regulatory and litigation risk, is so prohibitively high that the end result may be the elimination of a commission-based brokerage model for IRA accounts").

[14] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *In re: Conflict of Interest Proposed Rule, Related Exemptions and Regulatory Impact Analysis Hearing Transcript of Proceedings* at 1077 (Aug. 30, 2015), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript4.pdf.

render to the customer, I mean, would there be any workability problem with that?[15]

"MR. HAUSER: So, if we impose an obligation that was nothing more than a commitment . . . up front before you've taken money from the customer that the recommendations you made and are going to make are going to be . . . in your customer's best interest the way I described. It's going to be prudent and the fees are going to be reasonable in relationship to the services and even – let's say that's it . . . .[16]"

FSR believes the FSR SIMPLE PTE fully meets the terms of Mr. Hauser's proffered "simple best interest contract" as described by Mr. Hauser. The FSR SIMPLE PTE would address the Department's public policy goals while better addressing the needs of Retirement Investors,[17] because it would mitigate the burdens imposed on Retirement Investors as a result of implementation of the Department's Proposal (*e.g.*, the Department's Proposal would eliminate lower and moderate-income Americans' access to affordable professional financial advice), as more fully described in the FSR July 2015 Comments.

Accordingly, FSR recommends that the Department adopt the FSR SIMPLE PTE, which would address the Department's public policy goals of ensuring Retirement Investors receive advice that is in their best-interest, and that compensation received by firms or individuals providing advice is reasonable. The FSR SIMPLE PTE also preserves: (a) access to professional financial advice and guidance to help savers plan and meet their unique financial needs in retirement; and (b) flexibility to work with their preferred financial professional or firm, and pay for retirement products and services in the manner of their choosing. Finally, this approach would allow transaction-based compensation, as opposed to fee-based compensation, where it would make more sense for both the Retirement Investor and the financial professional or institution.

To further these objectives, we have clarified the proposed disclosure requirements of the FSR SIMPLE PTE (*e.g.*, plain English descriptions of fee arrangement, how fees are determined, how interests of Adviser/Financial Institution

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15 *Id*. at 1078.

16 *Id*. at 1082-83.

17 *Retirement Investor* means: (1) a participant or beneficiary of a plan subject to Title I of Employee Retirement Income Security Act ("ERISA") with authority to direct the investment of assets in his plan account or to take a distribution; (2) the beneficial owner of an individual retirement account ("IRA") acting on behalf of the IRA; or (3) a plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer, or director thereof) of a plan subject to Title I of ERISA to the extent it acts as a fiduciary for the plan. This definition excludes non-retirement accounts in section 408; however, if the Department ultimately decides to include these non-retirement accounts, the definition of "Retirement Investor" also would include the owners of those accounts.

differ from Retirement Investor, *etc.*), to assure that the Retirement Investors have adequate access to information regarding the potential benefits of any recommendation to the adviser and the financial institution.

III. DoL should adopt FINRA's guidance on the term "Recommendation."

We understand that the Department had intended its proposal under the BIC Exemption to apply to "recommendations" as defined under the similar rules promulgated by FINRA. FSR had precisely the same intent with the use of the term "recommendation" in the FSR SIMPLE PTE. To clarify that in the proposed FSR SIMPLE PTE, we have added language directing that such term be interpreted in a manner that is co-extensive with the rules promulgated by FINRA.

IV. Request that DoL Confirm Certain Commitments Concerning Revisions to the Proposal.

During the Hearings, Department Officials sought to allay various concerns raised about the adverse impact of the operation of its Proposal, including the BIC exemption. The following examples are illustrative.

In explaining the type(s) of communications that would not "[trip] the fiduciary line," Mr. Hauser stated:

> We fully intend for people to be able to describe the attributes of their investment products, the historical performance, what the terms are of getting into that investment, what the terms are for getting out of that investment, penalties, all the rest. That every bit of that can be described without tripping the fiduciary line. We only propose to cover an actual recommendation.[18]

In response to a suggestion that the Department "incorporate the guidance from FINRA with regard to what a recommendation means,"[19] Mr. Hauser stated his view that the Department had intended to apply the FINRA guidance.[20]

With respect to advice to buy health insurance or disability policies "to fund benefits under a plan or to provide individual health or disability benefits," Mr. Hauser observed that "the proposal doesn't cover [this advice], . . . because we don't view those

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[18] Hearing Transcript (Aug. 10, 2015) p. 138, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript1.pdf.

[19] Statement of Barbara Roper, [title], Consumer Federal of America, Hearing Transcript (Aug. 10, 2015) p. 155, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript1.pdf.

