FINANCIAL SERVICES INSTITUTE | VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS AND INDEPENDENT FINANCIAL ADVISORS

VIA Federal eRulemaking Portal

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Employee Benefits Security Administration
Office of Regulations and Interpretations
Office of Exemption Determinations
U.S. Department of Labor
Federal eRulemaking Portal
RIN 1210-AC02
Application Nos. D-12057, D-12060 and D-12094
Attention: Definition of Fiduciary

Re: Proposed Definition of ERISA "Investment Advice" Fiduciary and Related Exemptions for Conflicted Investment Advice

To Whom It May Concern:

On November 3, 2023, the Department of Labor (the "Department") published its notice of proposed rulemaking regarding, and offered for comment its third iteration of, a revised regulation defining "investment advice for a fee" under section 3(21) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The Department simultaneously proposed for comment revisions to its existing Prohibited Transaction Exemptions ("PTE") 2020-02, 84-24, 75-1, 77-4, 80-83, 83-1 and 86-128 (together with the proposed regulation, the "Proposal").[1]

The Financial Services Institute ("FSI")[2] appreciates the opportunity to respond to this important Proposal. The issues raised by the Department are of longstanding and vital interest to our members and their financial professionals, and to the retirement investors they serve.

- We supported the adoption of Regulation Best Interest ("Regulation BI") by the Securities and Exchange Commission ("SEC") in 2019 and the Department's issuance of PTE 2020-02 in 2020.
- We are in favor of a system of regulation that asks financial professionals to put the investor's interest before their own, to provide professionally appropriate advice for a reasonable fee, and not to make misleading statements.
- With respect to our members, we believe that system of regulation already exists.

As was the case with the Department's proposals in 2010 and 2015, however, we cannot support the current Proposal.

[1] 88 Fed. Reg. 75890 et seq. (Nov. 3, 2023).
[2] FSI is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

- In its reach, the Proposal exceeds the Department's authority under ERISA and has no empirical justification;
- In its execution, the Proposal is flawed beyond repair; and
- If adopted, the Proposal would unnecessarily layer costs and complexities onto the heavy "best interest" and other regulation to which our members are already subject, in ways of no practical utility to retirement investors, and thus compromise the availability and utilization of needed investment services for retirement investors, particularly those with smaller account balances.

Accordingly, we are compelled to urge the Department to withdraw the Proposal.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the United States, there are more than 500,000 independent contractors in the financial and insurance industries, including 160,000 independent financial advisors, who account for approximately 52.7 percent of all producing independent financial advisors.[3] These financial advisors are self-employed independent contractors, rather than employees of independent financial services firms.[4] They own and operate approximately 130,000 financial advisory and insurance brokerage firms, employing approximately 330,000 people and accounting for 27 percent ($47 billion) of the output of the financial-advisory and insurance-brokerage industry. Between 2015 and 2019, independent contractors in the financial services sector created approximately 54,000 new businesses and 174,000 new jobs.

FSI members make substantial contributions to our nation's economy. According to Oxford Economics, FSI members nationwide generate $35.7 billion in economic activity. This activity, in turn, supports 408,743 jobs including direct employees, those employed in the FSI supply chain, and those supported in the broader economy.[5] In addition, FSI members contribute nearly $7.2 billion annually to federal, state, and local government taxes.[6]

FSI's member independent financial services firms provide business support to independent financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small business owners and job creators with strong ties to their communities. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans. Their services include financial education, planning, implementation, and investment monitoring.

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[3] Cerulli Associates, Advisor Headcount 2019, on file with author; NERA Economic Consulting, The Role of Independent Contractors in the Finance and Insurance Sectors (Nov. 2022), available at https://www.nera.com/content/dam/nera/publications/2022/NERA_Independent_Contracting_In_Financial_Services_November_2022_Final_For_Release.pdf (finding that more than half a million people work as independent contractors in the financial and insurance sector and in financial-services occupations).

[4] The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, or a dual registrant. The use of the term "investment advisor" or "advisor" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

[5] Oxford Economics for the Financial Services Institute, The Economic Impact of FSI's Members (2020).

[6] NERA Economic Consulting, The Role of Independent Contractors in the Finance and Insurance Sectors (Nov. 2022).

FSI's members serve ordinary Americans across all income levels. Independent financial services firms enable independent financial advisors to provide financial advice that helps the advisors' clients save for common financial needs such as college tuition, homeownership, retirement, and support for their aging parents. These advisors' services are especially important in underserved minority and rural communities that lack access to a robust financial-services market, because they frequently offer a one-stop shop for affordable investing advice, tax preparation, financial education, and estate planning.

Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the affordable financial advice, products, and services necessary to achieve their investment goals. The business model has two players: financial advisors and independent financial services firms. Financial advisors normally establish their own business without any coordination with or approval required by the firm. Some advisors engage in limited operations, such as purchasing and selling securities on behalf of clients. Others may have a more significant enterprise, offering a full range of financial planning, investment advice, insurance, tax, and estate-planning services.

Financial advisors affiliate with independent financial services firms in order to take advantage of economies of scale and to ensure regulatory compliance. The firms offer financial advisors business services like platforms and products. They also help individual advisors comply with federal and state regulations. In particular, under the Securities Exchange Act of 1934, anyone who effectuates securities transactions or offers advice concerning investing in securities, including independent financial advisors, must register with the SEC or affiliate with a corporation that is registered with the SEC, such as an independent financial services firm.[7] Federal regulations also require registered investment advisors to implement written policies and procedures designed to prevent violations of the federal securities laws.[8] Individual advisors who choose to satisfy these requirements by affiliating with a corporation do not individually register as broker-dealers but instead agree to supervision by their firms, which assume responsibility for ensuring compliance with applicable laws.[9] The firms thus oversee the securities operations of their financial advisors, including by establishing written procedures (as required by law) to ensure compliance with federal law and the conduct rules of the Financial Industry Regulatory Authority, Inc. ("FINRA").

Our Members Enhance the Financial Security of Retirement Investors

Even pre-dating the adoption by the SEC of Regulation BI in 2019 and the Department's issuance of PTE 2020-02, the research was very clear that, notwithstanding incremental costs and any effects of conflicts, assistance from investment professionals enhances the financial security of retirement investors.[10] To see how this might occur, consider how our members assist clients,

[7] 15 U.S.C. § 78o(a)(1).
[8] 17 C.F.R. § 270.38a-1.
[9] *Id.*; FINRA Rule 3110.
[10] See our August 6, 2020, comment letter on proposed PTE 2020-02, available at https://www.dol.gov/sites/dolgov/files/EBSA/ laws-and-regulations/rules-and-regulations/public-comments/1210-ZA29/00066.pdf, at pages 5-6 for citations to this research that predated recent regulatory and industry developments.

particularly low-income clients or those with a less developed financial education, with retirement security in the context of their overall financial picture.

- Our financial advisors emphasize the importance of commencing and retaining retirement savings, encouraging employers to adopt retirement plans.
- In turn, our financial advisors point out the many advantages of retirement savings and encourage individuals to participate in those plans and/or IRAs. For example, our financial advisors have been instrumental in promoting retirement savings to segments of our population underrepresented in the retirement system.
- Financial advisors help clients weather market volatility, where inexperienced retail investors often make impulsive, fear-based, ill-informed decisions like buying securities at market highs and selling at market lows.
- Financial advisors assist clients in building a well-diversified portfolio to protect their assets through fluctuating market conditions and in-line with long term goals and each investor's time-horizon.
- Financial advisors offer their skill and expertise to help clients navigate major financial pressures imposed by medical issues, bankruptcy, deaths in the family, and caring for aging family members.
- Financial advisors assist clients in providing for other types of financial needs, such as life insurance, to provide security to clients' family members as well as lifetime income and longevity protection in retirement.
- Financial advisors protect investors from cashing out their retirement accounts for short-term needs and help prevent retirement asset "leakage."
- Finally, investors need professional financial advisors to assist them with decisions related to estate and tax planning and making their assets last through their retirement.

FSI Supports a Best Interest Standard

As discussed above, FSI and its members have a deep and abiding interest in the retirement security of working Main Street Americans. Those investors are the reason for, and their financial security is the purpose of, our member firms and their independent financial advisors. Accordingly, FSI has been vitally interested in the Department's investment advice project since it commenced in October 2010. We have provided written comments to the Department at every opportunity to do so and participated in three of the public hearings the Department has conducted on these proposals.

FSI strongly opposed the Department's 2010 and 2015 proposals, but not out of any disagreement with their objectives. We have long advocated for a carefully-crafted "best interest" standard of conduct for personalized investment advice to retail clients that:

- Protects affordable choice for investors among investment professionals, and
- Is workable, in the context of the very heavy regulation to which investment professionals are otherwise subject.

FSI opposed the Department's 2010 and 2015 proposals because, as executed, they would harm retirement investors by reducing access to retirement advice and increasing its costs, disrupting the retirement services industries, and causing a surge in unnecessary litigation. Our desire to ensure retirement investors' access to qualified investment assistance led us to participate in the *Chamber of Commerce v. Department of Labor*[11] litigation that vacated the Department's 2015-2016 rulemaking.

In contrast, our members strongly support the standards of conduct to which they are subject under Regulation BI and the Investment Advisers Act of 1940, as amended ("Advisers Act"). In particular, FSI supported the SEC rulemaking that resulted in the adoption of Regulation BI. Congress specifically charged the SEC with evaluating the effectiveness of existing standards of care and delegated to the SEC authority to promulgate a uniform standard of care for broker-dealers and investment advisers.[12] While we provided constructive feedback and suggestions on specific elements of the proposal, we believed that rulemaking overall provided a clear standard of care for financial professionals, including guidelines for managing conflicts of interest, while preserving investor access to the broad range of products and services available in the broker-dealer model.

FSI was also pleased to support the adoption of PTE 2020-02. In particular, we applauded the Department's approach to ensure that PTE 2020-02 imposed a best interest obligation on financial professionals when acting as conflicted ERISA fiduciaries that both (i) substantially aligned with Regulation BI and with registered investment advisers' fiduciary duty under the Advisers Act, and (ii) was faithful to ERISA. The Department carefully constructed a compliance solution for conflicted investment advice that:

- Was uniform for all financial service providers and agnostic among their business models;
- Did not disrupt the cost structure for investors;
- Left the choice of the provider that best serves each retirement investor to that investor, supported by key disclosures to inform that choice; and
- Undertook to align with the primary regulation for providers and not to invent new causes of action that were not established or intended by Congress.

As such, we believed PTE 2020-02 would result in enhanced retirement security for working Americans through affordable access to and choice among professional advice, with safeguards against conflicts inherent in that advice that are uniform across providers but accommodating of their primary regulation.

We regret that we cannot say the same of the current Proposal. Accordingly, we must ask the Department to withdraw the Proposal, until such time as the need for additional regulation within the Department's authority can be empirically demonstrated and that additional regulation can be targeted to the need.

At the outset, before we detail our concerns with the Proposal, we note that we are in agreement that, whether or not the Proposal is otherwise adopted, (i) robo-advice should be within the scope of relief provided by PTE 2020-02, and (ii) Interpretive Bulletin 96-1 continues to appropriately define the distinction between investment education and fiduciary investment

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[11] 885 F.3d 360 (5th Cir. 2018).

[12] Dodd–Frank Wall Street Reform and Consumer Protection Act, Public Law 11-213, §913 (2010).

advice, and at the appropriate time should be amended to re-incorporate the helpful refinements vacated in the Fifth Circuit decision.

Executive Summary of FSI's Comments

- **In its reach, the Proposal exceeds the Department's authority and lacks any empirical justification.**

  - The Proposal will again fail in court as regulatory overreach inconsistent with ERISA.
  - In support of its overbroad regulation, the Proposal cannot cite *even a single source of empirical data* on the effects in 2023 of conflicts in the retail investment marketplace.
  - The cost/benefit analysis in the regulatory impact statement cannot quantify the benefits and grossly underestimates the true costs of the Proposal.
    - The benefits claimed for the Proposal are qualitative, not quantitative, and do not stand scrutiny.
    - All the literature cited by the Department to support the claimed benefits utilize data predating the effective date of Regulation BI.
    - Our members project compliance costs greatly in excess of the costs to all affected entities estimated in the regulatory impact analysis.
    - The paperwork mailing cost alone is just one example of grossly understated costs.
    - The regulatory impact analysis too lightly dismisses the Proposal's effect on small investors.
    - The experience in the United Kingdom has been that its Retail Distribution Review actually increased costs for and decreased utilization of professional advice by investors.

- **In its execution, the Proposal is flawed beyond repair.**

  <u>Flaws in Alignment with the Securities Laws</u>

  - The Proposal proceeds as if ERISA operates in a regulatory void.
  - The Proposal also proceeds as if ERISA protection is the sole remedial recourse for retirement investors.
  - The SEC's regulatory impact analysis underlying Regulation BI exposes flaws in the Proposal.
  - The Proposal overlaps with and in certain important respects conflicts with SEC and FINRA rules.

  <u>Flaws in the Proposed Definition</u>

  - While the proposed definition purports to be a facts-and-circumstances analysis consistent with ERISA, it globally declares all financial advisors to be fiduciaries.
  - The titles used by our financial advisors are neither misleading nor an indicia of fiduciary status.

- Our member firms often would not make any recommendation – that relationship runs between the financial advisor and the retirement investor – yet amended PTE 2020-02 would compel the firm always to acknowledge fiduciary status.
- The functional prohibition on disclaimers in the Proposal is counterproductive to the interests of plans and participants.
- The proposed rule omits important clarifications from the 2016 rule that certain activities do not constitute "investment advice."
- The Department's proposal on enforcement both seeks to preempt our members' opportunity to be heard in court on this issue and provides IRA owners a private right of action.

Flaws in the Proposed Amendments to Exemptions

- The Proposal neither asserts nor demonstrates that the current terms of PTE 2020-02 are inadequate.
- The Proposal would create an additional basis for a private right of action by IRA owners, notwithstanding the Department's protestations to the contrary.
- The requirement that fiduciary acknowledgements be "unqualified" would result in misleading disclosure to retirement investors.
- The Proposal would amplify disclosure overload, without any evidence that additional disclosure is needed or helpful.
- The additional rollover disclosures are an example of over-regulation for no purpose.
- The public website disclosure would be a particularly egregious example of such over-regulation.
- On its face, the ban on differential compensation in PTE 2020-02 and PTE 84-24 cannot be a serious proposal.
- The other constraints on compensation and personnel practices are unreasonable.
- The Proposal would authorize public fishing expeditions in the business records of financial services firms.
- The proposed changes to the retroactive review and self-correction procedures are full of problems.
- The proposed ineligibility provisions are disproportionate, unjustified, and beyond the Department's authority.
- The proposed amendments to PTE 84-24 intrude on State insurance regulation and are unworkable.
- The Proposal continues to extend ERISA fiduciary standards to IRAs.
- The Proposal creates unnecessary uncertainty about the "best interest" standard.

- The final exemption might bar in-kind covered principal transactions even when they are in the retirement investor's best interest.
- The preamble threatens unintended consequences for PEPs and PPPs.
- The mass revocation of five other exemptions, as applied to investment advice, will be disruptive.
- Retirement investors will be hurt if PTE 86-128 is amended.

- **The Department's process for this rulemaking did not provide a full and fair opportunity for public comment.**
  - The public comment process allowed by the Department to respond to this rulemaking was inadequate.
  - The Department's invitation to comment on severability did not provide notice of its initial position and thus did not provide any basis for an informed response.
- **The proposed compliance date is patently unreasonable and must be changed.**

These points are discussed in detail below.

I. In its reach, the Proposal exceeds the Department's authority and lacks any empirical justification.

A. The Proposal will again fail in court as regulatory overreach inconsistent with ERISA.

As was the case with the 2016 rule, the gravamen of the Proposal is that, in 1974, Congress, in the federal pension law of all places, appointed the Labor Department, of all agencies, as the universal and ultimate "standard of conduct" regulator for investment and insurance professionals, however otherwise regulated, an appointment made so quietly it was only recently discovered.

As was the case with the 2016 rule, the Proposal will not survive judicial scrutiny.

The Proposal of course must be evaluated against the *Chamber of Commerce v. DOL* opinion, in which the Fifth Circuit vacated the Department's 2016 rulemaking and admonished the Department for "its overreaching definition of 'investment advice fiduciary …'" that "conflicts with the plain text of the 'investment advice fiduciary' provision as interpreted in light of contemporary understandings, and … is inconsistent with the entirety of ERISA's 'fiduciary' definition." [13]

The Proposal's avowed purpose is to define "investment advice" to effectuate the expectations of retirement investors and the purposes of the statute.

> These regulatory efforts reflect the understanding that broker-dealers and insurance agents commonly make recommendations to their customers for which they are compensated as a regular part of their business; that investors rely upon those recommendations; and that regulatory protections are important to ensure that the advice is in the best interest of the retail customer, in the case of broker-dealers, or consumers, in the case of insurance agents. After careful review of the existing regulatory landscape, the Department too has concluded that existing regulations should be revised to reflect current realities in light of the text and purposes of Title I of ERISA and the Code….
>
> 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 investor's best interest, rather than merely promoting their own competing financial interests at the investor's expense….[14]

In service of that purpose, the Proposal extrapolates from the Fifth Circuit's opinion a basis for inventing a broad "fiduciary" definition derived from the retirement investor's expectations.

> Specifically, the Fifth Circuit found that the 2016 Final Rule swept too broadly and extended to relationships that lacked "trust and confidence," which the court stated were

[13] 885 F.3d at 379.
[14] 88 Fed. Reg. at 75893, 75899.

> the hallmarks of the common law fiduciary relationship that Congress intended to incorporate into the statutory definitions. The court concluded that "all relevant sources indicate Congress codified the touchstone of common law fiduciary status – the parties' underlying relationship of trust and confidence – and nothing in the statute 'requires' departing from that touchstone."…
>
> The Department's [current] proposal is also intended to be responsive to the Fifth Circuit's emphasis on relationships of trust and confidence. The current proposal is much more narrowly tailored than the 2016 Final Rule, which treated as fiduciary advice, any compensated investment recommendation as long as it was directed to a specific retirement investor …. In contrast, the proposal provides that fiduciary status would attach only if compensated recommendations are made in certain specified contexts, each of which describes circumstances in which the retirement investor can reasonably place their trust and confidence in the advice provider.[15]

From that extrapolation, the Proposal then propounds an "investment advice" definition that leads in effect to the same result as the 2016 rule. It would generally treat investment professionals as ERISA fiduciaries whenever they provide a paid recommendation to a retirement investor, because those professionals hold themselves out in the market as trustworthy experts solely by reason of working in a financial services industry.

The Proposal then adds two other "contexts" – discretionary management, and acknowledgement of fiduciary status – in which a "recommendation" provider would be an "investment advice" fiduciary, primarily based on the Department's predispositions about investor expectations.

The Proposal's approach to statutory construction is fatally defective. Its continued insistence that the statutory definition is "broad," and therefore should be broadly interpreted, assumes the Department's preferred result. The language of section 3(21)(A)(ii) may be succinct, but it is neither broad nor narrow. It simply has the meaning Congress intended when it enacted that provision in 1974.

On a prior occasion when an ERISA definition was construed to effectuate expectations and the protective purposes of the statute, the Supreme Court unanimously, definitively and specifically rejected that approach. In *Nationwide Mutual Ins. Co. v. Darden*, the Court considered the ERISA definition of "employee," which is even more fundamental to the statute than "fiduciary." The Fourth Circuit, in the decision below, had found that the common-law employee definition was inconsistent with the statutory statement of purposes in ERISA section 2 and invented a new test drawn from that provision and keyed to the expectations of the putative employee: "(1) that *he had a reasonable expectation* that he would receive [pension] benefits, (2) that *he relied on this expectation*, and (3) that he lacked the economic bargaining power to contract out of [benefit plan] forfeiture provisions." In so doing, the Fourth Circuit relied in part on earlier Supreme Court authority that "the content of the term 'employee' in the context of a particular federal statute is 'to be construed' in the light of the mischief to be corrected and the end to be attained." The Court rejected that approach and construed "employee" to have the traditional common-law definition, reiterating that "'[w]here Congress uses terms that have accumulated

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[15] *Id.* at 75895 (footnotes omitted), 75901.

settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms ....'" The Court noted that its prior authorities supporting a different construction had been superseded by subsequent developments. The Court also noted that the Fourth Circuit test was "infected with circularity" and "would turn not on a claimant's actual 'expectations,' which the court effectively deemed inconsequential, but on his statutory entitlement to relief, which itself depends on his very status as an 'employee.'"[16]

The Proposal makes precisely the same mistakes reading the statute that the Fourth Circuit did in *Darden*.[17]

- The Proposal does not start from the commonly understood legal meaning of "investment advice" in 1974.
- Instead, it starts from the proposition that the expectations and interests of retirement investors might be served if their relationships with investment professionals were treated as ERISA fiduciary relationships, and then backs into a definition treating those relationships as fiduciary relationships.
- That is, the Proposal reasons from the remedy backwards to the definition, while the statute proceeds forward from the definition to the remedy. The Proposal assumes that since retirement investors might benefit from the protections of the statute, then they are protected by the statute.
- In starkest terms, the Proposal identifies the elements of the enforcement case the Department would like to make and believes it can prove, and declares those elements to be law in the "investment advice" definition.

The Fifth Circuit, of course, showed the way to the proper interpretation of "investment advice" under ERISA.

> Expanding the scope of DOL regulation in vast and novel ways is valid only if it is authorized by the authority that Congress delegated it by statute….
>
> Congress's use of the word "fiduciary" triggers "the settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'"…
>
> Properly considered, the statutory text equating the "rendering" of "investment advice for a fee" with fiduciary status comports with common law and the structure of the financial services industry. When enacting ERISA, Congress was well aware of the distinction, explained further below, between investment advisers, who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients. The [2016] Fiduciary Rule *improperly dispenses with this distinction*. Had Congress intended to include as a fiduciary *any financial services provider*

[16] 503 US 318, 321, 322, 324, 327 (1992)(emphasis added).
[17] Curiously, in *Darden*, the Department through the Solicitor General supported Nationwide's position that "employee" as used in ERISA has its commonly understood, common-law meaning.

> *to investment plans*, it could have written ERISA to cover any person who renders "*any* investment advice for a fee…."… Stockbrokers and insurance agents are compensated for only completed sales ("directly or indirectly"), not on the basis of their pitch to the client. Investment advisers, on the other hand, are paid fees because they "render advice." *The statutory language preserves this important distinction*….
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> Further, in law and the financial services industry, rendering "investment advice for a fee" customarily distinguished salespeople from investment advisers during the period leading up to ERISA's 1974 passage….
>
> DOL's 1975 regulation flowed directly from contemporary understanding of "investment advice for a fee," which contemplated an intimate relationship between adviser and client beyond ordinary buyer-seller interactions. The Fiduciary Rule is at odds with that understanding.[18]

Thus, in defense of its position, the Proposal selectively quotes from the Fifth Circuit opinion, in an effort to evade the holding in the case. Under the opinion, a "trusted and confidential relationship" is indeed one "hallmark" of an ERISA "fiduciary," but more is required than that, and it is not the definition of that term. By its own admission, the Proposal would again eviscerate the understood, traditional distinction in 1974 between investment and insurance intermediaries who were or were not acting as fiduciary advisers.

