Insured Retirement Institute
1100 Vermont Avenue, NW | 10th Floor
Washington, DC 20005

t | 202.469.3000
f | 202.469.3030

www.IRIonline.org
www.myIRIonline.org

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

Re: Improving Investment Advice for Workers and Retirees
ZRIN 1210-ZA29

To Whom It May Concern:

On behalf of our members, the Insured Retirement Institute ("IRI")[1] appreciates the opportunity to provide comments to the Department of Labor (the "Department") on the above-referenced rulemaking (the "Release"),[2] including with respect to both the new prohibited transaction exemption proposed in the Release (the "Proposed Exemption") and the discussion in the preamble to the Proposed Exemption (the "Preamble").

In general, we applaud the Department for developing and seeking public comment on the Proposed Exemption. We believe the Department's intent in doing so is appropriate, and if enacted with certain constructive changes, will offer retirement savers continued access to retirement advice.

BACKGROUND AND INTRODUCTION

The Release reflects the Department's ongoing efforts to support and advance Americans' planning for retirement by providing rules applicable to parties that may be considered "fiduciaries" to a plan

[1] IRI is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, and distributors such as broker-dealers, banks and marketing organizations. IRI members account for more than 95 percent of annuity assets in the U.S., include the top 10 distributors of annuities ranked by assets under management, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community.

[2] 85 Fed. Reg. 40,834 (July 7, 2020), *available at* https://www.federalregister.gov/documents/2020/07/07/2020-14261/improving-investment-advice-for-workers-and-retirees.

governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), or subject to Section 4975 of the Internal Revenue Code of 1986, as amended (the "Code"), by virtue of providing "investment advice" to the plan. IRI commends the Department's efforts to ensure that financial institutions and financial professionals working with retirement assets are promoting the interests of investors and that investment advice is not compromised by competing interests. Our members are also focused on these issues and, in seeking a path forward to advance Americans' efforts to save for retirement, our members have benefitted from their experience working with the regulation finalized by the Department in April 2016 (the "2016 Regulation")[3], Regulation Best Interest ("Reg BI") promulgated by the Securities and Exchange Commission (the "SEC"), Model Regulation 275 ("Model Regulation 275") issued by the National Association of Insurance Commissioners (the "NAIC"),[4] and similar laws and regulations that have been proposed or enacted by various states. We very much appreciate the Department's effort to align the Proposed Exemption with Reg BI and, by extension, Model Regulation 275. We look forward to working with the Department on a final exemption (the "Final Exemption") and related guidance that will provide appropriate protections for retirement investors while also preserving retirement investors' access to investment advice and alternative business models in a manner consistent with Reg BI and Model Regulation 275.

The 2016 Regulation, along with the prohibited transaction exemptions ("PTEs") that were amended or newly-issued in connection with the 2016 Regulation, represented an effort by the Department to reframe who would be considered an investment advice fiduciary with respect to assets held by plans and other entities subject to ERISA and individual retirement accounts ("IRAs"). The 2016 Regulation, together with the related exemptive authority, was vacated in a March 2018 decision by the U.S. Court of Appeals for the Fifth Circuit in *U.S. Chamber of Commerce v. U.S. Department of Labor* ("U.S. Chamber of Commerce").[5]

An effect of *U.S. Chamber of Commerce* was to return the regulatory authority for determining who is an investment advice fiduciary to the Department's 1975 regulation defining "investment advice" (the "1975 Regulation").[6] The 1975 Regulation defined "investment advice" using a now-familiar five-part test (the "Five-Part Test") that, until the 2016 Regulation, stood the test of time to determine who is an investment advice fiduciary. On the same day as the Release, the Department issued a technical amendment[7] to confirm the restoration of the 1975 Regulation (and the prior versions of the exemptions, which were amended in connection with the issuance of the 2016 Regulation), and expressly conformed the Code of Federal Regulations accordingly. We applaud the Department for taking this action.

Section I of this letter provides a brief summary of our thoughts on the Five-Part Test. Section II focuses on the Proposed Exemption, with detailed discussions of our concerns and recommendations with

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[3] 81 Fed. Reg. 20,948 (Apr. 8, 2016).

[4] "Suitability In Annuity Transactions Model Regulation," NAIC Model Laws, Regulations, Guidelines and Other Resources—Spring 2020, available at: https://www.naic.org/store/free/MDL-275.pdf.

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

[6] 40 Fed. Reg. 50,482 (Oct. 31, 1975).

[7] 85 Fed. Reg. 40,589 (July 7, 2020).

respect to the conditions and requirements included therein. Section III explains our concerns regarding the Department's new interpretation of key elements of the Five-Part Test in greater detail. Section IV discusses the impact of those concerns on various aspects of our members' businesses – including a number of considerations that are unique to the insurance industry generally, and the distribution of insurance products through independent agents in particular – and sets forth our recommendations to address those concerns.

EXECUTIVE SUMMARY

In the Release, the Department set forth the Proposed Exemption and offered a new interpretation of the Five-Part Test. In this letter, we address the following points:

1. With certain important modifications, the Proposed Exemption will appropriately protect retirement investors while preserving access to investment advice and alternative business models.

    A. Written acknowledgment of fiduciary status would impair the ability of financial professionals and their clients to dictate the terms of their relationship, and should therefore be excluded from the Final Exemption.

    B. The annual certification requirement is unnecessary to ensure compliance with the conditions of the Proposed Exemption, and should therefore be excluded from the Final Exemption.

    C. The prescriptive list of principal transactions permitted under the Proposed Exemption serves no legitimate purpose, and should therefore be excluded from the Final Exemption.

    D. Robo-advice should be eligible to rely on the Final Exemption when provided in compliance with the specified conditions.

    E. Delivery of the disclosures required under Reg BI or Model Regulation 275 should satisfy the disclosure requirements of the Final Exemption as to content and timing.

    F. Just as the SEC and NAIC determined not to include prudence requirements in their rules to avoid confusion and uncertainty, the Department should not include prudence as a condition of the Final Exemption.

    G. Financial professionals should be permitted to rely on the accuracy and completeness of information provided by retirement investors about existing retirement accounts when recommending rollovers.

    H. The Final Exemption should allow fiduciaries to determine whether ongoing monitoring is required and should not mandate monitoring based on the Department's perception of the complexity or risk of particular products.