[20] Hearing Transcript (Aug. 10, 2015) p. 156, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript1.pdf. (stating that "we can bring clarity to that line by making it clearer, we're talking about a recommendation in the FINRA sort of sense, maybe giving additional examples").

as investments in the first place. The same would be true of a life insurance policy that does not have an investment component."[21]

We urge the Department to reflect these commitments in the final rule.

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[21] Hearing Transcript (Aug. 10, 2015) pp. 242-43, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript1.pdf.

FSR appreciates the opportunity to supplement its comments on the Department's Proposal. If it would be helpful to discuss FSR's specific comments or general views on this issue, please contact me at Richard.Foster@FSRoundtable.org, or Felicia Smith, Vice President and Senior Counsel for Regulatory Affairs at Felicia.Smith@FSRoundtable.org.

Sincerely yours,

Richard Foster
Senior Vice President and Senior Counsel
for Regulatory and Legal Affairs
Financial Services Roundtable

Attachments: APPENDIX A, "FSR's *Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption* (Revised as of Sept. 24, 2015)

APPENDIX B, "FSR's *Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption* (Revised as of Sept. 24, 2015) [*marked to show changes from July 21, 2015 version*]

With a copy to:

The Honorable Thomas E. Perez, Secretary

The Honorable Phyllis Borzi, Assistant Secretary
Judy Mares, Deputy Assistant Secretary for Policy
Tim Hauser, Deputy Assistant Secretary and Chief Program Operations Officer
Joe Canary, Director, Office of Regulation and Interpretation
Fred Wong, Office of Regulation and Interpretation
Lyssa Hall, Director, Office of Exemption Determinations
Karen E. Lloyd, Chief, Division of Class Exemptions, Office of Exemption Determinations
Employee Benefits Security Administration

United States Department of Labor

The Honorable Mary Jo White, Chair
The Honorable Luis A. Aguilar, Commissioner
The Honorable Daniel Gallagher, Commissioner
The Honorable Kara Stein, Commissioner
The Honorable Michael Piwowar, Commissioner

Dr. Mark J. Flannery, Director and Chief Economist
Division of Economic and Risk Analysis

David Grim, Director, Division of Investment Management
Stephen Luparello, Director, Division of Trading and Markets
United States Securities and Exchange Commission

The Honorable Timothy G. Massad, Chairman
The Honorable Sharon Y. Bowen, Commissioner
The Honorable J. Christopher Giancarlo, Commissioner
United States Commodity Futures Trading Commission

The Honorable Monica J. Lindeen, President
National Association of Insurance Commissioners

The Honorable William Beatty, President of the Board of Directors
North American Securities Administrators Association

APPENDIX A

FSR's *Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption* [As Revised September 24, 2015]

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Internal Revenue Code (Code) section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan or individual retirement account (IRA) from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary discharge its duties respecting the plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of Code section 401(a) that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under ERISA section 408(a) and Code section 4975(c)(2), the Department must find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protects the rights of participants and beneficiaries of the plan and IRA owners, respectively;

(3) If granted, the proposed exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Dates: *Written Comments*: Written comments concerning the proposed class exemption must be received by the Department on or before **[Insert date that is 60 days following publication in the Federal Register].** All comments received will be made a part of the record. Comments should state the reasons for the writer's interest in the proposed class exemption.

Addresses: All written comments concerning the proposed class exemption should be sent to the Office of Exemptive Determinations by any of the following methods, identified by ZRIN: 1210-ZA[__]:

Federal eRulemaking Portal: http://www.regulations.gov at Docket ID number: EBSA-2014-00[__]. Follow the instructions for submitting comments.

Email to: *e-OED@dol.gov*.

Fax to: (202) 693-8474.

Mail: Office of Exemptive Determinations, Employee Benefits Security Administration, (Attention: D-11712), U.S. Department of Labor, 200 Constitution Avenue, NW, Suite 400, Washington, DC 20210.

Hand Delivery/Courier: Office of Exemptive Determinations, Employee Benefits Security Administration, (Attention: D-11712), U.S. Department of Labor, 122 C Street, NW, Suite 400, Washington, DC 20001.

Instructions. All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW, Washington, DC 20210. Comments will also be available online at *www.regulations.gov*, at Docket ID number: EBSA-2014-00[__] and *www.dol.gov/ebsa*, at no charge.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security Number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

For Further Information Contact: Karen E. Lloyd or Brian L. Shiker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (202) 693-8824 (this is not a toll-free number).

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Proposed Simple Investment Management Principles and Expectations Exemption

Section I—Best Interest Exemption

(a) *In general*. ERISA and the Internal Revenue Code (Code) prohibit a fiduciary with respect to an employee benefit plan (Plan) and any individual retirement account (IRA) from receiving compensation that varies based on its investment recommendations. Similarly, a fiduciary is prohibited from receiving compensation from third parties in connection its advice.

