Submitted Electronically to: www.regulations.gov

January 2, 2024

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

Re: **Definition of Fiduciary: RIN 1210-AC02;**
Proposed Revisions to Prohibited Transaction
Exemption 2020-02: ZRIN 1210-ZA32

Ladies and Gentlemen:

Cetera Financial Group ("Cetera") submits the following comments regarding the proposed "Retirement Security Rule", redefinition of advice fiduciary status, and amendments to Prohibited Transaction Exemption 2020-02 ("PTE 2020-02") noted above. These matters have been published as separate rulemaking initiatives, but they are related and we will offer comments regarding all of them in this letter. We will refer to the proposed new rules and accompanying text collectively as the "Proposal".

Cetera is the corporate parent of five broker-dealers and three investment advisers. We provide securities brokerage and investment advisory services to more than 1 million investors through our more than 12,000 affiliated financial professionals. The vast majority of our customers are individuals and small businesses. They include sponsors of workplace retirement plans, participants in those plans, and individuals who invest through Individual Retirement Accounts ("IRAs") and other similar self-directed retirement savings vehicles.

Investing for retirement is critical for individual Americans and the health of both our economy and society. The evolution from employer-funded defined benefit retirement plans to self-directed defined contribution arrangements has made it more critical than ever for retirement savers to have the greatest possible degree of access to information, advice, and investment products that will allow them to meet their retirement financial goals. No matter how well-intentioned, revisions to the current regulations must be undertaken with caution and in full appreciation of the collateral consequences for both investors and the broader economy.

We will offer more comments on specific aspects of the Proposal below, but it will result in a reduction of investor access to information and advice and other negative effects that have not been sufficiently considered by EBSA and the Department of Labor (the "Department"). It will increase costs for both investors and providers of investment advice, add confusion and

uncertainty about applicable legal standards, and produce little in the way of tangible benefits for the investors it is intended to protect.

President Biden recently held an event at the White House in which he spoke about the Proposal.[1] A central message in his remarks was that many financial advisers provide advice to investors that is not in their best interest, and often recommend products which include unspecified "junk fees" of which investors were not aware.

We recognize that the President has his own views on regulatory initiatives and that the Department may not agree with all of them. That being said, the Department is part of the administration and has promulgated the Proposal, and it will be viewed as endorsing the substance of the President's remarks. Any suggestion that a large segment of providers of investment advice are deliberately misleading customers is inaccurate, not supported by objective evidence, and in general not helpful to any discussion of changes to the current regulatory system applicable to retirement saving and investing. In particular, the notion that a significant segment of investment products contain "junk fees" that are not disclosed to clients is simply false. That should be immediately evident to anyone who reviews the fee and expense section of the prospectus for virtually any investment product.

It is likely true that some individuals or firms have made recommendations to purchase investment products in retirement accounts that were not in the best interest of the purchaser. If that occurs, it can and should be dealt with through enforcement of existing regulations under ERISA, SEC Regulation Best Interest ("Reg. BI"), the NAIC Suitability in Annuity Transactions Model Regulation, and numerous other state laws applicable to the sale of securities and insurance products. However, the idea that such practices permeate the marketplace and require new regulations such as those in the Proposal is simply not borne out by the facts. In considering this topic, the Department should heed the Hippocratic Oath to which physicians subscribe: First, do no harm.

I. Redefinition of Investment Advice Fiduciary Status: Another Step in A Long Journey

The primary thrust of the Proposal is to alter the standards governing how investment advice fiduciary status is determined. This issue has a long history, beginning shortly after the passage of the ERISA statue in 1974. Since 1975, the Department has utilized a list of criteria referred to as the "Five-Part Test" to determine who is an investment advice fiduciary and thus subject to the stringent rules governing receipt of compensation in connection with provision of advice and services.

The Five-Part Test consists of the following elements:

- Provision of advice or recommendations regarding purchases or sales of securities or other property for a fee;

[1] https://www.youtube.com/watch?v=35Nq9YmYowY

- On a regular basis;
- Pursuant to a mutual understanding;
- The advice is intended to serve as a primary basis for an investment decision; and
- The advice is individualized to the person receiving it.

