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Office of Regulations and Interpretations and
Office of Exemption Determinations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary RIN 1210-AC02 and Proposed Amendment to Prohibited Transaction Exemption 2020-02 ZRIN 1210-ZA32

Dear Sir or Madam:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to comment on the Department of Labor's recent proposed rulemaking concerning investment advice to plans, plan fiduciaries, participants, beneficiaries, and IRA owners and related prohibited transaction exemptions (the "Proposal"). The Proposal generally includes a new definition of investment advice within the meaning of Section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and section 4975(e)(3)(B) of the Internal Revenue Code (the "Code"), and certain amendments to Prohibited Transaction Exemption ("PTE") 2020-02 and other related prohibited transaction exemptions.[2] The Proposal represents the Department's

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[1] Fidelity was founded in 1946 and is one of the world's largest providers of financial services. Fidelity provides recordkeeping, investment management, brokerage, and custodial/trustee services to thousands of Code section 401(k), 403(b) and other retirement plans covering approximately 43 million workplace investing plan participant accounts. Fidelity is the nation's largest provider of services to individual retirement accounts ("IRA") with more than 11 million people saving and investing for retirement through more than 14 million IRA accounts. Fidelity also provides brokerage, operational and administrative support, and investment products and services to thousands of third-party, unaffiliated financial services firms (including investment advisors, broker-dealers, banks, insurance companies, and third-party administrators).

[2] The proposed Retirement Security Rule: Definition of an Investment Advice Security – RIN 1210-AC02 https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf. Proposed Amendment to Prohibited Transaction Exemption 2020-02 – ZRIN 1210-ZA32 https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23780.pdf. Proposed Amendments to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and

fourth effort to modify rules in this area since 2010 and provides a history of the Department's previous approaches to defining investment advice under ERISA and the Code as well as a summary of the significant efforts of financial services regulatory bodies to develop standards of conduct related to investment recommendations and advice.

As one of the nation's leading retirement plan providers, Fidelity has a deep and long-standing commitment to working with the Department on its rulemaking in the areas of investment education and advice. We have commented extensively on the Department's previous proposals relating to investment advice, including in 2015, 2017 and 2020.[3] We agree with the goal of applying a consistent set of standards and rules for persons that engage in investment advice to retirement investors as part of a relationship of trust and confidence, and we appreciate the Department's efforts to align the Proposal with the rules, requirements, and interpretations of financial services regulators. We also support the commonsense expansion of PTE 2020-02 to include self-led online advice interactions.

Retirement investors receiving investment advice related to their retirement accounts deserve to know that financial institutions and their representatives are providing this advice in their best interest. Better aligning the Department's Proposal to other efforts in this area also helps to harmonize the set of rules regulating advice to Americans across all their financial resources, including both retirement and non-retirement accounts. All investors, including retirement investors, will appreciate and benefit from the increased simplicity that results from regulatory alignment. They will also appreciate the consistency and simplicity that can result when the same rules are available whether advice is provided through a live representative or online through a website or mobile device.

However, certain aspects of the Proposal run counter to the Department's stated goals. In particular, as drafted, the Proposal's amendments to the current, long-standing definition of investment advice (the "1975 Regulation") would treat some advisers differently than others and would be inconsistent with the bedrock characteristic of fiduciary status—that of being in a relationship of trust and confidence with one's client.[4] Most notably, in certain circumstances the Proposal brings within the scope of fiduciary investment advice many routine and necessary

86-128 – ZRIN 1210-ZA34, 88 Fed. Reg. 76032 https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23782.pdf; Proposed Amendment to Prohibited Transaction Exemption 84-24 – ZRIN 1210-ZA33, 88 Fed. Reg. 76004 https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23781.pdf.

[3] *See* Fidelity Investments letters to the Employee Benefits Security Administration – July 21, 2015, *available at*: https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00658.pdf; September 24, 2015, *available at*: https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/03089.pdf; April 17, 2017, *available at*: https://www.regulations.gov/comment/EBSA-2010-0050-4877; and August 6, 2020, *available at*: https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA29/00071.pdf.

[4] As the Fifth Circuit stated in *U.S. Chamber of Commerce v. U.S. Department of Labor* when vacating the Department's 2016 effort to replace the five-part test: "The [five-part test] captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client." *U.S. Chamber of Commerce v. U.S. Department of Labor*, 885 F.3d 360, 363 (5th Cir. 2018).

interactions with institutional retirement investors—including RFP responses, pitch materials, and other standard components of the institutional sales process—that are not based on a relationship of trust and confidence, and that could not reasonably be relied upon by the institutional investor. If the Proposal is enacted without modification, it will stymie these and other common interactions that help plan fiduciaries and plan participants alike to make informed decisions about their investment options. To avoid this outcome, we propose below a limited set of clarifications and revisions to the definition of fiduciary investment advice in the Proposal.

In addition, we request a number of specific changes to the proposed modifications to PTE 2020-02. We appreciate that the Proposal leaves PTE 2020-02 largely intact. Currently, PTE 2020-02 provides a path for helpful advice to plan participants and IRA owners that is in their best interest. At the same time, we believe many of the proposed modifications to PTE 2020-02 will create significant burdens without providing meaningful additional benefits or protections to retirement investors.

Finally, we note that, given the broad scope of the preamble to the Proposal, it is not feasible for us to comment on all of the viewpoints and interpretations expressed by the Department therein. While we have commented on a small number of statements contained in the preamble, our focus in this letter is on the proposed regulatory provisions related to the definition of fiduciary investment advice and the proposed changes to PTE 2020-02.

I. THE PROPOSED DEFINITION OF INVESTMENT ADVICE SHOULD BE CLARIFIED AND REVISED.

While certain aspects of the Proposal advance the Department's stated goals and better align the definition of an investment advice fiduciary under ERISA and the Code with the common law and other regulatory regimes, we are concerned that other aspects of the Proposal cut against these objectives. Most notably, we are concerned that the language of the Proposal is overbroad to the extent that it pulls into the ambit of fiduciary investment advice routine and necessary sales interactions with institutional investors. In order to address these concerns, we request that the Department clarify and revise the proposed definition of investment advice as set forth below.

A. Section (c)(1)(i) of the proposed definition of investment advice should be removed because, to the extent it expands the definition of fiduciary investment advice beyond conduct already covered by Sections (c)(1)(ii) and (c)(1)(iii), it is overbroad.

The Proposal provides that a person is a fiduciary to the extent the person makes a covered recommendation involving securities or other investment property to a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary (such

recommendation recipients each being defined as a "retirement investor" under the Proposal), and

> "[t]he person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor…."[5]

Under a literal reading of this provision, so long as a firm has discretionary authority or control over some subset of a retirement investor's assets, any recommendation that it makes to that investor related to their retirement assets—in any context—will automatically constitute fiduciary investment advice. This is true irrespective of whether the recommendation is individualized or blasted out to millions of investors; irrespective of whether it is the kind of communication on which a reasonable investor would rely or the kind of communication that is recognizable as marketing material; and irrespective of whether fiduciary status has been acknowledged or disclaimed. Put differently, this provision renders all recommendations to certain retirement investors fiduciary investment advice, irrespective of whether a reasonable investor would consider that recommendation to be part and parcel of a relationship of trust and confidence. This not only conflicts with the bedrock principles upon which ERISA's statutory language is based, it would also lead to impractical, incongruous, and unworkable results.

