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Invested in America

August 6, 2020

Submitted via www.regulations.gov
Assistant Secretary Jeanne Wilson
Employee Benefit Security Administration
Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: ZRIN 1210-ZA29
RIN 1210 AB 96

Dear Secretary Wilson:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Department of Labor's proposed class exemption for the receipt of fees in connection with the provision of investment advice and its notice of Court vacatur of the 2016 rule relating to investment advice and several class exemptions issued or amended in conjunction with the 2016 investment advice rule. We strongly support the Department amending the Code of Federal Regulations to replace the vacated 2016 rule and re-implementing the original five-part test, reinstating Interpretive Bulletin 96-1, and reinstating the class exemptions that were part of the same 2016 initiative, as they existed prior to 2016. We also appreciate the Department's revising its website to reflect current law. In addition, SIFMA strongly supports a class exemption that will permit financial professionals to provide investment advice in a flexible fashion.[2]

While we have a number of comments on the proposed exemption, we nevertheless believe it represents an improvement over the approach taken in 2016. The exemption's intent is sound, constructive, and if finalized with the changes we suggest, will facilitate more investment advice for participants and IRAs, and more flexible methods of delivering that advice. In general, the exemption is a positive departure from the now vacated class exemptions, which were overly

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.
[2] U.S. Department of Labor, Employee Benefits Security Administration, Notification of Proposed Class Exemption, *Improving Investment Advice for Workers & Retirees*, 85 FR 40834 (July 7, 2020) ("Proposal").

prescriptive and administratively burdensome. The tremendous complexity and other concerns with the 2016 rule and exemptions had negatively impacted IRAs and other retail retirement savers by causing them to lose access to important retirement products and services they had previously been able to select.

We appreciate that the Department has sought to align this new proposed class exemption with the SEC's Regulation Best Interest ("Reg BI").[3] SIFMA strongly supports Reg BI, and its members have worked diligently to implement it. To the extent that the Department's proposed exemption follows the SEC's expertise on market areas, we applaud its decision to support different business models and preserve choice for retirement savers.[4] Our comments are intended to improve the ability of financial professionals and financial institutions to operationalize the requirements of the exemption, thereby expanding reliance on the exemption, and protecting plan fiduciaries, participants and beneficiaries.

We suggest important changes to certain parts of the exemption to clarify the Department's view that the Reg BI standards and the requirements of the class exemption are "functionally equivalent" and to eliminate confusion in that regard.[5]

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[3] Securities and Exchange Commission, Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 FR 33318 (July 12, 2019)

[4] The concept of a heightened standard of conduct for broker-dealers when providing personalized investment advice to retail investors has been studied and debated for decades. Reg BI is robust and expansive with significant duties and obligations imposed on broker-dealers that enhance investor protection. A SIFMA survey of firms earlier this year found that in response to the SEC's Reg BI, firms are making adjustments to their business models, prioritizing the management of conflicts of interest, strengthening their compliance systems and procedures, and investing significant resources to prepare for the rule's implementation.

The effort and costs to implement new regulations are substantial – under ordinary terms. The challenges to meet implementation have been magnified by the current pandemic. Nonetheless, firms report making strong good-faith efforts to be in compliance on day one, consistent with SEC guidance. Reg BI imposes a materially heightened standard of conduct for broker-dealers when serving retail clients. While principles-based, the rule is specific with respect to the duty and obligations brokers owe to their clients, and what steps they must take to comply, including the obligation to eliminate, or disclose and mitigate, certain conflicts of interest.

Under Reg BI, recommendations must be in the retail customer's "best interest." Reg BI explicitly provides that broker-dealers cannot put their interests ahead of the interests of the retail customer. Further, brokers will be held to this new standard under the robust examination and supervision regimes of the SEC and FINRA, as well as in FINRA's arbitration forum.

The new rule also requires broker-dealers to exercise reasonable "diligence, care and skill" in making recommendations. These principles are the core of a broker-dealer's "Care Obligation" in Reg BI. The newly implemented standard – together with existing standards – address the intended principles, goals and protections of the 2016 Department's fiduciary rule. Reg BI applies more broadly than the 2016 fiduciary rule because it applies to all retail customer accounts, not just qualified retirement accounts, and will allow the SEC and FINRA to enforce a common standard across the industry. At the same time, it avoids the many shortcomings that were embedded in the 2016 rule, such as those that threatened to lead to greater cost, less choice and fewer professional services and options for retirement savers.

The totality of these new, explicit regulatory requirements necessitates brokerage firms dramatically to enhance their supervisory and compliance regimes to the benefit of retail investors. The decade-plus of advocacy and recent and ongoing compliance work are worth it to uniformly enhance investor protection to the level investors should and do expect.

[5] For example, Regulation Best Interest requires financial institutions to, among other things, disclose or eliminate, firm-level conflicts of interest associated with recommendations to retail customers, identify and mitigate advisor-

In addition, we urge the Department to eliminate or adjust conditions that would limit retirement investors' access to full service brokerage accounts, including access to principal markets.[6] Finally, we believe that the Department should modify conditions in the exemption that impose significant and unwarranted burdens on the delivery of investment recommendations and that do not enhance the goal of providing investment recommendations that are in clients' best interest. With these changes, we think it more likely that the Department will attain its goal of encouraging plan participants and IRA owners to seek investment advice to increase their retirement savings, increasing choice, and making advice and education more accessible.[7]