The Five-Part Test was developed to create a line of demarcation and make clear that not everyone who sells an investment product or service to a retirement investor should be deemed a fiduciary. Fiduciary status requires a relationship of trust and confidence, in which the customer has a reasonable expectation that the service provider will act in the customer's best interest. This is a crucial point: The Five-Part Test sets forth a set of factors that, in combination, are indicative of the kind of relationship of trust and confidence that the drafters of ERISA envisioned for fiduciaries.

In 2016, the Department adopted what became known as the "Fiduciary Rule".[2] It drastically changed the standards for classification as an investment advice fiduciary, as well as the exemptions under which fiduciaries could receive compensation for their services. The Fiduciary Rule was vacated by the 5th Circuit Court of Appeals in 2018.[3] In that case, the court found that the Department had exceeded its jurisdiction by impermissibly expanding the class of service providers deemed to be fiduciaries, specifically in situations in which the parties did not have a relationship that included the requisite degree of trust and confidence. The Department's approach in the current Proposal is a bit more subtle than it took with the Fiduciary Rule, but it should be recognized for what it is: Another attempt to expand fiduciary status to categories of people to whom it was never intended to apply.

II. The Proposed Definition of Investment Advice Fiduciary Status is Contrary to the Standard Set Forth in ERISA and Will Produce Negative Impacts for Investors

At the outset, we note that Cetera currently acknowledges fiduciary status in connection with recommendations to customers to undertake rollovers of assets from employer-sponsored retirement plans to IRAs, and complies with the provisions of PTE 2020-02 when we receive compensation in connection with that advice. In spite of that, we are concerned that the proposed expansion of the standards defining parties that are deemed fiduciaries is inconsistent with both the provisions of ERISA and the holding of the 5th Circuit Court of Appeals in the Chamber of Commerce case. It does this by effectively eliminating significant elements of the Five-Part Test and replacing them with a much broader and more subjective standard under which the service provider need only make investment recommendations on a regular basis as part of their business under circumstances in which they may be relied upon by the retirement investor.

Each of these changes represents a significant departure from the current Five-Part Test, but in combination, the effect is to eliminate any real requirement that a relationship of

[2] 81 FR 20946 (June 7, 2016).
[3] Chamber of Commerce v. U.S. Department of Labor, 885 F.3d 360 (5th Cir., 2018).

trust and confidence be present. The reformulation of the "regular basis" element to focus on whether or not the service provider furnishes similar services to other individuals as opposed to the nature and extent of the relationship between the service provider and the investor or prospective investor is a vast and unjustified departure, and creates a virtual presumption that fiduciary status results from even casual or one-time interactions.

The ***regular basis*** element of the Five-Part Test is intended to signify the type of ongoing relationship between the adviser and the investor that justifies an assumption that the adviser should be held to a fiduciary standard. The Five-Part Test rightly recognizes that an investor who only interacts with an adviser casually would not have a reasonable expectation that the relationship was one of trust and confidence. The Department seems to believe that the mere retention of the word "regular" in its new formulation somehow renders the two standards consistent.

Potentially more problematic, however, is the change from the "***mutual agreement, arrangement, or understanding***" and "***primary basis***" elements of the Five-Part test to the proposed "under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest". Any standard that rests on the predicate phrase "under circumstances indicating" will produce ongoing confusion for investors and service providers and create strong incentives for investors who experience bad or unexpected investment results to claim that a fiduciary relationship existed primarily with the benefit of hindsight.

This amorphous standard has both legal and practical consequences. If a service provider is deemed to be an investment advice fiduciary under ERISA, receipt of compensation in connection with investment recommendations is deemed a prohibited transaction, and the service provider must be able to meet the conditions of a Prohibited Transaction Exemption ("PTE") in order to receive such compensation. If they receive compensation and do not meet the requisite conditions, they may be subject to financial penalties. Service providers must have certainty regarding the exact nature and extent of their obligations to the investor. If the determination of fiduciary status hinges largely on the subjective interpretation of the customer, no such certainty can exist.