ERISA assigns fiduciary status only to the extent a person is performing a fiduciary function. As the Supreme Court has recognized, "[i]n every case charging breach of ERISA fiduciary duty, … the threshold question is … whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint."[6] Defining fiduciary investment advice based upon whether the adviser or an affiliate had discretionary authority or control over—and, thus, is an investment advice fiduciary with respect to—a completely different group of investments conflicts with this bedrock principle.[7]

Moreover, proposed Section (c)(1)(i) would give rise to fiduciary status where no reasonable expectation of a relationship of trust and confidence exists, and in a manner that inappropriately discriminates between similarly situated investors. For example, under the proposed Section (c)(1)(i):

- Imagine that Jane has, for the past 5 years, maintained a non-retirement brokerage account invested in Fidelity's robo-advisor, Fidelity Go, when she learns that her 401(k) plan is converting from another recordkeeper to Fidelity. Upon conversion, Jane—along with every other participant in her plan—receives an email from Fidelity in which

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[5] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75977.

[6] *Pegram* v. *Herdrich,* 530 U.S. 211 (2000).

[7] *See Chamber v. DOL*, 885 F.3d 360, 369-71 (5th Cir. 2018) (cautioning the Department that the regulatory test for investment advice and ERISA fiduciary status under Titles I and II should not extend beyond common law relationships of trust and confidence).

Fidelity recommends that participants ensure that their assets are appropriately diversified and suggests that they consider investment in their plan's age-appropriate target date fund to accomplish that end. While this email may include a "suggestion that a retirement investor engage in a particular course of action," that suggestion is not based on Jane's particular needs or individual circumstances. Nonetheless, simply because Jane happens to have a pre-existing Fidelity Go account, the email could constitute fiduciary investment advice to her (but not to other similarly situated participants in her plan).

- Imagine that John is a participant in a Fidelity-recordkept 401(k) plan that includes one Fidelity-managed collective investment trust ("CIT") and 10 non-Fidelity funds in its lineup. A portion of John's plan account is invested in the Fidelity CIT. If John receives the same email that Jane received above, that email could constitute fiduciary investment advice to John simply because he happens to be invested in the Fidelity-managed CIT, but it would not constitute fiduciary investment advice to those participants in his plan who are invested exclusively in the non-Fidelity funds.

- Imagine Joe has chosen to use Fidelity's workplace managed account service, Fidelity Personalized Planning and Advice at Work ("PPAW"), for his 401(k) account. Joe also has an IRA at Fidelity, and he receives an email that Fidelity sends to all IRA accountholders promoting Fidelity target date funds. While this email is not personalized to Joe and could not reasonably be relied upon by Joe as a basis for any investment decision, because Joe happens to use PPAW in his 401(k) plan account, this email could constitute fiduciary investment advice to Joe (but not to other IRA accountholders who receive it).

- Imagine that the ABC 401(k) plan offers Fidelity's workplace managed account service, PPAW, to its participants. The ABC fiduciary plan committee is considering a change to its target date funds, and it asks Fidelity to provide some generic materials related to its suite of target date funds for their consideration. While these materials are not individualized to the ABC plan and would not be reasonably understood to be fiduciary investment advice by the ABC plan committee in selecting a new target date fund, they could nonetheless be deemed fiduciary investment advice simply by virtue of the fact that the plan offers PPAW.

There is simply no basis for the inconsistent outcomes illustrated above. In each case, the "recommendation" received was not individualized and would not reasonably have been relied upon by the recipient as the basis for an investment decision that was in his or her best interest. As a result, it cannot be deemed advice given in the context of a relationship of trust and confidence. It is not relevant that the recommender may have a separate fiduciary relationship with the investor. Fiduciary status is a functional test, and that test cannot be met where a recommendation or suggestion is not individualized and would not reasonably be relied upon by recipient as basis for investment decisions in his or her best interest.

In the preamble, the Department asserts that this provision is similar to a provision in the 1975 Regulation "that provides for investment advice fiduciary status if a covered recommendation is made and the person making the recommendation either directly or indirectly has 'discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property *for the plan*."[8] The preamble suggests that the Proposal merely intends to extend the scope of this provision so that it applies not only where discretionary advice is being given to the plan, but also to circumstances where discretionary advice is being provided to an individual retirement investor.

But, in fact, what the Department describes as a minor change would have a sweeping impact, dramatically expanding the scope of what constitutes fiduciary investment advice. As a practical matter, the parallel provision in the 1975 Regulation covers few, if any, real-life situations because of its limitation to plan assets. In the case where an entity has discretion to make investment decisions for a plan, that entity generally has no reason to be making non-discretionary recommendations related to those same plan assets. Such an investment-related recommendation would be unnecessary because the entity has already been empowered to make the investment decisions to which the recommendation would relate. Given these practical limitations on the applicability of this provision in the 1975 Regulation, it has historically received little focus and, as best we can tell, has rarely been invoked as a basis for fiduciary status. But if the Department expands this provision to include discretionary advice to individual retirement investors in connection with accounts other than the account on which the advice is being provided—as illustrated in the examples above—it would pull within its scope a whole host of interactions involving suggestions or recommendations that could not reasonably be viewed as being made pursuant to a relationship of trust and confidence and, thus, that cannot constitute fiduciary investment advice under ERISA.

We submit to the Department that the best way to cure this overbreadth problem is to eliminate Section (c)(1)(i) from the definition of fiduciary investment advice. The objective tests set forth in Sections (c)(1)(ii) and (c)(1)(iii) of the Proposal (with some minor clarifications noted below) are sufficient to capture all recommendations made pursuant to a relationship of trust and confidence. To the extent Section (c)(1)(i) pulls into the definition of fiduciary investment advice recommendations that do not meet the standards set forth in those two provisions—because they are not individualized, they are not the type of recommendation upon which a retirement investor would reasonably rely, and they are not made pursuant to an express acknowledgment of fiduciary status—it is overbroad. We therefore urge the Department to eliminate Section (c)(1)(i) from its proposed definition of fiduciary investment advice.

B. Section (c)(1)(ii) should be clarified to confirm that it sets forth an objective—rather than a subjective—test.

[8] 88 Fed. Reg. 75901 (emphasis in original).

The preamble to the Proposal indicates that the Department intends the Proposal to capture objective understandings of the nature of a professional relationship[9] and explains that Section (c)(1)(ii) is intended to be similar to, and improve upon, the "mutual agreement, arrangement or understanding" and "primary basis" prongs of the current regulation.[10] To fully reflect this intent, Section (c)(1)(ii) should be clarified to provide expressly that whether circumstances indicate that a recommendation is individualized and may be relied upon is an objective determination based upon a reasonable person standard and not based upon the subjective view of the recipient of the recommendation. For example, Section (c)(1)(ii) could be revised to provide:

> "The person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances that would indicate to a reasonable person in like circumstances that the recommendation (A) is based on the particular needs or individual circumstances of the retirement investor and (B) may be relied upon as a basis for investment decisions that are in the retirement investor's best interest;"

In addition to clarifying the language of the regulation in this regard, the Department should retract the view stated in the preamble that "an investment provider's use of [certain] titles [e.g., financial consultant, financial planner, and wealth manager] routinely involves holding themselves out as making investment recommendations that will be based on the particular needs or individual circumstances of the retirement investor and may be relied upon as a basis for investment decisions that are in the retirement investor's best interest."[11] This amounts to a *per se* rule that the mere use of certain titles gives rise to fiduciary status. Such a view is not supported by the statute, nor is it reasonable to suggest that a relationship of trust and confidence can be established through the mere use of a particular title without otherwise meeting the objective tests in Sections (c)(1)(ii) and (iii) as proposed above.