    I. The Final Exemption should not be limited to non-discretionary investment advice only arrangements.

J. The Final Exemption should not include any criminal or similar disqualification events.

K. The provision of documentation requirement is overly broad and should be excluded from the Final Exemption.

2. The discussion of the Five-Part Test in the Preamble is inconsistent with the ruling in *U.S. Chamber of Commerce*, the Administrative Procedures Act,[8] and the goal of regulatory harmonization, and therefore must be withdrawn.

   A. The regular basis prong of the Five-Part Test should not be interpreted so broadly as to cover nearly all interactions with retirement investors.

   B. The primary basis prong is essential to distinguishing relationships of trust and confidence from transactional interactions, and should not be interpreted out of existence.

   C. The Preamble's interpretation of the mutual understanding prong would impair the rights of consumers and financial professionals to dictate the terms of their relationship.

   D. The interpretation of the Five-Part Test in the Preamble fails to meet the standards set by the U.S. Supreme Court for deferring to an agency's interpretations of its own rules.

3. The Department should clarify the application of the Five-Part Test in certain contexts in the preamble to the Final Exemption or other guidance.

   A. The Department should acknowledge that the facts and circumstances surrounding insurance recommendations will not typically trigger fiduciary status under the Five-Part Test.

   B. The Department should provide a clear and workable path to exemptive relief for the independent insurance distribution channel by allowing the Financial Institution obligations of the Proposed Exemption to be met through the mechanisms developed by state insurance regulators.

   C. The Department should clarify that "hire me" and wholesaling activities do not meet the Five-Part Test to avoid uncertainty with respect to marketing, educational and ongoing conversations and interactions with plan sponsors and other sophisticated investors.

<u>DISCUSSION</u>

I. Introductory Comments Regarding the Five-Part Test

Under the Five-Part Test, a financial institution or investment professional who is not otherwise a fiduciary under ERISA is treated as providing investment advice for purposes of ERISA (and the Code) when (i) rendering advice as to the value of securities or other property, or making recommendations as to the advisability of investing in, purchasing, or selling securities or other property (ii) on a regular basis (iii) pursuant to a mutual agreement, arrangement, or understanding with the plan or plan fiduciary that

[8] 5 U.S.C. § 555 (2006).

(iv) the advice will serve as a primary basis for investment decisions with respect to Plan assets, and that (v) the advice will be individualized based on the particular needs of the plan. IRI strongly supports the Department's confirmation that the Five-Part Test has been reinstated in light of *U.S. Chamber of Commerce*.

However, the Preamble presents wholesale changes to the Department's interpretation of the Five-Part Test that would substantially expand its reach in a manner that is inconsistent with *U.S. Chamber of Commerce*, and which appear to have little or no support in any of the Department's prior regulatory or sub-regulatory guidance on the Five-Part Test. For example, the Fifth Circuit ruled that the determination of fiduciary status rests in part on a "trust and confidence standard." There is nothing in the Five-Part Test or 45 years of case law of which we are aware that suggests that an ongoing brokerage relationship necessarily translates into an implied mutual agreement or even a mutual expectation that there is an ongoing fiduciary advice relationship under ERISA or the Code. Similarly, we believe that the Department's commentary concerning the "regular basis" prong of the Five-Part Test is a surprise, and we can find no regulatory or sub-regulatory guidance, or any case law, that supports the Department's position.

Furthermore, the Department's new "expectations-based" or "anticipatory" interpretation runs contrary to the plain English reading of "regular basis." The Department's apparent determination that it needed to revise the Five-Part Test in the 2016 Regulation to reach such a conclusion further serves to underscore this point. The Department also suggests that many relationships carry with them the natural expectation of ongoing monitoring. This would "naturally" fit within the "expectation-based" or "anticipatory" interpretation that the Department has put forth, but that interpretation itself is unnatural and forced. It ignores the fact that many relationships may be "regular" in the sense that interactions occur more than once over a given time frame, but they do not necessarily imply a regular basis of individualized tailored investment advice. Such episodic arrangements are common; by disregarding this reality, the Department risks being at odds with the carefully constructed architecture of Reg BI, Model Regulation 275, and other established securities and insurance rules.

The Preamble's approaches are contrary to the principles set forth in *U.S. Chamber of Commerce* and run counter to plain English and established expectations. As such, IRI respectfully requests that the Department withdraw the discussion of the Five-Part Test in the Preamble. In the 45 years since Congress enacted ERISA, it has had opportunities to legislatively adjust the Five-Part Test, but it has not. We urge the Department not to do so here, especially where its gloss may not be entitled to the deference it intends without further rulemaking with notice and comment. Absent the Department's withdrawal of the Preamble, IRI is extremely concerned that the meaningful and substantive treatment given to the Five-Part Test in the Preamble will have far-reaching consequences for all market participants, including retirement investors. These should be subject to the same administrative review process, including a notice and comment period, as apply to rulemaking proposals generally, and given a 45-year history, at a minimum, deserve closer scrutiny beyond just a 30-day comment period, and a chance to be examined with the goal of remaining consistent with regulatory regimes that have similar goals. While the Department might characterize its interpretations of the elements of the Five-Part Test as mere fine-tuning, we believe they instead represent a dramatic change in how ERISA's fiduciary rules and requirements are applied to financial services professionals, and – whether intentionally or not – serve to undercut the reinstatement of the Five-Part Test called for by the Fifth Circuit and the action otherwise taken by the Department in conforming the Code of Federal Regulations to the vacatur of the 2016 Regulation.

If the Department declines to withdraw the Preamble, at a minimum, it should respond to the serious concerns outlined below that its approach could have other unintended consequences, including a chilling effect on investment and retirement education, ongoing conversations with clients, including large institutional clients, and general marketing, including "hire me" conversations. While the Department has worked to provide a more useable exemption, the Preamble could drive financial institutions to cut back on education, information, and other services due to the risk that they could be considered to be providing fiduciary investment advice.

II. With Certain Important Modifications, the Proposed Exemption Will Appropriately Protect Retirement Investors While Preserving Access to Investment Advice and Alternative Business Models.

IRI and our members appreciate the Department's efforts to offer a Proposed Exemption that will enhance the provision of individualized and tailored investment advice to retirement savers while affording substantial choice in products and services to those investors. In this Section II, we discuss certain aspects of the Proposed Exemption and IRI's recommendations relating thereto.