This exemption permits certain persons who provide investment advice or guidance to Retirement Investors (as defined in Section VI, below), and their associated Financial Institutions, Affiliates and other Related Entities (each as defined in Section VI, below), to receive such otherwise prohibited compensation as described below.

(b) *Covered transactions*. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities to receive compensation for products or services provided in connection with the following: (i) an acquisition, disposition or holding of an asset or an interest in an investment program by a Plan, participant or beneficiary account, or IRA, as a result of the Adviser's and/or Financial Institution's advice to any Retirement Investor, including, without limitation, Recommendations with respect to proprietary or other limited range of products or services or products or services that give rise to Third Party Payments; or (ii) distributions, "rollovers," transfers of property or assets of the Plan or IRA. The exemption provides relief from the restrictions of ERISA sections 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F).

The Adviser and Financial Institution must comply with the provisions of Sections II-IV, below to rely on this exemption.

(c) *Exclusions*. This exemption does not apply to the following:

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

(2) The Adviser or Financial Institution (i) exercises any discretionary authority or discretionary control respecting management of the Plan or IRA assets involved in the transaction or exercises any authority or control respecting management or disposition of such assets; or (ii) has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA.

Section II—Impartial Conduct Standard and Other Requirements

(a) *Impartial Conduct Standard*. (1) When providing investment advice to the Retirement Investor regarding any asset of a Plan or IRA or any interest in an investment program in which a Plan or IRA participates or will participate, the Adviser and/or Financial Institution will provide investment advice that is in the "Best Interest" of the Retirement Investor. The *best interest* of the Retirement Investor means that at the time any Recommendation is made, the Adviser and/or Financial Institution's Recommendation to the client: (i) reflects the care, skill, prudence, and diligence under the circumstances then-prevailing that a prudent person would exercise; and (ii) provides the Retirement Investor with an opportunity for an appropriate return, risk exposure, or benefit taking into account the Retirement Investor's unique needs as disclosed by the Retirement Investor to the Adviser and/or Financial Institution. Under this standard, the Adviser and/or Financial Institution must (y) evaluate any Recommendation made to a Retirement Investor in light of the totality of information the Retirement Investor has disclosed to the Adviser and/or Financial Institution concerning the Retirement Investor's investment objectives, the Retirement Investor's risk profile and tolerance, financial circumstances and needs, and the role of the Recommendation as part of the Retirement Investor's overall investment portfolio; and (z) conclude in its good faith judgment that the Recommendation is made with the primary purpose of promoting the financial objectives of the Retirement Investor; and

(2) When providing investment advice to the Retirement Investor regarding a Plan or IRA or any interest in an investment program in which a Plan or IRA participates or will participate, the Adviser and/or Financial Institution will not make a Recommendation with regard to such asset or interest if the compensation anticipated to be received by the Adviser, Financial Institution, Affiliates and Related Entities in connection with the acquisition, disposition or holding of the asset or interest by the Plan, participant or beneficiary account, or IRA, will exceed Reasonable Compensation. The term *Recommendation* is defined in Section VI, below.

NOTE: For purposes of the definition of "best interest" in Section II(a)(ii) above, the Adviser and/or Financial Institution would satisfy its fiduciary duty of loyalty if the principal purpose of the Recommendation is to promote the Retirement Investor's particular investment goals. The *best-interest standard* in this Section II explicitly acknowledges that the Adviser and the Financial Institution are entitled to receive Reasonable Compensation for the services provided to the Retirement Investor.

(b) *Conditions*. The Adviser and/or Financial Institution shall:

(1) Adopt written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest (as defined in Section VI, below) on any

Recommendation and ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II (a), above; and

(2) Identify Material Conflicts of Interest and adopt measures reasonably designed to ensure compliance with the Impartial Conduct Standards set forth in Section II (a), above.

(c) *Disclosures*. The Adviser and/or the Financial Institution must provide clear and concise disclosures in "plain English" to the Retirement Investor covering the following items:

(1) Identify and disclose any Material Conflicts of Interest, and the policies that the Adviser and/or Financial Institution have in place to mitigate the impact of any such Material Conflicts of Interests;

(2) Inform the Retirement Investor of its right to obtain (and when requested, to provide the Retirement Investor with) complete information about the fees associated with the asset or interest being recommended to be acquired, disposed of or held, that are paid or payable to the Adviser, Financial Institution, and any Affiliates, including all direct and indirect fees. Such disclosures must describe in plain English (i) any arrangements under which the fees are payable, (ii) a general explanation of how the amount of the fees will be determined, including a general example illustrating such calculation, (iii) how the interests of the Adviser and the Financial Institution differ from those of the Retirement Investor and (iv) the reason that such fees are being paid to the Adviser and/or the Financial Institution. Such disclosures shall be made in a manner consistent with the requirements applicable to covered service providers under Section 408(b)(2) of ERISA; and

(3) Disclose to the Retirement Investor whether the Adviser and/or Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the recommended acquisition, disposition or holding of an asset of a Plan or IRA or any interest in an investment program in which a Plan or IRA participates or will participate.

