E*TRADE FINANCIAL

September 24, 2015

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

RE: Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice (RIN 1210-AB32)
Proposed Best Interest Contract Exemption (ZRIN: 1210-ZA25)
Proposed Class Exemption for Principal Transactions in Certain Debt Securities Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (ZRIN: 1210-ZA25)
Proposed Amendments to Various Exemptions (ZRIN: 1210-ZA25)

Dear Ladies and Gentlemen:

E*TRADE Financial Corporation ("E*TRADE") appreciates the opportunity to provide comments regarding the recently re-proposed Department of Labor ("DOL") regulation to redefine the term "fiduciary" for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") and Section 4975 of the Internal Revenue Code of 1986 (the "Code"),[1] the proposed new Best Interest Contract Exemption ("BIC Exemption"),[2] the proposed new class exemption for principal transactions in certain debt securities,[3] and amendments to certain existing prohibited transaction exemptions ("PTEs") (collectively, the "Proposal").

We have participated in the efforts of industry groups like the Securities Industry and Financial Markets Association ("SIFMA") and Money Management Institute ("MMI") to comment on the Proposal. We affirm those efforts and do not recreate their detailed analysis of the Proposal in this letter. Instead, we hope to illustrate the real-world implications of the Proposal from our

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[1] Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 80 Fed. Reg. 21928 (Apr. 20, 2015) (to be codified at 29 C.F.R. pts. 2509 & 2510) [hereinafter "Proposed Definition of Fiduciary"].

[2] Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550).

[3] Proposed Class Exemption for Principal Transactions in Certain Debt Securities Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, 80 Fed. Reg. 21989 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550).

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unique vantage point servicing retail investors ("Main Street investors"), including those saving for retirement through individual retirement accounts ("IRAs").

We are actively involved in the IRA marketplace, including individual IRAs, IRA rollovers, and small business IRAs, and currently provide low cost custodial and brokerage services to approximately 880,000[4] retirement accounts, making us uniquely positioned to understand the impact of, and provide comments regarding, the Proposal.

We wholeheartedly support efforts to advance the best interests of Main Street investors. Like many in our industry, we would welcome a "best interests" or fiduciary standard applicable industry-wide when providing investment advice about securities to Main Street investors. We remain hopeful that such a standard will emerge from the U.S. Securities and Exchange Commission ("SEC") and would equally welcome the DOL's efforts in the retirement space to work in harmony with that standard, or a jointly crafted DOL-SEC standard.

E*TRADE's core values embrace three concepts intrinsically linked with the best interests of Main Street investors:

- **CHOICE** -- Providing a full spectrum of account management solutions, including self-directed trading, , advice when a customer wants it, or fully discretionary advice;
- **EDUCATION** -- Empowering Main Street investors with the tools, education and information with which to make informed investment decisions; and
- **CLARITY** -- Providing a fully transparent customer experience for both retail and retirement accounts.

Our concerns expressed herein do not arise from any hesitation in acting as an investment fiduciary; rather, we believe that the status of fiduciary should be entered into purposefully by both parties intending to form a fiduciary relationship, not inadvertently because, in hindsight, an Internet tool was found to have offered fiduciary advice to a casual user or as a result of some other unintended aspect of the Proposal. We are concerned that the Proposal will result in Main Street investors actually having reduced choice, less access to education and lack of clarity in their retirement planning for the following reasons:

- *Less Choice*. In our experience, the majority of Main Street investors choose self-directed accounts because they want lower cost alternatives, and because they affirmatively choose to manage their own assets. We believe the BIC Exemption is not a realistic alternative as it is complicated, expensive to implement, and ultimately, unworkable in practice, as explained more fully below. Therefore, a likely result of the Proposal will be that many industry participants will forgo the BIC Exemption and service IRA account holders exclusively through fully discretionary accounts or on an unsolicited basis. More limited investor choice and increased costs for IRA account holders will be the outcome for Main Street investors who no longer have the option to hold IRAs as

[4] Data as of June 30, 2015.

brokerage accounts. The DOL has offered robo accounts as a potential alternative for Main Street investors. While robo accounts are a cost-efficient and innovative way to provide investment guidance, robo tools may not be for everyone; many investors prefer to interact with financial consultants directly or prefer to make their own decisions. Any sort of a one-size-fits-all solution that eliminates investor choice is not in the best interests of Main Street investors.

- *Less Education*. As proposed, the definition of "fiduciary" encompasses a broad range of activities that do not create a fiduciary duty under the federal securities laws. The proposed definition captures information, tools, and assistance often provided for free to non-account holders and IRA account holders alike. These valuable resources currently available to Main Street customers would have to be drastically reduced. The Proposal will also limit simple informational discussions and fact-gathering conversations with Main Street investors who need assistance with their retirement savings, but have not opened accounts. Less education does not serve the best interests of Main Street investors.

- *Less Clarity*. We fear the current Proposal will confuse Main Street investors and result in disparate, disadvantageous treatment for IRA account holders. The creation of a third regulatory standard and new rules, limits and obligations on IRA accounts may confuse investors and cause them to wonder why they have more limited investment choices for their IRA account than for their brokerage account. In our experience, Main Street investors see their financial assets holistically; they pursue complementary investment strategies in their retirement and non-retirement accounts, and rely on their total net worth — not just those assets in specifically designated retirement accounts — to carry them into retirement. Confusing standards, limited choices, and reduced access to investment options in retirement accounts are not in the best interests of Main Street investors.