At the outset, we applaud the Department's effort to harmonize the conditions of the Proposed Exemption with those of Reg BI and Model Regulation 275. As described below, we urge the Department to avoid including conditions that do not align with Reg BI and Model Regulation 275.

A. Written Acknowledgment of Fiduciary Status Would Impair the Ability of Financial Professionals and Their Clients to Dictate the Terms of Their Relationship, and Should Therefore Be Excluded from the Final Exemption.

Section II(b)(1) of the Proposed Exemption requires a written acknowledgement of fiduciary status. While we agree that retirement investors should be provided with information about the services to be provided by their financial professionals, as required by Section II(b)(2) of the Proposed Exemption, we respectfully request that the Department eliminate the requirement to provide written acknowledgement of fiduciary status. This requirement is unnecessary with respect to financial professionals who know they will be serving as fiduciaries, as they can disclose such status as part of the required disclosure regarding services to be provided and, as explained below, this requirement is problematic for inadvertent fiduciaries. Moreover, we believe such an acknowledgment will, in many instances, be confusing to clients, inconsistent with other required disclosures, and incompatible with the understanding of the parties as to their relationship and the offering of products and services.

The Department has issued prohibited transaction class exemptions in the past that can be relied upon by individuals who are unaware of their fiduciary status under the Five-Part Test. As noted above and explained further in Sections III and IV below, the discussion of the Five-Part Test in the Preamble would significantly increase the risk that a financial professional might inadvertently attain fiduciary status. By conditioning the Proposed Exemption on a written acknowledgement of fiduciary status, the Department is effectively depriving such inadvertent fiduciaries of the ability to rely on that exemptive relief. Doing so would serve to significantly discourage financial professionals from working with retirement investors unless they definitively intend to serve as fiduciaries.

The Department already recognizes that the Five-Part Test requires a determination based on the facts and circumstances. The Department's new interpretation of the Five-Part Test in the Preamble will significantly impair our members' ability to make a factual determination of fiduciary status on a case-by-case basis and adjust their approach and disclosures accordingly. To avoid the risk of engaging in a prohibited transaction without the ability to determine with certainty whether fiduciary status actually arises at the time a recommendation is made, firms would be compelled to either provide the written acknowledgement in every transaction where fiduciary status is possible or avoid engaging in any such transactions.

This is not an outcome that helps investors. In this regard, we note and appreciate the Department's belief that compliance with the Proposed Exemption will not result in a private right of action. However, we are concerned that activist states may take a contrary view, and the acknowledgment of fiduciary status as a prophylactic for those financial institutions that may not be certain about their role as investment advice fiduciaries may lead to suboptimal results for them and their clients.

A similar concern arose in connection with the now-vacated Best Interest Contract ("BIC") Exemption. This issue is not merely theoretical – a written fiduciary acknowledgement could be treated as a contractual fiduciary obligation under regulations recently adopted by the Massachusetts Securities Division,[9] thereby triggering the fiduciary obligations contemplated by those regulations even if the parties do not intend or desire to have a fiduciary relationship. IRI believes that fear of a latent compliance risk should not guide relationships between otherwise consenting parties in commercial relationships. Our concerns extend to any implication that there be any ongoing monitoring obligation where the parties do not expressly contemplate that such obligations be part of the relationship.

Both the Proposed Exemption's contemplation of ongoing monitoring and the Department's "expectations-based" assumptions about the existence of regular basis individualized investment advice will be certain to disrupt Reg BI's carefully crafted regime[10] to preserve investor choice between business models through the fiduciary status of investment advisers and the "best interest" standard[11] it

[9] *See* 950 Mass. Code Reg. 12.207(1)(b)2.

[10] The SEC carefully considered and rejected a fiduciary rule based on its findings that the fiduciary duties owed by investment advisers are "not appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e., transaction-specific recommendations and compensation)." 84 Fed. Reg. at 33,322. "For example, an investment adviser's fiduciary duty generally includes a duty to provide ongoing advice and monitoring, while Regulation Best Interest imposes no such duty and instead requires that a broker-dealer act in the retail customer's best interest at the time a recommendation is made." Id. at 33,321 (footnote omitted). "We are 'reluctant to reverse' such a 'considered and carefully articulated' policy decision. *Cty. of Westchester*, 802 F.3d at 431 (citation omitted)." *See XY Planning Network, LLC v. SEC*, 963 F. 3d 244 (2d Cir. June 26, 2020).

[11] "FINRA and a number of cases have interpreted FINRA's suitability rule as requiring a broker-dealer to make recommendations that are 'consistent with his customers' best interests' or are not 'clearly contrary to the best interest of the customer,' but this is not an explicit requirement of FINRA's suitability rule." SEC, Regulation Best

applies to broker-dealers.[12] The duty to monitor is the fundamental difference between broker-dealer and adviser-based models. As the SEC explained in the release accompanying the issuance of Reg BI (the "Reg BI Release"):

> Broker-dealers typically provide transaction-specific recommendations and receive compensation on a transaction-by-transaction basis (such as commissions) ("transaction-based" compensation or model). A broker-dealer's recommendations may include recommending transactions where the broker-dealer is buying securities from or selling securities to retail customers on a principal basis or recommending proprietary products. Investment advisers, on the other hand, typically provide ongoing, regular advice and services in the context of broad investment portfolio management, and are compensated based on the value of assets under management . . . , a fixed fee or other arrangement ("fee-based" compensation or model). This variety is important because it presents investors with choices regarding the types of relationships they can have, the services they can receive, and how they can pay for those services.[13]

An investment adviser's fiduciary duty applies to the entire adviser-client relationship, including non-securities advice.[14] A broker-dealer's best interest duty "only applies at the time of a recommendation of any securities transaction or investment strategy by a broker-dealer to its retail customers."[15] The

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Interest Proposal, Exchange Act Release No. 34-83062, at fn. 6 (April 18, 2018), available at https://www.sec.gov/rules/proposed/2018/34-83062.pdf.