The five-part test is not "a multi-part series of technical impediments to fiduciary liability,"[19] as the Proposal characterizes it. Instead, as the Fifth Circuit ruled, it is a contemporaneous and fair reflection of the scope of fiduciary liability intended by Congress. Accordingly, like the 2016 rule, the Proposal overreaches in its invention of a "vast and novel" definition of fiduciary "investment advice" that not a single member of the 93rd Congress, which enacted ERISA, would recognize.

In the end, this critical flaw in the Proposal arises because, in enacting ERISA, Congress did not identify an objective to be achieved, and leave it to the executive and judicial branches to work out the details. Rather, ERISA is the polar opposite.

> "ERISA is, we have observed, a `comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens* v. *Hewitt Associates,* 508 U.S. 248, 251 (1993) (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corporation,* 446 U.S. 359, 361 (1980)). The Act is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests--not all in favor of potential plaintiffs." *Id.*, at 262. Given the "evident care" with which ERISA was crafted, we have traditionally been "reluctant to tamper with [the] enforcement scheme" embodied in the statute. [*Mass. Mutual Life Ins. Co. v. Russell*, 473 US 134, 147 (1985).] Accordingly, we have repeatedly declined invitations

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[18] 885 F.3d at 372-374 (citations omitted; emphases added).
[19] 88 Fed. Reg. at 75913.

by plan participants and beneficiaries to extend benefits and remedies not specifically authorized by the statutory text.[20]

As it did in the 2016 Final Rule, the Department through the Proposal tampers with the ERISA regulatory scheme, and extends ERISA benefits and remedies, this time in at least seven ways not authorized by statute:

- In the proposed regulation, by extending fiduciary status far beyond the scope of any understanding of "investment advice" fairly attributable to Congress when it enacted ERISA in 1974;
- In the impartial conduct standards of PTE 2020-02, by extending ERISA fiduciary standards to individual retirement accounts ("IRA");[21]
- As discussed below, in its enforcement position and in the disclosure requirements of PTE 2020-02 and PTE 84-24 (a variation in form from the express contractual warranties required under the 2016 rule), by creating a private right of action for IRA owners;
- In a variety of ways discussed below, by encroaching on the authority of and superseding rules promulgated by the primary regulators of the financial services industries, contrary to the express preservation of banking, insurance and securities law in ERISA section 514, to significantly restructure those industries in a manner not specifically authorized in the statute;
- In a variety of ways discussed in this section and below, by promoting and facilitating enforcement cases and private litigation against financial services providers, to slant the ERISA enforcement scheme embodied in the statute to favor plaintiffs;
- As also discussed below, by rewriting ERISA section 411 in the ineligibility provisions of PTE 2020-02 and PTE 84-24, including granting itself authority to impose a "death penalty" on financial services providers that is found nowhere in the statute; and
- In other ways discussed below, by exercising its deregulatory exemptive authority to impose regulation.

We also note that the Department intends the disposition of funds withdrawn from an ERISA-governed arrangement to be subject to its regulation, even when invested in a non-ERISA environment,[22] and that by knock-on effect, its regulation would extend to our members' interactions with investors outside of any retirement setting.[23]

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[20] *Varity Corp. v. Howe*, 516 US 489, 516 (1996)(Thomas, J., dissenting).
[21] 88 Fed. Reg. at 75979.
[22] *Id.*
[23] By its terms, the standard in the Proposal would be limited to retirement assets, and to the investment of amounts distributed from a retirement plan, but its practical reach would not be so limited. As the Fifth Circuit observed:

> The SEC has the expertise and authority to regulate brokers and dealers uniformly. DOL has no such statutory warranty, but far from confining the [2016] Fiduciary Rule to IRA investors' transactions, DOL's regulations effect dramatic industry-wide changes because it is impractical to separate IRA transactions from non-IRA securities advice and brokerage.

885 F.3d at 385.

In the end, the only possible conclusion is that, if it proceeds with the Proposal, the Department will once again overreach its authority.

B. In support of its overreaching regulation, the Proposal cannot cite *even a single source of empirical data* on the effects in 2023 of conflicts in the retail investment marketplace.

While this comment can be stated with brevity, its importance cannot be overstated.

The preamble, including the regulatory impact analysis, cites no literature quantifying the incidence in 2023 of adverse outcomes for retirement investors due to conflicted interests on the part of investment intermediaries.

- As the preamble itself acknowledges, the prior literature on which the Department relied in 2015-2016 is out of date, in light of subsequent regulatory and industry developments.
- Early publications from the SEC, FINRA and the North American Securities Administrators Association ("NASAA") cited in the preamble stand at most for the proposition that industry institutionalization of Regulation BI, in the first year or two after its compliance date, is a work in progress that is still being perfected.[24] Even the securities law guidance is a work in progress with additional SEC and FINRA guidance post-dating these publications, including on December 5, 2023, when FINRA issued a new release amplifying Regulation BI in certain ways,[25] and on December 8, 2023, when the SEC issued additional FAQs on Form CRS.[26]

In short, there is ***no empirical justification for the Proposal***, and particularly for a Proposal of such magnitude and consequence that it seeks to re-impose a universal standard of conduct for the entire range of financial services industries and restructure those industries in significant ways.

C. The cost/benefit analysis in the regulatory impact statement cannot quantify the benefits and grossly underestimates the true costs of the Proposal.

For that reason, and as the preamble acknowledges, the benefits accruing from the Proposal, on which the regulatory impact analysis relies, are entirely speculative and lack any reliable empirical basis. The costs of the Proposal, however, are not speculative and grossly exceed those posited in the regulatory impact analysis.

In addition, the regulatory impact analysis suffers from a fundamental internal inconsistency. In part because of changes in regulation starting with the vacated 2016 rule and Regulation BI, the Department argues the cost of complying with the Proposal will be relatively

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[24] In addition, the methodology of the survey conducted by the NASAA committee is flawed; specifically, by not following the established standards for survey research in a variety of ways. Consequently, the conclusions reached by the committee are not supported by the information gathered in the survey and cannot serve as a basis for regulatory action. Any attempt to realistically assess the impact of Regulation BI on investors would require a different and appropriately structured study. For a careful assessment, see Greenwald Research, ANALYSIS OF NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION'S (NASAA) REG BI SURVEYS (February 2022), available at https://greenwaldresearch.com/wp-content/uploads/2022/02/Analysis-of-NASAA-Surveys-on-Reg-BI-Greenwald-Research-2.22.pdf.

[25] FINRA Regulatory Notice 23-20 (December 5, 2023).

[26] SEC Frequently Asked Questions on Form CRS, available at https://www.sec.gov/investment/form-crs-faq.

low. In defending the potential benefits of the Proposal, however, the Department relies exclusively on literature predating any of those changes.

In support of the following comments, we will submit to the Department a report prepared by Oxford Economics discussing in greater detail the deficiencies in the regulatory impact analysis. Given the compressed comment period allowed by the Department, it was not possible for this report to be completed prior to the submission of this letter.

1. The benefits claimed for the Proposal are qualitative, not quantitative, and do not stand scrutiny.

The regulatory impact analysis does not make any formal quantitative estimates of the benefits of the Proposal. Instead, the claimed benefits are defended entirely on the basis of five non-quantified qualitative claims,[27] all of which are deficient for reasons to be detailed in the Oxford Economics report.

Claimed benefit		**Deficiency in claim**
More efficient allocation of capital[28]	Little is said about this claim, which apparently relates to improved social benefits from transfers between retirement and non-retirement investors.	This claim does not close the loop with more efficient capital allocation in the economy and is theoretical.
Increasing uniformity in the regulation of investment advice[29]	The Proposal promotes clarity and efficiency, and prevents bad actors from gravitating to least regulated markets.	To the contrary, the Proposal creates a regulatory seam between retirement and non-retirement accounts, disregards that many investors have both kinds of accounts, and, as discussed elsewhere in this letter, will produce significant uncertainties.
Giving retirement investors increased trust and confidence in their advisers.[30]	Investors may encounter lower costs in finding and monitoring an adviser, and may be more likely to seek or follow advice.	The analysis does not weigh this benefit against the detriment to investors of reduced access to and utilization of professional advice.

[27] 88 Fed. Reg. at 75929, 75937-75944.
[28] *Id.* at 75937-75938.
[29] *Id.* at 75938.
[30] *Id.* at 75941-75942.

Claimed benefit		**Deficiency in claim**
Protecting consumers from losses that can result from advisers' conflicted interests, including:		
• Plan-level advice[31]	Regulation BI does not apply to plan-level advice.	As discussed below, this advice is hardly unregulated.
• Rollover advice[32]	Investors are frequently better off leaving their retirement savings in an ERISA-covered plan, because it sometimes (but not always) has lower costs than an IRA and enjoys the benefits of ERISA protections.	Much rollover advice is already covered by existing "best interest" regulation, and the Department's analysis is incomplete because (i) its contrafactual does not consider the full range of poor choices investors might make that could be prevented by even imperfect professional advice and (ii) it does not account for the costs to investors of unconsolidated retirement savings.
• Annuity advice[33]	The standard of care attached to some annuities depends on State regulation, and the Proposal would result in $3.6 billion in investor gains premised on a 0.2% higher return on 50% of the amount currently outstanding in annuities held in retirement plans.	This is the intended consequence of a federal system that leaves insurance regulation primarily to the States, and the attempted quantification based on variable annuity data (i) makes use of total annuity holdings rather than annual flows into annuities, (ii) is asserted with respect to fixed index annuities rather than variable annuities, and (iii) provides no basis for the overstated guess that the claimed higher rate of return would apply to 50% of all annuities.

In text,[34] the preamble also claims the benefits of (i) the Department's enforcement program, as if other, efficacious regulatory enforcement programs were not already in effect

[31] *Id.* at 75941.
[32] *Id.* at 75838-39.
[33] *Id.* at 75939-75941.
[34] *Id.* at 75942.

(discussed in detail below), and (ii) the imposition of Code section 4975 prohibited transaction excise taxes, as if the Code did not already require the payment of those taxes if due.

In short, none of the claimed benefits of the Proposal justifies the over-regulation and restructuring of the financial services industries produced by the Proposal.

2. All the literature cited by the Department to support the claimed benefits utilize data predating the effective date of Regulation BI.

The literature cited by the Department to support the benefits claimed for the Proposal all rest on data from before the effective date of Regulation BI, much less PTE 2020-02 and the other regulatory developments noted in the preamble. That data does not represent the retail investment market in 2023.

Literature cited in the Proposal's Benefits and Transfers section[35]

Paper cited	Benefit claimed in the Proposal	Data coverage	Data predates Regulation BI?
Alec Smith, *Advisers, Brokers, and Online Platforms: How a Uniform Fiduciary Duty Will Better Serve Investors*, 2017 COLUM. BUS. L. REV. 1200 (2017)[36]	Regulatory uniformity	Pre-2017	Yes
Santosh Anagol, Shawn Cole & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market*, 99 THE REVIEW OF ECONOMICS AND STATISTICS 1 (2015)[37]	Regulatory uniformity	2010	Yes
Pew Charitable Trusts, *Small Differences in Mutual Fund Fees Can Cut Billions from Americans' Retirement Savings*, PEW CHARITABLE TRUSTS ISSUE BRIEF (June 2022)[38]	Rollover advice	2019	Yes

[35] *Id.* at 75937-75942.
[36] *Id.* at 75938, and available at https://journals.library.columbia.edu/index.php/CBLR/article/view/1730/751.
[37] *Id.*, and available at https://doi.org/10.1162/REST_a_00625.
[38] *Id.* at 75939, and available at https://www.pewtrusts.org/-/media/assets/2022/05/smalldifferenceinmutualfunds_brief_v1.pdf.

Paper cited	Benefit claimed in the Proposal	Data coverage	Data predates Regulation BI?
John Turner & Bruce W. Klein, *Retirement Savings Flows and Financial Advice: Should You Roll Over Your 401(k) Plan?*, 30 BENEFITS QUARTERLY 42 (2014)[39]	Rollover advice	2014	Yes
John A. Turner, Bruce W. Klein & Norman P. Stein, *Financial Illiteracy Meets Conflicted Advice: The Case of Thrift Savings Plan Rollovers*, 3 THE JOURNAL OF RETIREMENT 47 (2015)[40]	Rollover advice	2013	Yes
Mark Egan, Gregor Matvos, & Amit Seru, *The Market for Financial Adviser Misconduct*, 127 JOURNAL OF POLITICAL ECONOMY (February 2019)[41]	Annuity advice	2005-2015	Yes
Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice*, Working Paper 25861, National Bureau of Economic Research (2020)[42]	Annuity advice	2013-2015	Yes
Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35 THE REVIEW OF FINANCIAL STUDIES 5334 (December 2022)[43]	Annuity advice	2005-2020Q2	Yes
Ashley C. Vicere, *Defining Fiduciary: Aligning Obligations with Expectations*, 82 BROOKLYN LAW REVIEW 1783 (2016)[44]	Annuity advice	Pre-2017	Yes
Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *It Pays to Set the Menu: Mutual*	Advice given to plan fiduciaries	1998-2009	Yes

[39] *Id.*, and available at https://www.iscebs.org/Documents/PDF/bqpublic/bq414f.pdf.
[40] *Id.*, and available at https://gflec.org/wp-content/uploads/2015/04/Turner-0408Assessing-the-Standard-for-Financial-Advice.pdf.
[41] *Id.* at 75940, and available at https://www.nber.org/system/files/working_papers/w22050/w22050.pdf.
[42] *Id.*, and available at https://www.nber.org/papers/w25861.
[43] *Id.* at 75941, and available at https://www.nber.org/system/files/working_papers/w27577/w27577.pdf.
[44] *Id.*, and available at https://brooklynworks.brooklaw.edu/blr/vol82/iss4/8/.

Paper cited	**Benefit claimed in the Proposal**	**Data coverage**	**Data predates Regulation BI?**
Fund Investment Options In 401(K) Plans, 71 The Journal of Finance 1779 (August 2016)[45]			
Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *Mutual Fund Revenue Sharing in 401(k) Plans*, Vanderbilt Owen Graduate School of Management Research Paper (November 8, 2022)[46]	Advice given to plan fiduciaries	2009-2013	Yes
Australian Securities and Investments Commission, *Report 627- Financial Advice: What Consumers Really Think* (August 2019)[47]	Reliability of advice	2018	Yes
Claude Montmarquette & Nathalie Viennot-Briot, *The Value of Financial Advice*, 16 Annals of Economics and Finance 69 (2015)[48]	Reliability of advice	2010-2011	Yes
Jill E. Fisch, Tess Wilkinson-Ryan, & Kristin Firth, *The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors*, 66 Duke Law Journal (2016)[49]	Reliability of advice	2015	Yes
Ben Charoenwong, Alan Kwan, & Tarik Umar, *Does Regulatory Jurisdiction Affect the Quality of Investment-Adviser Regulation*, 109 American Economic Review (October 2019)[50]	Enforcement	2009-2014	Yes

To reiterate, none of the literature cited in the Proposal is sufficiently current to justify the over-regulation and restructuring of the financial services industries produced by the Proposal.

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[45] *Id.*, and available at https://onlinelibrary.wiley.com/doi/abs/10.1111/jofi.12411.
[46] *Id.*, and available at https://www.nber.org/papers/w30721.
[47] *Id.* at 75942, and available at https://download.asic.gov.au/media/5243978/rep627-published-26-august-2019.pdf.
[48] *Id.*, and available at http://aeconf.com/articles/may2015/aef160104.pdf.
[49] *Id.*, and available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3875&context=dlj.
[50] *Id.*, and available at https://www.aeaweb.org/articles?id=10.1257/aer.20180412.

3. Our members project compliance costs greatly in excess of the costs to all affected entities estimated in the regulatory impact analysis.

The Department estimates total compliance costs for the Proposal, across all affected entities and industries, of $253 million in the first year and $216 million per year in subsequent years. Approximately 91% of these costs are associated with compliance with amended PTE 2020-02, and the bulk of those costs, especially after the rule review in the first year, relate to costs for rollover disclosures.[51] These are astonishingly low estimates for a regulatory initiative with the scope and consequence of the Proposal, in part because the estimates (i) assume existing compliance with Regulation BI and other regulation, as noted above, and (ii) do not take account of, e.g., the time of financial advisors and support staff to comply with the procedural requirements of the Proposal.

Based on these estimates, the Department calculates that the total 10-year cost of the Proposal would be $1.880 billion, or an annualized cost of $220.4 million using a 3% discount rate.[52] These estimates are dramatically lower than the Department's total cost estimates for the vacated 2016 rule, which ranged from $10.0 billion to $31.5 billion using the 3% discount rate.[53] That is, the Department estimates that the Proposal will result in **total costs 81% to 94% lower than its own estimated costs of the 2016 rule**. The regulatory impact analysis for the Proposal does not undertake to quantify these differences. For example, while the start-up costs for implementing Best Interest Contract Exemption contracts are no longer applicable, the other categories of start-up costs allocated to broker-dealers in the regulatory impact analysis for the 2016 rule – disclosure requirements; data collection; record keeping; training and licensing; and supervisory, compliance, and legal oversight – remain relevant and accounted for 67% of the start-up costs estimated in 2016.[54]

In connection with the preparation of this letter, FSI engaged Oxford Economics to survey member firms about the potential cost implications for the Proposal. Fifteen member firms responded to the survey. All respondents answered questions about the following aspects of the Proposal:

- Upfront costs, focused on the costs the firms would have to incur in preparing for the Proposal if adopted, specifically upgrading software systems, external legal or consulting costs, and incremental staff time on understanding and implementing the requirements of the Proposal; and
- Ongoing costs, focused on the cost would incur on an annual basis going forward, specifically financial advisor time, support staff time, and documentation and disclosure.

Staff time was valued using salary rates adapted from the regulatory impact analysis in the Proposal. Cost estimates for individual firms were adjusted to a per-financial advisor basis, and

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[51] *Id.* at 75948-75954.
[52] *Id.* at 75948 n.62.
[53] Department of Labor, REGULATING ADVICE MARKETS: DEFINITION OF THE TERM FIDUCIARY, CONFLICTS OF INTEREST-RETIREMENT INVESTMENT ADVICE: REGULATORY IMPACT ANALYSIS FOR FINAL RULE AND EXEMPTIONS, at 248 (April 2019), available at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.
[54] *Id.* at 232, Oxford Economics calculations based on Figures 5-8.

the median cost value in each category was selected and scaled to the national total of financial advisors. The survey methodology and calculations will be described in more detail in the Oxford Economics report when it is submitted.[55]

The following chart compares the estimates in the Proposal **for all entities** against the estimates **solely for our industry segment** developed by Oxford Economics based on the FSI member firm survey. We present this data on both the upfront/ongoing bifurcation used in the survey and the first year/subsequent year bifurcation used in the regulatory impact analysis.

Estimated Cost Comparisons

Bifurcation		Regulatory impact analysis ($ millions)	FSI survey results ($ millions)	% difference
Survey	Upfront costs	$37	$238	543%
	Ongoing costs	$216	$2,535	1074%
Regulatory impact analysis	First-year costs	$253	$2,773	996%
	Subsequent year costs	$216	$2,535	1074%

Using the bifurcation in the regulatory impact analysis, our survey results project costs for **just our segment of the industry** of over $2.7 billion for the first year – **almost 11 times the Department's estimate for all affected entities** – and over $2.5 billion for each subsequent year – **almost 12 times the Department's estimate for all affected industries**.[56]

That is, while the benefits of the Proposal are entirely speculative and unquantified, the costs of the Proposal for independent financial services firms can be quantified and are many times the costs estimated in the Proposal for all affected entities.

These results also belie the Department's claim that, with respect to our members as compared to other financial services providers, "the potential costs of this proposal are relatively limited, because the SEC actions [including Regulation BI] and this proposal share many similarities and many firms have already built compliance structures based on SEC actions, the Department's 2016 Final Rule, and PTE 2020-02."[57] The operational and compliance costs for our members differ enormously between observing PTE 2020-02 for rollover recommendations only, on the

[55] The regulatory impact analysis did not model staff time costs except where it directly related to preparation of disclosures. The Oxford Economics report shows that staff time cost, more generally, is the largest cost of the Proposal for financial services firms.
[56] As the full Oxford Economics report will show, these projected costs for our members are comparable to reported costs for PTE 2020-02 compliance on adoption in 2020. The projected costs are less than reported (realized) costs for compliance with the vacated 2016 rule or Regulation BI.
[57] 88 Fed. Reg. at 75924.

basis that other interactions are not fiduciary interactions under the five-part test, and observing it for all recommendations provided to retirement investors.

4. The paperwork mailing cost alone is just one example of grossly understated costs.

For purposes of compliance with the Paperwork Reduction Act, the preamble to the Proposal reaches the following conclusions:

> There is no paperwork burden associated with the proposed rule. However, there is paperwork burden associated with the amendments to PTEs 75-1, 84-24, 86-128, and 2020-02.[58]

These burdens are elaborated in the Information Collection Requests for each exemption provided by the Department to the OMB Office of Information and Regulatory Affairs. The Information Collection Request for the PTE 2020-02 amendments estimates an incremental increase, over PTE 2020-02 as it currently stands, of approximately 4.7 million paperwork "responses," at an increased burden of 642,799 hours and $75,233 in costs,[59] reaching an overall total of approximately 6.5 million responses.

Based on firms' response to an inquiry in the Oxford Economics survey and using comparable methodology to that described above, our members expect advisors across the industry will **print approximately 120 million pieces of paper annually** to comply with the Proposal if adopted, not counting disclosures that can be delivered electronically.

- Using for convenience the ratio in the Information Collection Request, assume about 86.8 million of those pages will be required by the incremental requirements of the Proposal.
- The Information Collection Request estimates, for mailed documentation, a combined material and postage cost of $0.33 per page.[60]

On that basis, the incremental cost, **just for mailed paperwork in our industry segment**, would be approximately $28.6 million,[61] compared to the total incremental documentation expense for all affected entities of $75,233 estimated in the Information Collection Request.

Also, we fail to see how any additional paperwork requirements, some of which inevitably will be provided in hard copy by mail, can be squared with the Administration's whole-of-government initiatives with respect to its climate change priorities.

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[58] *Id.* at 75964.
[59] Department of Labor, *Supporting Statement for Paperwork Reduction Act of 1995: Improving Advice for Workers & Retirees Prohibited Transaction Exemption*, Information Collection Request Reference No. 202308-1210-003, at 24 (Nov. 3, 2023), available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202308-1210-003.
[60] *Id.* at 22. The same assumption is used in the Proposal's regulatory impact analysis.
[61] $\$28,600,000 \cong 120,000,000 \times (4,700,000/6,500,000) \times \$0.33$

5. **The regulatory impact analysis too lightly dismisses the Proposal's effects on small investors.**

The preamble dismisses concerns about adverse effects of the Proposal on small investors, for, ironically, the asserted absence of empirical evidence that products or services were limited or account minimums were increased following the adoption of the vacated 2016 rule and Regulation BI.[62] The Department agreed that "it is possible, as the market evolves, small investors and the firms that serve them will increasingly move away from commission-based or "advised" brokerage accounts or commission-compensated advice from insurance agents," in favor of (i) target-date funds, (ii) receiving advice directly from investment firms, (iii) hourly engagement or subscription-based firms, and (iv) robo-advice. By expressing that point in terms of market evolution, of course, the Department declines to acknowledge the role its Proposal could play in shifting retirement investors among business models, contrary to its stated objectives.