Investors at E*TRADE have choices: They can choose among entirely self-directed accounts, accounts that receive advice only when the customer requests it, and fully discretionary accounts. Such alternatives honor an investor's fundamental right to choose what type of account to hold, how much advice to receive and at what cost. The variety of costs, choices and products and the ability of an IRA customer to make his or her own account choices are imperiled by the Proposal for the reasons detailed in the accompanying appendix.

We hope the DOL finds our perspective to be helpful as it considers how the Proposal may limit the retirement marketplace, especially for Main Street investors.

Thank you again for the opportunity to provide our comments on the proposed regulation and PTEs. Should you have any questions or require additional information, please contact the undersigned at 703.236.8506 or jballowe@etrade.com.

Sincerely,

James E. Ballowe, Jr.
Senior Vice President and General Counsel, Brokerage
E*TRADE Financial Corporation

APPENDIX

I. About E*TRADE and Its Customers.

E*TRADE is an innovative financial services company offering a full suite of easy-to-use online brokerage, investing, and related banking solutions, delivered at competitive prices.[5] We provide the products, tools, and services that allow individuals to take control of their financial future and execute on both their near-term and long-term investing goals. We provide these services to customers online and through our network of customer service representatives, investment professionals, and Financial Consultants – over the phone and in person at our 30 E*TRADE branches.

E*TRADE has positioned itself in the marketplace to provide a broad range of services to Main Street investors – that is, investors seeking quality service at a lower cost. Our core business is providing unsolicited trade execution services online to self-directed retail customers; however, E*TRADE also provides comprehensive educational resources, useful and intuitive tools, and professional guidance on its website to both E*TRADE customers and the general public. In order to better serve Main Street investors, we have established low account minimums, low commissions, and low fees.

E*TRADE offers a variety of free educational online tools available to both customers and the general public. We do not offer any proprietary investment products, and we receive traditional compensation for the sale of mutual funds (*e.g.*, rule 12b-1 fees, shareholder service fees, supermarket payments from mutual funds on our mutual fund platform, or "supermarket," and revenue sharing from certain commission-free exchange-traded funds ("ETFs")) on our platform which provides Main Street investors with access to over 7,000 funds, including over 4,000 no-load and nearly 6,000 no transaction fee funds.[6] Revenue sharing information is disclosed to our customers in each fund's prospectus as required by Financial Industry Regulatory Authority ("FINRA") and SEC rules and regulations.

A representative Main Street investor at E*TRADE has an account size well under $100,000[7]. Many of our Main Street investors have both a retail account and an IRA rollover account. We

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[5] Securities products and services are offered by E*TRADE Securities LLC ("E*TRADE Securities") (a member of the Financial Industry Regulatory Authority ("FINRA") and Securities Investor Protection Company ("SIPC")); banking products and services are offered by E*TRADE Bank (a Federal savings bank and member of the Federal Deposit Insurance Corporation ("FDIC")) or its subsidiaries; and full portfolio management and advisory services are offered by E*TRADE Capital Management, LLC ("E*TRADE Capital Management") (an investment adviser registered with the SEC).

[6] Data as of February 2015.

[7] Data as of June 30, 2015.

have approximately 880,000 retirement accounts at E*TRADE and 27% of our brokerage accounts are retirement accounts, with 17% of our assets in retirement accounts.[8] E*TRADE Securities offers several self-directed IRA account options, including a Roth IRA, traditional IRA, Rollover IRA, Beneficiary IRA, IRA for Minors, E*TRADE OneStop Rollover IRA, E*TRADE Complete™ IRA, SEP IRA, and Simple IRA.

E*TRADE offers a range of solutions for Main Street investors to choose from, depending on the level of involvement they wish to have in managing their assets. The vast majority of our accountholders are self-directed investors. Those self-directed Main Street investors who need assistance completing an IRA rollover can access step-by-step assistance from E*TRADE Securities "Rollover Specialists," who guide clients through the rollover process, including by assisting with paperwork, contacting the former plan, and following up with the customer throughout the process. In addition, Main Street investors seeking assistance with asset allocation and investing decisions have a variety of options available by phone, online, or in a branch office. For example, customers can access E*TRADE Securities Financial Consultants or select, through an online portal, an E*TRADE OneStop Rollover IRA, which is an IRA composed of a professionally managed portfolio of mutual funds or ETFs selected by E*TRADE Capital Management, LLC ("ETCM"), an investment adviser registered with the SEC. Those Main Street investors that do not desire to direct their own investments may enroll in a fully discretionary account managed by the investment professionals at ETCM. ETCM clients receive a copy of its Form ADV, Part 2A disclosures, which include information about firm conflicts of interest, fees, services, and disciplinary information.

II. The Proposal Would Limit Our Ability to Provide Information and Assistance to Main Street Investors in Considering Retirement Vehicles.

A. The Proposed Definitions of "Fiduciary" and "Recommendation" are Unclear and Overbroad.

While we understand that the DOL has been concerned that the current five-part test may permit some service providers to evade status as an investment advice fiduciary ("ERISA fiduciary"), we believe the scope of activities that would be covered by the Proposal is so broad that it would ultimately harm Main Street investors and curtail the educational and other services provided to such customers, especially with regard to IRA accounts. We are especially concerned that the DOL has not provided sufficient clarity to identify when a financial institution would be providing investment education or acting as an ERISA fiduciary.

The DOL has proposed a definition of "recommendation" that could be interpreted as including almost any communication about retirement investments and distribution options.[9] In

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[8] Id.