[12] "We have declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e., transaction-specific recommendations and compensation), and would not properly take into account, and build upon, existing obligations that apply to broker-dealers, including under FINRA rules. Moreover, we believe (and our experience indicates), that this approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations. We have also declined to craft a new uniform standard that would apply equally and without differentiation to both broker-dealers and investment advisers. Adopting a 'one size fits all' approach would risk reducing investor choice and access to existing products, services, service providers, and payment options, and would increase costs for firms and for retail investors in both broker-dealer and investment adviser relationships. Moreover, applying a new uniform standard to advisers would mean jettisoning to some extent the fiduciary standard under the Advisers Act that has worked well for retail clients and our markets and is backed by decades of regulatory and judicial precedent." *See* SEC, Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 34-86031, at 19-20 (June 5, 2019) ("*Reg BI Release*"), available at https://www.sec.gov/rules/final/2019/34-86031.pdf; *see also*, Reg BI Release at 55 ("we seek to preserve retail investor access (in terms of choice and cost) to differing types of investment services and products.").

[13] Reg BI Release at 6-7.

[14] "With regard to the substance of both standards, the investment adviser fiduciary duty generally is broader and applies to the entire relationship between adviser and client, including providing non-securities advice, whereas Regulation Best Interest only applies at the time of a recommendation of any securities transaction or investment strategy by a broker-dealer to its retail customers." Reg BI Release at 638. " For example, an investment adviser may consider both securities annuity products (e.g., variable annuities) and non-securities annuity products (e.g., fixed annuities) when providing advice on annuity products to a client with an advisory retirement account." *See* Reg BI Release at fn. 1348.

[15] *See* Reg BI Release at 638.

"solely incidental" exception under the Investment Advisers Act of 1940, as amended (the "Advisers Act"),[16] allows broker-dealers to provide investment advice in the course of effectuating securities transactions without being deemed a fiduciary. Whether a broker-dealer satisfies the solely incidental exception is a facts and circumstances[17] determination, with the provision of ongoing monitoring services functioning as an inexact line of demarcation.[18] Imposing an ongoing monitoring obligation could mean that compliance with the Proposed Exemption would force broker-dealers out of the "solely incidental" exception and require them to register as investment advisers and serve as a fiduciary under securities law.

Reg BI's protections for consumers working with broker-dealers would continue beyond a given transaction and apply to the entirety of the relationship if the broker-dealer provides ongoing monitoring services in compliance with the Proposed Exemption.[19] However, Reg BI does not "generally require a broker-dealer to have a continuous duty to a retail customer or impose a duty to monitor."[20] The imposition of an ongoing monitoring requirement in the Proposed Exemption will thus have the presumably unintended consequence of blurring the lines between the two investment advice business models.[21] Accordingly, eliminating the ongoing monitoring duty would eliminate potential additional

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[16] "The Advisers Act regulates the activities of certain 'investment advisers,' who are defined in section 202(a)(11) of the Advisers Act in part as persons who, for compensation, engage in the business of advising others about securities. Section 202(a)(11)(C) excludes from the definition of investment adviser—and thus from the application of the Advisers Act—a broker or dealer 'whose performance of such advisory services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation' for those services (the 'broker-dealer exclusion')." *See* Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer; Exclusion from the Definition of Investment Adviser, Release No. IA-5249, p. 2 (June 5, 2019) (the "Solely Incidental Release"), available at https://www.sec.gov/rules/interp/2019/ia-5249.pdf.

[17] "Whether advisory services provided by a broker-dealer satisfy the solely incidental prong is assessed based on the *facts and circumstances* surrounding the broker-dealer's business, the specific services offered, and the relationship between the broker-dealer and the customer." *See* Solely Incidental Release at 13 (emphasis added).

[18] "We disagree with commenters who suggested that any monitoring of customer accounts would not be consistent with the solely incidental prong. A broker-dealer that agrees to monitor a retail customer's account on a periodic basis for purposes of providing buy, sell, or hold recommendations may still be considered to provide advice in connection with and reasonably related to effecting securities transactions. …We decline to delineate every circumstance where agreed-upon monitoring is and is not solely incidental to a broker-dealer's brokerage business." *See* Solely Incidental Release at 19-20.

[19] "[W]hen a broker-dealer agrees with a retail customer to provide account monitoring services: (1) the broker-dealer would be required to disclose the material facts (including scope and frequency) of those services pursuant to the Disclosure Obligation, and (2) such agreed-upon account monitoring services involve an implicit recommendation to hold (i.e., an implicit recommendation not to buy, sell, or exchange assets pursuant to that securities account review) at the time agreed-upon monitoring occurs, which is a recommendation "of any securities transaction or investment strategy involving securities" covered by Regulation Best Interest." *See* Reg BI Release p. 77, fn. 155.

[20] *See* Reg BI Release at 77.

[21] "The traditional distinctions between the services offered by the two types of firms have blurred in recent decades, raising questions about this standard-of-care framework. As a result, in 2019, the SEC adopted Regulation Best Interest, which imposes a new 'best-interest obligation' on broker-dealers." *See XY Planning Network, LLC v. SEC*, 963 F.3d 244, 247-48 (2d Cir. June 26, 2020); *See also,* Brian Scholl et al., SEC Office of the Investor Advocate & RAND Corp., *The Retail Market for Investment Advice* ("*RAND study*") 4 (2018), *available at* https://www.sec.gov/comments/s7-07-18/s70718-4513005-176009.pdf, ("although in theory broker-dealers and

regulatory inefficiencies and further align[22] the Proposed Exemption with the SEC's broker-dealer conduct standard and the Advisers Act fiduciary duty.[23]

Moreover, to the extent that compliance with the Proposed Exemption effectively limits access to the "solely incidental" exclusion, it could "generate direct costs to investors if firms change their pricing structures or eliminate certain account features in response."[24] Clients should have a choice as to whether or not they would like their financial professional to monitor their investments and incur the cost for doing so. Existing regulatory regimes such as Reg BI and state securities laws require financial professionals to clearly explain the risks of the products they are selling so that investors can make an informed decision about whether they would benefit from ongoing monitoring. Imposing a duty to monitor for certain products serves only to deprive clients of that choice and force them to pay for a service they may not need or want. For example, it would not be in the best interest of consumers to be in a fee-based account that is "trad[ed] so infrequently that they would have incurred lower costs for the investor had the accounts been commission-based."[25] Most importantly, by charging an additional fee to clients to cover the costs of providing monitoring services, broker-dealers would receive "special compensation"[26] that would force these firms out of compliance with the "solely incidental" exception and once again blur the lines between transaction and advisory-based business models. To avoid these needless complications, the Department should not impose any requirement concerning monitoring—and should not assume that one exists based on its own expectations.