In any event, the regulatory impact statement uncritically accepts these possible substitutes as favorable for small investors. The Oxford Economics report will point out that, like any other structural investment alternate, these possible substitutes for investment professionals are not without their own limitations in terms of costs, conflicts, personalization, product shelf, or otherwise. With respect to robo-advice in particular, the Oxford Economics report will discuss developments since the 2016 Deloitte report, on which the Department relies, which show that robo-advice has not yet become the game-changer that was once expected. If there is an alternative for small investors that provides superior advice at a lower cost and without conflicts, as the proponents of the Proposal claim, it is hard to fathom why that alternative has yet to emerge and claim market share.

Even the Department admits, indirectly, that there may be a tipping point at which over-regulation will result in decreased availability to and utilization of financial services by small investors. We discuss elsewhere in this letter specific elements of the Proposal that could yield that result. Failure to factor into the cost-benefit analysis the risk of contraction in the investment product and service market for small investors, and the uncertainties around possible substitutes, is yet another material deficiency in the regulatory impact analysis.

6. **The experience in the United Kingdom has been that its Retail Distribution Review actually increased costs for and decreased utilization of professional advice by investors.**

In this respect, the regulatory impact analysis seeks support from the experience of the United Kingdom ("U.K.") with its Retail Distribution Review ("RDR") to support the Proposal.[63] The analysis states that while the U.K. advice rate fell both in the lead up to RDR and in the years immediately following its implementation, more recent developments have included a 35 percent increase in the number of U.K. adults that received financial advice, a 5 percent increase in the number of advisers, and a 9 percentage point increase in consumer awareness of automated advice.[64] The analysis then concludes that RDR ultimately resulted in a modest increase in the

[62]88 Fed. Reg. at 75944-75946.
[63] 88 Fed. Reg. at 75947.
[64] *Id.*

number of adults accessing financial advice as well as their satisfaction with the advice they are receiving.[65]

The Department's analysis recites an incomplete summary of the impact of RDR on the market for advice in the U.K. The sole study cited in the Analysis in connection with RDR was a 2020 evaluation of RDR conducted by the U.K. Financial Conduct Authority ("FCA").[66] Other studies assessing the impact of RDR have found to the contrary – that the cost of advice to consumers increased post-RDR.[67] A more recent consultation paper published by the FCA recognized that barriers exist among advice firms in providing advice to investors with smaller amounts of investible assets, and one consequence is that while at least 15.6m U.K. consumers had over £10,000 in investable assets, 55% held the majority (at least 75%) or all of this in cash.[68] A 2021 study showed that only 1 in 14 U.K. investors paid for advice during the previous two years, a drop from 1 in 10 over the prior year, while 1 in 10 stated that they would pay for financial advice if it cost less.[69]

While the Proposal optimistically cites the potential for digital advice to provide low cost advice to U.S. investors, the Oxford Economics report will show to the contrary, as discussed above, and a recent rule proposal by the SEC likely would, if adopted, vastly increase the cost of similar advice offerings to U.S. investors, if not eliminate them entirely.[70]

Therefore, any lessons to be drawn from the U.K. in respect of the effect on the market of RDR and the potential of digital advice actually undercut the justification for the Proposal.

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[65] 88 Fed. Reg. at 75948.
[66] 88 Fed. Reg. at 75947 n.452, 75948 n.461, *citing* UK Financial Conduct Authority, Evaluation of the Impact of the Retail Distribution Review and the Financial Advice Market Review, U.K. Financial Conduct Authority (December 2020), available at https://www.fca.org.uk/publication/corporate/evaluation-of-the-impact-of-the-rdr-and-famr.pdf.
[67] *See RDR, ten years on*, IFA MAGAZINE (Sept. 28, 2002)("RDR ten years on"), available at https://ifamagazine.com/rdr-ten-years-on/.
[68] UK Financial Conduct Authority, *Broadening Access to Financial Advice for Mainstream Investments*, Consultation Paper CP 22/24 (November 2022), available at https://www.fca.org.uk/publication/consultation/cp22-24.pdf.
[69] RDR ten years on, *supra* note 67.
[70] Securities Exchange Act Rel. No. 97990, *Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers*, 88 Fed. Reg. 53960 (Aug. 9, 2023).

II. In its execution, the Proposal is flawed beyond repair.

As we have studied the Proposal, we have been forced to conclude that it is rife with internal contradictions, inconsistencies with other applicable laws, expensive conditions of no practical utility, inefficient duplication of remedies, uncertainties, unsupportable conclusions, unintended consequences, counterproductive effects, and incitements to needless litigation. These are not flaws that can be cured.

Flaws in Alignment with the Securities Laws

A. The Proposal proceeds as if ERISA operates in a regulatory void.

ERISA does not exist in a bubble. Retirement investors would not experience the consequences of the Proposal in a vacuum.

Our financial advisors' interactions with retirement investors are comprehensively regulated by the federal securities laws. Depending on the circumstances, they may also be subject to the fiduciary standards applicable to broker-dealers in States like Massachusetts, or the expansion on Regulation BI under development by NASAA,[71] or the fiduciary standards applicable to certified financial planners (if the financial advisor has that status). If they are proposing the purchase of an annuity contract, they would be regulated by the NAIC Annuity Suitability "Best Interest" Model Regulation that has been adopted in forty-three jurisdictions, among other insurance rules.[72] The overlapping of these regulatory regimes has consequences, not all to the benefit of retirement investors.

At the December 12-13 hearing, we provided a practical demonstration of the paperwork that would be required under the Proposal, in combination with other bodies of regulation, to open a rollover IRA with the assistance of a financial advisor from our member firms and to invest in a single balanced mutual fund. Our demonstration made use of documentation exemplars publicly available online from nationally recognized companies. The paperwork for this simple transaction consisted of:

[71] *Request for Public Comment: Proposed Revisions to NASAA's Dishonest or Unethical Business Practices of Broker-Dealers And Agents Model Rule* (Sept. 5, 2023), available at https://www.nasaa.org/wp-content/uploads/2023/09/Request-for-Public-Comment-on-BD-Best-Interest-Model-Rule.pdf.

[72] In this comment letter, we focus primarily on the alignment of the Proposal with the federal securities laws.

<u>Operative documents</u>

1. IRS Form 5305, which states the applicable tax provisions for IRAs in 2 pages.
2. The IRA custodial agreement, which adds administrative and other appropriate provisions. Our exemplar was 9 pages long, which is in the normal range.
3. An account application, which has become common practice. This IRA custodian's application was 12 pages long, which is also in the normal range.

<u>Disclosure documents</u>

4. IRA disclosure statement required by the IRS, to provide notice of various tax rules applicable to IRAs. Our exemplar, from the same IRA custodian, was an economical 6 pages long; these disclosures typically run 8-10 pages.
5. Projection of financial performance, also required by the IRS. We included 1 page in the practical demonstration as a proxy.
6. The SEC Form CRS for the financial services firm (which in our demonstration was not affiliated with the IRA custodian). Form CRS for dually registered firms cannot exceed and typically is 4 pages long.
7. The PTE 2020-02 acknowledgement for the financial services firm, which was a typical 2 pages long.
8. Additional disclosure about its business and conflict management practices provided by the financial services firm, in supplementation of its Form CRS and PTE 2020-02 acknowledgement. The exemplar document was 20 pages long.
9. The FINRA BrokerCheck report on the firm, which was also 20 pages long.
10. The PTE 2020-02 rollover analysis. Our exemplar was sample output from a vendor that provides financial institutions with a system to develop these analyses, and was 4 pages long.
11. The summary prospectus for the balanced mutual fund: 8 pages long.
12. The statutory prospectus for the balanced mutual fund: 71 pages long.
13. The most recent annual or semi-annual report for the balanced mutual fund: 80 pages long.
14. The Statement of Additional Information for the balanced mutual fund: 185 pages, which is entirely normal. This level of over-disclosure is the result of including disclosure of any item that might be of benefit to the investor.
15. The Proposal's disclosure of rollover assumptions. Our proxy document consisted of 6 pages: a page to input actual plan information if available, and a page each for the default assumptions for micro-, small, medium, large and mega-plans.
16. The Proposal's summary of the Financial Institution's policies and procedures. Our proxy was an optimistic 10 pages long.
17. The public website disclosure under consideration by the Department. When our larger member firms were developing the public website disclosure required under the vacated Best Interest Contract exemption, they projected the equivalent of hundreds of pages of disclosure. Our proxy document in the practical demonstration was 200 pages long, but the important point was that, whatever the assumed page count, the public website disclosure would be over-disclosure on the scale of a mutual fund Statement of Additional Information.

We omitted from our demonstration any potential account transfer paperwork, receipt for delivery of the prospectus, the documents available on request to retirement investors under the Proposal, and other miscellaneous documents.

In our demonstration, to open a rollover IRA invested in a single mutual fund, the paperwork consisted of **17 separate pieces of documentation totaling about 650 pages**. We contrasted that paperwork to an exemplary real estate closing package to buy a house, and the **IRA paperwork was about triple the length of the home purchase paperwork**.

If **the paperwork for the simplest IRA rollover is equivalent to the paperwork to buy three houses**, serious over-regulation is in effect.

While the Department is not responsible for other agencies' requirements, it is responsible for evaluating how its disclosure requirements, and the other conditions of its exemptions, fit in context, with respect to their incremental benefit and their effect on a retirement investor's experience. The conclusion is inescapable that the paperwork required under the Proposal, in combination with that required by other agencies, goes massively beyond documentation of any practical utility to retirement investors. The Proposal would require disclosure only for the sake of disclosure[73] – disclosure that would be meaningless to and ignored by retirement investors, disclosure that only adds costs to the system, including the always unrecognized burdens required to keep disclosures across multiple regulatory regimes, sometimes updating on different schedules, current and consistent and correct.

The Information Collection Request noted above states the Department's apparent perspective on duplication, as follows:

> **4. Describe efforts to identify duplication. Show specifically why similar information already available cannot be used or modified for use for the purposes described in Item 2 above.**
>
> The ERISA and Code rules governing advice on the investment of retirement assets overlap with SEC rules that govern the conduct of investment advisers and broker-dealers who advise retail investors. The Department considered conduct standards set by other regulators – such as SEC, NAIC, and FINRA – in development of the exemption, with the goal of avoiding overlapping or duplicative requirements. To the extent the requirements overlap, compliance with other disclosure or recordkeeping requirements can be used to satisfy the exemption conditions, provided the conditions are satisfied. In this regard, there is no duplicate requirements because entities are able to satisfy the requirements of both this exemption and of other applicable laws.

The preamble suggests that PTE 2020-02 disclosures could be incorporated into Form CRS, but that is a non-starter – the Form CRS page limit is fully absorbed by the information required to be disclosed by the SEC, which in any event has not countenanced additional content extrinsic to the Form's stated requirements. More fundamentally, and contrary to the Department's

[73] It may also be disclosure that incites needless litigation against Financial Institutions, which we discuss further below.

statement, burdening our members with overlapping requirements, each of which must be satisfied separately, is the very definition of duplicative over-regulation.

We recognize the Department's broad discretion to determine the conditions for the prohibited transaction exemptions it grants, yet surely there must be a limit on imposing conditions that accomplish nothing other than increasing costs and legal exposure for our members.

Indeed, the consequences of the Proposal's disclosure and other conditions could be far more counterproductive than that. The IRA custodian whose documentation we presented currently has no minimum account size for IRAs. The full 650-page paperwork package would be required for a rollover IRA of as little as, say, $1,000. There surely will come a point when the IRA custodian would rationally conclude that the burden of regulatory compliance expense and exposure compels it to set a substantial IRA account minimum, leaving out retirement investors with smaller balances to roll over. And there surely will become a point when less experienced retirement investors would be so intimidated by the IRA rollover paperwork that they would walk away from a "best interest" transaction – not because of the investment professional's conflicts of interest, but because the over-regulation of the transaction has become overwhelming. And without proper advice, the retirement investor might not leave the money in the plan but may instead cash out the account.

In this respect, the paperwork requirements are a surrogate for the Proposal as a whole, in relation to other applicable laws – overlapping disclosure requirements, overlapping best interest standards, overlapping policies and procedures requirements, and so on, all with the same broad objective but each with unique idiosyncrasies that must be satisfied. The Proposal proceeds as if no other regulation of financial services exists, when in fact financial services are among the most heavily regulated industries in the country.[74] It layers on additional disclosures with no justification other than "it is the Department's view." It imposes conditions that, in the context of other regulatory requirements, are of limited or no practical utility. In so doing, the Proposal provides no useful service to retirement investors; rather, it only increases costs and complexity, which inexorably decreases availability and utilization.

B. The Proposal also proceeds as if ERISA protection is the sole remedial recourse for retirement investors.

The securities laws, through the Advisers Act and Regulation BI and FINRA conduct rules and other provisions, already provide a powerful "best interest" consumer protection standard and remedy for retirement investors served by our members. The Proposal's insistence on a duplicative ERISA "best interest" remedy completely disregards the robust and more efficacious compliance regime that already exists for our members.

1. The securities laws provide consumer protections for plan-level recommendations, as well as participant-level recommendations.

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[74] We acknowledge the Department's statement of its intent to align the Proposal's best interest standard with Regulation BI and the Advisers Act. As discussed below, however, the preamble also distinguishes the Proposal from those standards.

The preamble to the Proposal discusses at length the most fundamental standards of conduct under the securities laws that protect retirement investors: the best interest standard of Regulation BI and the fiduciary standard of the Advisers Act. Those standards are, however, only the cornerstones of the investor protections provided under the securities laws.

Consider, for example, the case of investment services provided by a financial advisor to a plan sponsor or other fiduciary with respect to the investment options to be offered under the company 401(k) plan.

- If the services provided to the plan sponsor are investment advisory services, they will be governed by the Advisers Act, which establishes a federal fiduciary duty for investment advisers comprising a duty of care and a duty of loyalty.
- If the services provided to the plan sponsor are broker-dealer services, they will be governed by the Securities Exchange Act of 1934 ("1934 Act"), SEC rules and FINRA rules. Among other things, these statutes and rules require broker-dealers to deal fairly with their customers and observe high standards of commercial honor and just and equitable principles of trade. These obligations include having a reasonable basis for recommendations in light of a customer's financial situation to the extent known to the broker and giving "best interest" recommendations.

Registered Investment Adviser Services. The SEC issued an interpretation regarding the standard of conduct for investment advisers in 2019 ("2019 Interpretation").[75] The 2019 Interpretation states that an investment adviser's federal fiduciary duty

> is broad and applies to the entire adviser-client relationship. The fiduciary duty to which advisers are subject is not specifically defined in the Advisers Act or in Commission rules, but reflects a Congressional recognition "of the delicate fiduciary nature of an investment advisory relationship" as well as a Congressional intent to "eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."[76]

The 2019 Interpretation notes that investment advisers can serve clients ranging from retail clients to institutional clients with sophisticated understandings of the securities markets.[77] The 2019 Interpretation states that the federal fiduciary duty has provided sufficient flexibility to investment advisers "to serve as an effective standard of conduct for investment advisers, regardless of the services they provide or the types of clients they serve."[78] The SEC has expressed the view that an adviser's federal fiduciary duty is not waivable, regardless of the sophistication of the client, though the duty will apply in a manner that reflects the agreed-upon scope of the relationship.

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[75] SEC Release No. 34–86031, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Investment Advisers Act Release No. 5248 (June 5, 2019), 84 Fed. Reg. 33669 (July 12, 2019)("Regulation BI Release").
[76] *Id.* at 33670 (citations omitted).
[77] *See id.* at 33671.
[78] *Id.*

An investment adviser's fiduciary duty governs the entirety of the adviser's relationship with its clients and prospective clients and requires advisers to

- Act in "utmost good faith";
- Provide "full and fair disclosure of all material facts"; and
- Utilize "reasonable care to avoid misleading" their clients and prospective clients. Fundamental to the federal fiduciary standard are the duties of loyalty and care. The duty of loyalty requires an adviser to serve the best interests of its clients, which includes an obligation not to subordinate the clients' interests to its own. An adviser's duty of care requires it to "make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information."[79]

The federal fiduciary duty that applies to investment advisers comprises a duty of care and a duty of loyalty.[80] The 2019 Interpretation specifically provides that the duty of care is comprised of up to three separate obligations:

- The duty to provide advice that is in the best interest of the client;
- The duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades; and
- The duty to provide advice and monitoring over the course of the relationship.[81]

Broker-Dealer Services. Federal securities laws and self-regulatory organization ("SRO") rules impose upon broker-dealers a duty of fair dealing.[82] Among other things, the duty of fair dealing requires broker-dealers to make only suitable recommendations to customers and to receive only fair and reasonable compensation.[83] Broker-dealers are also subject to obligations to eliminate, mitigate, or disclose certain conflicts of interest.[84] Moreover, broker-dealers must comply with a comprehensive set of statutory, SEC and SRO requirements that seek to promote business conduct that, among other things, protects investors from abusive practices, including practices that are not necessarily fraudulent.[85] Similar to the federal fiduciary duty, customers cannot waive these business conduct obligations.[86]

As the SEC explicitly stated in a 2011 report to the Congress, "a central aspect of a broker-dealer's duty of fair dealing is the suitability obligation, which generally requires a

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79 Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* at 22 (Jan. 2011) ("913 Study"), available at www.sec.gov/news/studies/2011/ 913studyfinal.pdf.
80 *Id.*
81 Regulation BI Release, at 33672.
82 *Regulation Best Interest*, Securities Exchange Act Release No. 83062 (Apr. 18, 2018), 83 Fed. Reg. 21574, 21576 (May 9, 2018).
83 *Id.*
84 *Id.* at 21576-77.
85 913 Study at 51.
86 *Id.*

broker-dealer to make recommendations that are consistent with the ***best interests*** of his customer."[87] The suitability obligation requires a broker-dealer to:

- Have an "adequate and reasonable basis" for any security or strategy recommendation that it makes (so-called "reasonable-basis suitability"); and
- Make recommendations based upon a customer's financial situation and needs, as well as the customer's other securities holdings, to the extent the broker-dealer knows about those holdings (so-called "customer-specific suitability").[88]

In 2012, FINRA advised that "[t]he suitability requirement that a broker make only those recommendations that are consistent with the customer's best interests prohibits a broker from placing his or her interests ahead of the customer's interests."[89]

A broker-dealer also must ensure that its communications with the public are not misleading.[90] A broker-dealer also is required to reasonably supervise its employees and independent contractors and must establish and implement policies and procedures reasonably designed to prevent and detect violations of the federal securities laws and regulations and SRO rules.[91]

Other than a duty of loyalty of comparable intensity to that in PTE 2020-02, these protections correspond to the fundamental duties of investment professionals under the exemption:

- A duty to give "best interest" recommendations that meet professional standards;
- A duty to disclose conflicts;
- A duty to receive only fair and reasonable compensation; and
- A duty to ensure that its communications to the public are not misleading.

Accordingly, the securities laws governing broker-dealers also provide plan fiduciaries – who of course have responsibilities of their own under ERISA with respect to the recommendations they receive – with substantial and meaningful protections parallel to PTE 2020-02 as it currently exists.

This crucial point bears repetition. The only material difference between the duties of our financial advisors under the 1934 Act, including Regulation BI, or the Advisers Act, as applicable, and the impartial conduct standards of PTE 2020-02 is the intensity of the duty of loyalty owed by broker-dealers for plan-level advice. **In every other respect and circumstance, the Proposal invents fiduciary status in order to impose in PTE 2020-02 duties that duplicate those already owed by our financial advisors under the securities laws.**

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[87] *Id.* at 59 (emphasis added).
[88] *Id.* at 63-64.
[89] See FINRA Regulatory Notice 12–25, *Additional Guidance on FINRA's New Suitability Rule* (May 2012).
[90] Regulation BI Release, at 70.
[91] *Id.*

2. Securities laws provide an efficacious enforcement and remedy regime that protects retirement investors.

Compliance and enforcement under the securities laws is a well-developed, vigorous and effective multi-layered process, ultimately including private litigation pursued by the energetic plaintiff's securities enforcement bar.

Firm compliance programs. In the interest of properly serving investors, our members invest hundreds of millions of dollars annually on their securities laws compliance programs, including:

- Vetting potential financial advisors;
- Training financial advisors, both initially and on a continuing basis;
- Establishing and updating policies and procedures for financial advisors' interactions with investors;
- Supervising financial advisors, including every transaction they order for an investor;
- Reversing and otherwise remedying any transaction that does not comport with the firm's practices and procedures; and
- Disciplining or terminating financial advisor' affiliations, as appropriate, for violations of those policies and procedures.

SEC Examination and Disciplinary Programs. The SEC runs a robust examination program; indeed, notice that SEC examiners are looking at a particular financial services firm, or conducting a "sweep" of many firms, is cause for concern within the targeted firm(s). The reach of the SEC's power to examine is made clear by its statistics. In 2023, the SEC Division of Examinations has more than 1,100 employees, working from the SEC's headquarters in Washington, D.C., and from eleven (11) offices located throughout the U.S, and its Division of Enforcement has a comparable number of employees.[92] These employees are solely focused on ensuring compliance with the federal securities laws and rules, and in 2023, conducted more than 3,100 exams, including examinations focused on standards of care.[93]

Importantly, like the Department, the SEC does not need to suspect wrongdoing in order to conduct an examination. Financial services firms know that they are constantly subject to SEC surveillance through a number of different methodologies, including data collection and analysis by Examination Division staff; on-site examination at a firm's offices; and off-site exams. Both on-site and off-site examinations involve massive document requests and interviews. Not only are firms at risk of SEC enforcement; their staffs are at risk as well because personal liability is a feature of SEC exams and enforcement.