[9] *See* Proposed Regulation 3-21(f)(1). We recognize there are also interpretive issues regarding what it means for there to be an "understanding" about the investment advice provided and the impact of applying fiduciary status when investment advice is "specifically directed to" a retirement investor. Overall, these interpretive questions create uncertainty regarding whether, and under what circumstances, a fiduciary relationship would exist.

addition, the definition of "recommendation" has implications for persons seeking to rely on the carve-out for investment education, as that carve-out is not available where information and materials "include (standing alone or in combination with other materials) recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations on investment, management, or value of a particular security or securities, or other property."[10]

A financial institution needs clarity about when an activity will cause it to step across the line into providing investment advice.[11] Without clarity, legal and practical concerns may force a financial institution to conduct its business more narrowly and keep its activities further away from that dividing line. With respect to investment education, the Proposal's lack of clarity will cause financial institutions to strip out information and tools that would otherwise be helpful to Main Street investors because providing such information and tools might raise a question about whether the financial institution is providing investment advice.

We recognize that the DOL's proposed definition of "recommendation" is based in part on FINRA guidance under FINRA Rule 2111 (Suitability). However, FINRA's concept of a recommendation encompasses two levels of recommendations – the broader concept of general recommendations (for which a broker-dealer needs to ensure that the recommendations are suitable for at least some customers) and the narrower concept of customer-specific recommendations (that carry customer-specific obligations).[12] The DOL should make clear that the concept of "recommendation" reflected in its rules is the narrower concept of customer-specific recommendations. At a minimum, we believe the DOL should adopt existing FINRA guidance on customer-specific recommendations, without modification, so that financial institutions can follow a consistent approach to determining what constitutes a recommendation. In addition, the DOL should consider what additional guidance is needed to address issues not explicitly addressed in FINRA guidance, including when the provision of investment education materials would include a recommendation and what information can be provided upon an investor's request without triggering ERISA fiduciary status.[13]

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[10] Proposed Definition of Fiduciary, 80 Fed. Reg. at 21958.

[11] This clarity is especially important in the retirement marketplace where status as an ERISA fiduciary would subject a financial institution to the prohibited transaction restrictions under ERISA and the Code. In this circumstance, a financial institution might be mindful that offering information or tools might subject it to a later assertion or determination that it was an ERISA fiduciary and engaged in a prohibited transaction.

[12] A general recommendation would include any communication that constitutes a "call to action," such as suggestions that investors consider investing in large-cap mutual funds or a particular market sector. In comparison, a customer-specific recommendation would be a communication that suggests a particular investor or group of investors engage in a transaction or investment strategy based on that investor's or group of investors' particular circumstances.

[13] For example, if providing materials to an investor is viewed as a fiduciary activity because they are "specifically directed to" the investor, financial institutions and advisers may be reluctant to provide that information, even when provided at the investor's request.

B. The Proposed Carve-Out for Investment Education is so Narrow it Would Eliminate Educational Materials for Retirement Accounts.

The Proposal does not clearly distinguish between when a financial institution would be deemed an ERISA fiduciary and when it would be operating within the carve-out for investment education. The practical implication to Main Street investors is that the vast majority of E*TRADE's educational online tools would have to be "off limits" to IRA account holders or diluted in content in order to meet the requirements of the carve-out for investment education. The reconstitution of the tools would render them of less utility to an investor researching IRA options because they would have to be stripped of any language that may be deemed in hindsight to have been a "recommendation," as broadly as that term is defined in the Proposal. Much of that information is currently provided completely for free, without any obligation to open an account at E*TRADE. Retrofitting online tools to adhere to the new regulatory paradigm under the Proposal or implementing mechanisms to restrict free access or access by IRA accounts would be a costly undertaking, would deprive IRA investors of valuable analytical tools, and likely would result in higher expenses for Main Street investors.

The proposed carve-out for investment education is unnecessarily restrictive in that the provisions applicable to asset allocation models and interactive investment tools would not be available where specific investment products, investment alternatives, or distribution options are included or identified. While a fiduciary relationship may be appropriate where an investor is placing his or her trust and confidence in a financial professional, or where the financial professional has investment discretion, we do not believe that an investor who is accessing investment education materials through a website and entering information in response to questions prompted by the materials can reasonably expect to be receiving fiduciary investment advice. Online tools are often used for hypothetical scenario planning and not intended by the prospect or customer to be actionable. It has been our experience that investors who utilize both our public site and customer-only online tools often input different time horizons, investment goals and other personal information, presumably to compare the differing results.

FINRA has adopted several rules that have proven effective in addressing investor protection concerns in the use of asset allocation models and interactive investment materials, including when they are accompanied by a recommendation of a particular security or securities, while at the same time recognizing that investors can realize significant benefits from such materials.[14] In light of this, we encourage the DOL to permit asset allocation models and interactive investment materials to recommend specific investment products, investment alternatives, and distribution options while still fitting within the education carve-out, provided that any recommendation is accompanied by the disclosure required under FINRA rules. This approach

[14] *See* FINRA Rule 2111 (Suitability) (applying suitability obligations to recommendations made through investment education materials); FINRA Rule 2210 (Communications with the Public) (establishing content standards for communications with the public, including investment education materials); FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) (establishing content and disclosure requirements for investment analysis tools).

will ensure that all investors, including retirement investors, have access to important investment educational tools and information, while receiving consistent and effective investor protections. In addition, it would fully satisfy the DOL's goal to ensure that the Proposal does not limit access to financial education.[15]

C. A Departure from Current Regulatory Guidance for Educational Tools Will Lead to Fewer Options for *All* Main Street Investors.