Rather than enhancing the substantive controls on "conflicts of interests" that the Proposed Exemption aims to address, a written acknowledgement of fiduciary status risks creating investor confusion in that it diverges from other regulatory regimes. As an example, Reg BI requires disclosure that a broker-dealer act in the best interest of the client, including when making a recommendation to rollover assets to an IRA or to take a distribution from a qualified plan and invest in a security, including a variable annuity. If the Department retains this fiduciary status disclosure requirement on top of Reg BI's "best interest" disclosure requirement, the client will receive confusing and potentially inconsistent messaging. In this regard, the Proposed Exemption's requirement of a written acknowledgement of fiduciary status is inconsistent with the standards set forth in Reg BI. Indeed, the SEC was clear in enacting Reg BI that no

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investment advisers "play distinct roles," "in practice, trends in financial services markets since [at least] the early 1990s have blurred the boundaries between these financial professionals.")

[22] "This proposed exemption's alignment with other regulatory conduct standards could result in a reduction in overall regulatory burden as well. As discussed earlier in this preamble, the proposed exemption was developed in consideration of other regulatory conduct standards. The Department envisions that Financial Institutions and Investment Professionals that have already developed, or are in the process of developing, compliance structures for other regulators' standards will be able to experience regulatory efficiencies through reliance on the new exemption." *See* Release at 40,851.

[23] "The [best interest] standard is to be interpreted and applied consistent with the standard set forth in the SEC's Regulation Best Interest and the SEC's interpretation regarding the conduct standard for registered investment advisers." *See* Release at 40,842.

[24] *See*, e.g., 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 (Jan. 2011) ("913 Study"), at 151, available at www.sec.gov/news/studies/2011/913studyfinal.pdf

[25] 913 Study at 152.

[26] *See* 913 Study at 139.

such fiduciary standard attaches.[27] In combination with the standards and accompanying liabilities of other regulatory regimes, the resulting investor confusion could be substantial. Thus, IRI respectfully requests that this condition be removed in the Final Exemption.

B. *The Annual Certification Requirement is Unnecessary to Ensure Compliance with the Conditions of the Proposed Exemption and Should Therefore Be Excluded from the Final Exemption.*

Under Section II(d) of the Proposed Exemption, Financial Institutions (as defined in the Proposed Exemption) are required to conduct an annual retrospective review of compliance policies and procedures, which must be certified by the chief executive officer or equivalent (*i.e.*, the most senior officer or executive in charge of managing the Financial Institution) as "a means of creating accountability for the review." This is an unusual and unnecessary requirement. We are not aware of any commonly-used class exemptions with respect to Section 406(b) of ERISA that contain any such requirement.[28] Likewise, neither Reg BI nor Model Regulation 275 require any similar certification. Instead, the SEC and the NAIC regimes give firms license and flexibility to create and oversee compliance policies and procedures.

We acknowledge the Financial Industry Regulatory Authority, Inc. ("FINRA"), the self-regulatory organization for broker-dealers conducting business with public customers, has promulgated Rule 3120, which requires that financial institutions under its purview establish a supervisory control system. However, the certification required under Rule 3120 need only be provided by "one or more principals" designated by the financial institution who have knowledge of and can certify to the satisfaction of the applicable requirements. This person is generally not the chief executive officer, but rather a person that serves in a compliance role.

Moreover, this additional burden on financial institutions is inconsistent with the Department's statement in the Preamble that the Proposed Exemption aligns with other regulations to promote efficiencies. As such, this requirement is antithetical to the Trump administration's deregulatory posture.[29]

Compliance programs are subject to legal requirements that ensure consumer protection is a top priority. Noncompliance with these programs typically involves severe financial and legal penalties, which could include fines, license revocation, and premium refunds. We believe these penalties are sufficient incentive to promote compliance with the conditions of the Proposed Exemption, thus rendering this certification requirement superfluous.

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[27] *Supra* note 11.

[28] See, e.g., PTCE 77-4 (investments in open-end registered mutual funds); PTCE 84-24 (transactions involving insurance agents, brokers, pension consultants, insurance and investment companies, and investment company principal underwriters); PTCE 86-128 (agency transactions in securities with a broker-dealer affiliated with a fiduciary asset manager). Note also, none of the so-called "Underwriters' Exemptions" issued in connection with mortgage backed and other asset backed securities have such a condition.

[29] See Exec. Order 13771 (January 30, 2017); See also, Exec. Order 12866 (Sept. 30, 1993) ("Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.").

Based on the foregoing factors, IRI respectfully requests that this condition be omitted from any Final Exemption. If the Department is unwilling to omit this requirement, we respectfully request that the Department provide flexibility in the Final Exemption for firms to designate an appropriate senior officer with direct knowledge of, and responsibility for, the firm's compliance function to provide the contemplated certification.

C. The Prescriptive List of Principal Transactions Permitted under the Proposed Exemption Serves No Legitimate Purpose, and Should Therefore Be Excluded from the Final Exemption.

We appreciate the Department's helpful confirmation that the sale of an insurance or annuity contract would not be considered a principal transaction. However, if the transaction is a sale to an ERISA-governed plan or IRA, the Proposed Exemption only permits a limited list of securities to be sold on a principal basis.[30] The Proposed Exemption would not be available to cover many common transactions that are executed on a principal basis, including foreign currency transactions (including to repatriate dividends, interest, or proceeds on the sale or disposition of foreign denominated assets), foreign or sovereign issuers, issuers other than corporations, structured notes, offerings of closed-end funds, and initial public offerings of equity securities. Similarly, purchases of equity securities that are effected on a principal basis would be ineligible for relief (notwithstanding that, in many cases, it may well be possible that a broker-dealer or bank may be able to obtain a better price for the customer through its own inventory than by trading "away").

There is also the possibility that 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 in a principal transaction.[31] As a further matter, certain types of securities can only be purchased in a principal transaction, and there is no persuasive reason for the Department to limit retirement investors' access to these investment opportunities.

The Department's rationale for the restriction is essentially the same as the rationale used to support similar restrictions in the now-vacated PTE for principal transactions that was promulgated in connection with the 2016 Regulation – 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."[32] We have the same concerns under the Proposed Exemption. The Department should not substitute its judgment for a fiduciary acting in accordance with ERISA's heightened standards. Moreover, IRI does not understand how an issuer's jurisdiction of incorporation or domicile makes an investment either more or less risky to the investor. The same could be said for the currency in which a security is denominated, and whether or not the issuer is a corporation or some other issuer. Reg BI does not impose any restrictions on the types of securities that can be sold to retail investors on a principal basis and we urge the Department further to align the Proposed Exemption with Reg BI in this regard.