With respect to Regulation BI in particular, the SEC has made it abundantly clear to the broker-dealer community that compliance with Regulation BI is a top priority of the SEC Division

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[92] SEC, FISCAL YEAR 2022 AGENCY FINANCIAL REPORT ("FY2022 REPORT"), available at https://www.sec.gov/files/sec-2022-agency-financial-report.pdf.
[93] SEC, FISCAL YEAR 2023 AGENCY FINANCIAL REPORT, available at https://www.sec.gov/files/sec-2023-agency-financial-report.pdf

of Examinations. The Division has already published its priorities for 2024,[94] and Regulation BI exams are noted first in the SEC's discussion of broker-dealer exam priorities. SEC examinations in 2024 will pay particular attention to: (1) recommendations with regard to products, investment strategies, and account types; (2) disclosures made to investors regarding conflicts of interest; (3) conflict mitigation practices; (4) processes for reviewing reasonably available alternatives; and (5) factors considered in light of the investor's investment profile, including investment goals and account characteristics.[95]

The SEC's examination program for investment advisers is every bit as rigorous as it is for broker-dealers. Individual advisers are examined by SEC staff on the basis of two types of risk: (i) the risk of the particular adviser; and (ii) the risk of particular activities in which the adviser engages. The SEC has stated that its adviser exams are dynamic because it examines advisers on the basis of risk at a particular firm; responds to events that threaten investors and the markets more broadly; and assesses how advisers are adapting to new regulatory requirements.[96] SEC adviser examinations typically include reviewing an adviser's disclosures and conflicts of interest and test the effectiveness of the adviser's compliance policies and procedures for monitoring and managing its risks and conflicts of interest. The SEC's 2024 examination priorities for advisers specifically include a specific focus on older investors and those saving for retirement.[97]

SEC leadership has made clear that it is committed to ensuring that Regulation BI has the desired effect in the market through enforcement.[98] The SEC has already filed its first complaint alleging violations of Regulation BI, in federal district court demanding a jury trial and seeking a financial recovery, civil penalties, and equitable relief.[99] Both the SEC and FINRA enforcement divisions continue to demonstrate a commitment to identifying violations of Regulation BI.

FINRA Examination and Disciplinary Programs. FINRA examinations touch virtually every broker-dealer registered with the SEC. Similar to SEC examinations, FINRA examiners collect copious amounts of data from brokerage firms and study the risk characteristics of each firm so that exams and document requests match the particular lines of business in which the broker-dealer engages. In assessing individual firm risk, FINRA examination staff considers the size of a firm; its examination and disciplinary history; its business practices; its hiring practices; and the firm's financial and operational risks, among other factors.

As is the case with the SEC, FINRA is constantly performing a surveillance and examination function. It does not wait for wrongdoing to occur; it conducts regular examinations (called "cycle

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[94] SEC, 2024 EXAMINATION PRIORITIES at 13 (Oct. 2024)("2024 EXAMINATION PRIORITIES"), available at https://www.sec.gov/files/2024-exam-priorities.pdf.
[95] *Id.*
[96] SEC Risk Alert: Investment Advisers: Assessing Risk, Scoping Examinations, and Requesting Documents (Sept. 2023), available at https://www.sec.gov/files/risk-alert-ia-risk-and-requesting-documents-090623.pdf.
[97].2024 EXAMINATION PRIORITIES at 7-10.
[98] *See, e.g.*, Testimony of Gurbil S. Grewal, Director, Division of Enforcement, Securities and Exchange Commission, before the House Subcommittee on Investor Protection, Entrepreneurship and Capital Markets (July 19, 2022), available at https://docs.house.gov/meetings/BA/BA16/20220719/115031/HHRG-117-BA16-Wstate-GrewalG-20220719.pdf.
[99] SEC, Press Release: SEC Charges Firm and Five Brokers with Violations of Reg BI (June 16, 2023), available at https://www.sec.gov/news/press-release/2022-110. We note that the defendant in this matter is an FSI member who is vigorously contesting the case.

exams") of FINRA member firms to identify areas of concern and take corrective action. Firms that have retail customers are closely scrutinized for compliance with Regulation BI and numerous other FINRA rules that apply to the offer and sale of securities to retail investors. In 2020, FINRA stated that it conducts approximately 1,200 cycle exams annually, which means that approximately thirty (30) percent of FINRA member firms are examined annually by FINRA and every firm is examined at least once every four years.

With respect to Regulation BI specifically, FINRA examined more than 570 firms in the eighteen-month period from the adoption of the rule in June 2020 through 2021,[100] and that remains an enforcement priority.[101]

> Regulation Best Interest (Reg BI) and Form CRS remain areas of focus across FINRA's regulatory operations programs. FINRA's reviews of member firms' adherence to their obligations pursuant to Reg BI and Form CRS address a number of areas, such as making recommendations that adhere to Reg BI's Care Obligation; identifying and addressing conflicts of interest; disclosing to retail customers all material facts related to conflicts of interest; establishing and enforcing adequate written supervisory procedures (WSPs), including the provision of effective staff training; and filing, delivering and tracking accurate Forms CRS.

Like the SEC, FINRA's examination efforts are coupled with strong enforcement; FINRA routinely levies significant fines against broker-dealers and individuals and returns money to harmed investors, and, like the SEC, bars firms and individuals from continuing to work in the financial services industry.

FINRA Arbitration Forum. FINRA also operates a dispute resolution service, offering arbitration of investor claims for monetary or other relief arising from securities or business disputes with a broker-dealer or one of its representatives. Arbitration is a compulsory process requiring FINRA members to answer claims. Arbitration cases are decided by independent arbitrators who are chosen by the parties to issue final binding decisions. This service provides effective resolutions for investors in a manner that avoids the costs of litigation.

3. ERISA enforcement remedies would unnecessarily duplicate these existing remedies.

Thus, for financial services firms regulated by the SEC, a "best interest" if not a fiduciary standard of conduct has already been adopted, and is enforced by firms' compliance programs, an SEC staff of approximately 2,200 employees dedicated to examinations and enforcement,[102] and a FINRA examination staff of approximately 700 employees with 250 dedicated to retail

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[100] Podcast: *Regulation Best Interest and Form CRS: Two Years In* (June 28, 2023), available at https://www.finra.org/media-center/finra-unscripted/regulation-best-interest-form-crs-two-years.
[101] FINRA, 2023 REPORT ON FINRA'S EXAMINATION AND RISK MONITORING PROGRAM, available at https://www.finra.org/rules-guidance/guidance/reports/2023-finras-examination-and-risk-monitoring-program/selected-highlights.
[102] FY2022 REPORT.

firms like our members, as well as hundreds more staff in FINRA's enforcement department.[103] These agencies are entirely focused on the compliance of the securities industry with the rules within their purview, and they bring to bear formidable enforcement resources.

The Department's enforcement staff in its regional offices numbers less than 500 employees.[104] Their focus is split between (i) the compliance of sponsors with plan terms and ERISA Title I in respect of over 765,000 private retirement plans, 2.8 million health plans, and 619,000 other welfare plans,[105] and (ii) various categories of service providers to plans, including but not limited to securities firms.

Robust "best interest" if not fiduciary protection for the retirement investors served by our members already is in effect under the securities laws, either by statute or at the specific behest of Congress, and enforced by the SEC, and FINRA, and the plaintiff's securities enforcement bar. Any additional protection conceived by the Proposal would be on the margins at best, duplicative at worst, and would never match up with the enforcement focus, expertise, and resources already at work for investors under the securities laws. Should the Department identify potentially problematic cases in its investigative activity, it has a longstanding memorandum of understanding with the SEC that permits the exchange of enforcement and other information between the agencies.

In the only concrete enforcement example cited in the Proposal, based on allegations of conflicted rollover advice, the SEC settled its enforcement case for $97 million, but a private ERISA action was dismissed because the provider was not giving advice "on a regular basis" for purposes of the five-part test of ERISA fiduciary status.[106] The preamble does not claim that the SEC resolution was insufficient to protect and remedy the interests of the retirement investors. The preamble only insists that it should also be the business of the Department to duplicate the "best interest" remedies to which our members are already subject under the securities laws.

With respect, if a financial professional is willing to make a recommendation that puts their own interest first, notwithstanding their firm's training and compliance and oversight programs, plus Regulation BI and the Advisers Act and FINRA conduct rules and other existing rules, plus the vigorous efforts of the SEC and FINRA with a combined enforcement staff of nearly 3,000 employees, plus State securities and other regulators, plus the plaintiff's side of the securities enforcement bar, all of which create a realistic exposure to serious sanctions and remedies for that recommendation, overlaying a risk of enforcement from the Department does not seem consequential. And the retirement investor already has an existing range of options to remedy that defalcation; it's hardly ERISA or nothing.

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[103] Podcast, *The FINRA Examination Team: The Ins and Outs of FINRA's Annual Program* (June 13, 2023), published at https://www.finra.org/media-center/finra-unscripted/finra-examinations-team-program#:~:text=Michael%20Solomon%3A%20Sure.,Clearing%2C%20and%20Trading%20and%20Execution.

[104] EMPLOYEE BENEFITS SECURITY ADMINISTRATION: ENFORCEMENT EFFORTS TO PROTECT PARTICIPANTS' RIGHTS IN EMPLOYER-SPONSORED RETIREMENT AND HEALTH BENEFIT PLANS, GAO-21-376, at Figure 3 (May 27, 2021).

[105] Department of Labor, *About EBSA,* available at https://www.dol.gov/agencies/ebsa/about-ebsa/about-us.

[106] 88 Fed. Reg. at 75915 n.170.

C. The SEC's regulatory impact analysis underlying Regulation BI exposes flaws in the Proposal.

In evaluating the effects of Regulation BI, the SEC reached conclusions completely at odds with the Department's regulatory impact analysis, as well as with the confident if unsupported predictions by the Proposal's proponents at the December 12-13 hearing that the Department could regulate as it chooses without impairing the investment services market for retirement investors. The SEC observed, for example, that there are fundamental differences in the ways that broker-dealers and registered investment advisers engage with investors – differences that are recognized in the five-part test and the Fifth Circuit's opinion but are papered over by the Proposal. The SEC's analysis warrants quotation at length.

> Regulation Best Interest establishes a new standard of conduct for broker-dealers under the Exchange Act that is intended to address the agency costs that retail customers face when obtaining recommendations of securities transactions and investment strategies from broker-dealers and their associated persons. This new standard is intended to enhance investor protection, while preserving, to the extent possible, retail investor access (in terms of choice and cost) to differing types of investment services and securities. As noted above, the Commission considered several reasonable alternative policy choices, including (1) applying the fiduciary standard under the Advisers Act to broker-dealers, and (2) adopting a "new" uniform fiduciary standard of conduct applicable to both broker-dealers and investment advisers, such as that recommended by the staff in the 913 Study. The Commission also considered adopting similar standards to those the DOL had provided under its fiduciary rule to broker-dealers and investment advisers….
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> As discussed in the Proposing Release and as raised by commenters, instead of adopting our approach in Regulation Best Interest, the Commission could have alternatively imposed a form of fiduciary standard on broker-dealers providing recommendations to retail customers. The Commission recognized that fiduciary standards vary among investment advisers, banks acting as trustees or fiduciaries, or ERISA plan providers, but fiduciaries are generally required to act in the best interest of their clients. Under any of the options considered, *the Commission would have to craft a mechanism to apply a uniform standard of conduct to all financial professionals regardless of how they engage with their retail customers. This approach was advocated by certain commenters, many of whom asserted that it would reduce retail investor confusion* as it would ensure that investors are provided the same standard of care and loyalty regardless of what type of financial professional they engage. As discussed above and in detail further below *we believe, in practice, that such uniformity would be difficult to implement and disruptive to pursue as a result of various factors, including the key differences in the ways broker-dealers and investment advisers engage with retail clients.* Achieving such uniformity could require narrowing the type and scope of services permitted to be provided by various types of financial professionals. If we were to pursue such an approach, it could reduce retail customers' confusion with respect to the duties owed to them by the broker-dealers and investment advisers and could reduce potential costs to some investors associated with choosing a type of relationship that is not well suited to them, because under a uniform standard, retail customers of each type of financial professional would be subject to the same standard of conduct.

> However, this uniformity could come at a cost to both investors and financial service providers. *Such an approach could result in a standard of conduct for broker-dealers that is not appropriately tailored to the structure and characteristics of the broker-dealer model (i.e., transaction specific recommendations and compensation), and might not properly take into account, or build upon, existing obligations that apply to broker-dealers, including under FINRA rules.* A potential implication of this paradigm shift would be that broker-dealers would face significant compliance costs, at least in the short run, relative to the regulatory baseline. Potentially higher compliance costs could increase the incentive to offer investment advice in the capacity of investment adviser and could decrease the incentive to offer investment advice in the capacity of broker-dealer. *To the extent broker-dealers act on the increased incentives and decide to participate in the market for investment advice only in the capacity of investment advisers, retail customers could experience an increase in the cost of obtaining investment advice*, relative to the baseline. Furthermore, as noted above, *the potential exit of broker-dealers from the market for investment advice in the broker-dealer capacity could limit how retail customers would access certain securities or investment strategies and how they would pay for investment advice, which, in turn, could increase their costs of obtaining investment advice, relative to the baseline. To the extent broker-dealers decide to continue to participate in the market for investment advice in the capacity of broker-dealers, they could pass on increased compliance costs, in full or in part, to their retail customers.* As a result, retail customers could experience an increase in the cost of obtaining investment advice, relative to the baseline. The potential increase in the cost of accessing investment advice could push some retail customers outside the market for investment advice from Commission-registered broker-dealers and investment advisers.[107]

Thus, while the Proposal claims to align with SEC regulation, it instead rests on flawed judgments utterly at odds with those of the regulator that has been supervising financial services firms since 1934 and was selected by Congress to make the "standard of conduct" determination for broker-dealers.

D. The Proposal overlaps with and in certain important respects conflicts with SEC and FINRA rules.

PTE 2020-02, in its current form, permits Financial Institutions and Investment Professionals (*i.e.*, registered investment advisers, banks, insurance companies, broker-dealers) to provide investment advice that would otherwise not be permitted, provided they comply with the exemption's terms. The terms generally require the investment advice fiduciary to act according to the best interest standards, charging no more than reasonable compensation and adopting certain compliance policies and procedures. More specifically, under the current framework for PTE 2020-02, Financial Institutions and Investment Professionals relying on the exemption must: (1) acknowledge their fiduciary status in writing; (2) disclose their services and material conflicts of interest; (3) adhere to Impartial Conduct Standards (the "Impartial Conduct Standards"); (4) adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest that could otherwise cause violations of those standards; (5) document and disclose the specific reasons that any rollover recommendations are

[107] Regulation BI Release at 33462-33463 (footnotes omitted; emphases added).

in the retirement investor's best interest; and (6) conduct an annual retrospective compliance review.

The Impartial Conduct Standards require Financial Institutions and Investment Professionals to provide advice in a prudent manner; act with loyalty towards Retirement Investors when making recommendations by not placing their own interests ahead of the Retirement Investor's; charge no more than reasonable compensation and comply with the Federal securities laws regarding "best execution"; and avoid making misleading statements about investment transactions and other relevant matters.

While the Proposal largely retains the Impartial Conduct Standards, several of the proposed amendments would put PTE 2020-02 in conflict with the existing robust regulatory framework applicable to broker-dealers, including Regulation BI and FINRA rules.

1. The Proposal would upend long-standing compensation models.

PTE 2020-02 currently requires Financial Institutions to establish, maintain, and enforce policies and procedures that are prudently designed to ensure compliance with the Impartial Conduct Standards and to mitigate conflicts of interest that could potentially violate such standards. The proposed amendments would clarify, by adding examples to the operative text, some actions that Financial Institutions may not take, and including additional guidance on how Financial Institutions that construct their investment menus with reference to proprietary or third-party payments can comply with the exemption.

The preamble adds that policies and procedures must be prudently designed to protect Retirement Investors from recommendations to make excessive trades; to buy investment products, annuities, or riders that are not in the Retirement Investor's Best Interest; or to allocate excessive amounts to illiquid or risky investments. In that regard, the Proposal and the preamble list compensation practices which a Financial Institution's policies and procedures would presumably be expected to prohibit:

- 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 the Retirement Investors' Best Interest; and
- Incentive vacations, or even paid trips to educational conferences, if the desirability of the destination is based on sales volume and satisfaction of sales quotas.

Complying with these broad compensation prohibitions would force broker-dealers, including FSI members, to modify long-standing and accepted compensation and securities distribution practices which are permitted under Regulation BI.

The Proposal would broadly jeopardize the viability of differential or variable compensation arrangements accepted under Regulation BI. As noted above, the Proposal suggests that Financial Institutions would be required to adopt policies and procedures that prohibit "differential compensation" that a "reasonable person would conclude" is likely to "encourage . . . recommendations that are not in the Retirement Investors' Best Interest." Crucially, the "reasonable person" standard does not require that a differential compensation arrangement *actually cause* a recommendation that is not in a Retirement Investors' Best Interest – but only that a "reasonable person" might conclude that it "encourage[s]" such a recommendation. The Department leaves unsaid how firms would prove a negative and demonstrate that a particular compensation arrangement could not "encourage" a recommendation that is not in the Retirement Investors' Best Interest.

The natural result of the Department's suggestion that differential compensation arrangements should be prohibited is that Financial Institutions may be required to levelize compensation across all product types – a scenario that fails to take into account the plurality and diversity of compensation arrangements across product types (*i.e.*, brokerage commission on traded securities paid by the customers, markups/markdowns in the case of principal transactions, spreads in certain public offerings, selling compensation paid by issuer in private and public offerings, ongoing servicing and administrative relationships, and account fees and charges). It also fails to take into account that the recommendation and/or sale of certain product types takes the Financial Professional, and the associated Financial Institution, more time and effort. In the Proposal, the Department also takes a negative view towards particular forms of levelized compensation in which a Financial Institution pays Investment Professionals the same percentage of the Financial Institution's compensation across different investment products. The Department views this type of "level" compensation as "directly transmit[ting] the Financial Institution's conflict of interest to the Investment Professional, as the Investment Professional's compensation is increased in direct proportion to the profitability of the investment to the firm." The sum result of the Department's view would be a substantial narrowing of the types of compensation arrangements available to Financial Institutions and Financial Professionals, with a concomitant reduction in products and services available to retirement investors.

The Department's approach would put PTE 2020-02 in direct conflict with Regulation BI. In the Regulation BI Adopting Release, the SEC acknowledged that the payment of differential compensation to a financial advisor related to the sale of particular products may be a conflict of interest. However, instead of broadly prohibiting such arrangements, the SEC discussed "mitigation methods" that firms could implement to comply with the Conflict of Interest Obligation in the context of differential compensation arrangements. The SEC suggested that firms could "minimiz[e] compensation incentives for employees to favor one type of account over another; or to favor one type of product over another, proprietary or preferred products, or comparable products sold on a principal basis, for example, by establishing differential compensation based on neutral factors."[108] The SEC further noted that it was "not requiring firms to establish differential compensation based on neutral factors . . .", effectively leaving it up to the broker-dealer to determine how the conflict should be addressed based on the particular broker-dealer's business model and customer base.[109]

The Department's approach to differential compensation would potentially upend the distribution of proprietary products. Broker-dealers that distribute proprietary products employ compensation models that could be seen as a "conflict of interest" in favor of proprietary product sales. This compensation model is an inherent attribute of proprietary product distribution – when a proprietary product is sold, revenue flows both to the distributing broker-dealer and to the affiliated issuer. Given the fundamental compensation structure tied to proprietary product sales,

[108] *Id.*
[109] *Id.* at n.757.

prohibiting differential compensation would dismantle the current model of distributing proprietary products.

The Department fails to explain why the SEC's measured approach to differential compensation arrangements through Regulation BI is not sufficient to protect Retirement Investors with accounts held through a broker-dealer. Instead, the Department proposes an approach that is seemingly in direct conflict with SEC guidance in the Regulation BI Adopting Release.

The Proposal's suggested prohibition of certain associated person compensation arrangements conflicts with Regulation BI and FINRA rules. Similar to differential compensation, the preamble suggests that Financial Institutions would be required to adopt policies and procedures to prevent "contests," "bonuses," "special awards," and "other actions or incentives" unless the firm can demonstrate that a "reasonable person" would not view such compensation as "encourag[ing] . . . recommendations that are not in the Retirement Investors' Best Interest." The Department's approach is at odds with Regulation BI's Conflict of Interest Obligation, and, more specifically, the SEC's treatment under Regulation BI of associated person incentives and sales contests.

Regulation BI's Conflict of Interest Obligation requires broker-dealers to establish, maintain, and enforce written policies and procedures addressing conflicts of interest associated with recommendations to retail customers. These policies and procedures must reasonably be designed to identify all such conflicts and, at a minimum disclose (or eliminate) them. Importantly, broker-dealers are not required to eliminate all conflicts of interest, but can instead address most conflicts through a combination of disclosure and mitigation. In fact, the SEC has stressed the importance of "flexibility" for broker-dealers in addressing conflicts. In the Regulation BI Adopting Release, the SEC noted that the Conflict of Interest Obligation "was intended to provide flexibility to broker-dealers regarding how to address conflicts of interest, whether through disclosure . . . or elimination."[110]

In relevant part, the Conflict of Interest Obligation identifies two specific conflicts that must be mitigated, prevented, or prohibited entirely. With regard to certain "associated person incentives," a broker-dealer's policies and procedures must be reasonably designed to *mitigate* conflicts of interest that create an incentive for an associated person of the broker-dealer to place his or her interests or the interest of the firm above the retail customer's interest.[111] The Regulation BI Adopting Release identifies several examples of associated person incentives that should be mitigated by the firm, including employee compensation or employee incentives (e.g., incentives tied to asset accumulation, special awards, and differential or variable compensation).[112] Therefore, the Proposal's suggestion that broker-dealers would be required to prohibit financial incentives such as "special awards" under PTE 2020-02 is at direct odds with Regulation BI, which expressly allows such incentives so long as the associated conflicts are mitigated.

The Proposal's suggestion that firms would be required to prohibit "contests" is also at odds with Regulation BI. Under Regulation BI, a broker-dealer's policies and procedures must be reasonably designed to identify and eliminate any sales contests, sales quotas, bonuses, and non-

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[110] Regulation BI Release at 33388.
[111] Rule 15*l*-2(a)(2)(iii)(B) under the 1934 Act.
[112] *See* Regulation BI Release at 33391.

cash compensation *that are based on* the sales of specific securities or specific types of securities within a limited time period. Unlike Regulation BI, the Proposal suggests a broad prohibition on all "contests," without regard to whether the contest involves the "sale of specific securities or specific types of securities within a limited period of time."

The Department's suggestion in the Proposal that Financial Institutions would be required to prohibit "contests," "bonuses," "special awards," and "other actions or incentives" in many (if not most) circumstances is also in direct conflict with FINRA's established rules for cash and non-cash compensation. FINRA's cash and non-cash compensation ruleset sets forth certain requirements concerning proposals to pay or offer compensation (whether cash or non-cash) to associated persons of a FINRA member in connection with the sale and distribution of variable contracts or investment company securities. These rules are embedded in FINRA Rule 2320 (Variable Contracts of an Insurance Company) and Rule 2341 (Investment Company Securities).

The non-cash compensation rules prohibit any person associated with a member firm from accepting payments or offers of payment of any cash or non-cash compensation from anyone other than the member firm in connection with variable contracts or investment company securities unless certain conditions are met.[113] The non-cash compensation rules permit an associated person to receive non-cash compensation only in four circumstances meeting certain specified conditions: certain small gifts, occasional business entertainment, training and education expenses, and incentive programs.[114] Non-cash compensation for purposes of FINRA's non-cash compensation rules includes, but is not limited to, merchandise, gifts and prizes, travel expenses, meals, and lodging.[115] Since the implementation of Regulation BI, any such non-cash compensation must also be consistent with Regulation BI.[116]

The Department's restrictive approach to the types of compensation that Investment Professionals are entitled to is at direct odds with Regulation BI and FINRA Rules, and the Department does not provide a sufficient explanation as to why Retirement Investors' receiving recommendations from a broker-dealer or its registered representatives are not adequately protected by existing protections.