The Proposal will limit the ability of firms like E*TRADE to make available important investment education tools and information not only to IRA investors, but to *all* Main Street investors. Main Street investors move fluidly through a website like E*TRADE's to gather information that can be used in managing all of their assets, including self-directed brokerage and IRA accounts. Access to market data and information applicable across account types is critical since Main Street investors also save for their retirement in their non-IRA accounts.

Most of the Main Street investors who have opened accounts with E*TRADE are self-directed investors who make their own investment decisions and use the tools and information provided through our website to help analyze possible investment strategies. Others may turn to E*TRADE for assistance in navigating available investment alternatives and products, but still make their ultimate investment decisions independently. The Proposal would, however, remove access to important tools, information, and assistance we make available unless the Main Street investor were willing to engage ETCM in an ERISA fiduciary relationship and pay the associated fees. We believe that such a significant departure from current industry practice (in compliance with Interpretive Bulletin 96-1 *and* the federal securities laws) is unnecessary and would harm Main Street investors.

As previously described, Main Street investors can use investment ideas generated from investment education tools provided by E*TRADE, including asset allocation models and interactive investment materials, to make investment decisions for both their brokerage and IRA accounts. In fact, even non-E*TRADE customers use our free online tools to generate investment ideas and conduct research. E*TRADE is able to provide these investment education materials and tools to both its customers and the public while complying with long-standing requirements under both the federal securities laws and ERISA because, to a large degree, those requirements act in a complementary manner. Unfortunately, the Proposal would disrupt the current approach and create conflicting regulatory obligations that could ultimately harm Main Street investors.

E*TRADE would have two options to ensure that we are not considered an ERISA fiduciary (in situations where our customers have not elected to open an advisory account)[16] to any Main

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[15] Thomas E. Perez, Secretary, U.S. Dep't of Labor, Statement Before the Health, Employment, Labor and Pensions Subcommittee, Committee on Education and the Workforce, U.S. House of Representatives (June 17, 2015).

[16] As previously noted, we welcome the establishment of a uniform "best interests" standard applicable to both retirement and non-retirement accounts.

Street investor who accesses investment education materials and tools through our website. First, we could choose to provide only the bare-bones materials and tools that satisfy the conditions of the carve-out. We do not believe the DOL could have intended this result since it would restrict investment education to all Main Street investors, including non-retirement investors. Alternatively, and unrealistically, we could restrict the ability of retirement investors to access any tools and information that would trigger ERISA fiduciary status, while providing to non-retirement investors those tools that are currently available.

E*TRADE does not believe these are realistic alternatives given the fluidity with which Main Street investors, including E*TRADE customers and non-E*TRADE customers, navigate between various parts of our website. If we were to create separate tools and information, we would need to develop mechanisms to restrict the ability of retirement investors to access our tools and information for their retirement accounts, such as pop-up disclosures and other ways to obtain investor consent and acknowledgement. Even with costly and disruptive pop-ups, consents and acknowledgements, there could be no guarantee that a customer or non-customer would not still use the information to make decisions in his or her IRA account and subsequently claim we were an ERISA fiduciary regarding that transaction. Financial institutions that offer online financial planning tools would need to expend significant resources to implement the appropriate mechanisms and maintain any records needed to protect against potential litigation each time the website is accessed, which would likely be *millions* of records in any given year, and which still would not provide meaningful protection[17].

With any of the scenarios described above, the only viable result would be to restrict choice and reduce access to tools and information for <u>all</u> Main Street investors.

D. <u>The Proposal Would Create Disparate Treatment for IRA and Retail Accounts, Thereby Fostering Customer Confusion and Disadvantaging IRA Accounts.</u>

Even outside the context of online investment analysis tools and information, the Proposal raises substantial compliance questions and issues for financial institutions whose customers have a mix of retirement and non-retirement accounts. For example, day-to-day communications designed for non-retirement accounts might be received by a person who also has a retirement account, thereby raising concerns about ERISA fiduciary status depending on the content or context of the communication.[18] This risk of inadvertently tripping into ERISA fiduciary status will also present itself during in-person and other verbal communications with clients.

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[17] Moreover, it is unfair – and meaningless—to ask investors to use investment information in one type of account and not in another. Human beings simply cannot compartmentalize or "unlearn" information in that fashion.

[18] The DOL has not clarified that, consistent with FINRA guidance, appropriate disclosures can be used to clarify the purpose of a communication.

Consider some of the practical and legal issues that a typical conversation with an investor would pose:

- Would an E*TRADE Financial Consultant having a conversation about a customer's investment objectives or goals would have to preface every conversation or facet of advice with the disclosure that the advice is not intended for the IRA account?

- Would the Financial Consultant need to evidence that such disclosure was given for every interaction with a customer?

- Would the Financial Consultant need to receive the customer's consent and acknowledgement of the disclosure before giving any advice?

- Would the consent and acknowledgement need to be in writing, with attendant recordkeeping obligations?

- Would the customer have to enter into a contractual relationship under the BIC Exemption before the Financial Consultant has any conversation with the customer because the Financial Consultant cannot be sure in what direction the customer will take the conversation (*i.e.*, the customer may decide to open an account under the BIC Exemption paradigm or an ERISA fiduciary account)?

- How can a customer be made comfortable to enter into a contract before any advice or services are provided? What would be the consideration supporting that contract? Would any such consideration be sufficient from a contract law perspective?

- What happens if the customer decides not to pursue the advice provided by the Financial Consultant? Would the financial institution then have to formally terminate the contract? How would the financial institution document the termination of the contract? Would the client need to agree to terminate the contract?