Moreover, the SEC has previously considered and rejected the adoption of similar restrictions related to the use of certain titles. As part of its initial proposal for Form CRS, the SEC considered a rule restricting broker-dealers and their associated persons from using titles such as "adviser" or "advisor" except in instances where the individual was either registered as, or supervised by, an investment advisor. The SEC, however, concluded that adopting an express

[9] *See*, e.g., 88 Fed. Reg. 75899 ("The proposed revised definition of an investment advice fiduciary under ERISA, as discussed in detail below, is consistent with the express text of the statutory definition and better protects the interests of retirement investors. The proposal comports with the broad language and protective purposes of the statute, while at the same time limiting the treatment of recommendations as ERISA *fiduciary* advice to those objective circumstances in which a retirement investor would reasonably believe that they can rely upon the advice as rendered by an investment professional who is acting in the investor's best interest, rather than merely promoting their own competing financial interests at the investor's expense.").
[10] 88 Fed. Reg. 75902.
[11] 88 Fed. Reg. 75903.

rule restricting the use of certain names was not necessary given that broker-dealers are required, at the time of or prior to making a recommendation, to make full and fair disclosure that the representative is acting as a broker or dealer with respect to any such recommendation, including the fees, costs, and scope of services to be provided, and the identification of any related conflicts. The SEC also acknowledged that a prohibition on the use of certain titles would prevent broker-dealers from using the terms "adviser" or "advisor" in situations where they provide services other than investment advice to retail clients. In other circumstances, representatives that are duly registered may serve different roles, in some cases they may offer discrete recommendations in their capacity as a broker-dealer representative, and in other scenarios they may provide on-going investment advice in their capacity as an investment advisor.

We believe that, consistent with the approach that the SEC adopted in Regulation Best Interest, it is better for firms and their representatives to explain their role, relationship, and obligations with respect to each customer through clear disclosure than to create a regulatory presumption of what a relationship involves based on the use of specific words in an individual's title. The Department should make clear that fiduciary status depends on an objective assessment of all relevant facts and circumstances, and that the use of any particular title is not, without more, determinative of an adviser's fiduciary status.

C. Section (c)(1)(iii) should be clarified to confirm that it applies only where the acknowledgment of fiduciary status relates to the recommendation at issue.

The Proposal provides that a recommendation will constitute fiduciary investment advice whenever "[t]he person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations." While we agree that acknowledgment of fiduciary status is an appropriate basis for defining fiduciary investment advice, the Department should clarify that the acknowledgment must relate to the recommendation at issue, and not to separate and unrelated interactions.

Once again, take the hypothetical described above, in which Fidelity recommends that participants ensure that their plan assets are appropriately diversified and suggests that they consider investment in their plan's age-appropriate target date fund to accomplish that end. Assume that Jane (but not another plan participant, Joe) has previously sought distribution-related advice—and therefore Jane (but not Joe) has received an acknowledgment from Fidelity that it acts as a fiduciary with respect to rollover recommendations. Absent the requested clarification to Section (c)(1)(iii), one could take the position that this email would automatically be considered fiduciary investment advice to Jane (though not to Joe), even though the recommendation it contains is not individualized and would not reasonably be relied upon by either Jane or Joe as a basis for their investment decision-making, and even though Fidelity's acknowledgment of fiduciary status to Jane was expressly limited to an entirely different context.

In order to effectuate this clarification, we suggest that the Department revise Section (c)(1)(iii) to read: "The person making the recommendation represents or acknowledges that they are acting as a fiduciary in connection with the investment recommendation at issue."

D. In addition to the revisions and clarifications to the definition of investment advice proposed above, the Department should clarify how the definition of investment advice applies to investment interactions with institutional retirement investors.

In addition to eliminating of Section (c)(1)(i) and modifying to Sections (c)(1)(ii) and (iii) proposed above, it is important that the Department clarify how the definition of investment advice applies to investment interactions with institutional investors. In doing so, the Department should align any final rule based on the Proposal with the securities laws applicable to institutional investors, as well as other existing regulation under ERISA. This clarification is necessary so that all parties to these institutional business interactions can rest assured that such routine and necessary processes may continue without risk.

1. The Proposal should treat institutional investors consistently with their treatment under applicable securities laws.

The preamble to the Proposal contains a helpful discussion about how one of the Department's goals in drafting the Proposal was to bring consistency to the standards that apply to the provision of investment advice to retirement investors. The Department noted that the obligations under the Proposal "are generally consistent with the best interest obligations set forth in the Securities and Exchange Commission's (SEC's) Regulation Best Interest."[12] Likewise, when discussing the SEC's approach to determining what constitutes a recommendation, the Department stated that it "believes efficiencies will apply if it adopts a similar approach" to that taken by the SEC.[13]

This is a laudable approach. However, it is not clear that the Proposal in fact aligns with federal securities laws with respect to the treatment of institutional investors. The SEC's Regulation Best Interest ("Reg BI") applies solely to an adviser's interactions with retail customers, which Reg BI defines as "a natural person, or the legal representative of such natural person, who (i) [r]eceives a recommendation of any securities transaction or investment strategy involving securities [. . .] and (ii) uses the recommendation primarily for personal, family or household purposes."[14] In the Reg BI adopting release, the SEC clarified that the term "legal representative" was intended to mean "non-professional persons who are acting on behalf of natural persons but who are not regulated financial services industry professionals."[15] The SEC specifically carved out institutional investors from the definition of a retail customer, stating that Reg BI's definition of "retail customer" was intended to provide "more certainty that institutions

[12] 88 Fed. Reg. 75891.
[13] *Id.* at 75904.
[14] 17 C.F.R. §240.15l-1(b)(1).
[15] 84 Fed. Reg. 33343.

and certain professional fiduciaries are not covered for purposes of [Reg BI].” In particular, the SEC stated that it believes that a “workplace retirement plan is not a natural person” and, therefore recommendations to “workplace retirement plans or their representatives and service providers” (e.g., plan sponsors trustees and other fiduciaries) are not subject to Reg BI.[16] Practically speaking, the retail customer framework of Reg BI, which requires, among other things, an examination of an individual retail investor’s age, tax status, investment experience, investment time horizon, and risk tolerance, would not work when applied to institutional investors.