The Proposal's attack on educational meetings is in direct conflict with Regulation BI and FINRA rules. The Proposal notes that a Financial Institution may not offer incentive vacations, or even paid trips to educational conferences, if the desirability of the destination is based on sales volume and satisfaction of sales quotas. The Proposal appears to couch this as an absolute prohibition, regardless of whether the structure would encourage recommendations that violate the Best Interest standard. This proposed prohibition on incentive trips and educational conferences would call into question several well-established incentive practices that are permitted under Regulation BI and FINRA Rules.

In the Regulation BI Adopting Release, the SEC specifically addressed "educational meetings" in the context of its discussion of "sales contests." The SEC noted "we do not intend to

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113 FINRA Rule 2320(g)(1); FINRA Rule 2341(l)(1).
114 FINRA Rule 2320(g)(1); FINRA Rule 2341(l)(1).
115 FINRA Rule 2320(b)(3)(D); FINRA Rule 2341(b)(1)(D).
116 FINRA Regulatory Notice 20-18, available at https://www.finra.org/sites/default/files/2020-06/Regulatory-Notice-20-18.pdf.

prohibit training or education meetings, including attendance at company-sponsored meetings such as annual conferences, provided that these meetings are not based on the sale of specific securities or type of securities within a limited time period." This reflects yet another example of a practice that, subject to certain conditions, would be permitted under Regulation BI, but would presumably be prohibited under amended PTE 2020-02.

The proposed prohibition on educational meetings is also in direct conflict with FINRA Rules 2320 and 2341. FINRA Rules 2320 and 2341 expressly permit "[n]on-cash compensation arrangements between a member and its associated persons or a non-member company and its sales personnel who are associated persons of an affiliated member" provided certain conditions are met. For the purposes of Rule 2341, which addresses investment company securities, these conditions include: (i) the member's or non-member's non-cash compensation arrangement, if it includes investment company securities, is based on the total production of associated persons with respect to all investment company securities distributed by the member; (ii) the non-cash compensation arrangement requires that the credit received for each investment company security is equally weighted; (iii) no unaffiliated non-member company or other unaffiliated member directly or indirectly participates in the member's or non-member's organization of a permissible non-cash compensation arrangement; and (iv) certain recordkeeping requirements are satisfied.

There is a striking contrast between the Department's proposed approach to "incentive vacations" and "educational conferences" and the SEC and FINRA's more deliberative and measured approach. While the Department suggests that incentive trips should be flatly prohibited, it appears to open the door for Financial Institutions to allow certain trips depending on a subjective evaluation of the "desirability of the location." This suggests that the Department believes that Financial Institutions should evaluate incentive trips (whether educational or not) based on whether a particular location is "desirable," rather than by evaluating whether the underlying sales practices are causing a Financial Professional to make recommendations that are not in the Retirement Investors' best interest. Further, the Department does not address who is responsible for evaluating the "desirability" of a particular location and sets forth no criteria as to how such an evaluation could possibly be made.

In contrast, the SEC and FINRA set conditions for incentive trips (i.e., attendance at trips cannot be based on the sale of *specific securities within a limited period of time*) that are focused on sales practices, and preventing financial professionals from making recommendations that are not in their customers' best interest.

2. **The Proposal would layer on new disclosure requirements beyond those required by Regulation BI, in both form and substance.**

PTE 2020-02 requires that Financial Institutions provide certain disclosures to Retirement Investors prior to engaging in a recommended transaction. The Proposal builds on the existing fiduciary acknowledgment and disclosure requirements of current PTE 2020-02 in several ways, and would require additional disclosure as follows:

- An unqualified written acknowledgment of fiduciary status with respect to any investment recommendations provided by the Financial Institution or Investment Professional to the Retirement Investor;

- A written statement to Retirement Investors of the best interest standard of care PTE 2020-02 imposes;
- Additional fee disclosure that would include not only the amount the Retirement Investor will directly pay for such services but also the amounts the Financial Institution and Investment Professional receive from other sources, including through third-party payments;
- Information regarding a new right for the Retirement Investor to obtain specific information regarding costs, fees, and compensation that is described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, and nature; and
- As an addition to the existing disclosure for rollover advice, an explanation of the assumptions used when current plan information is not available, as well as the documentation behind the rollover recommendation.

The proposed PTE 2020-02 disclosure requirements would layer on top of existing robust requirements applicable to FSI's members. Regulation BI's Disclosure Obligation requires that, before or at the time of a recommendation, a broker-dealer must disclose, in writing, all material facts about the scope and terms of its relationship with the customer. The disclosures are required to be concise, clear, and understandable so that they promote effective communication between a broker-dealer and a retail customer. More specifically, a broker-dealer must disclose that the broker-dealer or representative is acting in a broker-dealer capacity; the material fees and costs the customer will incur; and the type and scope of the services to be provided, including any material limitations on the recommendations that could be made to the retail investor. A broker-dealer is also required to disclose all material facts relating to conflicts of interest associated with the recommendation that might incline a broker-dealer to make a recommendation that is not disinterested, including, for example, conflicts associated with proprietary products, payments from third parties, and compensation arrangements.

Investment advisers have their own set of disclosure requirements, including the requirement to file and update Form ADV, the uniform form used by investment advisers to register with both the SEC and state securities authorities. The form consists of three parts. Part 1 requires information about the investment adviser's business, ownership, clients, employees, business practices, affiliations, and any disciplinary events of the adviser or its employees. Part 2 requires investment advisers to prepare narrative brochures that include plain English disclosure of the adviser's business practices, fees, conflicts of interest, and disciplinary information. Part 3 is the "relationship summary" or "Form CRS," which is discussed in more detail below. In sum, the Form ADV provides clients and potential clients with a significant amount of information about an adviser and its conflicts of interest.

As noted above, on top of the disclosure required by Regulation BI and Form ADV, broker-dealers, investment advisers, and dual-registrants are required to provide a brief relationship summary, or Form CRS, to retail investors at specified times. Form CRS contains information and disclosures about the firm concerning (i) the types of services the firm offers; (ii) the fees, costs, conflicts of interest, and required standard of conduct associated with those services; (iii) whether the firm and its investment professionals have reportable legal or disciplinary history; and (iv) how to get more information about the firm. Broker-dealers must send

Form CRS to customers and prospective customers before or at the earliest of: (i) a recommendation of an account type, securities transaction, or an investment strategy involving securities; (ii) placing an order for the retail investor; or (iii) opening a brokerage account for a retail investor. Investment advisers are required to send Form CRS to new or prospective retail clients before or at the time of entering an advisory contract.

The Department's proposal to require broker-dealers, advisers, and dual-registrants to make additional disclosure, on top of the robust disclosure already required by PTE 2020-02, Regulation BI, Form ADV, and Form CRS, will add substantial burdens on SEC and FINRA regulated entities without providing any meaningful investor protection benefit.

3. The Proposal's definition of "recommendation" conflicts with Regulation BI.

The Proposal describes a "recommendation" as "a communication that, based on its content, context, and presentation, would be reasonably viewed as a suggestion that the retirement investor engage or refrain from a taking a particular course of action."[117] The preamble says this approach is "similar" to the approach taken by the SEC under Regulation BI, but provides no explanation for the difference in terminology and leaves open the possibility of different outcomes.

The term "recommendation" under the federal securities laws has a well-established meaning that has been developed through case law and regulatory guidance. In the Reg BI Adopting Release, the SEC noted that "whether a broker-dealer has made a recommendation that triggers application of [Reg BI] should turn on the facts and circumstances of the particular situation and therefore, whether a recommendation takes place is not susceptible to a bright line definition." The SEC lists a number of factors that should be considered to determine whether a recommendation has taken place, including whether the communication could "reasonably . . . be viewed as a 'call to action'" and "reasonably would influence an investor to trade a particular security of group of securities." The more individually tailored the communication is to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a "recommendation."[118]

The Proposal notes that "the Department would consider a recommendation for purposes of the SEC's Regulation Best Interest as a recommendation for the purposes" of the Proposal. However, the Department does not limit its definition of "recommendation" to how it is commonly understood under Regulation BI and substitutes a definition of the term which encompasses communications that make a "suggestion" that the Retirement Investor engage, or refrain from engaging, in a particular course of action. The only possible inference is that the Department sees a distinction between a "suggestion" and a "call to action," yet the preamble does not clarify the precise nature of this distinction.

In fact, while the Department asserts it is taking a "similar" approach to Regulation BI, it appears to have a fundamentally different approach to the types of communications that constitute "recommendations." For example, the Proposal notes that "providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a

[117] 88 Fed. Reg. at 75904.
[118] Regulation BI Release at 80.

recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security."[119] Merely providing an investor with a list of general securities that meet their investment objectives and risk profile, absent other facts and circumstances that would cause the communication to rise to the level of a recommendation, would likely not be a "recommendation" under Regulation BI. In many cases, a financial advisor may send a customer a list of securities for discussion at a later meeting, where a "recommendation" of a particular security or trading strategy may or may not be made. While the provision of such a list may not be a recommendation under Regulation BI, the Department, without providing any flexibility to consider the facts and circumstances of the particular communication, announces that merely providing such a list is a "recommendation as to the advisability of acquiring securities."

Thus, in a classic display of "not made here" syndrome – the decision-making error that values internal ideas above those conceived outside the group – the Department insists on its own "similar" approach for this foundational term rather than accepting the well-developed SEC understanding of "recommendation," creates the potential for disparities in outcomes, consequently adds complexity and cost to our members' compliance programs, and offers no justification for that needless difference.

<u>Flaws in the Proposed Definition</u>

E. While the proposed definition purports to be a facts-and-circumstances analysis consistent with ERISA, it globally declares all financial advisors to be fiduciaries.

The "investment professional" context of proposed paragraph (c)(1)(ii) of the Proposal is positioned as the most inclusive context and specifically directed at, among others, the financial advisors of our members, according to the preamble.

> By limiting the scope of those who may be an investment advice fiduciary to those who make investment recommendations as a regular part of their business, the Department believes that the proposed definition is appropriately tailored to those advice providers in whom retirement investors may reasonably place their trust and confidence….
>
> … [T]he Department intends to examine the ways investment advice providers market themselves and describe their services. For example, some stakeholders have previously expressed concern that investment advice providers that adopt titles such as financial consultant, financial planner, and wealth manager, are holding themselves out as acting in positions of trust and confidence while simultaneously disclaiming status as an ERISA fiduciary. In the Department's view, an investment advice provider's use of such titles 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….
>
> The Department invites comments on the extent to which *particular titles* are commonly perceived to convey that the investment professional is providing *individualized* recommendations in a retirement investor's best interest (and if not, why such titles are used). The Department also requests comment on whether other types of conduct,

[119] 88 Fed. Reg. at 75907-75908.

> communication, representation, and terms of engagement of investment advice providers should merit similar treatment.[120]

We would say that the Proposal imputes far too much substantive import and content – much more than would a typical consumer in a market economy – to marketing materials and titles reflecting no more than standard business practice (see our comment immediately below), but plainly the Department has already reached a conclusion on this point.

In contrast, almost from the moment of the enactment of ERISA, the Department has been clear that ERISA "fiduciary" status is a functional test, dependent on the specific substance of the particular case. From Interpretive Bulletin 75-5, issued on June 25, 1975, and Interpretive Bulletin 75-6, issued on October 3, 1975:

> D–1 Q: Is an attorney, accountant, actuary or consultant who renders legal, accounting, actuarial or consulting services to an employee benefit plan (other than an investment adviser to the plan) a fiduciary to the plan solely by virtue of the rendering of such services, absent a showing that such consultant (a) exercises discretionary authority or discretionary control respecting the management of the plan, (b) exercises authority or control respecting management or disposition of the plan's assets, (c) renders investment advice for a fee, direct or indirect, with respect to the assets of the plan, or has any authority or responsibility to do so, or (d) has any discretionary authority or discretionary responsibility in the administration of the plan?
>
> A: No. However, while attorneys, accountants, actuaries and consultants performing their usual professional functions will ordinarily not be considered fiduciaries, if *the factual situation in a particular case* falls within one of the categories described in clauses (a) through (d) of this question, such persons would be considered to be fiduciaries within the meaning of section 3(21) of the Act. [121]
>
> D–2 Q: Are persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, fiduciaries with respect to the plan: …
>
> A: No. Only persons who *perform one or more of the functions* described in section 3(21)(A) of the Act with respect to an employee benefit plan are fiduciaries….
>
> D–3 Q: Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plan?
>
> A: Some offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section 3(21)(A) of the Act. For example, a plan administrator or a trustee of a plan must, be the very nature of his position, have "discretionary authority or discretionary responsibility in

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[120] 88 Fed. Reg. at 75902-75903 (emphasis added).
[121] 29 C.F.R. §2509.75-5, D-1 (emphasis added).

the administration" of the plan within the meaning of section 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries.

Other offices and positions should be examined to determine whether they involve the *performance of any of the functions* described in section 3(21)(A) of the Act.[122]

The Department itself persuaded the courts to agree that the ERISA fiduciary test is a functional test, based not on formal title but the actual exercise of fiduciary authority. *See Donovan v. Mercer*, 747 F. 2d 304, 308 (5th Cir. 1984) ("'fiduciary' should be defined not only by reference to articulate titles, such as 'trustee' but also by considering the authority which a particular person has or exercises over an employee benefit plan."); *see also Brock v. Hendershott*, 840 F.2d 339 (6th Cir. 1988); *Acosta v. WH Administrators, Inc.*, 449 F. Supp.3d 506, 516 (D. Md. 2020).

A blanket judgement that a class of persons are fiduciaries, particularly on the basis of an occupation or presentation rather than on performance or function, ignores the "to the extent" qualifier in the statutory language and departs from the most fundamental understanding of Section 3(21), in an unprecedented manner. The Department is not applying a functional test but is, in effect, designating investment professionals as "named fiduciaries" outside of the authority of the statute and outside of any plan document. This is evident by applying each prong of proposed paragraph (c)(1)(ii):

- Every investment professional ***"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."***[123]
- Any meeting with an investment professional could be viewed by a retirement investor as ***"indicating"*** that the investment professional is ***"basing"*** a recommendation on their ***"individual circumstances."***[124]
- Any retirement investor ***"may"*** rely upon any communication ***"as a basis"*** for investment decisions that are in the retirement investor's best interest.[125]

Under this definition, as applied, all investment professionals are fiduciaries regardless of the extent to which they actually perform a fiduciary function.

F. The titles used by our financial advisors are neither misleading nor an indicia of fiduciary status.

As discussed above, the Proposal takes an inordinate interest in titles commonly used by financial advisors, and effectively suggests they are misleading unless the financial advisor is implicitly agreeing to act in a fiduciary capacity. This is a fundamental flaw in the Proposal, for three reasons.

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[122] 29 C.F.R. §2509.75-8, D-2, D-3 (emphases added).
[123] 88 Fed. Reg. at 75977.
[124] *Id.*
[125] *Id.*

First, most of our member firms are dually registered with the SEC or the States as both broker-dealers and investments advisers, and many of their advisors are individually registered in both capacities. When a financial professional is acting in her investment advisory capacity, she is, quite literally, acting as an advisor, with Advisers Act fiduciary responsibilities.

Second, the SEC and FINRA give specific attention to the titles used by registered professionals to assure they are not misleading, and guidance on this point has evolved with the issuance of Regulation BI. In the adopting release, the SEC addressed the question of titles as follows:

> *Capacity in the Context of Names, Titles, and Marketing Practices*
>
> The Relationship Summary Proposal included a proposed rule that would have restricted broker-dealers and their associated persons (unless they were registered as, or supervised persons of, an investment adviser), when communicating with a retail investor, from using the term "adviser" or "advisor" as part of a name or title ("Titling Restrictions"). After further consideration of our policy goals and the comments we received, and in light of the disclosure requirements under Regulation Best Interest, we do not believe that adopting a separate rule restricting these terms is necessary, because we presume that the use of the term "adviser" and "advisor" in a name or title by (1) a broker-dealer that is not also registered as an investment adviser or (2) an associated person that is not also a supervised person of an investment adviser, to be a violation of the capacity disclosure requirement under the Disclosure Obligation as discussed further below.
>
> Although using these names or titles creates a presumption of a violation of the Disclosure Obligation in Regulation Best Interest, we are not expressly prohibiting the use of these names and titles by broker-dealers because we recognize that some broker-dealers use them to reflect a business of providing advice other than investment advice to retail clients. A clear example is a broker-dealer (or associated person) that acts on behalf of a municipal advisor or commodity trading adviser, or as an advisor to a special entity, as these are distinct advisory roles specifically defined by federal statute that do not entail providing investment advisory services. We also recognize that a broker-dealer may provide advice in other capacities outside the context of investment advice to a retail customer that would present a similarly compelling claim to the use of these terms. In these circumstances, firms and their financial professionals may in their discretion use the terms "adviser" or "advisor." In most instances, however, when a broker-dealer uses these terms in its name or title in the context of providing investment advice to a retail customer, they will generally violate the capacity disclosure requirement under Regulation Best Interest.[126]

Industry practice has evolved with this guidance, including to educate investors about the differences in titles and the compensation structure associated with each title. Whatever title our member's registered professional might use today, it will be consistent with her licensed authority and legal responsibilities, and therefore will not be misleading to retirement investors. To the

[126] Regulation BI Release at 158.

extent this point may have been unclear in the past, such uncertainty is no longer the case today.[127]

Finally, our financial advisors' titles and marketing methods do not convey a promise to act solely in the customer's interest, any more than any other business does. Our advisors are simply engaging in standard, accepted business practice, to frame the services they provide and position themselves favorably with current and prospective customers with respect to their promise to deliver those services.

The Proposal puts far too much legal weight on the "trusted and confidential" concept, while ignoring the essential element of a "relationship." Under the common law of trusts, the Fifth Circuit decision and the five-part test, a bilateral *relationship* is required for fiduciary status. In the marketplace, all businesses always seek the trust and confidence of their customers or counterparties, for the simple reason that trust and confidence is essential to any successful business transaction.[128] It is the development of a higher *relationship* level that transforms the business *transaction* into a fiduciary *relationship*.

Thus, the Restatement (Second) of Trusts distinguishes fiduciaries from non-fiduciaries based on the nature of the relationship between two parties. For example:

- "[T]he relation between the vendor and purchaser, unlike that between trustee and beneficiary, is not a fiduciary one."[129]
- "There is a fiduciary relation between trustee and beneficiary; there is not a fiduciary relation between the promisor or promisee and the beneficiary of a contract."[130]
- "There is a fiduciary relation between trustee and beneficiary. There is not a fiduciary relation between assignor and assignee."[131]

When courts speak of fiduciary relationships as based on "trust and confidence," they are referring to the special relationship recognized under the common law of trusts, which goes far beyond the routine trust and confidence present in every business transaction. In an ordinary business relationship, the counterparties each has its own business interest and looks to benefit from the relationship. In a fiduciary relationship, one of the parties takes on the extraordinary responsibility of acting for the other party's exclusive benefit, rather than its own. Such an extraordinary dislocation of the normal allocation of responsibilities requires an extraordinary set of circumstances, and the courts' reference to a relationship of "trust and confidence" denotes those atypical circumstances where such atypical responsibilities are warranted.

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[127] FINRA has even posted for investors a glossary to "decode" the professional designations and certifications commonly used by financial advisors, available at https://www.finra.org/investors/professional-designations.

[128] As reported in the Harvard Business Journal, "Trust is the social glue that holds business relationships together." Brett and Mitchell, *Research: How to Build Trust with Business Partners from Other Cultures*, HARVARD BUSINESS REVIEW (January 31, 2020).

[129] RESTATEMENT (SECOND) OF TRUSTS §13, comment a (1959)("RESTATEMENT"). We cite to the Restatement (Second) because it was the current edition at the enactment of ERISA in 1974.

[130] *Id.* §14, comment b.

[131] *Id.* §15, comment e.

For example, as reflected in the Restatement (Second) of Trusts, there is a difference at common law between a trust relationship, which is fiduciary in nature, and a confidential relationship, which is not.

> Although the relation between two persons is not a fiduciary relation, it may, nevertheless, be a confidential relation. *A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind.* A confidential relation may exist although there is no fiduciary relation; it is particularly likely to exist where there is a family relationship or one of friendship or such a relation of confidence as that which arises between physician and patient or priest and penitent. If one person is in a confidential, but not a fiduciary, relation to another, a transaction between them will not be set aside at the instance of one of them unless in fact he placed confidence in the other and the other, by fraud or undue influence or otherwise, abused the confidence placed in him.[132]

That is, fiduciary status at common law was limited to extraordinary circumstances, in part because of a fiduciary's extraordinary duty of loyalty, while a person in a confidential relationship had only a duty of good faith and fair dealing. It is essential to note that, at common law, even "confidential" relationships generally were not deemed to arise in a business setting, but only in personal or familial settings, or in settings that involved the sharing of information of a highly personal nature about health or religious matters.

As the law stood in 1974 with respect to investment intermediaries, only an investment adviser was considered to be in such an extraordinary position with an investor that she should expected to place the investor's interests above her own as a fiduciary. In contrast, a broker-dealer representative or insurance salesperson might have the confidence of and undertake to act in the interest of the investor but was not considered to be in a position qualitatively comparable to an investment adviser, in part because she was providing recommendations and receiving compensation on a transaction-by-transaction basis. Accordingly, she was expected to deal honestly and suitably[133] with, but not exclusively for the benefit of, the investor.

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[132] *Id.* comment b (emphasis added).
[133] In 2019, of course, the SEC modified this standard in Regulation BI.

G. Our member firms often would not make any recommendation – that relationship runs between the financial advisor and the Retirement Investor – yet amended PTE 2020-02 would compel the firm always to acknowledge fiduciary status.

Under PTE 2020-02, the Financial Institution associated with the Investment Professional is obligated to acknowledge fiduciary status in order for the Investment Professional to obtain the necessary relief afforded by the exemption. The intent of this requirement is to expose the Financial Institution to ERISA fiduciary liability for recommendations provided to Retirement Investors.

When providing investment advisory services, our member firms generally would be ERISA fiduciaries – just as they are today under the five-part test. When providing broker-dealer services, however, on the facts the firm generally would ***not*** be a fiduciary under the proposed definition. The Proposal therefore includes a fundamental internal contradiction.

To review the elements of the definition in the context of a broker-dealer transaction:

- The PTE 2020-02 fiduciary acknowledgement required of a firm providing broker-dealer services would seem to satisfy the "admitted fiduciary" context under the proposed definition – an outcome produced by the circularity of the Proposal, rather than by the facts of the interaction with the Retirement Investor.
- As the preamble emphasizes in several places, however, a person must satisfy all the elements of the definition to be a fiduciary.
- In our members' broker-dealer business and regulatory model, the firm provides the shelf of investments available to investors, services and tools for financial advisors to use, back-office processes, and the required regulatory infrastructure including authority to review and break trades requested by the investor on the recommendation of the financial advisor that do not satisfy applicable requirements, but the firm itself neither makes nor controls any recommendation to any investor.
- The recommendations are entirely generated and provided by the financial advisor, who is an independent contractor and not under the control of the firm.