Section III—Compliance Processes

(a) *Compliance Process*es. To assure compliance with the conditions in Section II of this exemption, the Adviser and/or Financial Institution must implement the following compliance processes:

(1) Adopt written policies and procedures reasonably designed to ensure that the Adviser and/or Financial Institution complies with the conditions of the exemption. The policies and procedures must be tailored to the business and operations of the Adviser

and/or Financial Institution, and must include appropriate training for relevant personnel who manage the Adviser's and/or Financial Institution's business and operations and the persons who interact with Retirement Investors, including Advisers and call center and other customer service staff.

(2) Adopt written policies and procedures reasonably designed to remediate promptly any failure to comply with the conditions of this exemption. Such policies would include a process for the Retirement Investor to submit a written complaint describing the alleged failure to meet the conditions of the exemption, which would be followed by an opportunity for the Adviser and/or Financial Institution to resolve the complaint. If the complaint accurately reflects a failure to comply with the otherwise applicable provisions of the exemption, the policies would require that the Adviser and/or Financial Institution promptly restore the Retirement Investor to the same position as it would have been in had such failure not occurred. If the correction is properly implemented, the Adviser and/or Financial Institution will be deemed to be in compliance with this exemption. To the extent that the Retirement Investor does not believe that the Financial Institution has resolved the complaint appropriately, the Retirement Investor will have recourse to the same remedies that are available generally to it under the agreements or other provisions governing its arrangements with the Financial Institution.

Section IV—Recordkeeping

(a) *Recordkeeping*. The Adviser and/or Financial Institution maintains for a period of six (6) years, in a manner that is accessible for examination, the records necessary to enable the persons described in paragraph (b) of this Section IV to determine whether the Adviser and/or Financial Institution has met the conditions of this exemption; *provided* that:

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

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

(b) (1) Except as provided in paragraph (b)(2) of this Section IV (and notwithstanding any provisions of ERISA section 504(a)(2) and (b)), the records referred

to in paragraph (a) of this Section IV are unconditionally available at their customary location for examination during normal business hours by:

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

(B) Any authorized employee or representative of the Department with respect to Plans subject to ERISA;

(C) Any fiduciary of a Plan that engaged in an acquisition, disposition or holding of an asset or interest in an investment program which is acquired, disposed of or held in reliance on this exemption, or any authorized employee or representative of such fiduciary; or

(D) Any participant or beneficiary of a Plan or IRA owner that engaged in the acquisition, disposition or holding of an asset or interest which is purchased, disposed of or held in reliance on a Recommendation made by the Adviser and/or Financial Institution under this exemption, or any authorized employee or representative of such participant, beneficiary or owner.

(2) None of the persons described in paragraph (b)(1)(C) and (D) of this Section IV are authorized to examine privileged trade secrets or privileged commercial or financial information, of the Adviser and/or Financial Institution; or information identifying other individuals.

Section V—Exemption for Pre-Existing Transactions

Covered transaction. Subject to the applicable conditions described in this Section V, the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b) shall not apply to the receipt of compensation by an Adviser, Financial Institution, and any Affiliate and Related Entity, in connection with the acquisition, holding or disposition of any asset or interest, as a result of the Adviser's and/or Financial Institution's advice, that was purchased, disposed of, or held by a Plan, participant or beneficiary account, or an IRA before the Applicability Date.

Section VI—Definitions

For purposes of this exemption:

(a) *"Adviser"* means an individual who:

(1) Is a fiduciary of a Plan or IRA, including by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) and/or Code section 4975(e)(3)(B), and the applicable regulations thereunder; and

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

(b) *"Affiliate"* of an Adviser or Financial Institution means:

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

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

(3) Any corporation, partnership, or other entity of which the Adviser and/or Financial Institution is an officer, director, employee, or similar position; or in which the Adviser and/or Financial Institution is a partner.