The ERISA statute was passed in 1974. The market for investment advice relating to retirement savings has changed in ways that may not have been foreseen by its drafters. However, the primary aim of ERISA was to prevent plan sponsors from taking actions detrimental to beneficiaries or acting improperly with respect to retirement plan assets. As the Court discussed at length in the Chamber of Commerce opinion, it was not generally intended to apply to circumstances in which retirement investors utilize self-directed vehicles such as IRAs, in which they make their own investment decisions based on their own preferences, investment objectives, and risk tolerance. Applying the standards that Congress intended for plan sponsors is not supported by the terms of the statute or common sense. In particular, it fails to take into account the difference

between a vendor selling a product (investment or otherwise) while providing information or advice incidental to that sale and circumstances in which the advice itself is an intrinsic element of the product. Only in cases where the purchaser has a legitimate expectation that a relationship of trust and confidence exists should investment advice fiduciary status under ERISA apply.

Broadening the definition of fiduciary in the way proposed by the Department creates negative impacts that are both legal and practical: If all interactions between providers of investment products and prospective customers may potentially be deemed fiduciary in nature, service providers will naturally curtail the type and quantity of information they make available to customers in order to limit their potential liability. The current framework for retirement savers who invest through IRAs and similar vehicles is intended to encourage investors to seek out information and take responsibility for funding their own retirement. The Proposal goes in the opposite direction by making information less available and the task of the investor more difficult.

In preparation for adoption of the Fiduciary Rule, a number of broker-dealers announced that they would cease providing investment advice to retirement investors in accounts in which investors paid transaction-based sales charges.[4] Many came to the conclusion that providing investment advice under the conditions prescribed would be too difficult and expensive for both firms and customers, and elected to offer only fee-based investment advisory accounts.

Cetera provides fee-based investment advisory services to many of its clients. Investors often find that such an arrangement offers them the best combination of cost and services to meet their needs. However, the economics of most fee-based investment advisory relationships make them incompatible with accounts that hold smaller investment balances (generally under $100,000), or in circumstances in which the customer does not need or wish to pay for ongoing monitoring of their investments. When the Fiduciary rule was vacated by the 5th Circuit, most firms reversed their earlier decisions and resumed offering transaction-based brokerage services to IRA accounts, but had the court not ruled as it did, access to certain types of investment advice and products would have been severely restricted. This is not in the interest of either investors or the capital markets in general. The Proposal simply repackages many of the elements that led providers of financial advice to limit their product and service offerings, and it will produce the same result if it is adopted.

We have noted that Cetera acknowledges fiduciary status in connection with most investment recommendations to retirement investors and complies with the

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[4] See, for example: **https://www.investmentnews.com/industry-news/features/commonwealth-financial-eliminates-commission-based-retirement-products-in-wake-of-dol-rule-69608, and https://www.investmentnews.com/industry-news/features/merrill-lynch-reverses-policy-on-banning-ira-commissions-following-death-of-dol-fiduciary-rule-75821.**

requirements of PTE 2020-02. To that extent, we do not have a dog in this particular fight. We are, however, concerned when an administrative agency attempts to expand its jurisdiction beyond the boundaries established by Congress, and that is what is happening here. The Department should not proceed with the proposed redefinition of investment advice fiduciary status.

III. Proposed Revisions to PTE 2020-02 Are Unnecessary and Will Result in Significant Costs to Investors Without Commensurate Benefits

In addition to the redefinition of fiduciary status, the Proposal would make significant revisions to PTE 2020-02. At the outset, it is important to remember that if a service provider is deemed to be an investment advice fiduciary, they are generally required to meet all of the conditions of a PTE in order to receive compensation in connection with an investment transaction. In the Proposal, the Department would amend PTE 2020-02 to make its conditions more onerous, while also effectively eliminating many other existing PTEs. For example, it would amend PTE 84-24 in ways that make it very similar to PTE 2020-02 and thus effectively not usable by a large number of service providers. This would make it harder for many service providers to meet the conditions of any existing PTE. Their natural reaction will be to either cease providing information, advice, and investment products to retirement investors or redouble their efforts to avoid classification as investment advice fiduciaries. We assume that a primary objective of the Department in adopting the Proposal is to encourage more service providers to acknowledge fiduciary status. We do not believe that the broad brush being employed is either good policy or authorized by ERISA, but even if it was, by making it harder for service providers to comply with the provisions of PTEs, the Department is creating incentives for service providers to contort their relationships with customers in ways that are not likely to further it's aims.

