BANK OF AMERICA

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Assistant Secretary Jeanne Wilson
Employee Benefit Security Administration
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: *Application No. D-12011*
ZRIN 1210-ZA29

Dear Ladies and Gentlemen:

Bank of America[1] appreciates the opportunity to submit this letter in response to the Department of Labor's ("DoL") proposed class exemption (the "Proposed Exemption") covering the receipt of fees in connection with the provision of nondiscretionary investment advice.[2]

Bank of America, through its Merrill Lynch Pierce Fenner & Smith Incorporated subsidiary ("Merrill"), has more than 4.3 million households invested through brokerage and investment advisory accounts holding more than $2.8 trillion in assets. Our clients range from small households to ultra-high net worth investors, with widely divergent financial circumstances, financial goals and objectives, and investment strategies. Bank of America seeks to meet the needs of these investors with an array of services and products, from self-directed "no advice" brokerage, to an online investment advisory program, to brokerage accounts and discretionary investment management, with differing levels of advice (or no advice), types of investable assets, and fee arrangements.

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[1] Bank of America Corporation is one of the world's largest financial institutions, serving its clients with a full range of banking, investing, asset management and other financial and risk management products and services. It is among the world's leading wealth management companies. Certain Bank of America Corporation affiliates are registered as both broker-dealers and investment advisers.

[2] 85 Fed. Reg. 40834, July 9, 2020.

Bank of America appreciates the DoL's efforts to align the Proposed Exemption with the Securities and Exchange Commission's Regulation Best Interest ("Reg. BI").[3] The Proposed Exemption's overall consistency with Reg. BI represents a welcome; and productive, step toward facilitating the provision of non-discretionary investment advice by fiduciaries subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA") or Section 4975 of the Internal Revenue Code of 1986 as amended (the "Code"), outside the context of an investment advisory relationship. By proposing a largely workable exemption, the DoL has encouraged financial services firms to accept a fiduciary standard of care for ERISA plans and their participants as well as individual retirement accounts ("IRAs") and other plans and accounts subject to Section 4975 of the Code (together "retirement investors"), who desire to receive their advice through a transaction-based brokerage arrangement. However, as detailed below, the Proposed Exemption includes a number of troublesome conditions that may hinder broad adoption by financial services firms. Our comments focus on critical changes needed to more closely align the Proposed Exemption with Reg. BI and to encourage firms to structure their products and services in a way that encourages the provision of professional investment advice to retirement investors, while making the process to comply efficient and effective to avoid additional costs being passed onto investors.

1. <u>Eliminate the Written Acknowledgment of Fiduciary Status</u>

We believe that the DoL should eliminate the condition in Section II(b)(1) that requires "a written acknowledgement that the Financial Institution and its Investment Professionals are fiduciaries under ERISA and the Code, as applicable, with respect to any fiduciary investment advice provided by the Financial Institution or Investment Professional to the Retirement Investor". As the DoL recognizes, whether all prongs of the "five-part" test will be satisfied, "will be informed by all the surrounding facts and circumstances."[4] Large, complex financial institutions, such as Merrill, offer different products and services and our advisors interact with their clients and prospects in diverse ways. In our view, it would not be reasonably practicable on a case by case basis (or even on a service by service basis) to make that <u>factual</u> determination of fiduciary status. To address the practical issue, we could essentially be forced to comply with the exemption conditions in situations where we are not acting as a fiduciary, but there is some <u>risk</u> that fiduciary status could attach to a particular interaction.

We note that PTE 84-24, the primary exemption for insurance agents and brokers, is expressly available to people who are such inadvertent fiduciaries. We believe that the DoL should account for "inadvertent fiduciaries" in the Proposed Exemption so long as the financial institution satisfies the other conditions of the exemption. Removal of this express acknowledgement will eliminate the problematic choice of either trying to conduct case by case facts and circumstances analysis or acknowledging fiduciary status in all cases, even where that is not the true nature of the relationship. Eliminating the written acknowledgement of fiduciary status would go a long way to achieving the DoL's goal of encouraging use of the Proposed Exemption.

[3] SEC, Regulation Best Interest, 17 C.F.R. § 240.151-1 (2020).

[4] 85 Fed. Reg. at 40839.