That is, in our members' broker-dealer structural model, the "recommendation" relationship runs between the Retirement Investor and the financial advisor; the firm is not party to it and thus cannot be a fiduciary under the proposed definition. Any contrary conclusion again would contravene the Department's longstanding position that fiduciary status is determined on the particular facts of each individual case. Accordingly, we fail to see how the requirement that the firm acknowledge fiduciary status under PTE 2020-02 can be rationalized with the proposed fiduciary definition.

H. The functional prohibition on disclaimers in the Proposal is counterproductive to the interests of plans and participants.

The prohibition in the Proposal of disclaimers of fiduciary status is intended to prevent their use by investment professionals. While the prohibition is framed as a facts and circumstances inquiry, it is perfectly clear that the same facts that would cause a person to be described in the investment professional context would also trigger the prohibition on disclaimers.

Accordingly, for investment professionals who provide paid recommendations to Retirement Investors, the Proposal functionally outlaws disclaimers.

We appreciate that the Department's experience with disclaimers arises primarily from its enforcement experience and, in that setting, disclaimers might be perceived as technical evasions of what might otherwise be fiduciary liability.[134] It is important, however, that the final rule also take account of the appropriate and necessary uses to which disclaimers are put in practice, in primarily three circumstances.

First, express or implied disclaimers are routinely part of a "request for proposal" ("RFP") or similar process. In that process, the plan fiduciary or participant or IRA owner is asking for a business proposal, not fiduciary advice; at that stage, the prospective providers often are not completely informed of everything needed to provide fully developed fiduciary advice, and in any event must be able to take account of their own business interests in responding to that request. If a provider is engaged, the concepts proposed in the business response might be elevated and perfected as fiduciary advice, but that would occur only after the provider has been engaged and is being compensated. The Proposal very much clouds the ERISA treatment of this essential process, including in its "hire me" discussion, and introduces the threat of legal liability counterproductive to the purposes of plans and participants.

Second, financial advisors make use of disclaimers to properly structure their relationships with Retirement Investors when fiduciary status is neither intended nor appropriate, and to avoid misunderstandings that might otherwise arise from the sort of circumstances that the preamble frequently describes. For example, a Retirement Investor's mandate to a financial advisor might give rise to potential conflicts of interest that could be accommodated under common-law fiduciary principles, but not under the more exacting ERISA standard as administered by the Department. In appropriate circumstances, an ERISA disclaimer allows the financial adviser to structure the relationship to serve the Retirement Investor's needs, in compliance with Regulation BI or other applicable securities law, but without a limitation of services to investment education, or on the shelf of investments available, or to other constraints on the advisor's services ERISA would require.

Finally, at least under existing law, the disclaimer has also been a legitimate tool to manage the legal risk of "inadvertent" fiduciary status unintended by the parties. In this respect, the disclaimer conceptually works as an extension of the standard, uncontroversial integration clause in contracts, and serves a purpose comparable to the standard disclaimers required by law in prospectuses and investment marketing materials.

We predict with complete confidence that, if the prohibition on disclaimers is retained, the final rule will roil the RFP process to the detriment of plans and participants, and that the market of investment professionals from which Retirement Investors may choose will contract.

[134] With respect to the Department's frequent assertion that disclaimers have been in the "fine print" and "buried in the paperwork" – given the practical demonstration of paperwork requirements we provided at the hearing, how could it be otherwise?

I. The proposed rule omits important clarifications from the 2016 rule that certain activities do not constitute "investment advice."

The exceptions and clarifications provided under the 2016 rule as to the scope of "investment advice" are largely missing from the Proposal. We note, for example, that the discussion in the preamble of platform providers is not co-extensive with the platform provider exceptions in the 2016 rule, and there is no discussion of (i) actuarial, legal or accounting services, (ii) the status of ERISA Interpretive Bulletin 75-8, although there is helpful discussion of a plan sponsor's human resource personnel, or (iii) guidance with respect to the perennial question about assistance with required minimum distributions.

If the statutory definition is properly informed by expectations, as the Department contends, then the Proposal is internally inconsistent, in the ways noted above and below.

- Sophisticated investors or counterparties in transactions, in the normal course, are not expecting "best interest" treatment from the financial professional or institution on the other side of the table, who therefore are not fiduciaries for purposes of the statute as the Department reads it.
- As noted above, our members often respond to institutional RFP's from ERISA plans. Their RFP responses are neither understood by either side to be other than a business proposal, nor compensated by the party issuing the RFP. RFP responses are not fiduciary advice for purposes of the statute, as the Department reads it.
- Our members often meet with wholesalers of investment and insurance products, to consider whether a particular product might be included on the member's investment shelf and sometimes to identify the product solutions that might merit consideration for a particular Retirement Investor. These are all business interactions rather than fiduciary interactions. The Retirement Investor has no expectation that the wholesaler is acting for her best interest; typically, the investor does not know that the wholesaler exists. In the foregoing circumstances, wholesalers are not fiduciaries for purposes of the statute, as the Department reads it. If the wholesaler is joining a financial advisor to directly interact with a Retirement Investor, it is to better educate the investor about the product under consideration, an objective that the Department should wholly support. In this circumstance, it is enough that the financial advisor has a fiduciary responsibility for any recommendation provided; it is unnecessary that the wholesaler also be a fiduciary, and it serves the interests of Retirement Investors that wholesalers remain available to provide education as appropriate.

In its failure to follow through on the logic of its position, the Proposal is flawed.

Finally, the pronouncements in the Proposal are framed so broadly that some concern has been expressed that the sponsors and managers of asset allocation and similar arrangements may be fiduciaries. In these arrangements, the sponsor arranges for "third-party" investment managers to design an investment strategy, and sometimes populate it with specific assets, around a particular investment profile or objective. The financial advisor then might recommend one or more of these arrangements to a Retirement Investor as part of an advisory program. The financial advisor has a fiduciary responsibility for her recommendation, but the understanding has been that the sponsor and third-party managers are not ERISA fiduciaries because they do not individualize the strategy to any particular investor, are not in privity with any particular investor, and often are entirely unaware of even the identity of the investors utilizing the strategy. They have no part in making any recommendation to any Retirement Investor. Any contrary conclusion would disrupt both the cost structure and the availability of these useful arrangements to Retirement Investors. This is one of many points where the Proposal has created unproductive uncertainty.

J. The Department's proposal on enforcement both seeks to preempt our members' opportunity to be heard in court on this issue and provides IRA owners a private right of action.

On a related point, we object to the Proposal's effort to bootstrap ERISA section 502 enforcement jurisdiction over rollover recommendations by enshrining in the regulation the Department's apparent litigation position – that rollover recommendations always relate back to an ERISA plan – which is a highly debatable position, at best. If the Department believes its position is correct, it should be prepared to defend that position in court, without attempting to tilt the playing field against private sector parties by building its litigation position into the final regulation.

The Proposal would include, as fiduciary advice, 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." The preamble goes on to assert that "recommendations on distributions (including rollovers or transfers into another plan or IRA) or recommendations to entrust plan assets to a particular IRA provider would fall within the scope of investment advice in this proposed regulation, and would be covered by Title I of ERISA, including the enforcement provisions of section 502(a)."

This assertion is in direct conflict with ERISA, the Fifth Circuit's decision, and the District Court's decision in *American Securities Ass'n v. DOL*.[135] As the Fifth Circuit explained, one problem with the 2016 rule was that it "ignores that ERISA Titles I and II distinguish between DOL's authority over ERISA employer-sponsored plans and individual IRA accounts." By asserting that it retains enforcement jurisdiction over money that has left the employer plan, the Proposal is crossing the line between interpretive and enforcement jurisdiction, regulating IRAs when it has "no direct statutory authority to regulate them." Instead of following the Fifth Circuit's admonition in this regard, the Proposal doubles down.

In addition, while at the same time asserting that the amendments to PTE 2020-02 are permissible because they do not create a private right of action, the Proposal states:

> Under the proposal, the full range of covered investment advice interactions with Title I plans would be subject to the Department's robust enforcement program as well as to a private right of action. In general, participants and beneficiaries have the right to bring suit under ERISA 502(a) against fiduciaries who breach their duties and obligations to the plan, including engaging in non-exempt prohibited transactions. This private right of

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[135] 8:22-cv-330-VMC-CPT (M.D. Fla. Feb. 13, 2023).

action, which ensures participants and beneficiaries have ready access to the Federal courts, provides critical protection of tax-advantaged retirement plans.

Merging Title II advice into Title I advice is the first of the ways the Proposal would manufacture a private right of action for IRA owners; we discuss the second way below.

Flaws in the Proposed Amendments to Exemptions

K. The Proposal neither asserts nor demonstrates that the current terms of PTE 2020-02 are inadequate.

As stated above, FSI supported PTE 2020-02 when first proposed, and we continue to support the current version.

The Proposal does not assert that the existing exemption is inadequate; indeed the preamble states that it is "proposing to maintain all of the core protections in PTE 2020-02" that "provide fundamental investor protections." The preamble instead offers that the amendments would add "additional protections", "additional clarity" and "more certainty" and ensure that Retirement Investors "have sufficient information."

The proposed amendments do not proceed, however, on the basis of any evidence suggesting that "additional protections", "additional clarity" "more certainty" or more "sufficient information" is necessary. As the full exemption has only been in effect for 15 months at the publication of the Proposal, and the industry generally has only been through one retrospective review cycle, we expect that no such evidence exists. When PTE 2020-02 was released, our members took their obligations seriously, hiring consultants, lawyers, and benchmark providers, among others, and established compliance systems and disclosures. It is entirely premature to propose major amendments that will require the industry to once again gut its existing compliance solutions and begin all over again, based solely on the speculation in the preamble.

Because the Proposal has not even asserted, much less demonstrated, that the current exemption is inadequate, we submit that the Department must withdraw the proposed amendments *in toto* and re-propose any amendments only after sufficient time has passed that the efficacy or lack of efficacy of the current exemption can be assessed, and that any amendments be narrowly targeted to specifically identified problems that are backed by evidence.

The Proposal does not even meet its minimal objective of clarity and certainty. The Proposal is full of uncertainties, including in the various ways described in this letter. It introduces new and inadequately explained conditions, which inherently add to uncertainty. It is entirely predictable that a series of FAQs would be required after the final rule is released. Thus, in point of fact, the Proposal would actually create additional uncertainty and confusion.

Finally, the proposed amendments would add compliance costs without any plausible demonstration of a commensurate incremental increase in protection for Retirement Investors. The proposed amendments create incremental enforcement and litigation exposure for recommendation providers, which will adversely affect Retirement Investors in the form of increased costs or market exits. When every rollover transaction has the potential to lead to class action litigation, the economically rational response would be to limit rollover recommendations to cases large enough to justify the risk. Once again, small investors will lose out on the advice market.

L. The Proposal would create an additional basis for a private right of action by IRA owners, notwithstanding the Department's protestations to the contrary.

It hardly bears repeating that the Fifth Circuit specifically ruled that creating any private right of action for IRA owners is impermissible and contrary to Congressional intent. Thus, the Proposal contends that neither the existing PTE 2020-02 nor the proposed amendment creates any new causes of action or requires Financial Institutions to provide enforceable warranties to Retirement Investors including IRA owners. In this respect, however, the Department is simply wrong: IRA owners will have a basis for new causes of action arising from amended PTE 2020-02, as well as from the Department's new litigation position, that post-distribution advice may be subject to Title I and its remedies (discussed above).

At the time PTE 2020-02 was originally proposed, we and other commentators expressed concern that the fiduciary acknowledgement and other disclosures created a basis for potential claims against Investment Professionals and Financial Institution. As with the Proposal, that concern was dismissed at the time on the basis that no such exposure was intended, and the disclosure was not a contract. The enhanced disclosure in the Proposal amplifies those concerns regardless of the Department's intent, which may not be binding on State courts as to matters of State law in any event.

Consider, from the perspective of a motivated plaintiff's lawyer, the Department's proposed PTE 2020-02 acknowledgement.

- It takes little imagination to anticipate how bare statements that the Investment Professional and Financial Institution are "fiduciaries," will "meet a professional standard of care when making investment recommendations (give prudent advice)," and "never put our financial interests ahead of yours when making recommendations (give loyal advice)" could be leveraged by IRA owners as a basis for claims on a unilateral contract or detrimental reliance theory, a quasi-contract theory, a breach of fiduciary duty theory, or on other theories outside of contract.
- Those theories could readily assert State law interpretations of the duties created by the disclosure language that differ from those intended under ERISA and PTE 2020-02.
- After all, the Proposal is taking the position that the admission of fiduciary status under any other body of law also makes a recommendation provider an ERISA fiduciary and subject to ERISA fiduciary standards, which may differ at least in intensity from those to which the recommendation provider is otherwise subject.

It is inarguable that the disclosures required in the Proposal provide a basis for claims – which may not be in contract – by IRA owners beyond those provided in the statute, no matter how much the Department might protest otherwise.

M. The requirement that fiduciary acknowledgements be "unqualified" would result in misleading disclosure to Retirement Investors.

On a related point, the Proposal would require that the PTE 2020-02 ERISA fiduciary acknowledgement be "unqualified," arguing that "if the Financial Institution and Investment Professional are to comply with the law and meet the exemption's conditions, they should decide if they are acting as a fiduciary, inasmuch as their legal obligations and exemption conditions turn on fiduciary status under ERISA, the Code, or both."

- To the extent fiduciary acknowledgements have been "qualified" to date, it is for one or more of several reasons, including:

  - The law has been in flux. In the most notable example, if the interaction was a rollover recommendation, a fiduciary acknowledgement based on the Department's rollover interpretation under the five-part test could and in fact did become retroactively incorrect under a later court decision;
  - Fiduciary status is judged under a fact and circumstances analysis that, at least under some positions the Department has espoused in the past, cannot always be determined in advance with certainty;
  - The acknowledgement of fiduciary status is only for purposes of ERISA, and not for any other purpose; and/or
  - Perhaps most importantly, the ERISA investment advice definition is a transactional definition, and not every interaction with a Retirement Investor is fiduciary activity.

- As an initial matter, the Proposal presents no evidence that any Retirement Investor has been misled or harmed by the "qualified" acknowledgements described in the preamble.
- Further, the experience of our members is that "fiduciary" is neither a meaningful nor a dispositive signifier to Retirement Investors.
- More fundamentally, it is a basic ERISA tenet that the determination of whether a person is a fiduciary is determined under a functional definition and a person is a fiduciary *only "to the extent*… he renders investment advice for a fee or other compensation…."
- It is well-established that not every act undertaken by an ERISA fiduciary in respect of a plan is fiduciary activity. The Supreme Court has instructed that:

  > "[i]n every case charging breach of ERISA fiduciary duty . . . the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan's beneficiary interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the actions subject to complaint.. . . a court must ask whether [that] person is a fiduciary with respect to the particular activity at issue.

  Pegram v. Herdrich, 530 U.S. 211, 226 (2000).

- When read together with the proposed re-definition of fiduciary, which causes a person to be a fiduciary if they say so, the ability to qualify a fiduciary representation is necessary if the functional test of fiduciary status is to survive. With regard to the specific acknowledgement required by the proposed amendments to PTE 2020-02, unless the

Retirement Investor is an ERISA lawyer, they are unlikely to understand the legal nuances between investment advice and, for example, investment education or ministerial acts.

- Similarly, fiduciary status is to be determined on a transaction-by-transaction basis, and we are hard pressed to understand how an advance unqualified acknowledgement can be accurate for all subsequent interactions between the Investment Professional and the Retirement Investor.
- Accordingly, we are very much concerned that an "unqualified" fiduciary acknowledgement could very well mislead the Retirement Investor, even to the point of itself being a materially misleading statement. If the Department insists on including this provision, to avoid the paradox of compliance with one condition causing non-compliance of another condition, we request that the final rule make clear that in no case will an unqualified fiduciary acknowledgement be deemed to be a materially misleading statement for purposes of the Impartial Conduct Standards.
- Finally, the preamble is clearly wrong in suggesting that Investment Professionals are shirking their responsibilities if they do not commit unequivocally to fiduciary status. It is one thing to choose to act like a fiduciary and to observe the various requirements of PTE 2020-02, even when it is uncertain that a court would find that the Investment Professional was indeed a fiduciary. It is quite a different thing to make, effectively, an advance confession of fiduciary liability. The first advances the best interest of the Retirement Investor. The second advances only the ease of making enforcement or litigation cases against the Investment Professional and Financial Institution.

N. The Proposal would amplify disclosure overload, without any evidence that additional disclosure is needed or helpful.

The preamble states that additional disclosures are proposed which the Department has determined will help ensure that Retirement Investors have sufficient information to make an informed decision about the costs of the transaction and the significance and severity of the Financial Institution's Conflicts of Interest. The preamble requests comment on these disclosures and is particularly interested in receiving information regarding whether additional or alternative disclosure should be required. In footnote 12, the preamble recognizes that "[a]voiding duplication of disclosures is important and the Department reiterates that the disclosure standard under this exemption may be satisfied in whole, or in part, by using other required disclosures to the extent those disclosures include information required to be disclosed by the exemption."

- The practical demonstration we provided at the hearing provides a complete response to the Proposal in this respect.
- The new disclosures already proposed, much less any additional or alternative disclosure, are unnecessary, overburden Retirement Investors, and increase compliance costs and exposure to no good purpose.

The preamble requests input from those Financial Institutions already complying with PTE 2020-02 and from investors about the helpfulness of the current disclosures and what information might provide additional protections. The preamble points out that the Department has carefully worked to make the current disclosure requirements consistent with that of other regulators.

- This very request for input demonstrates that the Proposal's inclusion of additional disclosure was premature and unsupported.
- Even consistent disclosure is additional disclosure, and our practical demonstration proved beyond question that existing disclosure is already overwhelming.

The Proposal would add to the fiduciary acknowledgement an opportunity for Retirement Investors to request a written description of the Financial Institution's policies and procedures and information regarding costs, fees, and compensation. The preamble assumes that, on average, each Financial Institution would receive 10 such requests annually and that most financial institutions already have such information available. The Department requests comment on these assumptions.

- Our members do not have a responsive document readily at hand and would be required to compose and update it as appropriate.
- In our members' experience with similar opportunities to obtain additional information under Form CRS and other disclosure documents, Retirement Investors essentially never request this sort of documentation in support of their investment decisions. Even if it might hypothetically occur 10 times annually, as the regulatory impact analysis suggests, the cost would not be commensurate with the benefit.
- Accordingly, this requirement would entail additional compliance expense without advancing the "best interest" objectives of the Proposal.
- Finally, as discussed elsewhere in this comment letter, requests of this sort are made only as a fishing expedition and advance discovery for litigation.

O. The additional rollover disclosure would be another example of over-regulation for no purpose.

Under the Proposal, before 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 Investment Professional must consider and document their conclusions as to whether a rollover is in the Retirement Investor's Best Interest and provide that documentation to the Retirement Investor.

- Our members have been diligent in developing materials for use in evaluating whether a rollover is in the Retirement Investor's best interest. Many have purchased software to assist Financial Institutions and Investment Professionals in documenting and making this determination. These materials are intended for financial professional use, can be voluminous, and could be confusing or misleading to Retirement Investors.
- None of this has been cheap; costs have been substantial.
- If the Proposal on this point is adopted, our members will be compelled to rework this documentation to make it understandable for Retirement Investors, substantially duplicating the investment they have already made pursuant to Regulation BI and PTE 2020-02.
- To require that of our members, only fifteen months after the full compliance date of PTE 2020-02 and without any evidence that the current approach is not adequately serving Retirement Investors, would be unreasonable and arbitrary.

Under the Proposal, if the Retirement Investor cannot or will not provide specific plan information, the Financial Institution and Investment Professional are to make a reasonable estimate of a Plan's expenses, asset values, risk, and returns based on publicly available information, and then document those assumptions in a disclosure to the Retirement Investor. The preamble asks for comments on reliable benchmarks that could be used for this purpose.

- As discussed above, between PTE 2020-02 and the securities laws, Retirement Investors are already suffering from disclosure overload, particularly with respect to rollovers.
- This clearly would be another instance of disclosure for its own sake, and not because of any practical utility for Retirement Investors.

The preamble estimates that documenting each rollover recommendation will require 30 minutes for a personal financial advisor whose firms currently do not require rollover documentations and *five minutes* for financial advisors whose firms already require them to do so. The preamble estimates that this will result in an hour burden of 883,953 hours with an equivalent cost of approximately $193.8 million, and requests comment on the time it would take to document the rollover recommendation.

- These estimates do not accord with the reality of our members' experience.
- Any difference in the time required will not turn on whether the firm currently does or does not currently require documentation, but on whether (i) the process is manual or automated; (ii) the Retirement Investor does or does not provide specific plan information; (iii) the investments to be made in the IRA and, if known, the number and nature of these investments; and (iv) the specifics of the documentation to be provided to the Retirement Investor.
- The time and expense the firm will incur in building out or updating this process, as appropriate, and maintaining it will be an additional compliance expense.
- There is no set of circumstances in which an estimate of five minutes of the Investment Professional's time, for a total cost of $18.27 per disclosure,[136] accurately represents this cost.

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[136] $18.27 = ($193.8 million ÷ 883,952 hours ÷ 60) x 5 minutes

P. The public website disclosure would be a particularly egregious example of such over-regulation.

The Department asked for comments regarding whether it should require Financial Institutions to maintain a public website containing the pre-transaction disclosure, a description of the Financial Institution's business model, associated Conflicts of Interest (including arrangements that provide Third-Party Payments), and a schedule of typical fees. It contemplates that, to the extent applicable, the website would list all product manufacturers and other parties with whom the Financial Institution maintains arrangements that provide Third-Party Payments to the Investment Professional, the Financial Institution, or Affiliates with respect to specific investment products or classes of investments recommended to Retirement Investors, and a description of the arrangements, including a statement on whether and how these arrangements impact Investment Professionals' compensation, and a statement on any benefits the Financial Institution provides to the product manufacturers or other parties in exchange for the Third-Party Payments.