We would also note that many providers of investment advice and products are already subject to comprehensive regulatory regimes established and enforced by other agencies. These agencies are experts in how regulated entities interact with customers and how their regulations may impact both investor protection and other important policy objectives such as facilitating capital formation.

Reg. BI establishes standards of conduct for broker-dealers and their agents that are similar but not identical to those in PTE 2020-02. This creates the potential for conflict and confusion among standards of conduct applicable to individuals performing essentially the same activities and offering the same services. For example, PTE 2020-02 includes a provision requiring that the service provider not receive any more than "reasonable" compensation. The "reasonable" standard is inherently subjective and imprecise, and PTE 2020-02 does not include meaningful standards regarding how it is to be applied. This is compounded by the fact that all investment products are different. Some are simple and inexpensive to create, distribute, and manage. Others have multiple features that make them more complicated and which involve higher fees or costs. The Department essentially glosses over this fact by stating that " …it is not

enough merely to pay Investment Professionals the same percentage of the Financial Institution's compensation for a recommended investment product, as for other products, if the Financial Institution receives more compensation from recommending that product rather than other products."

Reg. BI includes specific requirements that financial professionals make recommendations that are in the best interest of the customer and not place their interest above those of the customer. It recognizes that all investment products and all investors are unique, and should not be grouped arbitrarily. Inclusion of the reasonable compensation element in PTE 2020-02 without an objective standard makes this extraordinarily difficult for service providers to comply with. In order to minimize the potential for conflicting standards and confusion for both financial professionals and investors, we urge the Department to incorporate a carve-out from the conduct standards in PTE 2020-02 and the reasonable compensation element for entities that are regulated by the SEC and subject to the conduct standards in Reg. BI. This will increase certainty for all constituents without any decrease in investor protection.

We also offer the following comments with respect to specific provisions in the Proposal regarding revisions to PTE 2020-02:

A. Web Disclosure

The Proposal seeks comment on the advisability of requiring service providers to create websites to deliver disclosure material to customers and potential customers prior to transactions. This idea has merit, but if it is adopted, it should be framed as an alternative and not an additional requirement. If firms offer comprehensive disclosures on websites or similar facilities, they should not also be required to deliver the same material directly to customers or prospective customers prior to transactions.

Consistent with this, we suggest that the Department utilize the Proposal as an opportunity to thoroughly review its standards for delivery of all disclosure materials to customers and prospective customers to encourage electronic means as a default option. The Department has been more progressive than many other agencies in how it views this issue. For example, it has specifically approved of electronic delivery as the default option for certain disclosures to participants in employer-sponsored retirement plans. This approach should be expanded to permit and encourage all service providers to provide access to disclosure materials on websites and specifically provide that access to those facilities would be presumed to constitute effective delivery in all cases except those in which the customer specifically requests a different method.

B. Policies and procedures

Section II(c) of the Proposal provides that entities wishing to avail themselves of PTE 2020-02 must maintain policies and procedures that are sufficient to ensure

that the entity and its affiliates comply with impartial conduct standards. Among the requirements is that Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to encourage investment professionals to make recommendations that are not in retirement investors' best interest.

Requirements for covered entities to manage conflicts that are created by compensation practices or other incentives for agents to act contrary to the best interest of the investor are both necessary and appropriate. Reg. BI includes such a requirement, but it is considerably less prescriptive and easier to understand and manage than that in PTE 2020-02. Consider the following examples:

- It is common practice for broker-dealers to pay financial professionals a larger portion of the revenue they generate as the financial professional produces greater total revenue in a given year. This reflects the fact that some financial professionals are more productive than others, usually by achieving higher levels of customer satisfaction and retention than their colleagues. At Cetera and most other firms, this practice is "product agnostic", and the percentage of revenue paid to the financial professional increases based on the total revenue that they produce and not with respect to sales of specific products or services. This effectively mitigates any conflict that exists between the financial professional and the customer, but the Proposal creates the impression that any kind differential compensation would be presumed to be inappropriate. This provision should be removed.