I. Preamble Language Should be Consistent with the Department's Regulatory Action and Executive Order 13891

We urge the Department to make clear that that its commentary in the preamble to the proposed exemption is not intended to change over 45 years of case law concerning who is an ERISA fiduciary. The Department's regulatory actions in connection with this proposal, including reinstating the investment advice regulation from 1975, reaffirming that the test for whether one is an investment advice fiduciary under ERISA or the Code reverts to the 1975 five-part test, reinstating the class exemptions modified by the vacated fiduciary rule to their pre-rule status and reinstating Interpretive Bulletin 96-1 strongly indicate the Department did not intend to upend current law. However, the preamble to the proposed class exemption appears to undercut this restatement and recognition of current law. Much of the preamble's description of the five-part test appears to be taken from the Department's 2016 regulatory initiative that the Fifth Circuit Court of Appeals clearly set aside. Many of the comments in the preamble appear to have little or no support in any Department regulatory or sub-regulatory guidance, nor in any case law.[8]

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level conflicts that create an incentive for the advisor or the firm to place their interests ahead of the retail customer. Contrast with the Department's condition which combines the concepts of firm and advisor level conflicts of interest and requires that, "when viewed as a whole," they avoid misalignment of the firm's and advisor's interests with the client's interests in connection with fiduciary advice and transactions. Firms have designed and implemented policies and procedures based on the SEC's formulation and it would be unduly burdensome and duplicative to require a separate approach for retirement accounts. Under the Department's subjective condition, a firm would never know whether it has sufficiently mitigated firm level conflicts to the Department's satisfaction. We ask that the Department align this condition with the Reg BI obligation and not unnecessarily introduce confusion and uncertainty as to how to address conflicts of interest.

[6] For example, it would be particularly helpful for the preamble to specifically state that the Regulation BI and CRS disclosure meets the disclosure requirements of this proposed exemption, including with respect to the timing of the disclosure. In addition, as discussed later in this comment, the SEC fully understands those parts of the market where the industry trades as principal, and we think it would be a mistake for the Department to substitute its views of those markets for the views of industry regulatory experts. We think it is critical that retirement savers have the same access to services and products as other retail investors, including, if they prefer it, nonfiduciary full service brokerage.

[7] We urge the Department to make changes where the Department has departed from the SEC's approach. We recognize, as did the SEC, that a standard of care that puts the client's interest first does not equate to fiduciary status under ERISA or the Code. The Reg BI best interest requirement goes to a standard of care, not legal status, and simply following that standard should not inform whether a person is a fiduciary, including under ERISA or the Code with all of the attendant consequences. Where the SEC drew the line on legal status is at the obligation to monitor; giving advice on a regular basis, or with an understanding that the client might rely on it, does not make a person subject to the regime applicable to advisors.

For example, the preamble contains language that could be read as a strong inference that someone recommending a rollover is likely to be a fiduciary when financial advisors may provide education to the client regarding their options, including not "cashing out" and depleting retirement savings, or a rollover occurs during a "hire me" discussion and the financial advisor does not provide a recommendation regarding whether to rollover or stay in the plan.[9] The preamble suggests that because the decision is an important one, it could lead to fiduciary status.[10] The importance of the decision is not a factor included in any elements of the five-part test. Similarly, the preamble ignores the fact that often, clients seek information and education from several different financial professionals and may not rely on advice rendered by any one of the financial professionals as a primary basis for their investment decisions. Where the parties mutually agree to document the relationship as a non-fiduciary relationship, that agreement should be respected, under the Department's own regulations.

Nor is there support for the suggestion that if a financial professional would like to provide investment recommendations regularly in the future, that means the financial professional is *currently* making recommendations on a regular basis. Such anticipatory, but by no means mutually agreed to or assured, rights and obligations are simply not factors which enter into a present determination of fiduciary status under the five-part test. Further, neither the financial professional's nor the client's state of mind is part of the test.

There is nothing in the legislative history of ERISA, the preamble of the 1975 rule, nor any court case we have been able to find that suggests that a speculative or even hoped for future arrangement constitutes advice on a regular basis to a plan, making a financial professional a "fiduciary" at first blush under the regular basis test.[11] Such a reading does not, in our view, meet the plain language test for a reasonable interpretation of the rule. Nor does an ongoing brokerage relationship mean that the parties have mutually agreed to an ongoing fiduciary advice relationship under ERISA or the Code. Clients and financial professionals can mutually agree to the arrangement they want, and under the five-part test, that agreement is determinative. Congress has had numerous opportunities to legislatively overrule the five-part test or change it in any way it chooses. It has not. Accordingly, the Department's new gloss included in a preamble to an exemption purporting to state what the five-part test "really" must mean is not

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[8] We question whether the Department's interpretative pronouncements about a 40–year-old regulation are consistent with this Administration's guidance on issuing binding rules though a notice and comment process.

[9] We appreciate other statements by the Department acknowledging that not all recommendations or sales transactions with retirement investors will satisfy the five-part test. See FR at 40856 ("[A] one-time sales transaction, one-time sale of an insurance product, does not by itself confer fiduciary status under ERISA or the Code, even if accompanied by a recommendation that the product is well-suited to the investor and would be a valuable purchase"); id at 40839 ("The Department acknowledges that advice to take a distribution from a Plan and roll over the assets may be an isolated and independent transaction that would fail to meet the regular basis prong.")