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

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

(2) A bank or similar financial institution supervised by the United States or any state or territory of the United States; or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act [12 U.S.C. § 1813(b)(1)]);

(3) An insurance company qualified to do business under the laws of any state or territory of the United States; *provided*, that such insurance company:

(A) Has obtained a Certificate of Authority from the insurance commissioner of its jurisdiction of domicile which has neither been revoked nor suspended;

(B) Has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year, or has undergone a financial examination (within the meaning of the law of its domiciliary

jurisdiction) by the jurisdiction's insurance commissioner within the preceding five (5) years; and

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

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

(d) *"Individual Retirement Account"* (*"IRA"*) means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including an individual retirement account described in Code section 408(a), but excluding any non-retirement account (*e.g.*, health savings account, education savings account, *etc*.).

(e) *"Material,"* when used to qualify a requirement in this exemption, limits the information required to those matters to which there is a substantial likelihood that a reasonable Retirement Investor would attach importance in determining engage in—or refrain from engaging in—a particular action or transaction(s).

(f) *"Material Conflict of Interest"* means an Adviser or Financial Institution has a financial interest that could materially affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding an asset or an interest in an investment program.

(g) *"Plan"* means any employee benefit plan described in ERISA section 3(3), and any plan described in Code section 4975(e)(1)(A).

(h) *"Recommendation"* means a communication that, based on its content, context, and presentation, would reasonably be viewed by an objective person as an explicit suggestion that the advice recipient engage in, or refrain from engaging in, a specific transaction or transactions; *provided, however* that no such communication (i) that is a general advertisement shall constitute a "recommendation" unless it includes an explicit suggestion that the recipient purchase or sell a specific asset; and (ii) shall be considered a "recommendation" to continue holding an asset absent an express statement that the advice recipient should not sell or otherwise dispose of the asset. Whether any communication would constitute a Recommendation under this exemption is intended to be determined in a manner coextensive with the interpretation of the same term under the rules promulgated by the Financial Industry Regulatory Authority.

(i) *"Reasonable Compensation"* means an amount of compensation that is not in excess of prevailing market rates or practices for investments in that specific product type. *For example, if an* Adviser recommends to a Retirement Investor an investment in

a mutual fund that is primarily engaged in the investment of domestic securities, which charges fees within a range of fees commonly charged generally by funds of similar size and with similar investment objectives, the compensation received would be deemed Reasonable Compensation.

(1) Any compensation received by a broker or dealer subject to regulation by the United States Securities and Exchange Commission (*"SEC"*) or the Financial Industry Regulatory Authority (*"FINRA"*) that is otherwise permitted to be received under applicable SEC or FINRA regulations, in conformity with applicable securities laws, shall be deemed to be Reasonable Compensation.

(2) Any compensation received by an insurance agent or insurance company subject to regulation by insurance authorities of any state or territory of the United States that is otherwise permitted to be received under applicable insurance regulations, in conformity with applicable insurance laws, shall be deemed to be Reasonable Compensation.

(3) In no event would the term Reasonable Compensation include gifts or gratuities that exceed *de minimis* amounts (*i.e.*, less than $250 in the aggregate *per annum*), or as otherwise permitted by applicable law.

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

(k) *"Retirement Investor"* means:

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

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

(3) A Plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof) of a Plan subject to Title I of ERISA to the extent it acts as a fiduciary for the Plan.

(l) *"Third-Party Payments"* mean sales charges when not paid directly by the Plan, participant or beneficiary account, or IRA owner; or "rule 12b-1" fees (within the meaning of 17 C.F.R. § 270.12b-1) and other payments paid to the Financial Institution or an Affiliate or Related Entity by a third party as a result of the acquisition, disposition or holding of an asset or interest in an investment program by a Plan, participant or beneficiary account, or IRA owner.

APPENDIX B

FSR's *Simple Investment Management Principles and Expectations Prohibited Transaction Class Exemption* [As Revised September 24, 2015]

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Internal Revenue Code (Code) section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan or individual retirement account (IRA) from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary discharge its duties respecting the plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of Code section 401(a) that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under ERISA section 408(a) and Code section 4975(c)(2), the Department must find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protects the rights of participants and beneficiaries of the plan and IRA owners, respectively;

(3) If granted, the proposed exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Dates: *Written Comments*: Written comments concerning the proposed class exemption must be received by the Department on or before **[Insert date that is 60 days following publication in the Federal Register].** All comments received will be made a part of the record. Comments should state the reasons for the writer's interest in the proposed class exemption.

Addresses: All written comments concerning the proposed class exemption should be sent to the Office of Exemptive Determinations by any of the following methods, identified by ZRIN: 1210-ZA[__]:

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Federal eRulemaking Portal: *http://www.regulations.gov* at Docket ID number: EBSA-2014-00[__]. Follow the instructions for submitting comments.

Email to: *e-OED@dol.gov*.

Fax to: (202) 693-8474.