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[30] *See* Proposed Exemption, Section V(c).

[31] Consider that several widely desired stocks have substantial share prices. A number of companies have seen closing prices over $1,500, and in at least one case there has been a closing of over $273,900.

[32] Release at 40,840.

IRI respectfully requests that the Department eliminate the prescriptive list of "Covered Principal Transactions" such that, consistent with Reg BI, all types of principal transactions would be permitted.

D. Robo-Advice Should Be Eligible to Rely on the Proposed Exemption When Provided in Compliance with the Specified Conditions.

Under Section I(c)(2) of the Proposed Exemption, robo-advice – where the retirement investor has no interaction with a human advisor – is ineligible to rely on the Proposed Exemption. Online investment education, guidance and advice provides a lower-cost alternative for many investors. Use of these online services has grown in recent years and is expected to continue to develop in the future. There is no reason not to make the Proposed Exemption available for these purely online solutions.

Absent a clear path to utilizing the Proposed Exemption, providers that offer purely automated investment solutions would need to rely upon other exemptive authority, such as PTE 84-24 or Sections 408(b)(14) or 408(g) of ERISA. However, the ability of financial providers to use these is limited. PTE 84-24 may not be available for the services offered under a particular online solution and the statutory exemptions are complex, burdensome and costly to implement.

Reg BI makes no distinctions for purely online solutions, and we urge the Department to increase consistency with Reg BI by taking the same approach. The possible availability of other interpretive approaches or exemptions specifically geared to robo-advice is not a compelling reason to deprive robo-advice providers of the ability to rely on the Proposed Exemption. If the applicable conditions are met, plan participants and beneficiaries will be adequately protected regardless of whether the advice is provided by a human advisor or a robo-advisor. As such, IRI respectfully requests that the Department omit the robo-advice exclusion in the Final Exemption.

E. Delivery of the Disclosures Required Under Reg BI or Model Regulation 275 Should Satisfy the Disclosure Requirements of the Final Exemption as to Content and Timing.

The Proposed Exemption requires that a retirement investor be provided with certain disclosures. As an initial matter, we submit that compliance with the disclosure requirements under Reg BI and Form CRS, or under Model Regulation 275, should be presumptively satisfactory of any disclosure requirements under the Proposed Exemption. This would promote alignment with securities and insurance regulation and provide clarity regarding the scope of disclosures required.

The disclosure requirements applicable to broker-dealers and investment advisers under the federal securities laws are particularly thorough and inclusive, reflective of a broader array of investments and products that may be offered. Those disclosure requirements begin with a core relationship disclosure, the Client Relationship Summary, or Form CRS. This form covers brokerage and advisory services to the extent provided by the firm and provides an important high-level view of the potential customer relationship. In the event of changes to the information presented in the Form CRS, the firm is required to update the disclosure and redeliver it to existing customers, as well as providing the revised form to prospective and new customers.

In addition to Form CRS, advisory firms are required to maintain and deliver investment advisory brochures, Form ADV, to their current and prospective clients, and many broker-dealer firms provide or make available a corresponding broker-dealer brochure for the firm. These documents provide substantial relevant disclosures, including, importantly, discussions of the firm's management of relevant conflicts of interest. Firms also utilize a broad array of other materials, in a pattern of layered disclosures, to satisfy the firm's disclosure requirements.

Similarly, Model Regulation 275 includes important disclosure obligations, both in the body of the regulation and in a model disclosure attached as Appendix A to the model regulation. The NAIC worked diligently to establish a regulatory framework incorporating a best interest standard of conduct, while also respecting diverse distribution systems that carriers use today. As noted throughout this letter, it is critical that the Department recognize and align with the work done by our nation's experts on the insurance industry and insurance regulation.

If the Department identifies any gaps in either of these disclosure regimes, it could explicitly impose additional disclosure requirements as conditions for reliance on the Proposed Exemption.

If the Department is not receptive to the changes referenced above, the Department should, at the very least, harmonize the timing of its disclosure delivery requirements with Reg BI and Model Regulation 275. The Proposed Exemption requires that the specified disclosures be delivered "prior to engaging in a transaction pursuant to this exemption." Reg BI and Model Regulation 275, by contrast, require that required disclosures be delivered "prior to or at the time of the recommendation." The Department should harmonize the disclosure delivery requirement with Reg BI and Model Regulation 275 by inserting the phrase "or at the time of" in the text of the Final Exemption. Inconsistent timing requirements would create a significant incremental compliance burden for firms that have already established a compliance infrastructure consistent with the requirements of Reg BI and Model Regulation 275.

Ultimately, we believe the Department could further align the Proposed Exemption with Reg BI and Model Regulation 275 by explicitly clarifying that the disclosures required under those regimes are appropriate and will meet the disclosure requirements of the Proposed Exemption. The SEC and NAIC determined that those disclosures were sufficient, and we see no reason why the same disclosures should not be leveraged for purposes of the Proposed Exemption, consistent with the Department's stated goal of achieving regulatory alignment. To reiterate, the disclosure obligation under Reg BI requires that "the broker-dealer must 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." Model Regulation 275 imposes similar requirements. In short, any lack of harmonization between the Proposed Exemption and Reg BI and Model Regulation 275 will invite confusion, operational inefficiency, and potential errors, inclusive of the Proposed Exemption's requirement to acknowledge fiduciary status as described in Part II.A, above.

F. Just as the SEC and NAIC determined not to include prudence requirements in their rules to avoid confusion and uncertainty, the Department should not include prudence as a condition of the Final Exemption.