[10] Proposal at 40838-40839

[11] We discuss later in this comment our view of the exemption's requirement that a person using the exemption must state in writing that it is a fiduciary. We see no evidence that the Department believes that such a declaration applies other than on a transaction by transaction, plan by plan basis.

entitled to deference.[12] Furthermore, the preamble of a proposed prohibited transaction exemption is not the right place to suggest such a position.[13]

Consistent with the mutual understanding prong of the five-part test, an agreement that the financial professional will act as a fiduciary with respect to one transaction or one account, even if it is a retirement account, does not mean that specific written non-fiduciary documentation in another account should be overridden or ignored. Indeed, many clients open one or more advisory accounts and one or more brokerage accounts for their retirement assets, to differentiate their level of involvement in investing the account. Where a client opens an advisory account, it signals an intention to rely on a financial professional. However, with respect to that client's brokerage accounts, it evidences just the opposite. Brokerage clients are prepared to listen to ideas, obtain pricing and see different solutions, but they will make their own decisions without relying as a primary basis on the financial professional. The preamble seems to ignore this reality.

Moreover, the fact that a financial professional is subject to a best interest or any other standard of care[14]in its recommendations is not telling as to whether the five-part test is met in any particular case. [15] If, for example, an existing retirement client interested in bonds regularly calls and seek quotes, background or general education on many different issues from several different professionals, then there would be no *actual* intention to use such information or any of those financial professionals as a *primary* basis for any investment decision. Some clients may rely on a financial professional for asset allocation advice, but merely seek education on rollovers.[16] We would also note that if a financial advisor recommends that a client rollover from a 401(k) plan to a brokerage IRA (which recommendation must be made in the client's best interest under Reg BI), that is a one-time recommendation with respect to the 401(k) plan and any advice provided thereafter with respect to the IRA and incidental where compensation received is for any transaction and not for the advice provided. In neither case would there be "on-going advice for a fee." One can rely, for investment education, on a particular financial professional without crossing the line into investment advice. ERISA and the Code provide that a person acts as a fiduciary "to the extent" that it provides investment advice for a fee. The financial professional does not become a fiduciary under ERISA and the Code in every conversation and for every

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[12] See Wilkie v. Kisor: 139 S. Ct. 2400 (2019) which stands for the proposition that courts can give no deference to an agency's interpretation of its regulation unless it is genuinely ambiguous. Here, the Fifth Circuit Court of Appeals found that the 1975 regulation is not at all ambiguous.

[13] See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993).

[14] We note that the preamble also departs from Reg BI in its discussion of sales contests. The Department paints with a broad brush any sales contest based on "certain investments". The SEC focuses on sales of specific securities or specific types of security investments within a limited period of time.

[15] The preamble can be read to conclude that any person who advises with respect to rollovers must be a fiduciary and suggests that Reg BI supports this view. We disagree. Reg BI requires a standard of care with respect to advice on rollovers. It does not say that advising with respect to rollovers makes a person an advisor required to register under the Investment Advisors Act of 1940.

[16] We strongly support and appreciate the Department's alignment with long-standing educational carve-outs for Plan Information; General Financial and Investment Information, Asset Allocation Models, and Interactive Investment Materials. Section 2509.96-1 Interpretive Bulletin Relating to Participant Investment Education. However, we have concerns that the preamble undermines the certainty for financial professionals who make retirement education available.

subject, merely because it is acting as a fiduciary under ERISA or the Code for other purposes or in another plan.[17]

We urge the Department to clarify that the commentary included in the preamble to the proposed exemption is not intended to reinterpret or amend unambiguous provisions of its 1975 regulation. We further urge the Department to abandon statements that depart from the case law under ERISA and the 5th Circuit's guidance in its vacatur of the 2016 Fiduciary Rule. Finally, we urge the Department to abandon its statements in the preamble speculating regarding what *it* believes might be a reasonable understanding of the parties in different scenarios. The Department's ideas about possible intents of individuals are not relevant to the five-part test. Rather, what matters is the mutual understanding and agreement of the parties. The idea that a unilateral understanding or an assumed expectation is sufficient to confer fiduciary status under ERISA or the Code is inconsistent with the words of the Department's regulation and with Reg BI. We note that the Fifth Circuit Court of Appeals did not validate the Department's views about the meaning of "fiduciary," and including in the preamble of this proposed class exemption the very concepts rejected by the Fifth Circuit is inconsistent with the language and meaning of the five-part test, as well as inconsistent with the letter and spirit of Executive Order 13891 and the characterization of the package as deregulatory.[18]

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[17] We would also note that one does also not become a fiduciary under ERISA purely when acting in a client's best interest. One still needs to meet each prong of ERISA's five-part test.

[18] Executive Order 13891, issued on October 9, 2019, provides as follows:

> Section 1. Policy. Departments and agencies (agencies) in the executive branch adopt regulations that impose legally binding requirements on the public even though, in our constitutional democracy, only Congress is vested with the legislative power. The Administrative Procedure Act (APA) generally requires agencies, in exercising that solemn responsibility, to engage in notice-and-comment rulemaking to provide public notice of proposed regulations under section 553 of title 5, United States Code, allow interested parties an opportunity to comment, consider and respond to significant comments, and publish final regulations in the Federal Register.
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> Agencies may clarify existing obligations through non-binding guidance documents, which the APA exempts from notice-and-comment requirements. Yet agencies have sometimes used this authority inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA. Even when accompanied by a disclaimer that it is non-binding, a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply. Moreover, the public frequently has insufficient notice of guidance documents, which are not always published in the Federal Register or distributed to all regulated parties.
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> Americans deserve an open and fair regulatory process that imposes new obligations on the public only when consistent with applicable law and after an agency follows appropriate procedures. Therefore, it is the policy of the executive branch, to the extent consistent with applicable law, to require that agencies treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract, take public input into account when appropriate in formulating guidance documents, and make guidance documents readily available to the public. Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract.