FINRA Rule 2111 also makes a distinction between retail customers and institutional customers with respect to suitability obligations. The Supplementary Material to FINRA Rule 2111 makes clear that broker-dealer recommendations of securities transactions or investment strategies that are made to retail customers would be subject to Reg BI and not FINRA Rule 2111(a).[17] For recommendations made to institutional customers, FINRA Rule 2111(b) provides an exception to the suitability rules applicable to an institutional customer that is capable of evaluating risk and affirmatively indicates that it is exercising independent judgment. Under those circumstances, the broker-dealer is deemed to have fulfilled its suitability obligations when making recommendations to institutional clients. The FINRA approach—and the SEC’s view that Reg BI should not apply to institutional investors—reflects the practical reality that the scenarios under which broker-dealers provide services to institutional clients are very different than the typical broker/retail investor relationship. Institutional clients often provide services to their own clients (or in the case of a retirement plan, individual plan participants) and are best situated to determine what is in the best interests of their myriad of clients. Indeed, in many cases they have a fiduciary obligation to act in their clients’ best interests. For those institutional clients that have the ability to evaluate the risks and exercise independent judgment, requiring broker-dealers to comply with a separate set of obligations in connection with recommendations related to retirement assets would be redundant and not serve any practical purpose.

The same considerations that have led the SEC and FINRA to establish separate rules for recommendations to institutional investors under the securities laws should also apply to recommendations to institutional retirement investors under any final rule based on the Proposal. Accordingly, we request that the Department clarify the Proposal to align with the approach taken by the SEC and FINRA with respect to institutional investors under the applicable securities laws.

Finally, we note that long-standing Department and judicial precedent also establishes that sales interactions do not constitute fiduciary conduct. For example, in a 1977 regulation addressing application of the prohibited transaction exemption under ERISA section 408(b)(2) for payment of service providers,[18] the Department made clear that if a person who is already

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[16] *Id.* at 33344.
[17] FINRA Rule 2111, Supplementary Material: 0.8 Regulation Best Interest.
[18] DOL Reg. § 2550.408b-2(f), *Example 4.*

providing investment advice to a plan "persuades" a plan fiduciary to extend his or her contract at a higher fee, the advisor has not engaged in a prohibited transaction because the advisor has not used any of the authority, control or responsibility which makes it a fiduciary to cause the plan to pay an additional fee. Similarly, Circuit courts have consistently and uniformly rejected the notion that a service provider acts as an ERISA fiduciary when advocating for and negotiating the terms of its compensation.[19] The Department should align any final rule based on the Proposal with these precedents as well.

2. The Department should make clear that responses to RFPs and RFIs from, and other routine sales interactions with, institutional retirement investors are not fiduciary investment advice.

The Department should make clear in any final rule based on the Proposal that information and opinions provided as part of routine institutional interactions—including in responses to RFPs and RFIs and in pitch materials—do not contain recommendations that can reasonably be relied upon by the recipient institutions as a basis for decisions in their best interest and, thus, do not constitute fiduciary investment advice under ERISA and the Code.

The preamble of the Proposal makes passing reference to the very common occurrence in which an adviser is communicating with a potential customer when seeking to be hired for investment advice services (the so-called "hire me" recommendation).[20] Based upon this portion of the preamble, the Department states that it does not believe "a person could become a fiduciary merely by engaging in the normal activity of marketing themselves as a potential fiduciary… [or] [t]outing the quality of one's own advisory or investment management services…."[21]

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[19] *See Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1213 (10th Cir. 2019) ("A service provider [] does not owe a fiduciary duty regarding its compensation when compensation is fixed during an arm's-length negotiation."); *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833, 838 (9th Cir. 2018) ("A service provider is plainly not involved in plan management when negotiating its prospective fees[.]"); *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1003 (8th Cir. 2016) ("[A] service provider's adherence to its agreement with a plan administrator does not implicate any fiduciary duty where the parties negotiated and agreed to the terms of that agreement in an arm's-length bargaining process."); *Santomenno v. John Hancock Life Ins. Co. (USA)*, 768 F.3d 284, 293 (3d Cir. 2014) ("[W]hen a service provider and a plan trustee negotiate at arm's length over the terms of their agreement, discretionary control over plan management lies not with the service provider but with the trustee, who decides whether to agree to the service provider's terms."); *Danza v. Fidelity Mgmt. Trust Co.*, 533 F. App'x 120, 124 (3d Cir. 2013) ("[When] Fidelity was negotiating its fees with [the plan sponsor], it was not a fiduciary of the plan."); *Renfro v. Unisys Corp.*, 671 F.3d 314, 324 (3d Cir. 2011) (ERISA plan service provider "owes no fiduciary duty with respect to the negotiation of its fee compensation"); *Hecker v. Deere & Co.*, 556 F.3d 575, 583 (7th Cir. 2009) ("a service provider does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms."); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987) (a person with no "control over the [plan's] decision whether or not, and on what terms, to enter into an agreement with him . . . is not an ERISA fiduciary with respect to the terms of the agreement for his compensation").

[20] 88 Fed. Reg. 75906.

[21] *Id*.

But in reality, sales-related discussions with institutional investors include much more than "normal . . . marketing" activity. When plan fiduciaries and their consultants are considering whether to offer (or whether to continue to offer) Fidelity mutual funds or other Fidelity investment products and services in their plan, they routinely require Fidelity to respond to a lengthy Request for Proposal ("RFP") or Request for Information ("RFI"), in which Fidelity is asked to provide detailed responses to questions that are focused not only on the product being considered, but also on how that product is a good fit for the particular plan at issue. Last year alone, Fidelity responded to more than one thousand RFPs and RFIs along these lines. Throughout the RFP/RFI process, Fidelity will endorse its products and services as being a good fit for the plan. But the plan sponsor and its consultant are not relying in any way on Fidelity's endorsement: Instead, they are evaluating for themselves which of the many advisers who responded to the RFP offers the product that best meets the needs of the plan.

Similar situations also arise even where a formal RFP or RFI is not used. The pooled employer plan ("PEP") Fidelity offers is an example. Under the PEP, Fidelity entities serve as the pooled plan provider, designated investment manager, plan administrator, and directed trustee. When marketing the PEP, we provide general information about these various roles as well as the investments from which the fund lineup will be selected and monitored. In addition, we provide information about the fees that will apply in connection with the PEP. Prospective adopting employers are free to ask questions and of course may decide whether to adopt the PEP or not.

Once an employer adopts the plan and participates in the PEP, the applicable Fidelity entities perform their fiduciary duties within the scope of their various roles, including prudently selecting and monitoring a fund lineup on behalf of the plan. However, when marketing the PEP, we do not undertake to consider or recommend potential third parties to fulfill the role of choosing a fund lineup, as we arguably would need to do if we were serving as a fiduciary when marketing this product. Such an approach would not be feasible, practical from a business standpoint, or expected by the employers to whom we market our services.

Fidelity believes the institutional sales problem could be resolved by the revisions and clarifications to the definition of investment advice we propose above. With these proposed changes, the definition of investment advice would be appropriately limited to situations in which *either* (1) the fiduciary nature of the recommendation has been expressly acknowledged, or (2) the recommendation is individualized and of the sort that reasonably would be relied upon by a similarly situated investor as a basis for an investment decision that is in their best interest. However, given the routine, necessary and beneficial nature of these sales interactions, the industry requires clarity on this point. Accordingly, we ask the Department not only to make the changes to the definition of investment advice requested above, but also to expressly state its view that, with such changes, routine institutional sales interactions will not be fiduciary advice.

3. If the final rule does not adopt the revisions and clarifications to the definition of investment advice proposed above, then it should incorporate the carve-outs and exclusions set forth in the Department's 2016 Rule.