Mail: Office of Exemptive Determinations, Employee Benefits Security Administration, (Attention: D-11712), U.S. Department of Labor, 200 Constitution Avenue, NW, Suite 400, Washington, DC 20210.

Hand Delivery/Courier: Office of Exemptive Determinations, Employee Benefits Security Administration, (Attention: D-11712), U.S. Department of Labor, 122 C Street, NW, Suite 400, Washington, DC 20001.

Instructions. All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW, Washington, DC 20210. Comments will also be available online at *www.regulations.gov*, at Docket ID number: EBSA-2014-00[__] and *www.dol.gov/ebsa*, at no charge.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security Number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

For Further Information Contact: Karen E. Lloyd or Brian L. Shiker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (202) 693-8824 (this is not a toll-free number).

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Proposed Simple Investment Management Principles and Expectations Exemption

Section I—Best Interest Exemption

(a) *In general*. ERISA and the Internal Revenue Code (Code) prohibit a fiduciary with respect to an employee benefit plan (Plan) and any individual retirement account (IRA) from receiving compensation that varies based on its investment recommendations. Similarly, a fiduciary is prohibited from receiving compensation from third parties in connection its advice.

This exemption permits certain persons who provide investment advice or guidance to Retirement Investors (as defined in Section VI, below), and their associated Financial Institutions, Affiliates and other Related Entities (each as defined in Section VI, below), to receive such otherwise prohibited compensation as described below.

(b) *Covered transactions*. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities to receive compensation for products or services provided in connection with the following: (i) an acquisition, disposition or holding of an asset or an interest in an investment program by a Plan, participant or beneficiary account, or IRA, as a result of the Adviser's and/or Financial Institution's advice to any Retirement Investor, including, without limitation, Recommendations with respect to proprietary or other limited range of products or services or products or services that give rise to Third Party Payments; or (ii) distributions, "rollovers," transfers of property or assets of the Plan or IRA. The exemption provides relief from the restrictions of ERISA sections 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F).

The Adviser and Financial Institution must comply with the provisions of Sections II-IV, below to rely on this exemption.

(c) *Exclusions*. This exemption does not apply to the following:

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

(2) The Adviser or Financial Institution (i) exercises any discretionary authority or discretionary control respecting management of the Plan or IRA assets involved in the transaction or exercises any authority or control respecting management or disposition of such assets; or (ii) has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA.

Section II—Impartial Conduct Standard and Other Requirements

(a) *Impartial Conduct Standard*. (1) When providing investment advice to the Retirement Investor regarding any asset of a Plan or IRA or any interest in an investment program in which a Plan or IRA participates or will participate, the Adviser and/or Financial Institution will provide investment advice that is in the "Best Interest" of the Retirement Investor. The *best interest* of the Retirement Investor means that at the time any Recommendation is made, the Adviser and/or Financial Institution's Recommendation to the client: (i) reflects the care, skill, prudence, and diligence under the circumstances then-prevailing that a prudent person would exercise; and (ii) provides the Retirement Investor with an opportunity for an appropriate return, risk exposure, or benefit taking into account the Retirement Investor's unique needs as disclosed by the Retirement Investor to the Adviser and/or Financial Institution. Under this standard, the Adviser and/or Financial Institution must (y) evaluate any Recommendation made to a Retirement Investor in light of the totality of information the Retirement Investor has disclosed to the Adviser and/or Financial Institution concerning the Retirement Investor's investment objectives, the Retirement Investor's risk profile and tolerance, financial circumstances and needs, and the role of the Recommendation as part of the Retirement Investor's overall investment portfolio; and (z) conclude in its good faith judgment that the Recommendation is made with the primary purpose of promoting the financial objectives of the Retirement Investor; and

(2) When providing investment advice to the Retirement Investor regarding a Plan or IRA or any interest in an investment program in which a Plan or IRA participates or will participate, the Adviser and/or Financial Institution will not make a Recommendation with regard to such asset or interest if the compensation anticipated to be received by the Adviser, Financial Institution, Affiliates and Related Entities in connection with the acquisition, disposition or holding of the asset or interest by the Plan, participant or beneficiary account, or IRA, will exceed Reasonable Compensation. The term *Recommendation* is defined in Section VI, below.

NOTE: For purposes of the definition of "best interest" in Section II(a)(ii) above, the Adviser and/or Financial Institution would satisfy its fiduciary duty of loyalty if the principal purpose of the Recommendation is to promote the Retirement Investor's particular investment goals. The *best-interest standard* in this Section II explicitly acknowledges that the Adviser and the Financial Institution are entitled to receive Reasonable Compensation for the services provided to the Retirement Investor.