II. Scope of Exemption Too Limited

The proposed exemption should be broadened to cover a variety of activities that would be appropriate for inclusion in this exemption for the reasons we outline below.

a. Extensions of credit

The proposed exemption should be broadened to provide relief from the prohibitions of ERISA section 406(a)(1)(B) or Code section 4975(c)(1)(B) for extensions of credit in order to cover items such as overdraft protection, receipt of float, error corrections, settlement accommodations, short sales and other margin transactions, and paying fees in advance.

b. Clarification that "Hire Me" Conversations Do Not Make a Person a Fiduciary under ERISA or the Code

The proposed exemption should explicitly note that a financial professional urging a retirement investor to hire that financial professional is not fiduciary conduct under ERISA and the Code and there is no need to use this or any other exemption for that "sales pitch." Under the five-part test, courts have clearly indicated that a person urging a participant or IRA owner to hire them is not acting as a fiduciary when selling their own services. We strongly urge the Department to make clear that this exemption is not necessary when a person is urging their own hiring. We note that, even when proposing the very drastic changes in the 2016 rule, the Department understood that urging a prospect to hire a financial professional or financial institution was not fiduciary conduct under ERISA or the Code. Thus, the Department supported a "hire me" exclusion in the 2016 final fiduciary rule: "A person or firm can tout the quality of his, her, or its own advisory services or those of any other person known by the investor to be, or fairly identified by his adviser as, an affiliate, without triggering fiduciary obligations."[19] If the Department did not view urging a potential client to "hire me" as fiduciary conduct under ERISA and the Code under the significantly more expansive 2016 rule, it should not believe that it is fiduciary conduct under current law.

We would also like the Department to clarify that where a retirement client is provided a marketing brochure or sales presentation by a service provider on behalf of an affiliated advice provider, those materials and any hoped for relationship by such affiliate would not constitute nor be construed as part of an ongoing relationship that the individual enjoys with his advice provider.[20]

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[19] 81 FR 20946, 20968 (April 8, 2016).

[20] See Proposal at 40839. As noted elsewhere in this comment, the preamble misstates current law when it suggests that "anticipated" or "hoped for" relationships make a person a fiduciary under ERISA and the Code, regardless of whether the five-part test is met.

c. Fiduciary Status and Written Acknowledgment

The proposed exemption should cover "inadvertent" fiduciaries.[21] The proposed exemption only covers individuals who state in advance that they are fiduciaries within the meaning of ERISA or the Code. PTE 84-24, the primary exemption for insurance agents and brokers, is expressly available to people who are inadvertent fiduciaries. We believe that that should be the case here so long as the financial institution meets the other conditions of the exemption. We believe that this exemption should also cover individuals who are governed by appropriate policies and procedures, and make the appropriate disclosures, despite the fact that their intention was not to act as a fiduciary. We think it is far more important for financial professionals to meet the disclosure and impartial conduct requirements of the exemption than it is for them to specifically admit fiduciary status, which may be confusing to clients, inconsistent with other required disclosures and inconsistent with the understanding the parties have of their relationship. We fear that, notwithstanding the Department's indication that it "does not intend the fiduciary acknowledgment … to create a private right of action as between a Financial Institution or Investment Professional and a Retirement Investor and it does not believe the exemption would do so,"[22] the fiduciary declaration will in fact become an invitation to state law litigation just as the contract in the now vacated BIC exemption invited expensive state law litigation, which, as noted by the Fifth Circuit Court of Appeals, is inconsistent with the remedies envisioned by Congress in ERISA and the Code.[23]

Consistent with this principle, the proposed exemption should eliminate the disclosure requirement in Section II(b)(1) to make a written acknowledgment of fiduciary status under ERISA. There is no need for a written acknowledgment for all of the standards and conditions of

[21] Indeed, the exemption should cover financial professionals who exercise discretion and not just those who provide investment advice. Retirement investors who want discretionary management services should not be treated differently than those receiving non-discretionary support. To do otherwise would limit the discretionary client's access to the full range of products and services available to retirement investors who receive investment advice. For example, IRA investors who want to delegate the ability to execute transactions to their advisers will not be able to engage in the same transactions as IRA investors who receive advice on those transactions. This would be the case even though the adviser is a fiduciary in both instances and the transactions are otherwise identical. We believe there is no reason the Department should make this distinction in the exemption. The conditions of the exemption are sufficiently protective to mitigate any concerns relating to retirement investors whether they receive advisory or discretionary services.

[22] Proposal at 40844.

[23] The requirement of a declaration that one is a fiduciary is no different in intent or result than the contract requirement in the now vacated BIC exemption. In this context, we think the holding of Alexander v. Sandoval, 532 U.S. 275, 286 (2001) is controlling: Nothing in ERISA or the Code even hints that a state-law contract action can be brought against purported fiduciaries to enforce statutory provisions. ERISA's civil remedies are limited both in nature and scope, Great-W. Life &Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209-10 (2002), and the statute broadly preempts most state law, including breach-of-contract actions, Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272, 1275 (6th Cir. 1991). Further, ERISA's remedies have no application to non-ERISA plans such as IRAs. See 29 U.S.C. § 1002(1) & (2). The remedies under the Code are even more restricted than ERISA's, extending only to conducting audits and imposing taxes. 26 U.S.C. § 4975; see also Reorganization Plan No. 4 of 1978, § 105. The Fifth Circuit Court of Appeals agreed. See also Mertens v. Hewitt Assocs., 508 U.S. 248, 254 (1993) (stating Court's "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly" (internal quotation marks omitted)); Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.")