Moreover, written acknowledgement of fiduciary status does not enhance the substantive controls on "conflicts of interests", but instead would likely only create investor confusion. Reg. BI requires disclosure that the broker dealer is acting in the "best interest" of the client, including when making account recommendations like a rollover. The DoL's disclosure requirement would mean that a client or prospect is told that the financial professional is acting both as a fiduciary and in the client's best interest for the account recommendation. If the DoL's goal is to align with Reg. BI, including its disclosure obligation, then the SEC's disclosure alone would achieve this goal.

2. Broaden the Exemption for Principal Transactions

The Proposed Exemption provides relief for only limited types of principal transactions. This prescriptive approach is inconsistent with Reg. BI -- which imposes no such restrictions -- and unnecessarily limits retirement investor choice. The limitations on sales of securities to retirement investors seem to be modeled largely on those included in the Principal Trading Exemption issued in connection with the 2016 fiduciary rule. And, the rationale is essentially the same -- principal transactions by their very nature raise conflict concerns and "can be associated with low liquidity, low transparency, and the possible incentive to sell unwanted investments held by the Financial Institution." Those limitations created hardship in 2016 and will create similar unfairness for retirement investors if carried forward as conditions to the Proposed Exemption. In particular, the Proposed Exemption does not cover market-linked investments, certain structured notes, closed-end funds, equities or foreign securities. Certain types of investments can only be purchased in a principal transaction, and there is no persuasive reason for the DoL to substitute its investment judgment and foreclose the retirement investor from investing in certain segments of the market.

The limitations regarding "moderate credit risk" and "sufficient liquidity" are likewise problematic as they are difficult to apply, and for any particular security, the judgment made may change depending on market conditions at the time. This difficultly will serve to further limit the securities that may be sold to retirement investors on a principal basis.

3. Eliminate the Exclusion for Recommendations to Employees of a Financial Institution

We recommend deletion of the exclusion in Section I(c)(1) of the Proposed Exemption. There is no basis for restricting use of the Proposed Exemption for transactions involving ERISA covered plans if the "Investment Professional, Financial Institution or an affiliate is . . . the employer of employees covered by the Plan." The effect of this exclusion is to force an employee of a Financial Institution, who may have been working for many years with an advisor who is also an employee of the same Financial Institution, to seek advice from an unaffiliated third party for any transaction, including advice with respect to a rollover, involving their ERISA plan assets. The condition discriminates against a retirement investor employed by a Financial Institution, by restricting him from receiving certain services that the institution offers with respect to his ERISA plan assets. The general requirements to comply with ERISA's fiduciary standards of care and the conditions of the Proposed Exemption, in and of themselves, serve to mitigate any potential conflict concern.

4. Robo-advisors Should be Permitted to Use the Proposed Exemption

The DoL should eliminate the exclusion in Section I(c), and the Proposed Exemption should be available as a result of "investment advice generated solely by an interactive web site in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the website, without any personal interaction or advice with an Investment Professional (*i.e.*, robo-advice)." In many cases, robo-advisors that do not involve human interaction are intended to be simpler, lower cost investment solutions. Once an individual decides to invest through a robo-advisor, the firm will generally receive a level asset-based fee and act as a fiduciary and an investment adviser to the client. Thus, the Proposed Exemption would not be necessary once the retirement client selects the robo-advisor solution. We are concerned, however, that the initial on-line questions and output of the models could rise to the level of "investment advice" to enroll in the robo-advice program. Even if that is not a concern today, it could become a concern in the future as robo-advisors become more sophisticated. To address this concern, the Proposed Exemption should be available. It is significantly less burdensome than Sections 408(b)(14) and 408(g) of ERISA (and the analogous provisions in Sections 4975(d)(17) and (f)(8) of the Code). If firms needed to use a complex exemption simply because of the risk that the initial online questionnaire might be considered investment advice, that would turn on its head the entire point of an online robo-advisor (simple, streamlined, low cost advice). If nothing else, the incremental compliance costs associated with Sections 408(b)(14) and 408(g) of ERISA may very well be passed on to clients – precisely the result that one wants to avoid with an online investment solution.