While there are many similarities between the Proposal and the Investment Advice Rule that the Department finalized in 2016 (the "2016 Rule"), [22] the preamble to the Proposal states that, unlike the 2016 Rule, the Proposal does not include any carve outs or exclusions. Should the Department (1) appropriately narrow the overbroad definition of fiduciary investment advice as proposed above, and (2) clearly state that the definition of investment advice does not includes institutional sales interactions, then the 2016 carve-outs and exclusions may not be necessary. But, without all our requested changes, the Department should incorporate these carve-outs and exclusions, as it did in 2016, in order to avoid substantial overbreadth, and in order to ensure that the parameters of the activity that constitutes fiduciary conduct under the Proposal are both clear and appropriate.[23]

E. The Proposal should be clarified and/or revised with respect to its application to distributions and transfers of assets and "implicit" rollover recommendations.

The Proposal provides that a recommendation to take a distribution from a plan or IRA is fiduciary investment advice. According to the preamble, "[a] distribution recommendation involves either advice to change specific investments in the plan or to change fees and services directly affecting the return on those investments."[24] The Department appears to take the same view with respect to transfers of assets from a plan or IRA ("TOAs"). But beyond this bare assertion, there is no reasoning as to why or how a distribution or TOA recommendation would always involve an investment recommendation, and no recognition of the many common circumstances in which that is not in fact the case. For example, a recommendation to take (or not take) a distribution from a defined benefit plan does not necessarily involve an investment recommendation from the participant's perspective. Similarly, a discussion about the relative merits of a participant loan over a hardship withdrawal would not have investment implications. Nor would educating a participant or IRA owner on the applicable plan and IRS rules generally related to required minimum distributions involve an investment recommendation.

[22] Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, Labor Regulations Section 2510.3-21, 81 Fed. Reg. 20946 (April 8, 2016).

[23] The carve outs and exclusions in the 2016 Rule that would need to be reincorporated here, absent our suggested changes to the definition of investment advice, include the sophisticated investor exclusion and the platform provider exclusion, as well as carve outs for investment selection and monitoring assistance, general communications, and swap and security-based swap transactions. In addition, while the preamble to the Proposal reaffirms the validity of Interpretive Bulletin ("IB") 96-1 and "confirms that, for purposes of the proposal, the provision of such [educational] information would not trigger fiduciary status," any final rule should expressly incorporate IB 96-1 into the final regulation, as was done with the 2016 Rule. 88 Fed. Reg. 75907 and 75911.

[24] 88 Fed. Reg. 75906.

Moreover, IB 96-1, which the Department reinserted as part of a technical amendment to the Code of Federal Regulations in 2020,[25] provides that information and materials that inform a participant or beneficiary about the benefits of plan participation do not constitute the rendering of investment advice under ERISA. The rationale is that such information and materials "relate to the plan and plan participation, without reference to the appropriateness of any individual investment option for a particular participant or beneficiary under the plan."[26] The same rationale applies with equal force as a participant or beneficiary considers whether to leave the plan (take a distribution) or an IRA owner considers whether to engage in a trustee-to-trustee transfer. The Department confirms that although IB 96-1 generally applies in the context of participants and beneficiaries in participant-directed individual account plans, the analysis it presents is "valid whether the retirement investor is a plan participant, beneficiary, IRA owner, IRA beneficiary, or fiduciary."[27]

Accordingly, the Proposal should be clarified to provide that discussions about distributions and TOAs that are not for the purpose of changing investments are not investment advice and do not fail to constitute education merely because they refer to a particular plan participant, beneficiary or IRA owner.[28]

In addition, the preamble to the Proposal explains that the proposed definition of investment advice would reference "recommendations 'as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA.'"[29] According to the preamble,

> "[t]his proposed provision addresses an important concern of the Department that investment advice providers should not be able to avoid fiduciary responsibility for a rollover recommendation by focusing solely on the investment of assets *after* they are rolled over from the plan. In many or most cases, a recommendation to a plan participant or beneficiary regarding the investment of securities or other investment property after a rollover, transfer, or distribution involves an implicit recommendation to the participant or beneficiary to engage in the rollover, transfer, or distribution."[30] (Emphasis in original).

We do not agree that "in most cases" investment recommendations equate to a recommendation to roll over assets from a plan or IRA, as the above discussion in the preamble suggests. The recommendation to roll over assets and the recommendation as to how to invest

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[25] 85 Fed. Reg 40589.
[26] *See* IB 96-1.
[27] 88 Fed. Reg. 75911.
[28] It is also not clear whether the Proposal is intended to treat participant loans as distributions. While participant loans are distinct from distributions, they are functionally similar insofar as they involve the transfer of amounts from the plan. Also, loan discussions, like distribution discussions, typically do not involve any reference to specific investments and typically the liquidation of investment options since that is usually dictated by plan rules. So, for the same reasons that distribution discussions that are not for the purpose of changing investments should not be treated as fiduciary investment advice, the Proposal should be clarified to provide that participant loan discussions without reference to investments are not treated as fiduciary investment advice.
[29] 88 Fed. Reg. 75905.
[30] *Id*.

those assets are separate and distinct transactions. In practice, there are many situations where a customer is only seeking one of those recommendations and not both. For example, a plan participant may have already decided to leave his or her prior employer's plan and may simply be asking an advisor for help on investing the assets following the rollover. Likewise, many self-directed plan participants may desire a recommendation regarding whether to roll over but have no intention of seeking advice on how to invest their assets either in the plan or in an IRA following a rollover.

Under securities rules, a recommendation to rollover assets does not involve an implicit recommendation to purchase or sell securities. In its cost benefit analysis of Reg BI, the SEC noted that one of the benefits of Reg BI is that it would extend a best interest obligation to "recommendations to open an IRA or to participate in an IRA rollover that do not involve securities transactions," thereby recognizing that not all rollover recommendations necessarily involve a securities transaction.[31] The SEC also expressly recognized that discussions with customers regarding distributions can be purely educational in nature.[32] And, importantly, the SEC considered distribution and investment recommendations to be separate and distinct and subject to different considerations when determining whether the recommendation was in the best interest of the customer. For rollover or account type recommendations, the care obligation under Reg BI requires the consideration of various factors specific to an IRA account as compared to the existing employer-sponsored plan including fees and expenses, available investment options, availability of penalty-free withdrawals, and application of required minimum distributions, among other factors.[33] A recommendation involving a securities transaction, however, involves different considerations and obligations including the evaluation potential risks, rewards, costs, and complexity of the security and, importantly, the evaluation of reasonably available alternatives including whether less complex or costly products could achieve the same objectives for their retail customers.[34] Finally, the SEC recognized that, in the interest of encouraging financial wellness, certain conversations regarding distributions would be considered education and not a recommendation subject to a best interest obligation. For example, the SEC noted that "where a broker-dealer informs a retail customer that based on age and other relevant factors, he or she needs to take a required minimum distribution, but does not otherwise recommend specifics, such as what securities to sell, or where to place the proceeds, the communication would generally not be a 'recommendation' subject to Regulation Best Interest."[35]

In sum, while a rollover recommendation can also accompany a recommendation to invest in particular securities, we urge the Department to follow the approach taken by the SEC and acknowledge that discussions with customers can be purely educational and that a recommendation to rollover assets is separate and distinct from a recommendation to invest securities after the rollover has been completed.