the exemption to apply. In our view, the requirement of a written acknowledgment is an attempt to reinstate the contract exemption, and its invitation to state law litigation through a different route. Importantly, this required acknowledgment is not consistent with Reg BI, which has only a requirement to disclose that the broker dealer is acting in the "best interest" of the client. The Department's written acknowledgment requirement would mean that a client or prospect is told that the financial professional is acting both as a fiduciary under one set of laws and in the client's best interest under Reg BI and Form CRS (but not as a fiduciary registered advisor for securities law purposes for the account recommendation.) We believe the client or prospect will be confused by such a disclosure, which has different standards in relation to the same activity. If the Department is trying to align this exemption with Reg BI, including its disclosure obligation, then the SEC's disclosure is all that is necessary. In requiring that, in order to use this exemption, a financial professional must assert in writing that it is a fiduciary under the law, the Department has departed from nearly every other exemption issued by it or by Congress without justification.

Furthermore, as a practical matter, under the proposed exemption, a firm will need to decide, based on yet to be determined facts and circumstances and "prior to entering into the transaction" whether the five-part test has been met with respect to the transaction. For firms subject to Reg BI and Form CRS delivery requirements, they will have to provide their retail investor clients with a Form CRS that describes their duty of care as a "best interest" standard with no mention of a duty of prudence and then include a second notification (beneath Form CRS in the same packet of materials since the Form CRS has to be the first document in the packet) with the Department's fiduciary acknowledgment with respect to their retirement accounts. If a client asks the financial advisor if they are a fiduciary, in order to avoid making a misleading statement the financial advisor would need to explain that they are not a fiduciary under the securities laws with respect to their brokerage accounts but are a fiduciary for purposes of the Tax Code with respect to their IRA brokerage accounts. This will be at the very least confusing and likely pose regulatory and litigation risk. This confusion over inconsistent standards was the precise issue that Form CRS and Reg BI were supposed to solve and the reason why the industry was heartened to hear that the Department would provide guidance that is consistent with Reg BI and Form CRS. Our members have concluded that the difficulties in operationalizing this requirement is a substantial disincentive to using the exemption, which will have a detrimental effect on the provision of investment recommendations to retirement accounts.

d. <u>Robo-Advice</u>

The proposed exemption provides no relief for the provision of robo-advice provided without a personal advisor. In our view, it makes no sense to require financial firms to rely on another exemption, requiring different policies and procedures, for robo-advice. The statutory exemption at section 408(g), and particularly the Department's implementing regulations, are widely considered burdensome, administratively cumbersome and overly prescriptive. This path also creates an unlevel playing field with insurance agents and mutual fund advisors, who can use PTE 84-24 for robo-advice. We would also note that excluding robo-advice from this exemption is inconsistent with Reg BI, and the Department's goal of harmonizing the proposed exemption with that regulation. Reg BI did not distinguish between robo-advice and other advice in terms of the rule's applicability, although the SEC clearly knew robo-advice was part of the market, as evidenced by its inclusion of references to robo-advisors in the market in the economic analysis. In addition, the SEC has made it clear that the standard of conduct obligations should be applied consistently between robo-advisors and other service models.[24]

The statutory exemption is itself inconsistent with this proposed exemption, and nothing in that exemption suggests that it alone is the exclusive exemption for robo-advice. Indeed, the proposed exemption does not require the use of the second part of the statutory exemption in lieu of any other exemption and there is no principled reason for uniquely imposing such a requirement on a particular advice model.

The proposed exemption also provides no justification, other than the potential availability of the statutory exemption in Section 408(g), for excluding robo-advice. That is, it does not explain why the addition of a human to a particular advice interaction has any bearing on the actual requirements of the class exemption. If the exemption is available if a financial professional reads to a client investment advice generated by a robo-advisor, then the exemption should be available if the client reads the same advice on a computer screen. If robo-advice is configured to meet the class exemption's requirements, that advice should be eligible for the class exemption. This exclusion would make the class exemption less durable over time as robo-advice offerings continue to evolve. More broadly, investors benefit from a diversity of advice models that meet applicable regulatory requirements, and arbitrarily excluding a particular model unnecessarily inhibits investor choice.

e. Principal Transactions

The proposed exemption covers only a few types of principal transactions.[25] That approach is particularly troublesome because it is inconsistent with Reg BI,[26] is overly prescriptive, and creates huge challenges for retirement investors. We note that it appears to include tests from the 2016 regulation, which SIFMA and others criticized at the time, relating to liquidity and credit risk, and which do not make sense in today's economy. We note that while the SEC borrowed from the Department's 2016 standard of care and enumeration of "red flag" situations, the SEC *did not* embrace the Department's conditions for principal transactions. In particular, the proposed exemption does not cover foreign debt, certain structured notes issued by US

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[24] See SEC Interpretation: https://www.sec.gov/rules/interp/2019/ia-5248.pdf.

[25] The proposal covers debt securities issued by a U.S. corporation. We think limiting the exemption just to debt of "corporations" is too narrow. The corporate form of the issuer should not dictate the ability to use the exemption. Various entity types issue publicly-traded debt, including limited liability companies, limited partnerships and trusts. The exemption should just use the term "entity." We also think limiting the exemption to just domestic entities or entities that issue debt in U.S. dollars is too narrow. An issuer's jurisdiction of incorporation or domicile does not make the investment either more or less risky to the investor. The same could be said for the currency in which the debt is denominated.