(b) *Conditions*. The Adviser and/or Financial Institution shall:

(1) Adopt written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest (as defined in Section VI, below) on any Recommendation and ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II (a), above; and

(2) Identify Material Conflicts of Interest and adopt measures reasonably designed to ensure compliance with the Impartial Conduct Standards set forth in Section II (a), above.

(c) *Disclosures*. The Adviser and/or the Financial Institution must provide clear and concise disclosures in "plain English" to the Retirement Investor covering the following items:

(1) Identify and disclose any Material Conflicts of Interest, and the policies that the Adviser and/or Financial Institution have in place to mitigate the impact of any such Material Conflicts of Interests;

(2) Inform the Retirement Investor of its right to obtain (and when requested, to provide the Retirement Investor with) complete information about the fees associated with the asset or interest being recommended to be acquired, disposed of or held, that are paid or payable to the Adviser, Financial Institution, and any Affiliates, including all direct and indirect fees. Such disclosures must describe in plain English (i) any arrangements under which the fees are payable, (ii) a general explanation of how the amount of the fees will be determined, including a general example illustrating such calculation, (iii) how the interests of the Adviser and the Financial Institution differ from those of the Retirement Investor and (iv) the reason that such fees are being paid to the Adviser and/or the Financial Institution. Such disclosures shall be made in a manner consistent with the requirements applicable to covered service providers under Section 408(b)(2) of ERISA; ~~*provided*, that any disclosures made that satisfy applicable federal securities or state banking or insurance law or applicable regulations thereunder with respect to Material Conflicts of Interests and the direct and indirect fees paid or payable to the Adviser, Financial Institution, or any of their respective Affiliates will be deemed to satisfy the disclosure requirements set forth in this Section II(c)(2); and~~and

(3) Disclose to the Retirement Investor whether the Adviser and/or Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the recommended acquisition, disposition or holding of an asset of a Plan or IRA or any interest in an investment program in which a Plan or IRA participates or will participate.

Section III—Compliance Processes

(a) *Compliance Process*es. To assure compliance with the conditions in Section II of this exemption, the Adviser and/or Financial Institution must implement the following compliance processes:

(1) Adopt written policies and procedures reasonably designed to ensure that the Adviser and/or Financial Institution complies with the conditions of the exemption. The policies and procedures must be tailored to the business and operations of the Adviser and/or Financial Institution, and must include appropriate training for relevant personnel who manage the Adviser's and/or Financial Institution's business and operations and the

persons who interact with Retirement Investors, including Advisers and call center and other customer service staff.

–(2) Adopt written policies and procedures reasonably designed to remediate promptly any failure to comply with the conditions of this exemption. Such policies would include a process for the Retirement Investor to submit a written complaint describing the alleged failure to meet the conditions of the exemption, which would be followed by an opportunity for the Adviser and/or Financial Institution to resolve the complaint. If the ~~compliant~~complaint accurately reflects a failure to comply with the otherwise applicable provisions of the exemption, the policies would require that the Adviser and/or Financial Institution promptly restore the Retirement Investor to the same position as it would have been in had such failure not occurred. If the correction is properly implemented, the Adviser and/or Financial Institution will be deemed to be in compliance with this exemption. -To the extent that the Retirement Investor does not believe that the Financial Institution has resolved the complaint appropriately, the Retirement Investor will have recourse to the same remedies that are available generally to it under the agreements or other provisions governing its arrangements with the Financial Institution.

Section IV—Recordkeeping

(a) *Recordkeeping*. The Adviser and/or Financial Institution maintains for a period of six (6) years, in a manner that is accessible for examination, the records necessary to enable the persons described in paragraph (b) of this Section IV to determine whether the Adviser and/or Financial Institution has met the conditions of this exemption; *provided* that:

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

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

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

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

(B) Any authorized employee or representative of the Department with respect to Plans subject to ERISA;

(C) Any fiduciary of a Plan that engaged in an acquisition, disposition or holding of an asset or interest in an investment program which is acquired, disposed of or held in reliance on this exemption, or any authorized employee or representative of such fiduciary; or

(D) Any participant or beneficiary of a Plan or IRA owner that engaged in the acquisition, disposition or holding of an asset or interest which is purchased, disposed of or held in reliance on a Recommendation made by the Adviser and/or Financial Institution under this exemption, or any authorized employee or representative of such participant, beneficiary or owner.

(2) None of the persons described in paragraph (b)(1)(C) and (D) of this Section IV are authorized to examine privileged trade secrets or privileged commercial or financial information, of the Adviser and/or Financial Institution; or information identifying other individuals.