- As we explained when a similar public website was proposed in 2015, the scope, breadth, and complexity of the website disclosure renders it unmanageable and extremely costly. This is no less true today than it was in 2015.
- As an overarching matter, except possibly in the unusual case of a very small firm with a very limited menu of proprietary products, a financial services firm with a substantial investment shelf would either have to provide fee information for the entire universe of investment products available to Retirement Investors, or resort to providing potentially materially misleading information as to "typical" fees, which may have no relationship to the Retirement Investor's actual fees.
- The specific information that the Department contemplates is extraordinarily broad and goes beyond what is required for the 408(b)(2) disclosure or Form 5500 Schedule C reporting. As we already explained to the Department in 2015, in the independent financial advisor model, advisors have access to a vast array of investment products that they offer to their investors. Each product has unique pricing structures, and several versions of each product are typically offered. For example, when one factors in the various share classes available, a single mutual fund family might offer more than 500 versions of their funds. In addition, multiple broker-dealer representatives may receive compensation for the sale of a particular product as a result of a team-based sales approach employed by the firm, or ensemble practices that require financial advisors to split compensation for the sale of a particular product or group of products. Therefore, compiling, presenting, and maintaining the required internet disclosure for each financial advisor affiliated with a financial institution—some of whom are affiliated with thousands of financial advisors—will be a monumental undertaking that will impose significant costs on advisors and firms. In addition, the scope, breadth, and complexity of such an undertaking will lead to inadvertent errors that could confuse investors or expose financial advisors and financial institutions to an unreasonable risk of litigation.
- Moreover, it is highly doubtful that this information would be accessed by or helpful to Retirement Investors, especially relative to the enormous expense and effort that would be required to produce it. For investment decision making, Retirement Investors already are provided or have access to more information than they can consume in any reasonable amount of time. We believe that investors benefit only from more simplified, standardized disclosures that allow them to make direct comparisons between investment

products not only concerning price and fees, but on quality and features as well. The summary prospectus provided for mutual fund investments is an example of simplified disclosures that can be useful and can lead to greater transparency for investors. The Proposal will only increase "information overload" by providing information that will be so complex, and so detailed, that even sophisticated investors will find it daunting rather than enlightening.

- In addition, the development, curation, implementation and maintenance of the website disclosures may be cost-prohibitive for small firms. Large broker-dealer firms often have a significant level of control over the information sources needed to gather and process the information required by the web disclosure. By contrast, our members' experiences with the section 408(b)(2) disclosure have demonstrated that firms that clear on a fully disclosed basis will find it much more difficult to obtain all of the information necessary to comply with these disclosures. For purposes of section 408(b)(2) compliance, many independent broker-dealers have been forced to hire outside service providers to collect the necessary data, at costs of up to $100 per account. Even assuming half that cost for a much more complex disclosure regime, small firms will once again spend millions of dollars attempting to locate and retain providers to assist with data collection. These website costs alone will be significant enough to cause certain small independent broker-dealers and investment advisers to exit the retirement plan market.
- Moreover, the website disclosure raises significant concerns regarding potential advisor recruiting and may have the unintentional consequence of driving inflation in certain segments of the investment market, resulting in higher investment costs. We fear that as a result many smaller firms will likely decide that the benefits of servicing retirement assets simply do not outweigh the costs – real or potential. Our members negotiate commission terms with each individual financial advisor. Collecting information on the terms of each individual financial advisor's compensation with regard to each asset that an investor could possibly purchase, hold or sell, and formulating that information into a webpage will result in a massive disclosure, and massive costs.
- Finally, the conclusion in the regulatory impact statement that this process "would require eight hours of labor annually from a computer programmer" is simply not credible. The discussion above completely belies that notion, and the record for the 2015-2016 rulemaking included hundreds of pages of data in this regard.

Q. On its face, the ban on differential compensation in PTE 2020-02 and PTE 84-24 cannot be a serious proposal.

Under the proposed amendment to the PTE 2020-02 policies and procedures condition, a Financial Institution may not use "differential compensation," among other things, that a reasonable person would conclude is likely to result in other than "best interest" recommendations.[137] The preamble then proceeds to make that decision for the hypothetical reasonable person, on a "could" rather than "would" basis:

> The proposed amendment clarifies, by adding examples to the operative text, some actions that Financial Institutions *may not take* because a reasonable person *could* conclude

[137] 88 Fed. Reg. at 75979.

> that they are likely to encourage Investment Professionals to make recommendations that are not in the Retirement Investors' Best Interest.[138]

The proposed amendment to PTE 84-24 is to similar effect.

Absent any further discussion of this crucial and extraordinarily complicated matter, we are forced to take the preamble at face value. As such, this "clarification" is fundamentally flawed in multiple ways.

- On its face, the Department's position appears more draconian than even the position it took under the vacated Best Interest Contract Exemption.
- This position certainly was not signaled in the original issuance of PTE 2020-02.
- To the extent the Department is seeking to preserve the opportunity to assert this position on a retrospective basis, it would be regulation without notice, of the worst sort.
- If the Department intends an outright ban, the operative language should dispense with any pretense to the contrary and state a ban.
- Such a ban could be operationalized only if the transaction-based compensation available to financial advisors for ***every single investment*** they were authorized to offer was identical – which is neither reasonable nor possible.
- Prospectively, such a ban would create internal inconsistencies with the balance of the Proposal, of the highest order.

In further explanation of the last point, the Proposal intends to allow Investment Professionals to provide critical rollover advice and other investment services to Retirement Investors notwithstanding a conflicted interest, subject to certain guardrails but without preference among business models and compensation structures. Consider, then, the consequences of requiring that an Investment Professional cannot receive "differential compensation," i.e., that the compensation received by the Investment Professional cannot vary with the choices made by the Retirement Investor.

- At the outset, such a ban conceptually is completely at odds with the basis for a prohibited transaction exemption; absent a difference in compensation, there is no section 406(b) violation, and thus no need for exemptive relief.
- Evaluation of the rollover alternative always involves a difference in compensation; the financial advisor is compensated only if the Retirement Investor rolls over, but is uncompensated if she does not. A ban on differential compensation would mean that a financial advisor cannot give rollover advice.
- More generally, consider any "hire me" situation. The financial advisor could not proceed from a "hire me" interaction to an investment recommendation, because the advisor would be paid if the Retirement Investor accepted the recommendation, but not if she didn't.
- Many of our financial advisors are dually registered as both broker-dealer and investment advisory representatives. They could not provide a recommendation as to which type of account best served the Retirement Investor – a recommendation the

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[138] *Id.* at 75986 (emphasis added).

Proposal clearly contemplates – because they are compensated differently under the different kinds of accounts.

- Even assuming arguendo that the Department did not intend the differential compensation ban to indirectly preclude the foregoing "gating" interactions, consider the consequences if it were in the best interest of a Retirement Investor:
    - To rebalance her account between individual equity and debt securities;
    - To discontinue investing in individual securities and instead invest in mutual funds for diversification and scale economies in cost; or
    - To invest a tranche of her retirement portfolio in an annuity providing guaranteed lifetime income, because she never participated in a defined benefit plan.

  If her financial advisor is acting in a broker-dealer capacity, all of those recommendations structurally entail a difference in compensation and would not be permitted under the exemption. Even if her financial advisor is acting in an investment advisory capacity, at least the third situation would involve an impermissible difference in compensation.
- This last set of examples also points out that a differential compensation ban is far more consequential for the broker-dealer model, and therefore contradicts the stated objective of the Proposal not to favor or disfavor different business models.

In the end, this aspect of the Proposal plainly intends to displace, in some unexplained way, services and compensation structures permitted by the primary regulators of the various financial services industries and to force some measure of uniform pricing across very different industries and services, contrary to the claims of alignment made in the preamble.

- Taken to its logical conclusion, a differential compensation ban means that our financial advisors can only provide investment education to Retirement Investors.[139]
- Even if not taken to that extreme, such a ban is so fundamentally inconsistent with the overall Proposal and its objectives as to beggar belief.

Finally, on a smaller but nonetheless significant point, the proposed operative language bars such practices that "are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in Retirement Investors' Best Interest." The Department is by regulation apparently giving itself and plaintiffs flexibility to make cases against Financial Institutions as a matter of law (per the preamble), but also on the facts on either a subjective or objective basis (per the operative language). This would constitute a particularly comprehensive stacking of the litigation deck in plaintiffs' favor.

R. The other constraints on compensation and personnel practices are unreasonable.

PTE 2020-02 requires and would continue to require that policies and procedures be designed such an that a reasonable person reviewing the Financial Institution's policies and procedures and its incentive practices *as a whole* would conclude that they do not create an incentive for the Financial Institution or Investment Professional to place its interests ahead of the Retirement Investor's interest. The Proposal goes on to state that "Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards,

[139] Theoretically, we suppose a registered investment adviser might be able to provide her services within limits, if it were possible to get engaged for such services without communicating an investment recommendation.

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. A Financial Institution should not offer incentive vacations, or even paid trips to educational conferences if the desirability of the destination is based on sales volume and satisfaction of sales quotas."

On its face, the Proposal would apparently bar Financial Institutions from managing their Investment Professionals in any normal manner.

- Although the compensation packages are to be addressed as a whole, the Department singles out specific types of compensation that apparently are prohibited but does not explain how any of these forms are more likely to encourage Investment Professionals to make recommendations that are not in the Retirement Investor's best interest in the context of an overall set of policies and procedures. In particular, the Department appears to have a particular issue with non-cash compensation, even though that form of compensation is permitted and regulated under the securities laws.
- As in any other occupation, financial professionals who work the hardest and are otherwise successful at their jobs tend to earn more than others, yet the Proposal lists items such as "appraisals" and "performance or personnel actions" as problematic. Identifying, commending, and rewarding good performance is essential for our members to recruit and retain the best financial advisors, who will provide the best service to Retirement Investors.
- Achieving a sales goal is not the same thing as providing advice that is not the best interest of the investor. The Department appears to conflate these two concepts.

In short, the Department apparently would require the Financial Institution to treat the Investment Professional who produced no business from Retirement Investors in exactly the same manner as the Investment Professional who did produce "best interest" business. This would be so contrary to accepted business practice as to be an unreasonable condition in the exemption.

S. The Proposal would authorize public fishing expeditions in the business records of financial services firms.

According to the preamble, consideration is again being given to amending the recordkeeping provisions in Section IV of PTE 2020-02 to allow private parties to review the business records of the Financial Institution to determine whether the exemption is satisfied. The Proposal as written imposes this condition on fiduciaries seeking relief under PTE 75-1, PTE 84-24 and PTE 86-128.

The recordkeeping provisions of PTE 2020-02 allow only the Department and the Department of the Treasury to inspect books and records. In 2020, the Department originally proposed that records should be available for review by additional parties but limited that access in the final exemption in response to comments. Commenters expressed concern that parties might "overwhelm" Financial Institutions with requests for use in litigation.

We see no justification for including such a requirement in these exemptions.

- The Proposal does not provide a reason to reverse the Department's original decision to limit recordkeeping access to governmental agencies charged with enforcing the law. It simply asserts that the Department "is of the view" that Retirement Investors would benefit from access.
- It is unprecedented to require a business to provide unlimited access to its business records by private individuals. It is one thing to make compliance records available to governmental agencies; it is quite another to provide unlimited access to virtually anyone who asks for them.
- Again, the chance that any Retirement Investor would review such materials for any reason related to investment decision making is vanishingly small.
- Any such requirement would simply be a license for fishing expeditions and advance discovery for litigation, and would expose our members to violation of antitrust, privacy and other laws.

Opening up Financial Institutions to such exposure, as one price among many for participating in the retirement market, goes well beyond any requirement that any financial services regulator has ever deemed reasonable or appropriate.

T. The proposed changes to the retroactive review and self-correction procedures are full of problems.

At the outset, the preamble provides no record that the current retroactive review and self-correction provision is inadequate to protect the interests of Retirement Investors, and that the Department is not simply arbitrarily burdening Financial Institutions.

The preamble provides that the "primary penalty" for an IRA fiduciary that engages in a non-exempt prohibited transaction by failing to satisfy the exemption conditions of amended PTE 2020-02 would be the prohibited transaction excise tax imposed under Code section 4975.

- The language of the preamble implies there are additional, unannounced penalties, completely unknown to the regulated community, which the Department might seek.
- There is a possible implication that the Department would seek ERISA section 502 remedies for recommendations limited to the investment of an IRA, which we believe to be an unsupportable extension of the Department's enforcement jurisdiction for the reasons discussed above.

Also, as discussed in the preamble, an annual review will generally be appropriate, but Financial Institutions may choose to conduct their reviews more frequently and should do so as circumstances dictate. For example, if a Financial Institution knows or should know that non-exempt prohibited transactions or violations of either the Impartial Conduct Standards or policies and procedures conditions have occurred, the preamble asserts the Financial Institution cannot wait until the next annual review to correct transactions or revise its policies and procedures.

- As it stands and in the proposed amendment text, PTE 2020-02 requires an annual retrospective review.
- Far from a clarification, the preamble language muddies a clear and straightforward requirement by suggesting that a Financial Institution could be in noncompliance with the

exemption from time to time if it does not conduct reviews more frequently than annually, without providing definitive guidelines for when additional reviews are required.

- Every year, a Financial Institution would be at risk of being retroactively being second guessed by the Department that an additional review should have been made.

The Proposal would require Financial Institutions, as part of their retrospective review, to report any non-exempt prohibited transactions in connection with fiduciary investment advice by filing IRS Form 5330, correcting those transactions, and paying any resulting excise taxes.

- This aspect of the Proposal abridges the rights under the Internal Revenue Code of Financial Institutions as taxpayers.
- Under the Code, taxpayers are not required to file returns or pay taxes if they have a reasonable basis to believe that the tax is not due.
- It will be common practice for Financial Institutions to be over inclusive in self-reporting and correcting possible departures from PTE 2020-02 – including, out of caution, cases where the departure may not be clear – and the exemption provides clear incentives for Financial Institutions to do so.
- In these circumstances, the Financial Institution may very well have a reasonable belief that a non-exempt prohibited transaction did not occur and that no excise tax is due, but the apparent intent of the Proposal, in the statement of the Senior Executive Officer's certification obligation and elsewhere, is that a Form 5330 must be filed and excise tax paid for any self-reported transaction, in abrogation of taxpayer rights.
- It may also be the case that the Financial Institution is not a taxpayer from whom the excise tax is due, and thus unable to file the return and satisfy this condition.
- It is also unreasonable to expect Senior Executive Officers to bring tax as well as compliance expertise to the table, and to involve themselves sufficiently in the detail of tax filings and excise tax calculations to make the proposed certification.
- On a more technical point, our understanding is that a separate Form 5330 would need to be filed for each plan or IRA involved in this process, and the calculation of the section 4975 excise tax is rarely a simple matter, adding to compliance expense.

The proposed amendment would add to the list of behaviors that could make a Financial Institution ineligible to rely on PTE 2020-02 for ten years failure to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay the resulting excise tax imposed under Code section 4975.

- The preamble asserts these proposed conditions would provide important protections to Retirement Investors by enhancing the existing protections of PTE 2020-02.
- We fail to see any correlation between filing Forms 5330 and a Financial Institution's qualification to serve the best interests of Retirement Investors.

Finally, the preamble takes the view that "losses" are not limited to recommendations that leave the Retirement Investor with fewer assets than originally invested. Even if the IRA investments have performed well since a rollover, the Department's view is that the Retirement Investor may have been harmed by the loss of ERISA Title I's protections.

- Nowhere in ERISA, its legislative history, or otherwise is it suggested that the "amount involved" in a prohibited transaction can be measured as the loss of Title I protection, and there certainly is no way to quantify such a loss.
- Indeed, the impossible logic of this statement is that any rollover to an IRA is potentially always a prohibited transaction simply because there is no longer Title I protection.

U. The proposed ineligibility provisions are disproportionate, unjustified, and beyond the Department's authority.

In enacting ERISA, Congress in section 411 provided for the disqualification of persons convicted of specified crimes from serving as a "fiduciary" or as a "consultant or adviser to an employee benefit plan, including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to any employee benefit plan." Under the statute, convictions are not imputed to affiliates or relatives. Starting with PTE 84-14, the Department has been rewriting section 411 in class exemptions, to suit its own preferences.

A principal virtue of PTE 2020-02 at issuance was that it provided more sensible ineligibility provisions than those of PTE 84-14, which frankly are a train wreck – individual exemption proceedings with multi-year administrative hearings and supervision by the Department triggered by criminal convictions of remote affiliates, potentially in jurisdictions where prosecutions may not be legitimate, that have no bearing at all on the asset manager's conduct of business for ERISA investors in the US. The Proposal now proposes to repeat that mistake in PTE 2020-02 and PTE 84-24.

All the proposed changes to the ineligibility provisions will result in reduced choice and access for Retirement Investors. This is not a prediction on our part; this is the whole point of the ineligibility provisions. They are based solely on the conceits of the Department, without any substantiation of the inadequacy of the current provision in PTE 2020-02 or the need for such severe measures or the incremental benefits provided to Retirement Investors.

We protest in the strongest terms the imposition of such a punitive provision without any due process with respect to the criminal conviction, if it occurred outside the US.

In addition, the ineligibility provision would effectively authorize the Department to impose a "death penalty" on a Financial Institution, by putting it out of business with Retirement Investors for ten years – which will put it out of business altogether – in circumstances where the primary regulator would consider that penalty contrary to the public good and not remotely an appropriate regulatory action. It is the most essential responsibility of the primary regulator – the regulator that authorizes the company to conduct a financial services business – to judge whether a Financial Institution is so compromised that it cannot be trusted with the public's business, which has consumer and broader economic consequences far beyond the purview of ERISA. Instead, through the conditions of an exemption, the Department proposes to grant itself authority to countermand the primary regulator as to the integrity of a Financial Institution to continue doing business. Neither this authority nor the possibility of a "death penalty" is found anywhere in the statute.

Again, we acknowledge the Department's latitude to set conditions for the prohibited transaction exemptions it issues, but these proposed changes are so intrusive on the authority of other regulators, disproportionate, and needlessly burdensome as to be unreasonable. And they further demonstrate that the Department is using its deregulatory authority – the power to issue exemptions – to regulate, which the Fifth Circuit already held was unlawful.

We point out three more specific flaws below.

1. The expanded list of disqualifying crimes would produce unreasonable results.

The current version of PTE 2020-02 provides that a Financial Institution will lose its eligibility if it or a member of its controlled group is convicted of certain crimes involving retirement advice. The Proposal expands the disqualifying crimes in two ways, each of which is problematic and sure to lead to unintended consequences.

- The DOL expands ineligibility to include all "Affiliates" of Financial Institution and Investment Professional (as well as the Independent Producer in PTE 84-24.) "Affiliate" is broadly defined to include any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee, representative, or relative (as defined in paragraph (f)(12) of this section) of such person; and any corporation or partnership of which such person is an officer, director, or partner.
- Under current PTE 2020-02, a Financial Institution or Investment Professional becomes ineligible upon conviction of disqualifying "crimes arising out of such person's provision of investment advice to Retirement Investors." The Proposal includes conviction of the enumerated crimes, regardless of whether the conduct occurred in the context of providing investment advice to Retirement Investors.

The preamble explains that the inclusion of Affiliates is a response to the Department's perception that the current controlled group definition is confusing, and the limitation to investment advice crimes is too narrow. The preamble also contemplates that the changes would ensure that Financial Institutions would be diligent in their obligation to monitor the actions of their Affiliates and foster a culture of compliance throughout the organization. The expansion would not achieve these goals because it leads to absurd results, which cannot be anticipated, as illustrated through the following examples.

- Example 1: ABC Brokerage Firm employs X in its accounting department. X has a brother Y, who is an independent insurance producer in another state and sells only for insurance companies that are not affiliated with ABC. Retirement Investor Z relies heavily on Y for her retirement planning. She feels secure knowing that she has purchased in her IRA a guaranteed lifetime income stream through her Fixed Index Annuity contract, which Y recommended to her.

  Following a bad car accident, and unbeknownst to ABC, X becomes addicted to opiate painkillers. This results in a dispute between X and Y over money, after which they never speak again. Two years after the falling out, X begins stealing from ABC to help pay for her drug habit and later is caught. ABC calls the police and fires X. X is later convicted of embezzlement, as well as distribution of a controlled substance in derogation of ERISA section 411. This series of events results in the following consequences.

- X, as an employee, is an Affiliate of ABC for purposes of PTE 2020-02. Not only is ABC out of the embezzled funds, but as a result of the crime for which it is the victim, it can no longer rely on PTE 2020-02. ABC's financial professionals, who do not even know of X, are also out of the exemption.
- X, as a relative, is also an Affiliate of Y for purposes of PTE 84-24. Not only is Y broken hearted over his sister's addiction and their estranged relationship, but he is also out of a job because he can no longer rely on PTE 84-24.
- Sometime later, Z is in the market for a new car. She goes to her old college roommate F, who is a trusted friend and a successful car salesperson. Z mentions her FIA to F. F tells her that annuities, especially FIAs, are bad – even the President said so in a speech. F recommends that Z cash her annuity out of her IRA, use some of the funds to buy a new car, and invest the rest in crypto currency. F goes on with her life as usual, as the preamble specifically excludes car salespeople from fiduciary status for retirement investment advice. Z has a beautiful new car but is beginning to worry about outliving what is left of her retirement savings.

- *Example 2:* Financial Institution DEF is proud of its stellar compliance record, which it has had for over 20 years, as well as its focus on small investors. DEF is a subsidiary of GHI Holdco, a global conglomerate that also owns JKL Corp, which manufactures trademark jackets in a factory in China. The JKL jackets become the badge of choice for a protest movement in opposition to the government. Without a trial or even evidence, JKL is convicted of corporate fraud and income tax evasion. This series of events results in the following consequences.

  - DEF can no longer rely on PTE 2020-02. It submits a request to the Department for a hearing on its Affiliate's foreign conviction.
  - The Department would no doubt be sympathetic to DEF's case. Unfortunately, there is a considerable backlog of requests for hearings and the Department cannot get to DEF's request in a timely manner.
  - With the pendency of potential ineligibility, which DEF dutifully discloses in accordance with PTE 2020-02, it is unable to attract new business and eventually files for bankruptcy.

The expanded list of disqualifying crimes must be withdrawn. With respect, it is not within the Department's mission or authority to encourage compliance with U.S. laws other than ERISA, or laws outside the U.S., even under its broad discretion to set the conditions for exemptions. As the unhappy experience with PTE 84-14 shows, this amendment would penalize Investment Professionals and Financial Institutions, and indirectly the Retirement Investors who rely on them, for infractions far beyond their ability to influence or control, or that have no bearing on the integrity of the Investment Professional or Financial Institution serving Retirement Investors in the U.S., or that do not reflect in any way on the reliability or quality of the investment recommendations provided to Retirement Investors pursuant to the exemption.

It is equally unclear why the conviction of an employee of a foreign affiliate that is completely disconnected from the Financial Institution and Investment Professional is relevant to, e.g., advice to a take a rollover. Corporate restructuring and acquisitions often result in new affiliates joining the group, and as a result, Financial Institutions and Investment Professionals may unexpectedly lose their ability to rely on the exemption and provide much needed investment advice to retirement plans and their participants. In such situations, they may not even be aware of convictions involving new affiliates of the enterprise. Where does this leave the Retirement Investor? It can be expected that "trusted" relationships that are serving the Retirement Investor's best interest would be disrupted in situations where there is no corruption from the distant criminal activity, thus reducing the ability of Retirement Investors to obtain sound investment advice.

2. Ineligibility should not be tied to Form 5330 filings.

The Proposal amendment would add failure to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay the resulting excise tax imposed under Code section 4975 to the list of behaviors for which a Regional Office of the Department could make a Financial Institution ineligible to rely on PTE 2020-02 for ten years. The preamble asserts these proposed conditions would provide important protections to Retirement Investors by enhancing the existing protections of PTE 2020-02.