[26] Under a best interest standard, the SEC does not prohibit certain principal trades, and the conflicts inherent in principal trades are addressed in Reg BI through mitigation, including disclosure and consent. The Department seems to think that certain transactions are per se impermissible for retirement accounts and outside the scope of the proposed exemption, indeed, for any exemption, if we were deemed to be a fiduciary in our recommendation of those securities traded on a principal basis. The principal transaction restrictions would tighten what we are permitted to do under SEC rules. This would limit what investments we could recommend to retirement investors, and it might also indirectly negatively impact our ability to underwrite those securities as well.

corporations and subject to registration requirements under the Securities Act of 1933, or closed end funds, equities (including fractional shares), new issues,[27] currency or foreign securities.[28] In addition, the requirements that securities must have a "moderate credit risk" and be of "sufficient liquidity' is equally misplaced and would exclude from IRAs, for example, new issue below investment grade debt securities. We do not believe that the Department should substitute its judgment for the retirement investor and the financial professional who will be required to act in the client's best interest under Reg BI and ERISA.

f. Affiliates

Lastly, we urge the Department to add foreign affiliates of banks, broker dealers, insurers and advisors to the entities covered by the exemption. We note that PTE 77-4, 84-24 and 86-128 all cover foreign affiliates and we see no reason why this exemption should be written more narrowly. We believe providing these expansions of the PTE would help serve investors, given the increasingly global nature of retirement services.

III. Impartial Conduct Standards Should Not Be a Condition of the Exemption for ERISA Plans or IRAs

As we noted in 2016, we do not believe that the impartial conduct standards, which in part are based on subjective criteria, belong in a prohibited transaction exemption. Those standards are already in ERISA, and in particular, there is a huge body of case law on the meaning of prudence. Inclusion in the exemption is duplicative and adds a penalty for lack of prudence that Congress specifically chose not to apply. None of the statutory exemptions contain a condition so capable of subjective determinations as the proposed exemption's prudence requirement.[29] Moreover, the Department's individual exemptions often recite that compliance with exemptions does not relieve a fiduciary of its duty of prudence. We do not understand, nor agree with, this departure from the Department's long observed crafting of exemptive relief that mirrors that of Congress. By definition, prudence is based on facts and circumstances, measured in relation to what others might do (which itself is a very fluid concept). We believe the best path forward would be to require financial institutions to have and enforce policies and procedures based on concepts similar to the impartial conduct standards. This is especially true of a prudence condition, which by definition is a subjective concept, especially since it is based on what

[27] The "Covered Principal Transaction" exemption should be expanded to include equity syndicate offerings. Existing federal securities laws offer safeguards for these transactions in addition to ERISA. For example, syndicate transactions are sold via an offering document (either a prospectus or official statement) and which includes robust disclosures about the issuer; details on compensation paid to the selling broker; a section on the underwriter's conflict of interests.

[28] For example, the price of a share of stock may be too great for one client, but a broker dealer could provide it as a fractional share if able to provide as a principal transaction. To the extent that an IRA wants to invest in Amazon, which was trading at $3,186 a share on July 10, 2020, a broker-dealer would be able to make this available to them in a fractional share.

[29] We note that the Department has moved to the SEC formulation of best interest and dropped the "without regard to" formulation, which would have been nearly impossible to operationalize. We think this was a very positive change.

similarly situated fiduciaries might do.[30] For plans covered by ERISA, these standards in the exemption are unnecessary, since they are quite clearly required and enforceable under section 404 of ERISA which have their own set of penalties and governing case law. No statutory exemption contains prudence or best interest requirements; Congress clearly did not believe that such subjective conditions belonged in an exemption that could require reversal and the payment of excise taxes.

We were particularly surprised to see the impartial conduct standards as a requirement for IRAs. These standards, by their terms, do not currently apply to plans only subject to the Internal Revenue Code, and the Fifth Circuit Court of Appeals determined that the Department was acting outside its authority by adding to the requirements of the Code provisions that Congress chose not to apply to such accounts.[31] We urge the Department to remove these standards from the exemption.

If the Department declines to remove the Impartial Conduct Standards from this exemption, then we would ask, in order to be consistent with Reg BI, the Department to make adherence to the Reg BI Best Interest Standard of Care a safe harbor for complying with the Department's Impartial Conduct Standards such that so long as neither the SEC nor FINRA finds that a firm (or its financial professional) has violated the SEC's standard, the firm will have a rebuttable presumption that it has met the Impartial Conduct Standards condition of the proposed exemption.[32]

IV. The Delivery Requirement for the Disclosure Should Be Harmonized With Reg BI

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 Department 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 Department clarify that there is no obligation to deliver the disclosure for every transaction, and that following Reg BI's requirements would be sufficient to meet the exemption's conditions.

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[30] We note that the SEC explicitly rejected the use of "prudence" in the Care Obligation of Reg BI stating that it is "superfluous and unnecessarily presents the possibility for confusion and legal uncertainty", 84 FR 33318, 33375 (July 12, 2019). The Care Obligation requires broker-dealers to "exercise reasonable diligence, care and skill." It is not clear what the term "prudence" adds to this. Since the Department's stated intention is to align this class exemption with Reg BI, we urge the Department to eliminate the concept of prudence, if the impartial conduct standards are retained.

[31] Chamber of Commerce of the United States of America et al v. United States Department of Labor, 885 F. 3d 360, 364 and 381 (5th Cir. 2018).

[32] Should the Department decide not to align with Reg BI here, we would ask for either a corrections process or acknowledgment that if a firm's policies and procedures contain a corrections process, so long as corrected in accordance with those procedures, there will be no prohibited transaction.