Section V—Exemption for Pre-Existing Transactions

Covered transaction. Subject to the applicable conditions described in this Section V, the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b) shall not apply to the receipt of compensation by an Adviser, Financial Institution, and any Affiliate and Related Entity, in connection with the acquisition, holding or disposition of any asset or interest, as a result of the Adviser's and/or Financial Institution's advice, that was purchased, disposed of, or held by a Plan, participant or beneficiary account, or an IRA before the Applicability Date.

Section VI—Definitions

For purposes of this exemption:

(a) *"Adviser"* means an individual who:

(1) Is a fiduciary of a Plan or IRA, including by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) and/or Code section 4975(e)(3)(B), and the applicable regulations thereunder; and

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

(b) *"Affiliate"* of an Adviser or Financial Institution means:

(1) Any person directly or indirectly through one or more intermediaries that controls, is controlled by, or is under common control with the Adviser or Financial

Institution. For this purpose, *"control"* means the power to exercise a controlling influence over the management or policies of a person;

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

(3) Any corporation, partnership, or other entity of which the Adviser and/or Financial Institution is an officer, director, employee, or similar position; or in which the Adviser and/or Financial Institution is a partner.

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

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

(2) A bank or similar financial institution supervised by the United States or any state or territory of the United States; or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act [12 U.S.C. § 1813(b)(1)]);

(3) An insurance company qualified to do business under the laws of any state or territory of the United States; *provided*, that such insurance company:

(A) Has obtained a Certificate of Authority from the insurance commissioner of its jurisdiction of domicile which has neither been revoked nor suspended;

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

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

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

(d) *"Individual Retirement Account"* (*"IRA"*) means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including an individual retirement account described in Code section 408(a), but excluding any non-retirement account (*e.g.*, health savings account, education savings account, *etc*.).

(e) *"Material,"* when used to qualify a requirement in this exemption, limits the information required to those matters to which there is a substantial likelihood that a reasonable Retirement Investor would attach importance in determining engage in—or refrain from engaging in—a particular action or transaction(s).

(f) *"Material Conflict of Interest"* means an Adviser or Financial Institution has a financial interest that could materially affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding an asset or an interest in an investment program.

(g) *"Plan"* means any employee benefit plan described in ERISA section 3(3), and any plan described in Code section 4975(e)(1)(A).

(h) *"Recommendation"* means a communication that, based on its content, context, and presentation, would reasonably be viewed by an objective person as an explicit suggestion that the advice recipient engage in, or refrain from engaging in, a specific transaction or transactions; *provided, however* that no such communication (i) that is a general advertisement shall constitute a "recommendation" unless it includes an explicit suggestion that the recipient purchase or sell a specific asset; and (ii) shall be considered a "recommendation" to continue holding an asset absent an express statement that the advice recipient should not sell or otherwise dispose of the asset. Whether any communication would constitute a Recommendation under this exemption is intended to be determined in a manner coextensive with the interpretation of the same term under the rules promulgated by the Financial Industry Regulatory Authority.

(i) *"Reasonable Compensation"* means an amount of compensation that is not in excess of prevailing market rates or practices for investments in that specific product type. *For example, if an* Adviser recommends to a Retirement Investor an investment in a mutual fund that is primarily engaged in the investment of domestic securities, which charges fees within a range of fees commonly charged generally by funds of similar size and with similar investment objectives, the compensation received would be deemed Reasonable Compensation.

(1) Any compensation received by a broker or dealer subject to regulation by the United States Securities and Exchange Commission (*"SEC"*) or the Financial Industry Regulatory Authority (*"FINRA"*) that is otherwise permitted to be received under applicable SEC or FINRA regulations, in conformity with applicable securities laws, shall be deemed to be Reasonable Compensation.

(2) Any compensation received by an insurance agent or insurance company subject to regulation by insurance authorities of any state or territory of the United States that is otherwise permitted to be received under applicable insurance regulations, in conformity with applicable insurance laws, shall be deemed to be Reasonable Compensation.

(3) In no event would the term Reasonable Compensation include gifts or gratuities that exceed *de minimis* amounts (*i.e.*, less than $250 in the aggregate *per annum*), or as otherwise permitted by applicable law.

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

(k) *"Retirement Investor"* means:

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

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

(3) A Plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof) of a Plan subject to Title I of ERISA to the extent it acts as a fiduciary for the Plan.

(l) *"Third-Party Payments"* mean sales charges when not paid directly by the Plan, participant or beneficiary account, or IRA owner; or "rule 12b-1" fees (within the meaning of 17 C.F.R. § 270.12b-1) and other payments paid to the Financial Institution or an Affiliate or Related Entity by a third party as a result of the acquisition, disposition or holding of an asset or interest in an investment program by a Plan, participant or beneficiary account, or IRA owner.