- What happens if the client decides to follow the advice but executes the transaction through another financial institution? Will the Financial Consultant and his or her financial institution remain liable for the advice even though they received no compensation for the transaction?

Concerns about ERISA fiduciary status would also be raised if advice provided with respect to non-retirement assets were to be deployed by the customer in the customer's IRA account, notwithstanding the disclosure. The DOL should provide clear guidance about when, and under what circumstances, financial institutions and their representatives can clarify through disclosure that they are providing advice regarding non-retirement assets, and not acting as an ERISA fiduciary.

E. The Proposal Would Limit Our Ability to Provide Information and Assistance to Main Street Investors in Considering Retirement Vehicles.

We are concerned that the Proposal would limit our ability to help Main Street investors understand and decide among retirement vehicles, including whether to save for retirement through an IRA or to roll over assets from a plan or another IRA to an IRA account at E*TRADE. In our experience, many Main Street investors need help understanding basic information about the different types of IRAs available (*e.g.*, Roth and traditional IRAs), including, for example, issues related to contribution limits, deductibility of contributions, and withdrawals (*e.g.*, taxes on early distributions, required minimum distributions). Main Street investors also need assistance understanding and navigating the differences between investments in a plan as compared to an IRA, including deciding whether to leave money in a plan or to roll over those assets to an IRA.

We include multiple free resources on our website designed to help Main Street investors understand these important concepts with consideration to their retirement investing. The E*TRADE automated tools, which constitute only a small portion of what is available across the financial services industry, were utilized several million times in the last year alone, demonstrating the need for automated research tools by Main Street investors of all descriptions. That need will only increase as more tech-savvy investors begin to plan for their retirement.

All of this client-facing material is filed with FINRA and is consistent with FINRA conduct rules regarding communications with the public. All of our investment advisory material is consistent with our obligations under the Advisers Act and regulations thereunder. There is no public-facing section of our website that is not rigorously designed with the Main Street investor in mind, approved by registered principals, and devised to consider the need for comprehensive information in a readable and plain-English format.

The Proposal would shut the door on our ability to provide this type of assistance outside of an ERISA fiduciary relationship and may cause us to charge Main Street investors for information they otherwise could have accessed for free, or otherwise curtail the products and services we make available to Main Street investors, especially IRA account holders.

III. The BIC Exemption Would Create Undue Compliance Burdens and Costs.

Given the lack of certainty in the Proposal about whether a given communication would cause us to be deemed an ERISA fiduciary, we would be left with two choices: (1) restrict the information and assistance provided to Main Street investors to generic information that would fall within the investment education carve-out, or (2) rely on the BIC Exemption for all interactions with Main Street investors. Unfortunately, as proposed, we do not believe relying on the BIC Exemption would present a workable solution as it would be extremely difficult to implement. These costs ultimately would both increase the fees and reduce the services provided to IRA investors by financial institutions.

A. The BIC Exemption Process Would Result in a Poor Customer Experience.

As noted earlier, a large majority of our customers are self-directed, but, some, on occasion, may seek personalized advice. For example, an IRA investor may be generally self-directed, but may seek the input of a Financial Consultant for a particular transaction or decision, such as a mutual fund recommendation. It would be an unseeming result for that one-time interaction to transform the entire account into an ERISA fiduciary account thenceforth, with all of the attendant requirements, costs, and obligations, particularly where the customer has not intended — or consented to — the change in account status. In order to mitigate this result, the Financial Consultant will be placed in the position of declining to give any advice at all until the customer has signed the BIC contract. This would result in a poor customer experience, especially for customers with both non-retirement and IRA accounts who would not face this regulatory roadblock with their non-retirement account.

The FINRA regulatory regime accounts for such interactions in a more appropriate manner, as the suitability rule springs into effect when, and only when, a recommendation is made. Suitability does not attach in perpetuity to all other self-directed transactions made in an account from that point on. One recommendation does not otherwise completely transform an account and change its status from self-directed to fiduciary. The FINRA suitability rule recognizes the fluid nature of customer interactions and does not overly burden customers or negate a customer's choice to own a brokerage account and not an advisory account, thereby providing the customer the freedom to seek advice on his or her own terms. FINRA's suitability rule preserves a customer's choice to own a brokerage account while protecting the customer's best interests.

B. The Carve-Outs for Platform Providers and Selection and Monitoring Assistance Should Be Available to IRAs.

We encourage the DOL to clarify that simply marketing and making available a platform of mutual funds and other investment products to IRA owners through a website or otherwise is not fiduciary investment advice. Consistent with our previous comments about the carve-out for investment education, the DOL should also clarify that merely identifying investment alternatives that meet objective criteria and merely providing objective financial data and comparisons with independent benchmarks to an IRA owner do not constitute investment advice. It is unclear whether these activities would be considered investment advice under the DOL's proposed definition. The DOL should specifically extend the carve-outs for platform providers and selection and monitoring assistance to the IRA marketplace.

As proposed, the DOL has made these carve-outs available only to employee benefit plans, subject to certain conditions that are equally applicable in the IRA context. A person relying on the carve-out for platform providers must "disclose[] in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity." Similarly, the carve-out for selection and monitoring assistance is available when providing objective information based on criteria provided by the plan fiduciary or criteria that the plan fiduciary can use to monitor performance of the investments compared to a

benchmark. In declining to extend these carve-outs to the IRA marketplace, the DOL focuses on the absence of a "separate independent 'plan fiduciary' who interacts with the platform provider to protect the interests of the account owners," which makes it "much more difficult to conclude that the transaction is truly arm's length or to draw a bright line between fiduciary and non-fiduciary communications on investment options."[19]

We see no reason why service providers that market and make available platforms of investment options to IRA owners should be treated as investment advice fiduciaries, especially if they disclose in writing that, in making the platform available, they are not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity. We do not believe that in such circumstances an IRA owner can reasonably expect that the marketing of the platform is fiduciary investment advice. In addition, prior to making a product available on a platform, broker-dealers are required under FINRA rules to determine that the product is appropriate for at least some investors. In light of these protections, there is no reason for the DOL to superimpose ERISA fiduciary status on platform providers.