The Impartial Conduct Standards (as defined in the Proposed Exemption) require that investment advice be in the "best interest" of the retirement investor, which includes a "prudence" component that presents conceptual concerns, uncertainty and inconsistency with Reg BI and Model Regulation 275. Indeed, the SEC received significant public comments in opposition to the inclusion of a subjective "prudence" requirement in Reg BI when it was proposed in 2018, and ultimately omitted this term,[33] noting:

> We are persuaded by commentators that its inclusion in the proposed rule text…is superfluous and unnecessarily presents the possibility for confusion and legal uncertainty. We believe requiring broker-dealers "to exercise reasonable diligence, care, and skill" conveys "the fundamental importance of conducting a proper evaluation of any securities recommendation in accordance with an objective standard of care" that was intended by the inclusion of "prudence."[34]

The NAIC reached a similar conclusion in adopting Model Regulation 275. The Department should follow the lead of the SEC and NAIC and strike "prudence" as a component of the Proposed Exemption's standard of care for investment advice. ERISA Section 404 already contains appropriate standards for prudence; the inclusion of a behavioral standard inherently based on facts and circumstances as a condition to the Proposed Exemption is needlessly duplicative, affords little comfort to firms earnestly seeking to comply with the conditions of an exemption, and is seemingly inconsistent with Congressional intent. The penalties for violations of the prohibited transaction rules include excise taxes, which are clearly a sufficiently powerful and independent deterrent. If Congress wished to penalize market participants for a lack of prudence in the form of excise taxes, it could have done so at any point in the 45 years since ERISA was enacted.

We fail to see how the inclusion of a prudence standard would add anything other than uncertainty and fear of being second guessed with the specter of excise taxes hanging over one's head, contrary to the Department's desire to encourage market participants to rely on the Proposed Exemption in furtherance of providing investment advice that is in the best interests of retirement investors. Fear should not win out over prudence, and prudence already applies.

Accordingly, IRI respectfully requests that the Department exclude prudence as a condition to relying on the Final Exemption.

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[33] As proposed, Reg BI required broker-dealers "to exercise reasonable diligence, care, skill, and prudence" when providing investment advice. However, in its final Rule, the SEC revised the standard of care to remove the term "prudence." *See* Reg BI Release at 257.

[34] *See* Reg BI Release at 257.

G. Financial Professionals Should Be Permitted to Rely on the Accuracy and Completeness of Information Provided by Retirement Investors About Existing Retirement Accounts When Recommending Rollovers.

Section II(c)(3) of the Proposed Exemption requires documentation of "the specific reasons that any recommendation to roll over assets…is in the Best Interest of the Retirement Investor."[35] On its face, this requirement is appropriate and consistent with Reg BI and Model Regulation 275. The Preamble acknowledges that "[t]he SEC already encourages firms to record the basis for significant investment decisions such as rollovers, although doing so is not required under Reg BI." Similarly, Model Regulation 275 expressly requires that insurance producers record and disclose the basis for annuity recommendations. However, the discussion of this requirement in the Preamble would significantly and inappropriately expand the obligations of firms and financial professionals far beyond Section 404(a) of ERISA, which generally governs a fiduciary's prudence obligations, as well as the requirements of Reg BI and Model Regulation 275.

We generally acknowledge and agree that firms and financial professionals are better equipped to make recommendations regarding rollovers that are in the best interest of retirement savers when they have the relevant information regarding the ERISA-governed plan, including information regarding investment alternatives under the plan, fees charged and other aspects of the plan. The Preamble states that, in evaluating potential rollovers from ERISA plans, firms and financial professionals should "make diligent and prudent efforts to obtain information about the existing plan and the participant's interests in it."[36] We have no concerns about requiring that financial professionals request such information directly from the retirement investor. However, the Preamble goes much further.

Specifically, the Preamble asserts that, when the relevant information cannot be obtained from the investor, financial professionals would have to undertake their own independent efforts to obtain information upon which they could "make a reasonable estimation of expenses, asset values, risk, and returns." This represents a significant and unwarranted departure from Reg BI and Model Regulation 275, and in doing so, places an unreasonable burden on firms and financial professionals. In determining whether the financial professional has satisfied ERISA's fiduciary standard, the Department should clarify that the financial professional is not required to look beyond information provided by the retirement investor.

In addition, the Preamble seems to indicate that the Proposed Exemption would require that a financial professional actually suggest other methods of investing a participant's assets under the employer plan's menu in connection with rollover discussions.[37] This approach seems wholly unrealistic and unnecessarily and involuntarily expands the scope of the advice a financial professional and financial institution should be called upon to make under the Proposed Exemption.

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[35] Release at 40,849.

[36] Release at 40,845.

[37] The Preamble "would necessarily include consideration and documentation of . . . "selecting different investment options" under the plan." Release at 40,845.

Finally, we note that the Department's cost-benefit analysis estimates "that it would take, on average, 10 minutes per rollover to document [rollover-related] justifications." We do not believe a financial professional could reasonably be expected to meet the expectations set forth in the Preamble in just 10 minutes. We therefore urge the Department to avoid any such prescriptive requirements beyond what is required by Reg BI and Model Regulation 275.

H. The Final Exemption Should Allow Fiduciaries to Determine Whether Ongoing Monitoring is Required and Should Not Mandate Monitoring Based on the Department's Perception of the Complexity or Risk of Particular Products.

The Department notes in the Preamble that certain investments with "unusual complexity and risk" may require investment professionals and financial institutions to implement a mechanism for the ongoing monitoring of those investments.[38] This requirement represents a significant departure from Reg BI, which does not impose an ongoing duty to monitor on registered representatives or their broker-dealer firms,[39] and from Model Regulation 275, which imposes no such duty on insurance producers. Avoiding the imposition of a new ongoing "duty to monitor" presents an opportunity to further harmonize the two investment advice rules pursuant to Executive Order ("E.O.") 13563[40] and 13771.[41] We note in this regard, that FINRA has published guidance regarding supervision of sales of complex and risky investment products on several occasions.[42]

If fiduciaries are to do their job, they should be afforded the latitude to determine, in light of their duties under Section 404 of ERISA, when and under what circumstances it would be prudent to monitor. The use of loaded and insufficiently defined terms like "unusually complex and risky" offers no incremental benefit to retirement investors in the safeguards already afforded under ERISA, and risks creating needless uncertainty and the scaling back of products and services that retirement clients want.[43] This is particularly problematic in circumstances where the use of such terms can be prejudicial. For example, subjecting sales of any particular product to an ongoing monitoring requirement because they are

[38] *See* Release at 40,843.

[39] "We are also confirming that Regulation Best Interest does not impose a duty to monitor a retail customer's account. We agree, however, with commenters that Regulation Best Interest should apply to any recommendations that result from the account monitoring services that a broker-dealer agrees to provide." *See* Reg BI Release at 102.