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[31] 84 Fed. Reg. 33446.
[32] 84 Fed. Reg. 33337-38.
[33] 84 Fed. Reg. 33383.
[34] 84 Fed. Reg. 33380-81.
[35] 84 Fed. Reg. 33342, footnote 222.

II. CERTAIN PROPOSED CHANGES TO DISCLOSURE AND OTHER REQUIREMENTS OF PTE 2020-02 SHOULD BE FURTHER REVISED.

As stated above, we appreciate that the Department has left PTE 2020-02 largely intact. Readying our firm and our associates for compliance with PTE 2020-02 was not an easy task. It took hundreds of associates working thousands of hours and involved enormous expense (not to mention significant opportunity costs). Those efforts were not in vain, however, because PTE 2020-02 has provided a path to deliver fiduciary investment advice to the plan participants and IRA owners that we serve.

The Proposal provides significant efficiencies and benefits by expanding the applicability of PTE 2020-02 to self-led online advice as well as advice provided through live representatives. The exclusion of online-only advice from PTE 2020-02 has effectively operated to favor one business model over another, creating an uneven playing field among advice providers that operate solely online and advice providers that operate through live representatives. By expanding the scope of PTE 2020-02 in this way, the Department allows online advice providers to provide fiduciary investment advice for compensation by meeting the same exemptive conditions as a live advice provider would need to meet.

Moreover, as the Department recognizes in the preamble to the Proposal, "Financial Institutions may use a combination of computer models and individual Investment Professionals to provide investment advice and may wish to have a single set of policies and procedures that can govern all recommendations, regardless of whether a Retirement Investor speaks with an Investment Professional."[36] Today, an advice provider may offer an online advice tool and require or enable its representatives to use the same tool when making recommendations to retirement investors in person or over the phone. The current exclusion of online advice under PTE 2020-02 has forced reliance on two separate exemptions for the provision of the same tool-based advice in these circumstances, even where the advice recipient begins the interaction online but then calls to ask for personal assistance from a phone representative. Expanding PTE 2020-02 to cover both online advice interactions and advice offered through a live representative will provide the opportunity to streamline compliance, reducing cost as well as reducing confusion among investment advice recipients who may be receiving different disclosures with respect to otherwise identical advice interactions.

At the same time, however, we believe that the Proposal includes many other modifications to PTE 2020-02 that would create significant additional burdens without providing meaningful additional benefits or protections to retirement investors. Accordingly, we request a number of specific changes to the proposed modifications to PTE 2020-02.

A. The proposed acknowledgement and related model language suggested to comply with Sections II(b)(1), (2) and (4) of proposed PTE 2020-02 should be modified.

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[36] 88 Fed. Reg. 75982.

Under the Proposal, to comply with PTE 2020-02, a person must make "a written acknowledgement that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I, the Code, or both when making investment recommendations."[37]

The model language proposed by the Department to comply with this requirement, provides: "When we make investment *recommendations* to you regarding your retirement plan account, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable…."[38] (Emphasis added). That statement is both overbroad and not accurate. A person is only a fiduciary within the meaning of ERISA and the Code when he or she makes a recommendation that meets the definition of fiduciary investment advice. Read literally, the acknowledgment required by the Proposal and the proposed model language would deem *any* investment recommendation to constitute fiduciary investment advice under ERISA and the Code and, thus, it is overbroad.

The model disclosure currently provided in the preamble to PTE 2020-02 avoids this problem. It provides:

> "When we provide *investment advice* to you regarding your retirement plan account or individual retirement account, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts."[39] (Emphasis added).

Accordingly, we request that the Department make clear that the acknowledgement need only apply to recommendations made in a fiduciary capacity and revise its proposed model language to be consistent with its existing model language in this regard. Assuming such modification is made, the model disclosure set forth in the preamble[40] is helpful and should be included in the exemption as a safe harbor for compliance with Sections II(b)(1), (2), and (4).

B. The Proposal's modification of PTE 20202-02's rollover disclosure requirements should be revised.

The preamble to the Proposal indicates that it intends to clarify the rollover disclosure currently required under Sections II(b)(3) and II(c)(3) of PTE 2020-02. In so doing, however, we believe that the Department has introduced a new requirement under Section II(b)(5) of the proposed PTE 2020-02 that is unnecessary and burdensome. In particular, proposed Section II(b)(5) provides that,

[37] 88 Fed. Reg. 76000.
[38] 88 Fed. Reg. 75985.
[39] 85 Fed. Reg. 82827.
[40] 88 Fed Reg. 75985.

> "[b]efore engaging in a rollover, *or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan*, the Financial Institution and Financial Professional must consider and document the basis for their conclusions as to whether a rollover is in the Retirement Investor's Best Interest, and must provide that documentation to the Retirement Investor."[41] (Emphasis added).

This provision is fairly read to require that the financial institution consider and document the best interest basis for its recommendation before engaging in a rollover as is required under the current PTE 2020-02. However, the Proposal appears to impose these same requirements with respect to making a recommendation as to the post-rollover investment of assets. That is, the Proposal appears to state that the advice provider must deliver documentation of their conclusion as to why a *rollover* is in the best interest of the retirement investor before making a recommendation regarding *post-rollover investments*. This expansion of the requirement to document and provide a rollover "best interest rationale" prior to an investment recommendation is inappropriate.

As discussed above in Section I.E., a rollover recommendation and a recommendation as to how to invest post-rollover assets are separate and distinct recommendations. It is not required that they accompany one another, and, as a practical matter, they often don't accompany one another. Accordingly, while it makes sense that an advice provider would document why a rollover recommendation is in the retirement investor's best interest before engaging in the rollover, there is no reason why the best interest rationale for that rollover recommendation should be provided before an adviser makes a separate recommendation as to the post-rollover investment of assets, especially where the investment advice provider is only making a recommendation as to the investment of assets and is not recommending a rollover at all.

We assume that the Department did not intend this outcome. Accordingly, we request that the Department modify the wording of new Section II(b)(5) to delete the phrase "… or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan."

C. The proposed new language in Section II(c)(2) governing certain forms of compensation should be aligned to Regulation Best Interest.

The Proposal is not consistent with securities rules governing compensation. In particular, in adopting Regulation Best Interest ("Reg BI"), the SEC acknowledged that certain types of compensation programs are more likely to create an incentive for a financial professional to offer investment advice that is not in the best interests of his or her customers. To address this concern, the SEC took a reasoned approach and identified specific types of compensation arrangements that result in conflicts of interest that are so pervasive that "they

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[41] Proposed Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees, Section II(b)(5), 88 Fed. Reg. 76000.

cannot be reasonably mitigated and must be eliminated in their entirety."[42] Specifically, Reg BI requires broker-dealers to eliminate sales contests, sales quotas and similar arrangements that involve time-bound compensation and are limited to a specific period of time because they "create high-pressure situations for associated persons to engage in sales conduct contrary to the best interest of retail customers."[43] Importantly, the SEC noted that compensation arrangements that are not expressly prohibited are permitted "provided that the broker-dealer establishes reasonably designed policies and procedures to disclose and mitigate the incentive created" and complies with its other obligations under Reg BI.[44]

We encourage the Department to align with the approach taken by the SEC and reflected in existing text of PTE 2020-02 and continue to permit financial institutions the flexibility to structure and maintain compensation practices that are specific to an individual firm's unique business model while also continuing to require firms to adopt policies, procedures and practices to ensure that such compensation practices do not result in recommendations that violate the Impartial Conduct Standards.