If financial institutions were deemed to be ERISA fiduciaries when providing platforms to IRA owners, they would need to rely on a PTE or restructure their compensation in order to service those accounts, and it is unclear under the Proposal what PTE they could rely on. Presumably, financial institutions could rely on 408(b)(14) and charge IRA owners a level, asset-based fee to access their platforms. Alternatively, financial institutions may be able to credit revenue sharing payments that they receive, but as this would deprive financial institutions of revenue they are otherwise permitted to receive, they would likely charge an asset-based fee to recoup this lost revenue.[20] Ultimately, IRA owners, including self-directed investors who do not want to pay separately for advice, will be the ones harmed if the DOL does not extend the carve-out for platform providers to the IRA marketplace. Further, in the context of self-directed investors, the result will be to remove all choice about the nature of their relationship with a financial institution and increase investment expenses, a result that is in stark contrast to the DOL's stated goals.

C. Obtaining Investor Signatures for the BIC Exemption Presents an Impractical and Substantial Hurdle.

As proposed, the BIC Exemption would require a written contract to be signed by the financial institution, individual financial advisor, and the retirement investor *before* a recommendation is made. We think this requirement will be impossible to implement for at least three reasons.

- First, we question whether a retirement investor would be willing to sign a contract before deciding whether to open an account with us or any other financial institution, especially investors who only wish to use online tools for scenario planning purposes.

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19 Proposed Definition of Fiduciary, 80 Fed. Reg. at 21944.

20 It is unclear how a financial institution would rely on the BIC Exemption under such circumstances, including, for example, the pre-recommendation written contract requirement and the point-of-sale disclosures.

- Second, we believe this approach will create logistical difficulties when an investor changes financial advisors within the same financial institution or desires to work with advisor teams, or when a financial advisor leaves the financial institution.

- Third, we believe requiring a contract to be entered into before discussing information in real time over the telephone or before permitting investors to access certain portions of a website is unworkable.

Logistically, what happens if an agreement is entered into because a conversation is reasonably expected to lead to a fiduciary relationship, but, in fact does not? Would the Financial Consultant have to execute an agreement and then terminate the agreement, giving the requisite notice possibly within minutes?

In addition, there are practical issues with how this would operate with respect to investors accessing tools and information online:

- Would every retirement investor that accesses E*TRADE's website need to enter into an agreement before accessing a tool or other information that might be used in making decisions for his or her IRA?

- Would that investor only need to enter into the agreement if accessing the website for his or her E*TRADE IRA, or would E*TRADE be required to comply with the BIC Exemption with respect to non-E*TRADE customers?

- How long after a retirement investor accesses a tool or information will E*TRADE be considered an ERISA fiduciary?

- If the investor decides not to follow a recommendation derived from the tool or other information, will the investor need to confirm at that time that he or she will not act on that recommendation?

- Will E*TRADE remain liable if the investor decides at a later date to act on the recommendation, or executes the trade with another broker-dealer?

As discussed above, we would likely need to implement various disruptive mechanisms, such as pop-up disclosures and other consents, in order to allow retirement investors to access any investment education tools and materials on our website. Retirement investors looking to access these tools and materials would need to agree to various disclosures each time that they navigate to a different page on our website so that we could be sure to document properly whether we were acting as an ERISA fiduciary. We are concerned that the repeated intermediate steps will only frustrate retirement investors, causing them to abandon the tools and information online.

Moreover, there are practical issues in complying with the BIC Exemption in our dealings with existing customers. What would be the obligation to enter into BIC-compliant agreements with

existing customers? Would they have to execute a completely new customer agreement after years of a relationship with E*TRADE and if so, would it require affirmative consent? In our case, such an outreach would involve several million customers and the magnitude and costs of that effort – and the inconvenience to customers – are significant. In addition, the DOL has not provided sufficient guidance to allow us to determine whether we would be deemed to provide advice about existing investments such that the BIC Exemption's carve-out for preexisting investments would no longer apply.

In all, we are concerned that the written contract requirement will unnecessarily slow down or even prevent an IRA investor from receiving or accessing desired information, which could lengthen the investment process (in addition to the other requirements like the point-of-sale disclosure requirement), potentially causing investors to miss out on, or be delayed in pursuing, investment opportunities. In our experience working with Main Street investors, they typically approach us looking for assistance in understanding the options available to them prior to deciding whether to open an account. This is especially the case with do-it-yourself Main Street investors who visit E*TRADE's website to determine what products and services are available, and more importantly, who need some assistance narrowing down which ones they should consider in making decisions. We do not believe that IRA investors would be willing to – or should have to – sign a contract with us before even deciding whether to open an account with us.[21]

D. The Contractual Component of the BIC Requirement, in and of Itself, Could Raise the Risk that a Broker-Dealer Must Register as an Investment Adviser.