- It is common for broker-dealers to provide transition assistance in the form of loans to financial professionals in connection with their joining the firm or transfers of customer assets to the firm. This creates a potential conflict of interest between the financial professional and the customer, and is generally managed by disclosure to the customer. However, under the Department's interpretation, these arrangements could be construed to be a type of differential compensation and therefore presumptively impermissible under PTE 2020-02. This should also be eliminated.

Requirements for firms to identify and manage material conflicts of interest and adopt policies and procedures sufficient to accomplish that are necessary. That being said, the expansive and imprecise language in the Proposal goes far beyond established standards and fails to recognize that different firms have different business models and compensation practices. Reg. BI specifically recognizes this and incorporates a principles-based approach that allows firms to meet their conflict management obligations in different ways. The Proposal is overly prescriptive and will not be helpful in this process.

The Proposal also states that a Financial Institution should not offer incentive vacations or trips to educational conferences for financial professionals if the desirability of the destination is based on sales volume and satisfaction of sales quotas. Putting aside the lack of specificity in the term “desirability of the destination”, travel by financial professionals and attendance at events sponsored by investment product sponsors and broker-dealers is necessary to provide them with information about investment products, economic conditions, and capital markets. Providing advice regarding investments is complicated and requires that financial professionals continually educate themselves about the products and services they offer. We would also note that FINRA has had comprehensive rules covering travel paid for by product sponsors in effect for many years, and disapproval of this practice in the Proposal adds nothing to the cause of investor protection.

C. **Self-Correction**

Section II (e) would require institutions to conduct a retrospective review of their activities to determine if all of the conditions of PTE 2020-02 have been satisfied. If the firm determines that there have been failures, it would be required to report them to the Department and make investors whole for any losses. The approach in the Proposal is flawed for multiple reasons, including the following:

- It does not contain any form of materiality threshold, and appears to require that all mistakes be reported and remediated, no matter how minor or inadvertent. Large financial institutions have millions of customers. Simply reviewing the circumstances relating to small or inadvertent errors involving large numbers of customer accounts can result in substantial expenditures of time and money by the institution. This provision should be modified to specify that the institution would only be required to report violations that result in material losses to customers.

  FINRA Rule 4530 includes a provision requiring member forms to report and remediate instances in which violations of law or regulation occur under specified conditions. It appropriately recognizes that not all mistakes should necessitate the type of review and remediation effort that the Proposal would require, particularly in instances where clients losses have not occurred or are de minimis in amount. We suggest a threshold of $100 of actual losses per customer as a trigger.

- It specifically provides that “losses” are not limited to recommendations that leave the investor with fewer assets than originally invested. This changes the formulation from making investors whole to potentially giving them windfalls, and invites all manner of speculation about how to calculate the amount. This approach is neither fair nor reasonable.

D. Ineligibility

1. Criminal Convictions

Section III provides that institutions would be ineligible to rely on the provisions of PTE 2020-02 under several circumstances, including instances in which the institution is convicted of a crime in either a domestic or foreign jurisdiction. The principle that an institution should be disqualified from relying on the provisions of a PTE if it has been convicted of a crime involving related conduct makes sense, but the Proposal goes far beyond this in a number of ways. Under the proposed standard, a conviction for violating an environmental protection law by an affiliate could serve as the basis for a determination of ineligibility to rely on PTE 2020-02. Especially given the fact that the Proposal would eliminate virtually all of the other existing PTEs, large institutions that provide services to millions of investors could literally be forced out of the business due to events that are completely irrelevant to their fitness to do so. Ineligibility to rely on the provisions of any PTE due to a criminal conviction in any jurisdiction should be limited to instances in which the offense is closely related to the provision of investment advice to retirement investors.