D. The proposed new requirements with respect to correcting, and/or reporting and paying the excise taxes for, non-exempt prohibited transactions should be further modified.

The Proposal would require as part of the retrospective review that the Senior Executive Officer certify that the "Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975."[45] In addition, "engaging in a systematic pattern or practice of failing" to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay the resulting excise tax imposed under Code section 4975 would be added by the Proposal to the list of behaviors that could render a Financial Institution ineligible to rely on PTE 2020–02 for ten years.[46]

The Proposal should be further modified to provide expressly that these certifications and other obligations are to be based upon the financial institution and/or financial professional's good faith and reasonable diligence in complying with the retrospective review required under Section II(d) of the proposed PTE 2020-02 and good faith calculation of any excise taxes payable with respect to such prohibited transactions. Failure to discover, report, or certify to any non-exempt prohibited transactions despite such good faith compliance and reasonable diligence, as well as failure to correctly calculate any excise taxes due despite good faith reliance on

[42] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 FR 33318, 33395 (July 12, 2019).
[43] *Id*. at 33331.
[44] *Id.* at 33397.
[45] 88 Fed. Reg. 76001.
[46] 88 Fed. Reg. 76002.

applicable guidance, should not result in failure to comply with the conditions of PTE 2020-02 or expose the financial institution and/or financial professional to a finding of ineligibility to rely on PTE 2020-02. We suggest the Department revise section II (d)(3)(B) to read:

"(B) The Financial Institution has filed (or will timely file, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975. A Financial Institution will not fail to meet the requirements under this section II(d) where it has acted in good faith and exercised reasonable diligence to meet the requirements of this section."

Otherwise, the proposed PTE 2020-02 would effectively be conditioned on the financial institution and/or financial professional achieving perfection in this regard, despite the Department's appropriate recognition that in conducting the retrospective review, such techniques as sampling are an important and necessary component of any prudent review process.[47] Clearly, a sampling process cannot definitively discover every possible potentially non-exempt prohibited transaction that may have occurred. Having engaged in a reasonable, good faith retrospective review with reasonable diligence, financial institutions and financial professionals should not be held to a higher standard—that of perfectly discovering every non-exempt prohibited transaction or correctly calculating or paying any excise tax—in hindsight.

E. The proposed exemption should be available with respect to plans that cover the employees of financial institutions.

The Department has not proposed to eliminate from PTE 2020-02 the exclusion of investment advice with respect to plans that cover the employees of the financial institution providing the investment advice. We believe that the protective elements of the Impartial Conduct Standards and the other conditions of the PTE 2020-02 adequately protect participants in these plans. Moreover, non-discretionary investment advice provided to plan participants benefits retirement investors, including retirement investors who happen to work for a financial institution. The most efficient way to provide this advice is to do so in a uniform manner that is fully protective of the interests of plan participants by using one prohibited transaction exemption for all retirement investors, including both employees and non-employees of the financial institution.

The exclusion from PTE 2020-02 of investment advice to participants in a financial institution's own plans is also inconsistent with the Department's historical treatment of financial institutions as plan sponsors. As an example, the Department stated in the preamble to the ERISA Section 404(c) regulation proposed in 1991:

> The Department is persuaded, however, that in the case of plans sponsored by certain financial institutions which have appropriate professional expertise in investment management, the designating fiduciary need not be independent. In enacting ERISA,

[47] 88 Fed. Reg. 75988.

> Congress recognized the need to accommodate such plans by fashioning special rules. For example, section 408(b)(4) of ERISA permits a bank to invest the assets of an inhouse plan in deposits of that bank and section 408(b)(5) permits an insurance company to issue contracts to a plan covering its own employees. The stated Congressional policy underlying these exemptions is that it would be "contrary to normal business practice" for a bank or insurer to purchase the products of another company for its own in-house plans. Moreover, the Department has recognized in certain administrative exemptions that it would be contrary to normal business practice for a company whose business is financial management to seek financial management services from a competitor, e.g., Prohibited Transaction Exemptions 77-3 and 82-63.

Similarly, it would be contrary to normal business practice for a financial institution engaged in the business of providing advice to participants in retirement plans to seek advice services for its own employees from a competitor. There is no reason to exclude participants in a financial institution's plans from receiving investment advice. We urge the Department to eliminate this exclusion and allow for PTE 2020-02 to be used with respect to these plans.

F. *The Proposal should provide a longer period, no less than 30 days, in which to provide a complete copy of Policies and Procedures and the Retrospective Report to the Department.*

The Proposal would impose a new requirement for financial institutions to "provide their complete policies and procedures to the Department upon request within 10 business days."[48] For large financial institutions, policies and procedures may consist of numerous documents embedded in various compliance intranet sites and other records across multiple legal entities and/or business units. These policies and procedures are subject to continual updating, modification, and refinement. While this allows for the efficient, effective and timely use of the policies and procedures by diverse entities and associate groups across a firm, it makes the collection of a copy of the "complete policies and procedures" a difficult and potentially time-consuming task. Accordingly, we respectfully request that the Department modify Section II(c)(3) of the proposed PTE 2020-02 to provide for at least 30 days following a request in which to provide "complete policies and procedures" to the Department.

We also note that the proposed PTE 2020-02 would continue to require that a financial institution make the retrospective review report, certification and supporting data available to the Department within 10 business days of request. We anticipate that, as a practical matter, the Department would often request these materials at the same time that it requests "complete policies and procedures" from a financial institution. For the sake of consistency and efficiency, we therefore request that the Department modify Section (d)(5) of the proposed PTE 2020-02 to allow for the same period of at least 30 days following a request to make available a retrospective review report, certification and supporting data.

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[48] 88 Fed. Reg. 76001.

G. PTE 2020-02 should not be expanded to require an adviser to make all records demonstrating compliance with PTE 2020-02 available to plan sponsors, participants, and IRA owners.

In the preamble to the Proposal, the Department states that it is considering further amending PTE 2020-02 to allow plan sponsors, plan participants and IRA owners to review the records necessary to determine whether the exemption is satisfied by expanding the ability of those people to review the records required to be kept under Section IV of PTE 2020-02.[49] The Department expresses the view that such records could be "easily shared" with plan sponsors, plan participants and IRA owners, although the Department expects that few would request them.

We disagree that records demonstrating compliance with PTE 2020-02 could be easily shared and with the notion that few would ever request these records. To the contrary, such record production would be extremely burdensome. We also believe that the right to obtain such documentation could easily be abused by plaintiffs' attorneys who might use the mere burden of fulfilling such requests to exert leverage on advice providers to resolve what might be otherwise meritless disputes regarding investment advice.

More importantly, we can see little reason why a plan sponsor, plan participant, IRA owner, or beneficiary would need or benefit from evidence of compliance with the technical requirements of a prohibited transaction exemption. Failure to comply with the exemption does not necessarily mean that advice received by the retirement investor was not prudent or was not in that retirement investor's best interest. Moreover, any failure would result in excise taxes payable by the advice provider, not the retirement investor. The disclosures and other requirements of the exemption already more than adequately inform and protect retirement investors. It is unnecessary and overly burdensome to require financial institutions to produce records upon request to retirement investors as well.