The requirement of a written contract in the BIC Exemption may cause E*TRADE Securities LLC and other broker-dealers to be deemed investment advisers under the Advisers Act. As you may be aware, the SEC in 2007 proposed an interpretive rule under the Advisers Act affecting broker-dealers that would have established the principle that broker-dealers are deemed to provide investment advisory services that are not "incidental" to their business as a broker-dealer, and therefore operate outside of the broker-dealer exclusion from the definition of

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[21] We note that certain provisions of the federal securities laws provide protections to prospective customers and clients of broker-dealers and investment advisers, respectively. For example, FINRA Rule 2111 (Suitability) applies when a broker-dealer makes a recommendation to a prospective customer that becomes a customer and executes the recommendation through the broker-dealer (including for certain recommendations about IRA rollovers). *See* FINRA Regulatory Notice 12-55, Suitability (Dec. 2012); FINRA Regulatory Notice 13-45, Rollovers to Individual Retirement Accounts (Dec. 2013). Similarly, the antifraud provisions of the federal securities laws impose certain requirements on broker-dealers and investment advisers when dealing with prospective customers and clients, respectively. *See, e.g.*, Securities Exchange Act of 1934 § 15(c), 15 U.S.C. § 78o(c) (prohibiting a broker-dealer from inducing or attempting to induce the purchase or sale of a security using any manipulative, deceptive, or other fraudulent device or contrivance); Advisers Act § 206(1) & (2), 15 U.S.C. § 80b-6(1) & (2) (prohibiting an investment adviser from directly or indirectly employing "any device, scheme, or artifice to defraud any client or prospective client" or engaging "in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client").

"investment adviser" in Section 202(a)(11)(C), if they separately contract for advisory services.[22] While the SEC has not yet formally adopted this interpretive position, it presumably reflects the view of the SEC and its staff with respect to the availability of the broker-dealer exclusion, and neither the SEC nor the staff has suggested otherwise.

Broker-dealers would be unlikely to rely on the BIC Exemption if such reliance were to trigger a separate regulatory requirement that they must register as an investment adviser. In this particular situation, the BIC Exemption would create collateral concerns, including potentially causing a broker-dealer to be deemed an investment adviser – and thus a fiduciary – under the Advisers Act even when the broker-dealer is simply providing advice incidental to its role as a broker-dealer. The point is not that financial institutions want to shirk their responsibilities to customers – to be sure, financial institutions take these responsibilities seriously – but to ensure that they are not inadvertently deemed investment advisers, and subject to applicable restrictions (such as restrictions on acting as broker or principal in client transactions), where unwarranted. Turning broker-dealers into investment advisers when providing brokerage services (including when providing incidental advice) drives up the cost of providing these services and would cause financial institutions to reduce or eliminate free or low-cost services, or to increase investors' costs or otherwise restrict their choices.[23]

E. <u>The Proposal Would Infringe on the Privacy Rights of Financial Services Providers and Their Employees.</u>

We are concerned that the DOL, an agency championing the privacy of workers, would recommend a provision as antithetical to the privacy of employees of financial institutions as the website publication of the dollar amount of all compensation received by each Financial Consultant with respect to assets bought, held, or sold during the year. Most Americans would reject the worldwide publication of an employee's compensation as an unwarranted intrusion into the privacy of ordinary employees.

The proposed model webpage disclosure of transactional and ongoing compensation to the firm and its employees due to fiduciary status would not only infringe upon the individual privacy rights of employees, but also would require the public disclosure of highly confidential and proprietary information of firms. The revenue share between a fund and a distributor, like E*TRADE, is not a standardized percentage across the industry, but rather a negotiated amount

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[22] *See* Interpretive Rule under the Advisers Act Affecting Broker-Dealers, Advisers Act Release No. 2652 (Sept. 24, 2007), 72 Fed. Reg. 55126, 55131 (Sept. 28, 2007). This principle was also established in a prior rule adopted by the SEC, Rule 202(a)(11)-1 under the Advisers Act. *See* Certain Broker-Dealers Deemed Not to Be Investment Advisers, Exchange Act Release No. 51523, Advisers Act Release No. 2376 (Apr. 12, 2005), 70 Fed. Reg. 20424 (Apr. 19, 2005). The rule was subsequently was vacated on other grounds by the D.C. Circuit Court of Appeals. *See Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 488, 493 (D.C. Cir. 2007) (holding that the SEC exceeded its authority in promulgating the final rule by relying on Section 202(a)(11)(F) of the Advisers Act (now 202(a)(11)(H)) to establish a new, broader exemption for broker-dealers).

[23] Alternatively, such a requirement could drive broker-dealers to migrate to an investment advisory model, potentially removing the need to rely on the BIC Exemption, but similarly resulting in higher costs and/or restricted choices for investors.

that varies from firm to firm. Revenue sharing arrangements are highly negotiated, and their terms are kept confidential as an industry practice. Publicizing them, firm by firm, could create mass turmoil in the marketplace, as firms seek to negotiate, or renegotiate, revenue sharing arrangements based on the information.

Firms also could be competitively injured by the public disclosure of individual employee compensation, both transactional and ongoing. Firms will likely scour such information to determine ways to recruit employees away from competitors, and employees will use the information to demand higher payouts, or will leave their current employer for another firm that appears to offer a better compensation package. As employee compensation expenses are driven up, those costs will inevitably be passed onto the investor. Moreover, to the extent that the newly public information drives turnover among firms, investors will be further disadvantaged as the adviser with whom they have an established relationship moves to a new environment, requiring the investor to decide whether to move to an unfamiliar firm, transfer assets, and possibly incur even more fees in that process.