We would also note that the judicial process and standards for convictions of criminal offenses in foreign jurisdictions vary widely. Many jurisdictions do not provide substantive or procedural due process, and often become vehicles for hostile governments to achieve political ends as opposed to dispensing justice. We note recent instances in which the governments of Russia and Venezuela have effectively expropriated assets of foreign corporations through criminal charges that appear to lack substance and in proceedings that are devoid of due process.

If this version of the ineligibility provision is adopted, foreign governments would be in a position to pressure American institutions do their political bidding or risk suffering major adverse impacts on completely unrelated areas of their business in the United States. This provision should be eliminated.

2. Process for Determinations of Ineligibility Based on Systematic Practices

The Proposal sets forth a process under which the Department could deprive service providers of the ability to rely on PTE 2020-02 by issuing a notice of ineligibility due to a systematic pattern or practice of violating the conditions of the exemption. The process consists of a written warning, a relatively brief time in which to cure any alleged violations, and an opportunity to be heard by the Department. Any hearing that is conducted would be limited to a single conference (not necessarily even conducted in person) unless the Department determines, in its sole discretion, to allow additional conferences.

Any determination that an institution is ineligible to rely on a PTE has serious consequences that impact both the institution and its customers. Actions that effect such determinations must be taken with a serious view of the impact on all of the affected parties, with a full opportunity to present all relevant facts. We have serious doubts about the ability of an administrative agency to unilaterally grant itself the power to take actions that have consequences as far-reaching as this. It appears to violate Article III of the U.S. Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment. However, even if the Department has that power, it must provide a forum and process that is sufficient to allow for a full understanding of the facts and surrounding circumstances. A single conference in which the Department sets the rules and renders the decision does not come close to meeting that standard.

IV. The Cost Analysis Performed by the Department is Flawed and Inadequate

The Department is required to perform an analysis of the cost that will be incurred in complying all proposed regulations. It has done so here, but the analysis is flawed in numerous respects. At the outset, it appears to fundamentally misunderstand the steps involved in the evaluation and compliance with new regulations by large institutions, particularly those as significant as the Proposal. Any such process involves teams of professionals, multiple drafts of summaries and analyses, meetings and other communications, all culminating in the creation and delivery of policies, procedures, and training material. These are monumental exercises that take a lot of time and resources.

The analysis in the Proposal includes numerous instances of underestimation of the time and costs incurred by service providers. A particularly dramatic one is the estimate in Section 1.3.2 that it will require 30 minutes for a legal professional to draft updates to a disclosure document. We are at a loss to understand the basis of this estimate, because simply reading the text of the Proposal takes several hours of a legal professional or other staff member's time. It also assumes that the legal professional or anyone else involved in the process operates in a vacuum and can simply amend a document and put it into production. Any such exercise involves multiple rounds of drafting and review by teams of individuals, all of whom have other responsibilities. Using this as a single example, we think it reasonable to believe that all of the figures in Department's analysis should be multiplied by a factor of 100 to arrive at a more reasonable estimate of the time and cost incurred. This does not even address the other side of the equation, which is measurable benefits to investors. We submit that any such benefits would be minimal at best, but in order to make a legitimate comparison, the Department should make a much better attempt at realistically estimating the costs.

We have a suggestion that we believe would benefit both the Department and service providers that may be affected by the Proposal and any other future regulatory initiatives. Large institutions that provide retirement-related investment advice have

extensive experience with review and implementation of new regulations and what is involved from both an internal and external perspective. We realize that interested parties may offer information about this in comments addressing the Proposal, and that may provide some amount of useful information. However, we believe that a better and more enlightening approach would be for the Department to engage directly with service providers prior to going forward to obtain a better high-level understanding of the process and complexities involved in adapting to such a significant regulatory change. This will be useful for the Department on an ongoing basis, not just in connection with the Proposal.

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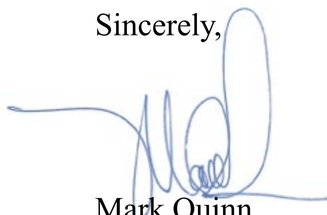
Thank you for this opportunity to share our views on this important matter. If we can offer any additional assistance or provide further information, please let me know.

Sincerely,



Mark Quinn
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