V. Criminal and other Disqualification Provisions Should Not Be a Part of the Exemption

We disagree with the Department's decision to add in a criminal disqualification and a systemic administrative bar in the proposed exemption.[33] No other statutory or class exemption has such a provision, other than the Qualified Professional Asset Manager ("QPAM") exemption, and we note that even the exemptions that serve the same purpose as QPAM, issued both before and after QPAM, have not included this provision.[34]

It is worth noting that the Department already has the authority to take action if an entity is convicted of a criminal violation under ERISA section 411. In such a situation, the Department can appear before the sentencing court and seek a bar from that entity acting as a fiduciary. Further, in the case of an individual, the bar is automatic. Since an entity can continue to act as a fiduciary, earning fees under any number of different exemptions, we do not understand why this particular exemption would be treated differently. We think it instructive that when Congress enacted an investment advice exemption, it included no such disqualification. Nor does the explicit disqualification in ERISA section 411 cover any entity other than the convicted entity. We urge the Department not to create an arbitrary penalty that does not appropriately further its law enforcement goals.

We further urge the Department to reconsider disqualifying an entity's use of the exemption for systemic violations. As we noted in our comments on the BIC exemption in 2016, giving the exemption staff of the Department the authority to decide what are "systematic violations" of the exemption, without an opportunity for a hearing before an administrative law judge and due process, is a mistake. We recognize the Department provides for an opportunity to be "heard." However, that opportunity is narrowed to one in-person conference before the Office of Exemption Determinations. This proposal simply does not provide for an appropriate due process opportunity and would lead to inconsistency and unfair administrative process. As we have seen in the QPAM context, the staff's distinctions among crimes and applicants have created significant hardships for plans and QPAMs. We urge the Department to remove this disqualification condition.

Ultimately, we do not believe a condition of an exemption should be used as a substitute for the Department's enforcement. If the Department finds, in the course of a particular investigation, that a financial professional has "mis-sold" a particular kind of investment, it can require, as part of its investigation settlement, that the financial professional no longer sell this investment to retirement accounts. If the Department's aim is to be able to investigate IRAs, which it does not now have the authority to do, we think bootstrapping investigative and enforcement authority over IRAs into this proposed exemption is inappropriate and inconsistent with the Department's

[33] We assume that the class exemption only becomes unavailable for disqualifying convictions after the effective date of the exemption.

[34] See PTE 90-1, PTE 91-38, PTE 96-23, PTE 95-60. See also ERISA section 408(b)(17) and section 408(g).

authority under ERISA and the Code, the decision of the Fifth Circuit Court of Appeals and the Reorganization Plan of 1978.

VI. Documentation Requirements and Comparison of Current Plan Information are Burdensome

In the preamble, the Department notes with regard to rollovers that if a participant is unwilling to provide information to the investment professional about the participant's existing plan, then the financial professional would need to make a reasonable estimation of "expenses, asset values, risk, and returns based on publicly available information and explain the assumptions used and their limitations to the Retirement Investor." This is a steep hurdle for the financial professional and inconsistent with Reg BI and FINRA Regulatory Notice 13-45. Moreover, if the participant is unwilling to share the information, then that should be the choice of that individual investor. It is worth noting that under the Reg BI standard, the investment professional needs to have a reasonable basis to believe the IRA rollover is in the best interest of the retail customer given that individual's unique needs and circumstances, taking into account the retail customer's investment profile and other relevant factors, including the potential risks, rewards, and costs to rolling over versus the current account. However, there is no specific mandate in Reg BI to track down information that the investor chooses not to or is unable to provide to the investment professional.[35] The class exemption should not impose such a requirement. And, there is no prescriptive documentation requirement under Reg BI like the proposed exemption. [36] The Department's assumptions that firms are already documenting specific plan information for all rollover recommendations is not a realistic reflection of today's existing processes and technologies. [37] We also believe the Department improperly lumped recommendations related to IRA transfers and transfers between brokerage and advisory accounts together. The latter two types of recommendations are not irrevocable and should not require documentation. Clients transfer funds between brokerage and advisory accounts on a regular basis for many reasons including to free up cash needed to pay living expenses over a shorter timeframe. To require documentation for such transfers would create an unnecessary and impractical burden. Rather than adopt prescriptive requirements, we urge the Department to adopt the same principles-based approach as the SEC for documentation requirements. The Department should focus on reasonable oversight practices and supervisory processes to ensure compliance.

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[35] If the Department believes that it is critical for every financial professional to have full and accurate and up to date information on every plan, it could facilitate that process by creating a searchable database of the investment options and costs of all plans. In the absence of that kind of database, financial professionals generally take the position with their plan participant clients that it is likely that the plan will be less expensive and the investment options will be lower cost, in the plan compared to in an IRA. We believe such a presentation should not only be acceptable, but accomplishes the Department's goals in a more straightforward, cost effective way.

[36] The proposal states: "For purposes of compliance with the exemption, a prudent recommendation to roll over from an ERISA-covered Plan to an IRA would necessarily include consideration and documentation of the following: the Retirement Investor's alternatives to a rollover, including leaving the money in his or her current employer's Plan, if permitted, and selecting different investment options; the fees and expenses associated with both the Plan and the IRA; whether the employer pays for some or all of the Plan's administrative expenses; and the different levels of services and investments available under the Plan and the IRA." Proposal at 40845.

[37] See Proposal at 40855 ("Department expects that many Financial Institutions already document significant decisions like rollovers."); Id. at 40856 ("To estimate costs, the Department further assumes that approximately 50 percent of 1.8 million rollovers involve financial professionals who already document rollover recommendations as a best practice.").