Finally, disclosure of proprietary compensation arrangements should be of no relevance to the investor. The individuals purchasing the funds will be charged the same fee, which is disclosed in the prospectus, regardless of the split between the broker and the fund. Moreover, other regulators such as FINRA and the SEC already require significant disclosure regarding potential conflicts of interest from revenue sharing arrangements and other forms of compensation financial consultants may receive. The DOL should thus narrow the scope of the webpage and annual disclosures by excluding private and proprietary information.

F. Other Data and Disclosure Requirements are Unnecessary and Cost Prohibitive.

The other requirements of the BIC Exemption, including ensuring compliance with the impartial conduct standards, providing the required point-of-sale, annual, and webpage disclosure, as well as maintaining the required data, will also be difficult to implement and impose compliance costs that will make it unduly burdensome to rely on the BIC Exemption. For example, in order to comply with the point-of-sale disclosure requirements, a firm would need to develop, test, and implement systems that will allow it to ensure all information required for its financial professionals to perform the required calculations accurately in real time is available and up to date. Beyond just the cost of providing the disclosures, we question whether the point-of-sale disclosure would help Main Street investors make more informed investment decisions, and note that the required information is currently available in various disclosure documents that are already required to be provided to Main Street investors, such as prospectuses filed with the SEC. Further, as with the written contract requirement, we are concerned that the point-of-sale disclosure may actually slow down the investment process and cause Main Street investors to miss out on, or be delayed in pursuing, investment opportunities.

IV. The Introduction of a Third Fiduciary Standard Will Not Meaningfully Protect IRA Account Holders.

While increased regulatory costs, duplicative regulation, and conflicting legal standards would affect providers of financial services, we would like to redirect the focus on how the introduction of a new fiduciary standard will affect Main Street IRA account holders. We believe that the current regulatory regime provides ample protection for IRA account holders, and provides regulators with significant flexibility to address investor protection concerns. The federal securities laws and FINRA rules mandate core protections applicable across both investment advisers and broker-dealers, including obligations to act consistently with the investor's best interest, to address conflicts of interest, and to charge reasonable fees and commissions. Investment advisers and broker-dealers are also subject to additional specific rules with respect to various business practices that create conflicts of interest or raise other investor protection concerns. In addition, both the SEC and FINRA can respond to new investor protection concerns that affect certain types of accounts, such as IRAs,[24] or that affect Main Street investors broadly.[25] The SEC and FINRA both have broad examination and enforcement authority with respect to registered persons subject to their jurisdiction, and have recently prioritized examining for compliance issues with respect to retirement accounts.[26]

We question whether the imposition of the new fiduciary standard, the other obligations under the impartial conduct standards, and the warranties required under the proposed PTEs will enhance investor protection. The DOL's assertion of the authority to regulate IRAs does not confer the power on the DOL to examine for compliance with the new rules or bring enforcement actions.[27] Rather than relying on the current regulatory regime, including the broad examination and enforcement authority of SEC and FINRA, the DOL's Proposal would

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[24] For example, FINRA has taken steps to address concerns about broker-dealers' marketing practices concerning fees for IRAs and to clarify the requirements when recommending IRA rollovers. *See* FINRA, Regulatory Notice 13-45, Rollovers to Individual Retirement Accounts: FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers (Dec. 2013), *available at* http://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf; FINRA, Regulatory Notice 13-23, Brokerage and Individual Retirement Account Fees: FINRA Provides Guidance on Disclosure of Fees in Communications Concerning Retail Brokerage Accounts and Individual Retirement Accounts (July 2013), *available at* http://www.finra.org/sites/default/files/NoticeDocument/p304670.pdf.

[25] For example, the SEC is considering whether to adopt a uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers, including those saving for retirement through IRAs and plans, as well as those saving for retirement or otherwise through non-retirement accounts.

[26] *See* OCIE, National Examination Priorities for 2015 (Jan. 2015), *available at* http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf; FINRA, 2015 Regulatory and Examination Priorities Letter (Jan. 2015), *available at* https://www.finra.org/sites/default/files/p602239.pdf.

[27] We agree with those commenters that assert the DOL does not have authority to impose affirmative obligations on financial institutions dealing with IRA accounts and that Congress could have imposed those obligations if it determined doing so was necessary to protect IRA account holders.

shift the burden to IRA account holders to oversee and enforce compliance with the contractual provisions.

In addition to these oversight issues, we believe that the ambiguity created by the Proposal may cause financial institutions to limit the products and services offered to Main Street investors to those selected solely on the basis of cost, rather than the entirety of a particular investor's facts and circumstances. Subjecting IRA accounts to different best interest standards could lead to investment recommendations that, in the long run, may not produce the best results for Main Street investors. Consider these practical issues:

- In an effort to recommend a lower/the lowest cost alternative to an IRA account holder, will a Financial Consultant seeking to comply with the new best interest standard have to forgo recommending a higher cost, but more suitable, alternative?

- Will the Proposal prevent financial institutions from offering certain products and services to investors with higher levels of sophistication and ability or desire to take on risk?

- Will Main Street investors ultimately achieve better returns in non-retirement accounts than in IRAs because of limitations on products and services?

- Will the Proposal effectively prevent IRA accountholders from pursuing active investment strategies when such strategies would be appropriate given market conditions or otherwise?

- How can financial institutions offer different investment strategies to Main Street investors that are not similarly situated?

With the addition of the concept of ERISA fiduciary status to the already existing broker-dealer and investment adviser roles, Main Street IRA investors will have to distinguish among three different sets of disclosure standards, contract provisions, education, and services. The overwhelming need, in our opinion, is to harmonize the standards applicable to personalized investment advice provided to retail investors, wherever possible, instead of superimposing a third standard.

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