As discussed above, we fail to see any correlation between filing Forms 5330 and a Financial Institution's qualification to serve the best interests of Retirement Investors. Moreover, under existing law, a taxpayer need not file Form 5330 if it believes the excise tax is not due. The high stakes involved in complying with the exemption mean that Financial Institutions will likely self-report and correct marginal compliance issues, even if they reasonably believe a nonexempt prohibited transaction did not occur. The Proposal as written could be construed as overriding Treasury Regulations and imposing unnecessary burdens on the IRS.

3. Shortening the wind-down period only hurts Retirement Investors.

While current PTE 2020-02 provides for different amounts of time before ineligibility, and then provides a one-year winding down period, the Proposal would "simplify" this process and create uniformity so 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. According to the preamble, the one-year wind down created a long period in which noncompliance and inappropriate conduct could continue. This six-month period would take the place of the winding down period and provide "ample time" for Financial Institutions and Investment Professionals to inform Retirement Investors of their ineligibility and/or find alternative means of complying with ERISA.

Shortening the wind down period only means that Retirement Investors will lose access to a trusted advisor sooner rather than later, generally for reasons entirely unrelated to the services provided to the Retirement Investor. It appears that this change is entirely punitive in nature and loses sight of the ultimate objective of protecting Retirement Investors.

V. The proposed amendments to PTE 84-24 intrude on State insurance regulation and are unworkable.

In its requisite Federalism Statement, the preamble expressed that the proposed amended PTE 84-24 is not intended to "change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2) (A) for State regulation of securities, banking, or insurance laws." The Department's view is that the proposed exemption "has no substantial direct effect on the States, on the relationship between the National government and the States, or on the distribution of power and responsibilities among the various levels of government." Nevertheless, the Proposal represents DOL's most intrusive undertaking to regulate the inner workings of the life insurance industry, affecting our members who are licensed to sell insurance.

The Department's dissatisfaction with the NAIC Annuity Suitability "Best Interest" Model Regulation ("Model Regulation") demonstrates the problem with attempting to regulate areas outside of its expertise. State insurance commissioners are charged with protecting consumers from bad actors, and those laws, to the extent they regulate insurance, are not preempted by ERISA. There is always a balancing of interests in those laws, however, because State insurance regulators also protect consumers with robust rules designed to ensure insurance company solvency. The NAIC had a deep understanding of solvency requirements when developing its model best interest standards. This is why the Model Regulation lacks, for example, needless and costly requirements including excessive and unworkable disclosure, and ineligibility restrictions that threaten the ability of the insurance companies to continue doing business. These provisions would not add meaningful protections but would increase the risk of insurance company insolvency, which could threaten both the Retirement Investors who own the company's contracts and the entire US economy.

We therefore strongly support the comments being provided by the American Council on Life Insurance, the Insured Retirement Institute, and the Committee of Annuity Issuers, among others, that PTE 84-24 is patently unworkable and potentially damaging to Retirement Investors. The following comments complement or amplify points raised by these other commentators.

1. Covered Transactions

PTE 84-24 is one of the first administrative class exemptions issued by DOL after the enactment of ERISA. Since 1977, it has provided relief for conflicted advice by financial professionals who, in the process of selling insurance products and proprietary mutual funds, "inadvertently" became "investment advice" fiduciaries under the five-part test. Ironically, effective 60 days after publication in the Federal Register, the Proposal would eliminate its availability to investment advice fiduciaries except in the most narrow of circumstances.

Among other things, the Proposal would limit covered transactions, as applied to investment advice fiduciaries, to sales of insurance products in the "independent producer" channel, and adds conditions comparable to PTE 2020-02 but intended to reflect the particular circumstances of that channel. The Proposal misses that mark in important points. Read literally, the amendment would even revoke investment advice relief retroactively to 1977, the very transactions that the exemption was intended to address.

It also appears that the proposed amendments would retroactively limit relief to insurance and mutual fund commissions defined to exclude revenue sharing payments or 12b-1 fees, administrative fees or marketing payments, payments from third parties, and similar amounts. DOL asserts that the relief has always been so limited, but that is revisionist history and certainly contrary to the understanding in the regulated community. The retroactive revocation of exemptive relief violates fundamental principles of due process and the Administrative Procedures Act. The DOL justifies the limitations on mutual fund commission because it estimates that only ten entities currently rely on PTE 84-24 with respect to mutual fund commissions, which is incorrect.

DOL also proposes to exclude from PTE 84-24 relief not only for ERISA section 3(38) investment managers, but also persons with discretionary investment management authority that has been conferred orally. Inasmuch as we understand ERISA to disallow oral delegations of investment discretion, it is unclear what case DOL is contemplating, although there must be one because this change is positioned as a clarification rather than a revision.

2. Impartial Conduct Standards

The flaws described in our discussion of PTE 2020-02 apply equally to PTE 84-24.

3. Policies and Procedures

The Proposal plans to require Insurers to maintain certain policies and procedures that differ in significant respects from those required by state insurance law and will be disruptive with regard to compensation structures and the relationships between Insurers and producers. The following proposals are particularly troublesome.

Compensation. The preamble effectively reflects a judgement call by DOL that the conflicts created by certain specific forms of compensation cannot be mitigated and must be eliminated, including "differential compensation." The preamble indicates that an Insurer "could not offer incentive vacations, trips, or *even educational conferences*, if qualification for the vacation, trip or conference is based on sales volume or satisfaction of sales quotas." The bar on qualification standards for an educational conference (which is hardly considered a perk in the industry) is particularly perplexing, given the Proposal's simultaneous requirement that Insurer's policies and procedures must include an annual assessment of each independent producer to ensure they have the skills necessary to sell the product. And it is surely reasonable for an insurance company not to pay for an Independent Producer's attendance at an educational conference if she has not sold any of the company's products for a period of time.

Independent Producer Diligence. Proposed PTE 84-24 requires Insurers to identify independent producers "who have failed or *are likely to fail* to adhere to the Impartial Conduct Standards." We have no idea how to predict in advance the likelihood that a producer is "likely to fail" sometime in the future to adhere to impartial conduct standards other than by an existing formal finding that a producer already has failed to adhere to the Impartial Conduct Standards. Because "have failed" is a separate item in the Proposal, the "likely to fail" must mean something other than a past failure.

No guidance is offered as to the diligence required for existing relationships with Independent Producers at the effective date of the proposal. Given the impossible task being asked of the insurance company, we have grave concerns. Absent actual knowledge of wrongdoing, ensuring that the producer is licensed and in good standing by the state insurance authorities should be all that is required.

Disclosure. Although the Department insists that the Proposal is not a disclosure rule, the Proposal nevertheless contains substantial new disclosure requirements, particularly as compared with the existing PTE 84-24 disclosure requirements. It seems improbable that disclosure at this scale and level of detail will be useful to any Retirement Investor. In fact, we believe it will have the opposite effect.

- Disclosure of every insurance company the Insurance Producer is authorized to represent, and each company's full book of available products, could be both voluminous and subject to frequent change.

- Advance disclosure of the dollar amount of commissions, before the Retirement Investor has committed to the initial premium payment and is free to modify or not make future premium payments, always is problematic and potentially misleading.

With regard to these two points in particular, the Department recognized these very problems back when the exemption was first enacted in 1977. Quoting from the preamble:

> Many comments were received criticizing the requirement of the proposal that the agent, broker, consultant or principal underwriter disclose the names of all insurance companies and investment companies with which such person is affiliated. The exemption, as adopted, has been modified in response to these comments and limits the disclosure in this area to information concerning the relationship between the insurance company or investment company whose contract or security is recommended and the person making the recommendation….
>
> Comments suggested that the exemption be conditioned upon the disclosure of the dollar amount of commissions to be received. The Agencies did not adopt this suggestion because disclosure of the percentage rate of commissions will be required, and this will provide comparable information to the approving fiduciary and will be more easily developed by the person claiming exemption.[140]

4. Retrospective review and self-correction

While the proposed amendment incorporates the self-correction program of PTE 2020-02, there are important differences:

- The Insurers, not the Independent Producer, would be required to conduct the retrospective review.

[140] 42 Fed. Reg.32395, 32397 (June 24, 1977).

- In contrast, Independent Producers could implement self-correction.

Self-correction would be allowed in cases when either (1) the Independent Producer has refunded any charge to the Retirement Investor or (2) the Insurer has rescinded a "mis-sold" annuity, canceled the contract, and waived the surrender charges. The DOL notes that this form of self-correction differs from PTE 2020-02, which is focused on investment losses. We agree with that statement – the focus in amended PTE 84-24 would be punitive, in complete disregard of what might be in the best interest of the Retirement Investor.

In its zeal to hold fire to the insurance company, the Department misses a number of important points that make the retrospective review and correction completely unworkable in practice. In particular, the Department expects that the rescission of an annuity contract may be required. State insurance regulation, however, generally prohibits the unilateral rescission of an annuity contract, with good reason. In addition, the preamble does not consider the possibility that the Retirement Investor may prefer to retain the contract. It would appear that the Department would rather see the Retirement Investor lose money, as well as the right to receive the lifetime income stream that she has carefully included as part of her retirement strategy, than to see an immaterial mistake (e.g., in a disclosure document) go unpunished.

5. Eligibility

While the proposed amendments to PTE 84-24 as a whole reflect a misunderstanding of the business of insurance companies as product manufacturers, this disconnect is particularly disturbing in the proposed eligibility provision.

The proposed amendment would impose eligibility criteria similar to that of PTE 2020-02, under which an Independent Producer or Insurer would become ineligible to rely on the exemption for 10 years in the event that the Independent Producer or Insurer violated the applicable criteria. It has the same fatal flaws as those described above regarding the relevancy of distant affiliate. There is no explanation -- and we cannot conceive of one – as to why a conviction of a distant affiliate has any bearing on the design of an insurance product, which is required to be reviewed and approved by State regulators before being offered for sale to the public, or the conduct of its regulated insurance business with Retirement Investors.

W. The Proposal continues to extend ERISA fiduciary standards to IRAs.

We reiterate the concern expressed at the time PTE 2020-02 was originally proposed that the impartial conduct standards impermissibly extend ERISA section 404(a) standards to IRAs, contrary to ERISA and the Fifth Circuit opinion. At the time, the Department disagreed with that concern, noting in part that, unlike the 2016 final rule at issue in *Chamber*, PTE 2020-02 would apply at the time only to a narrow group already deemed ERISA fiduciaries. That seemed an inadequate response in 2020, and we look forward to the Department's response in the circumstances of the greatly expanded "investment advice" definition it has now proposed.

X. The Proposal creates unnecessary uncertainty about the "best interest" standard.

Footnote 1 in the preamble to the proposed PTE 2020-02 amendments explains that "For purposes of this disclosure, and throughout the exemption, the term fiduciary status is limited to fiduciary status under Title I of ERISA, the Code, or both. While this exemption and the SEC's Regulation Best Interest both use the term "best interest," the Department retains interpretive authority with respect to satisfaction of this exemption."

- It is fundamental that Financial Institutions and Investment Professionals must have certainty as to what their underlying standard of care requires, and that the standard be consistent with that of their primary regulator. Our members currently, and will continue, to provide advice that in the best interest of investors and which does not put their interest ahead of the investor, in accordance with their primary regulators' guidelines.
- The Proposal is creating more, not less, uncertainty by not defining the best interest standard by reference to the Regulation BI best interest standard, the Advisers Act of 1940 fiduciary standard, state insurance law, or even ERISA's statutory fiduciary standard.

The preamble further explains that the requirement for Investment Professionals not to subordinate the Retirement Investor's interests to their own is not satisfied if the Investment Professional merely considers the Retirement Investor's interests along with its own and the Financial Institution's in choosing which product to recommend to a Retirement Investor.

- It is inevitable that, in some cases, the investment that is in the best interest of the Retirement Investor will also be the investment that provides the greatest economic benefit to the Investment Professional and/or the Financial Institution. The requirement stated above seems to require an evaluation of the Investment Professional's state of mind and subjective intent. We are concerned that in practice, this may result in the inability of an Investment Professional demonstrably to act in the best interest of the Retirement Investor because they will be unable to prove a negative – that the benefit to themselves or the Financial Institution did not factor into the recommendation.
- Moreover, the Department has long recognized that cost is not the only regarding investment and service choices.[141]
- The preamble discussion therefore creates uncertainties whether the Investment Professional is precluded from recommending an investment that happens to produce a greater economic benefit than others, if they have determined that the investment is also in the best interest of the Retirement Investor, and whether compliance with the best interest standard will be determined on a subjective or objective basis.

The Proposal requests comment on whether additional clarifications are necessary to its "mere clarification that advice provided to a Plan or IRA fiduciary must be in the Best Interest of the Plan or IRA, and not the Best Interest of the fiduciary."

- In the usual manner, the Department's "mere clarification" results in less clarity and less certainty.
- For example, we are concerned that this proposed change might be interpreted as meaning that the plan or IRA fiduciary can receive no benefit, no matter how incidental,

[141] *See. e.g.,* IB 95-1, 29 C.F.R. § 2509.95–1.

with respect to investment advice. Any such result would be contrary to the Department's existing guidance and long-established ERISA case law.[142]

Y. The final exemption might bar in-kind covered principal transactions even when they are in the Retirement Investor's best interest.

The Proposal asks for comments as to whether the definition of "Covered Principal Transaction" should be revised as "a principal transaction *for cash*", thus preventing in-kind transactions from being Covered Principal Transactions. The Proposal is seeking information regarding whether eliminating in-kind assets would reduce the complexity and conflicts of interest involved in these transactions.

- The preamble's concern with "complexity" is not a valid reason to foreclose investment transactions that are in the best interest of Retirement Investors.
- The Proposal does not assert any reason to believe that in-kind transactions are any more conflicted than cash transactions.
- In any event, the whole point of the exemption is to provide relief for conflicted transactions.

Z. The preamble threatens unintended consequences for PEPs and PPPs.

The preamble requests comment on how pooled employer plans (PEPs) and pooled plan providers (PPPs) may use this exemption. Although not part of the Proposal, the Department is considering adding language that would allow Investment Professionals, Financial Institutions, or any Affiliates to be a named fiduciary or plan administrator of the PEP, if that named fiduciary or plan administrator is a PPP that is registered with the Department under 29 CFR §2510.3-44. The preamble also states that the exemption would not provide relief for a PPP's decision to hire an affiliated or related party as an advice provider.

In requesting these comments, the preamble raises the possibility of role confusion and unintended consequences for a plan structure intended to grow the reach of the private retirement system.

- The PPP is a plan sponsor and named fiduciary. Moreover, the decision by an individual employer to participate in the PEP is a settlor function. As the Department is aware from the comments it received in its RFI for pooled employer plan regulations, in many cases a PPP may be an investment provider or an affiliate thereof.
- When an individual employer is considering participating in the PEP, whether or not based on the advice of an Investment Professional, the PEP generally already exists and already has named fiduciaries. The PPP is always a named fiduciary and, in most cases, has appointed a named investment fiduciary, which may be itself or an affiliate. When an employer decides to become a participating employer, it is the one making the decision to accept the whole package including the named fiduciaries.
- There is not a prohibited transaction in this process because the participating employer is the decision maker. We are concerned that the preamble's statement that the exemption

[142] *See, e.g.*, Advisory Opinion 2023-01A (Sept. 29, 2023); Advisory Opinion 2006-08A (Oct. 3, 2006).

would not be available to hire an affiliate or a related party would be construed as meaning that a PPP would have to appoint a competitor as named investment fiduciary, which would be contrary to current practice.

AA. The mass revocation of five other exemptions, as applied to investment advice, will be disruptive.

The proposed amendments would remove fiduciaries providing investment advice, as defined under ERISA and in proposed regulations, from the relief provided in PTEs 75-1, 77-4, 80-83, 83-1 and 86-128. Investment advice fiduciaries would be required to rely on the amended PTE 2020-02 for exemptive relief in connection with investment advice transactions.

- The Department proposed these amendments out of its administrative predilection to channel all conflicted recommendations through PTE 2020-02, without any meaningful understanding of the practical consequences of that change for either Retirement Investors or financial services firms.
- This transition is not as simple as sending out new documentation to a group of investors. These exemptions are operational in nature, meaning that entire business operations and systems have been structured with these exemptions in mind, for 37 to 48 years. For example, PTE 75-1 was the first class exemption issued by the Department, on the basis that it was indispensable to the ongoing operation of financial markets and utilization of those markets by ERISA plans.
- If the proposal is adopted, unintended consequences – in access by ERISA plans and Retirement Investors, in costs, or otherwise – will surely follow.

BB. Investors will be hurt if PTE 86-128 is amended to exclude relief for investment advice.

The Proposal would delete relief for conflicted investment recommendations from PTE 86-128, solely for the purpose of channeling all such recommendations through PTE 2020-02.

Our members that have relied on PTE 86-128 attest that it is a formidable exemption, particularly in its "fee offset" requirement; that it is not used lightly, because of that requirement; and that it provides a significant economic benefit to Retirement Investors when it is used, because the investor effectively receives two investment services for the price of one.

This is a very concrete instance where costs to Retirement Investors will increase if the Proposal is adopted. Because of the material cost savings PTE 86-128 provides for investors, it is a mistake for the Department to amend it as proposed, solely to preserve the exclusivity of PTE 2020-02. The Proposal elevates the Department's conceptual objectives over the economic interests of Retirement Investors.

III. The Department's process for this rulemaking did not provide a full and fair opportunity for public comment.

A. The public comment process allowed by the Department to respond to this rulemaking was inadequate.

For the record, we note our objection to the inadequate 60-day comment period allowed by the Department for this rulemaking, and to the scheduling of the hearing before the end of the comment period. Given federal holidays and weekends, the comment period encompassed only 39 working days. For the reasons stated in the letter of November 8, 2023, in which FSI and other stakeholders requested an extension of the comment period, this is a highly complicated rulemaking for which, based on the Department's prior practice for its initiatives on this topic that included a new regulation, a minimum of at least 90 days should have been allowed and for which a period of 120 days was justified. In declining our request, neither the Department's references to prior interactions during this long-running undertaking and more recent informal meetings with stakeholders, before the current Proposal was known to the public, nor its offer to meet during the comment period, is an answer to the lack of fair opportunity to review the Proposal as published and develop considered comments.

The scope and consequences of the Proposal exacerbated this problem. Despite best efforts, we were unable to complete a careful economic analysis of the Proposal – which the inadequacy of the regulatory impact analysis accompanying the Proposal made particularly difficult – within such a compressed comment period and will be submitting our complete economic analysis after the comment period closes.

The preambles to the Proposal specifically request input on over 100 separate items, which suggests the possibility of material changes to the final rule and exemptions, about which, individually or in combined effect, the public will not have the opportunity to comment.

Finally, by scheduling the hearing before the end of the comment period, the Department provided no opportunity to consider and respond to the comments of others. We have every expectation that, in adopting a final rule and PTE amendments, the Department will make use of comment letters provided by the Proposal's proponents, without providing its critics an opportunity to refute those letters, and conversely will credit comments made by critics without giving proponents an opportunity to respond.

This was not a rulemaking process that legitimates the final regulation and exemptions the Department will adopt.

B. The Department's invitation to comment on severability did not provide notice of its initial position and thus does not provide any basis for an informed response.

While the preamble posits the possibility of severability and expresses the Department's general intentions on the subject, it neither includes a specific severability proposal nor provides any initial rationale for severability. Because the preamble does not make such initial positions available for comment by interested parties – that is, the preamble does not provide adequate notice of the Department's proposed position – we have no basis on which to provide any informed, meaningful response.

We do note that, in *Chamber of Commerce v. DOL*, the Fifth Circuit held that "this comprehensive regulatory package [i.e., the 2016 rulemaking including revised exemptions] is plainly not amenable to severance."[143] The current Proposal is certainly no less comprehensive, integrated and cross-dependent than the 2016 rule.

IV. The proposed compliance date is patently unreasonable and must be changed.

We understand and accept that the final rule will have a nominal effective date of 60 days after publication in the Federal Register. The question of the period for compliance with the final rule is a different matter altogether.

Based on their experience with transitions to both the 2016 rule and Regulation BI, our members certify that compliance within 60 days after the final rule is an impossibility.

- For the reasons discussed above, Regulation BI compliance is only a starting point.
- Under the five-part test, our members generally take the historical position that financial advisors are not fiduciaries and that compliance with PTE 2020-02 is not required. Many firms followed PTE 2020-02 for rollover advice, as a matter of caution, but not all continued that practice after the New York court decision.
- There are important compliance considerations and practices that will not be definitive until the final rule is published.
- To the extent vendor assistance will be needed, that assistance cannot possibly be offered, arranged, and installed across the affected financial services businesses in 60 days.

A reasonable compliance date should allow for adequate time for affected parties to become aware of the new regulation, sufficient time to understand the requirements and implications of compliance, and reasonable time to implement necessary changes or adjustments to adhere to the regulation. Some of our members do not currently rely on PTE 2020-02 and will have to develop a full compliance system. Many of our advisors are not fiduciaries under the current definition and will need time to assimilate the full meaning of that status in their operations before the date that they will instantly become fiduciaries.

Furthermore, there are practical reasons why sixty days is insufficient. Regardless of whether currently utilizing PTE 2020-02, members will need time to budget for the costs associated with compliance, even before the implementation process begins. The new standards for fiduciaries, the training and follow-up supervision required to ensure compliance, and the administrative and systems processes that will need to be implemented, will require, at minimum, 18 months to be put into place. Even this estimation assumes that some of the more onerous disclosure provisions being considered by the Department are not adopted, that a conventional grandfather rule is adopted, and that many of the existing exemptions are preserved largely in

[143] 885 F.3d at 388.

current form. If these recommendations are not adopted by the Department, firms will require a much longer transition period.

Finally, as described above, the comment period provided during this rulemaking process has been unreasonably short, which means stakeholders have not had time for meaningful public participation. As a result, there will necessarily be bumps in the road to compliance, as some provisions will likely remain unclear and there is a real possibility that provisions will be unworkable. Some of this could have been avoided through an adequate notice and comment process but will instead have to be worked through during the compliance preparation process.

For the foregoing reasons, compliance with the Proposal as adopted should not be required until 18 months after publication in the Federal Register.

Conclusion

In promoting the Proposal, the Department asserted it is "much more narrowly tailored" than the vacated 2016 rule and suggested that it only filled regulatory gaps for "investment advice services that are neither subject to the SEC's Regulation Best Interest nor to the fiduciary obligations in the Advisers Act."[144] Had the Proposal, on inspection, held up on either or both of those assertions, our position would be very different. As it is, however, we believe the Proposal must be withdrawn.

FSI remains committed to constructive engagement in the regulatory process and welcomes the opportunity to work with the Department on this and other important regulatory efforts.

Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 379-0943.

Respectfully submitted,

Dale E. Brown, CAE
President and CEO

[144] 88 Fed. Reg. at 75900, 75901. Under the vacated 2016 rule, any person who directed a paid recommendation to a retirement investor was a fiduciary. Under the Proposal, any investment professional who makes a paid recommendation to a retirement investor would be a fiduciary. Inasmuch as only investment professionals are generally allowed by other applicable law to make paid investment recommendations, the Proposal is not "much more narrowly tailored."