H. If an adviser becomes ineligible to use PTE 2020-02, a six-month wind-down period is insufficient.

As part of PTE 2020-02's eligibility provisions, the Department has proposed that "all entities would become ineligible six months after the conviction date, the date of the Department's written determination regarding a foreign conviction, or the date of the Department's written ineligibility notice regarding other misconduct, as applicable."[50] According to the Department, six months is ample time to inform retirement investors of their ineligibility and/or to find alternative means of complying with ERISA. While six months may be adequate time to send a notice to retirement investors, it is clearly insufficient time for a financial institution to determine an alternative means of complying with ERISA in order to continue to

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[49] 88 Fed. Reg. 75990.
[50] 88 Fed. Reg. 75989.

provide advice to retirement investors. And enabling financial institutions to find alternative compliant means to help retirement investors surely should be the Department's goal under these circumstances. Doing so would enable retirement investors to continue to receive investment recommendations in their best interest. Moreover, as the Department notes, during any wind-down period,

> "the Financial Institution and Investment Professionals are still fiduciaries that are subject to all of the fiduciary requirements and prohibited transaction rules. Thus, Financial Institutions and Investment Professionals must continue to comply with the exemption during [the wind-down period], and any transactions that do not meet the terms of the exemption will be subject to excise tax and ERISA penalties."[51]

That is, any noncompliance or inappropriate conduct should not continue during a wind-down period. Accordingly, we request the Department to further revise the Proposal to provide for at least 12 months to wind-down advice or to find an alternative means of complying with ERISA following a finding of ineligibility.

I. Additional web disclosure is unnecessary and would be duplicative of disclosures required by Regulation Best Interest.

While we fully support meaningful disclosure of cost, compensation, and material conflicts, the information included in such disclosures and the manner in which they are delivered is critically important to both the usefulness of the information to the retirement investor and workability from the perspective of the financial institution. We believe the existing disclosure requirements under Reg BI and other existing regulatory obligations are sufficient to help retirement investors make informed decisions. We also believe that any new disclosure or delivery requirements that are substantially similar to a financial institution's disclosure obligation under existing federal securities laws would not advance the Proposal's goals that the Department set forth in the preamble of establishing regulatory uniformity and would not promote clarity and efficiency. Accordingly, any new requirement to establish a public website is unnecessary, would be burdensome to establish and maintain and would not provide useful information to investors.

To the extent that the Department nevertheless determines to require additional web-based disclosure, we request that the Department specify that such disclosure can also be accomplished through compliance with disclosure obligations with respect to similar information under applicable law. For example, in the preamble, the Department suggests that the web-based disclosure would contain a description of the financial institution's business model and associated conflicts of interest.[52] However, Reg BI already mandates that broker-dealers provide full and fair disclosure of all material facts relating to the scope and terms of a broker-dealer's

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[51] *Id*.
[52] 88 Fed. Reg. 75986.

relationship with the customer, the material facts and costs the customer will incur, the type and scope of services to be provided and all material facts relating to conflicts of interest associated with the recommendation including, without limitation, conflicts associated with proprietary products, payment from third parties and compensation arrangements.[53] Therefore, we believe that these Reg BI or other regulatory disclosures should be sufficient to provide investors the information they need to make an informed judgment about the transactions recommended by financial institutions and their associated persons.

Similarly, the Department suggests that a web-based disclosure would include "a schedule of typical fees." In the event the Department includes such a requirement, we request that the Department clarify that such schedule only be required with respect to account level fees charged by the financial institution to the retirement investor that are not otherwise required to be provided to the retirement investor under applicable regulation. For example, the annual disclosure required to be made to participants in participant-directed individual account plans includes fees that may be paid by the investor for investment advice as well as a variety of other services and that can vary by plan. Such fees should not also be required to be included in any web-based disclosure that may become required under PTE 2020-02.

Leveraging, rather than duplicating, existing disclosure obligations would also be consistent with the SEC's approach in Reg BI. Although Reg BI requires broker-dealers to fully and fairly disclose all material facts associated with fees and charges, the SEC acknowledged that many of these fees and charges are already required to be disclosed under the regulatory framework that existed prior to the adoption of Reg BI. In discussing disclosure obligations with respect to product-level fees, the SEC noted that to the extent "information regarding product-level fees and costs appears in a currently mandated disclosure document, such as a trade confirmation or a prospectus, delivery of that information in accordance with existing regulatory obligations will be deemed to satisfy the [disclosure obligations under Reg BI]."[54]

Finally, in the preamble of the Proposal, the Department suggests that any new web-based disclosure obligation would include a new obligation on financial institutions to list all product manufacturers and other parties that make third party payments to the financial institution, its affiliates, and representatives with respect to specific investment products recommended to retirement investors. As proposed, this disclosure requirement would include a description of the "benefits" the financial institution provides to product manufacturers and "percentages, formulas or other means reasonably calculated to present a materially accurate description of the arrangements."[55] We believe this requirement would be unduly burdensome on financial institutions, would not provide any meaningful information to investors and would only serve to distract investors from relevant information regarding the fees and costs associated with a financial institution's recommendations. Because broker-dealers make available to customers

[53] *See* Regulation Best Interest, 84 Fed. Reg. 33349.
[54] Regulation Best Interest, 84 Fed. Reg. 33355.
[55] 88 Fed. Reg. 75986.

securities manufactured by hundreds of different product manufactures, the disclosures contemplated by this requirement would be voluminous and possibly serve to distract customers from the material facts that are required to be disclosed under existing securities laws. If any of this information was material to an investor, that is if there was "a substantial likelihood that a reasonable shareholder would consider it important,"[56] it would already have been required to be disclosed under Reg BI. Similarly, with respect to any third-party payments that created a material conflict of interest, such conflict would need to be identified, disclosed, mitigated or eliminated under a broker-dealer's policies and procedures that a firm is required to maintain under Reg BI.[57] In summary, we strongly support meaningful disclosure of cost, compensation, and material conflicts to customers. However, we encourage the Department not to adopt new voluminous disclosure obligations that would be burdensome to maintain and deliver, that would largely duplicate disclosures required by existing regulations and that, in our view, would not provide any meaningful or material information to assist investors in evaluating a financial institution's recommendations.

III. THE PROPOSAL SHOULD BECOME EFFECTIVE OR APPLICABLE AT LEAST 12 MONTHS AFTER FINALIZATION.

The Department has proposed that any final rule become effective 60 days after publication in the Federal Register. Sixty days would provide a grossly inadequate timeframe in which to comply with the multitude of changes that the Department has proposed. Based on our experience complying with the Department's 2016 Rule and the Department's revised interpretation of the 1975 Regulation and PTE 2020-02 in 2020, we believe that at least 12 months would be needed to implement the changes required to comply with any final rule based on the Proposal. By the same token, the Department's regulation in this area has a long history, and we recognize that the Department has put much time and effort into this Proposal. Providing an additional 10 months to allow advice providers to implement the Proposal's new requirements thoroughly and correctly would be reasonable and worthwhile.

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We would be pleased to respond to any questions or comments regarding this letter.

Sincerely,

James Barr Haines

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[56] Regulation Best Interest, 84 Fed. Reg. 33354 citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 224 (1988).
[57] 17 C.F.R. §240.15l–1(a)(2)(iii).