We also note that for the first time, the Department suggests in the preamble that the impartial conduct standards would require a fiduciary to consider other methods of investing a participant's assets under the plan's menu before recommending a rollover. This new and unprecedented requirement is extremely surprising, and is inconsistent with ERISA, Reg BI and FINRA Regulatory Notice 13-45. A financial professional has no reasonable basis to reconsider how a participant has allocated his account under the plan, nor has the financial professional been retained to do so. In fact, financial professionals are typically precluded by their firms from making recommendations on held-away assets, an activity which the financial institution would not be able to supervise. This language should be removed from the preamble and instead, the preamble should make clear that the financial professional is under no obligation to provide investment advice with respect to the options under the plan.

VII. Retrospective Annual Review Should Not Be Included

We appreciate the Department's recognition that requiring a third-party external audit would impose significant costs and other logistical and market challenges.[38] 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. We do not understand why this particular exemption is requiring such a review since no other exemption providing section 406(b) relief does. We urge the Department not to be overly prescriptive here, but instead to allow each industry to reasonably meet its obligation to ensure that the conditions of the exemption are met .[39] We do not understand how the report requirement, as currently proposed, possibly could be described as "deregulatory."[40]

Furthermore, we do not believe that the requirement for the review to be certified by the CEO of the financial entity is necessary. note that Reg BI does not have this CEO certification process; nor does any comparable Department exemption that requires the single highest officer of a financial entity to read and certify these reviews. We believe that such a requirement is not appropriate for this exemption.

Finally, we strongly object to the availability of internal compliance documents, including all policies and procedures, to all participants, beneficiaries and others. The Department has long understood that internal compliance regimes can only be undercut by widespread availability, and the Department has long taken that fact into account by not requiring compliance reports and internal audit reports to be made available under exemptions. The Department has given no explanation for its change from the long accepted practice. Compliance professionals will affirm that such a requirement will chill the candor and detail of such reports and make them far less

[38] Proposal at 40861.
[39] For example, for FINRA Rule 3130, the broker dealers must test their policies and procedures and report the test results to senior management, including the CEO. We would also comment that to the extent that a new compliance report needs to be devised, the time required to devise such a report and the cost of devising the procedures and complying with them, has not been taken into account in the cost estimates for the exemption.
[40] We note that if this requirement is retained in any form, there should be a transition period through 2022, for the creation and testing of such a report, and so long as the institution is working towards creating and testing the process, it should be able to use the exemption.

useful to the financial institution. This requirement is a mistake, and we note that it has no corollary under Reg BI or, to our knowledge, any FINRA requirement.

VIII. Use of Best Execution Standard is Misplaced

We do not believe that the Department should be importing a reference to "best execution" from the securities laws. While our members understand the term as it has been interpreted and enforced by securities regulators, through various rulings and interpretations over the years, it is misplaced to use it within this exemption. Importing this term, and then leaving it to the Department to impose its definition upon the term, could create significant confusion and challenges if the Department attempted to define the term in any way other than that found by the securities regulators. In our view, if the Department were to take the position that a transaction did not achieve "best execution" under this exemption, where the SEC and FINRA make no such finding, the Department will have caused a significant inconsistency under the securities laws. We have no doubt that the Department does not intend such a result. We further note that in all of the exemptions ever issued by the Department, it has not required a best execution condition, nor has it utilized such a term in any of its guidance over the years. Lastly, we would note that "best execution" is well covered by other regulators. We strongly urge the Department to abandon this condition.

IX. Clarification that the Reg BI Disclosure, including the Form CRS, Constitutes a Safe Harbor for Compliance with the Disclosure Requirements of the Exemption, Including Both Content and Timing

We believe the Department could further align with Reg BI by explicitly clarifying that the disclosures required under Reg BI are appropriate as a safe harbor for meeting the disclosure requirement. As we noted earlier in this comment, the exemption's requirement that the financial professional state in writing that it is acting as a fiduciary under ERISA and the Code is inconsistent with Reg BI, as is the timing of the Department's disclosure condition. We think these differing requirements will be difficult to operationalize, prone to error, and unhelpful in a regime where the requirements are intended to be harmonized.

X. Eliminate Exclusion for Participants of Plans Sponsored by a Financial Institution

We believe the Department should delete the exclusion in Section I(c)(1), (applicable where the financial professional, financial institution or an affiliate is the employer of employees covered by an ERISA plan). There is no basis for this exclusion. We believe this exclusion would 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, that would involve their ERISA plan assets. The condition will be perceived as unfair and arbitrary to employees of a financial institution who know and appreciate the expertise of their colleagues and do not want to go elsewhere for their advice. We can think of no other exemption (other than the now vacated BIC exemption) that imposed such a condition with respect to participant level advice. Participants may invest in affiliated mutual funds, affiliated insurance pooled funds, affiliated bank collective trusts and affiliated deposits, and of course, there is no requirement that a participant in a financial institution's plan use an employee of that institution for advice. Financial institution employees should be able to choose a third party advice provider or an affiliated advice provider, as they see fit. 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.

XI. Conclusion

As we said at the outset, we think this proposed class exemption is an important step forward. We think it will encourage a variety of fiduciary investment advice approaches for those clients who desire that level of service, and with the changes we have asked for in the preamble and conditions, we think it will provide retirement investors with the services they seek. We appreciate the Department taking the time to review our comments here. We believe that the Department is headed in the right direction which will help ensure that investment advice is available to more individuals saving for their retirement years.

Sincerely,

Lisa Bleier

Lisa Bleier