5. Disclosure Should Be Prior to or at the Time for Delivery

The Proposed Exemption's disclosure requirement in the Impartial Conduct Standards requires it to be delivered "prior to engaging in a transaction pursuant to this exemption." Reg. BI by contrast requires delivery of its disclosure to be done "prior to or at the time of the recommendation." We urge the DoL to harmonize the disclosure delivery requirement with Reg. BI and to add the phrase "or at the time of" in the exemption text. Firms have already built systems and processes to meet the Reg. BI delivery requirement as of June 30, 2020, and it would be quite burdensome to develop new processes and systems to change the delivery requirement to be done "prior to engaging in a transaction." We also request that the DoL clarify that there is no obligation to deliver the disclosure for every transaction, and that following Reg. BI's disclosure requirements would be sufficient.

6. Rollover Documentation Requirements are Not Workable

Bank of America agrees that recommendations to rollover from an ERISA covered plan to an IRA should be documented, and we do so today. However, the preamble of the Proposed Exemption goes too far in proscribing details of the process the fiduciary should follow. For example, in the context of a rollover from an ERISA plan to an IRA, the DoL states that, if the retirement investor is unwilling to provide information regarding plan expenses, even after a full explanation of its significance, and the information is not otherwise readily available, the advisor should make a reasonable estimation of expenses, asset values, risk and returns based on publicly available information and explain the assumptions used and their limitations. It would be virtually impossible to complete this type of calculation and should not be necessary in cases where the retirement investor – who would be able to obtain the information – has simply said no to providing his current plan expenses. Moreover, even if the information is available, cost comparisons may be difficult in cases where an individual has not decided definitely on an investment strategy before rolling over. We separately note that in other contexts, such as an IRA to an IRA rollover, the fact patterns and relevant factors to consider will necessarily be different. IRA to IRA rollovers by their nature should raise fewer concerns than ERISA plan to IRA rollovers. Requiring extensive documentation for these types of transactions would necessarily be complex and costly to operationalize, and the incremental costs are reasonably likely to be passed through to clients. Thus, we urge the DoL to clarify that the Preamble factors listed as part of a "prudent" recommendation are not required, but rather are examples of the type of information that could be obtained on a rollover. Fiduciaries should be permitted to determine, based on their own judgment, business model, the type of rollover and other facts and circumstances, what information to gather and collect in making a rollover recommendation that is in the "best interests" of the client.

7. The DoL Should Not Have Discretion to Revoke the Exemption

The Proposed Exemption should not include a condition that permits the DoL to revoke it where an individual or a firm has engaged in "egregious" violations of the conditions of the exemption or provided materially misleading statements to the DoL in connection with use of the exemption. The "six months" cure period and single in-person conference do not afford a firm sufficient "due process" and opportunity to be heard. In the end, the DoL has full control over whether the exemption continues to be available. Further, the ability to revoke the exemption for the firm and others in the same "control" group threatens to have a material adverse impact on a large, complex organization like Bank of America. A DoL determination that there are material exemption compliance failures with respect to a particular service could cripple the ability to use the Proposed Exemption for very different products and services and across the entire firm. The DoL has worked hard to craft a workable exemption that financial services firms could use to provide investment advice in brokerage accounts. By including a provision that gives the DoL discretion to revoke availability of the exemption, it has embedded a significant disincentive for a firm to spend the time and effort developing a business model and compliance infrastructure under which it would accept fiduciary status for retirement investors and comply with an exemption – only for it to be taken away.

8. There is No Need for an Annual Retrospective Review or CEO Certification

The retrospective annual review required by the proposed exemption is unusual, especially since a financial professional can use many other exemptions without such a review. Instead, we suggest that compliance with FINRA Rule 3130 should satisfy the DoL rather than create an entirely new process. Furthermore, we do not believe that the requirement for the review to be certified by the CEO of the financial entity is necessary. Particularly in a large organization like Bank of America, this type of certification would be highly complex and time consuming to implement. We note that Reg. BI does not have this CEO certification process; rather, Reg. BI relies on reasonably designed policies and procedures. Further, there is no comparable DoL exemption that requires the single highest officer of a firm to annually certify that an exemption is being followed. We believe that the requirement should be eliminated.

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Bank of America appreciates and supports the DoL's efforts to propose a more workable exemption covering the receipt of compensation for non-discretionary investment advice. We hope that our comments are helpful in making changes that even better align with Reg. BI and eliminate or modify those conditions that create disincentives to using the Proposed Exemption.

Sincerely,

Patricia Anne Kuhn