[40] Release at 40,850 ("Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.").

[41] Release at 40,836 ("This proposed exemption is expected to be an [E.O.] 13771 deregulatory action because it would allow investment advice fiduciaries with respect to Plans and IRAs to receive compensation and engage in certain principal transactions that would otherwise be prohibited under ERISA and the Code.").

[42] *See*, *e.g.*, FINRA Regulatory Notice 12-03.

[43] We again urge the Department not to impose its judgment here. When faced with the uncertainty of whether or not a given product or service may somehow be suspect, investment professionals and their associating firms will choose not to offer the product or service. Even delineating what the Department believes are "risky" and "complex" products runs a real risk of unsettling a competitive field in which labels will supplant quality and choice.

adjudged to be "risky" will place a "disproportionate [compliance] burden" [44] on these transactions that has the potential to "competitively disadvantage"[45] the market for these products. This is one of the outcomes the Fifth Circuit sought to prevent when it vacated the 2016 Regulation in *U.S. Chamber of Commerce*.[46]

Thus, we respectfully request that the Department defer to the judgement of ERISA fiduciaries to determine whether ongoing monitoring should be provided in connection with any recommended product or transaction.

I. The Final Exemption Should Not Be Limited to Non-Discretionary Investment Advice Only Arrangements.

The Proposed Exemption aims to provide retirement investors with continued choice and access to non-discretionary fiduciary services that are in their best interests. IRI remains supportive of the Department's efforts in this initiative. Nonetheless, we do not see a principled reason why the Proposed Exemption should not also extend to discretionary management relationships. Many retirement investors seek access not only to investment advice but also discretionary management services, and since the inherent conflicts and avenues for redress appear to be the same for both sets of services, so too should the ability to rely upon the Proposed Exemption. To extend protection to non-discretionary investment advice relationships would unfairly prejudice discretionary arrangements. This is particularly the case where retirement investors may decide to delegate certain execution powers to their financial professional in connection with the advice they receive. We can think of no principled basis why the Proposed Exemption should be so limited, and we encourage the Department to use this opportunity to extend relief to arrangements that carry with them the same potential for self-dealing violations with the protections provided under the Final Exemption.

J. The Final Exemption Should Not Include Any Criminal or Similar Disqualification Events.

We strongly encourage the Department to eliminate or substantially revise Section III of the Proposed Exemption. We first note that Section 411 of ERISA already proscribes fiduciaries from acting as such if they commit certain crimes. We do not see what protection the disqualification requirement affords retirement investors. In the 45 years since ERISA was enacted, the Department has granted a number of widely-utilized class exemptions with respect to conflicts of interests described in Section 406(b) of ERISA (and the analogous provisions of the Code), none of which use the approach outlined in Section III of the Proposed Exemption. In particular, many prohibited transaction class exemptions that are widely used by financial services firms—exemptions that might appear to present similar "risks" of self-dealing to those that may be present in the current context —do not include such a provision. For example, the

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[44] *U.S. Chamber of Commerce* at 7 ("But DOL removed fixed indexed annuities from the more latitudinarian PTE 84-24, leaving only fixed rate annuities within its scope. In practice, this action places a disproportionate burden on the market for fixed indexed annuities, as opposed to competing annuity products.").

[45] *U.S. Chamber of Commerce* at 19 ("Finally, in failing to grant certain annuities the long-established protection of PTE 84-24, the Rule competitively disadvantages their market because DOL believes these annuities are unsuitable for IRA investors.").

[46] *See U.S. Chamber of Commerce* at 7.

Department has given broad relief with no such condition in PTCE 77-4, PTCE 84-24, PTCE 86-128, and PTCE 95-60.

Equally troubling is Section III's standard for non-criminal ineligibility and the mechanism by which petitions may be heard concerning allegations of "systematic" violations of the Proposed Exemption. The standard itself is far too opaque. Moreover, the Proposed Exemption reserves what arguably amounts to inappropriate judicial discretion for the Department. To contest any such finding of "systematic" violations, a market participant would be required to appear before a single individual at the Office of Exemptions and Determinations. Such a denial of due process is deeply concerning and subjects the market participant to the whims of that one individual, and, to the extent it would expand the Department's enforcement authority with respect to IRAs (and other accounts subject to Section 4975 of the Code but not to the fiduciary responsibility provisions of ERISA), may be inconsistent with the Fifth Circuit's holding in *U.S. Chamber of Commerce*.

K. The Provision of Documentation Requirement is Overly Broad and Should Be Excluded from the Final Exemption.

We strongly encourage the Department to substantially revise Section IV of the Proposed Exemption. Although the requirement to maintain records demonstrating compliance is not objectionable, the remainder of Section IV is a radical and unwarranted departure from past practice. As explained by the Department, Section IV of the Proposed Exemption requires a Financial Institution to "provide, among other things, documentation of rollover recommendations and their written policies and procedures adopted pursuant to Section II(c)." It also notes that "documentation may be especially important for recommendations of particularly complex products or recommendations that might, on their face, appear inconsistent with the best interest of a Retirement Investor." As discussed throughout this letter, we are concerned about the Preamble's repeated references to "complex products" and vague standards like "recommendations that might, on their face, appear inconsistent with the best interest of a Retirement Investor." Once again, the Department runs dangerously close to legislating an approved list of investments when Congress has expressly declined to do so.

More troubling is the requirement that Financial Institutions hand over documents to a wide group of persons on demand. "Documents demonstrating compliance with this exemption" can include a wide range of internal compliance documentation. Internal compliance protocols and similar internal materials are crafted and developed for specific purposes. Making such materials available on demand will only undermine the purposes for which they are intended. The dissemination of internal audit, internal compliance and other reports will almost certainly create a culture of "quiet" rather than a culture of compliance. It will be equally as certain to make the provision of such reports less useful to financial institutions who rely on them to supply candid and honest feedback to advance the goal of creating and implementing a culture of compliance. We urge the Department not to step where it has wisely chosen not to tread before. To the extent that the Department has a legitimate need to see internal materials regarding compliance as it affects plans or accounts subject to ERISA, the Department already has that authority. Further, as noted in Part II.J above, to the extent it purports to expand the Department's enforcement authority with respect to IRAs (and other accounts subject to Section 4975 of the Code, but not to the fiduciary responsibility provisions of ERISA), this requirement appears to be inconsistent with the Fifth Circuit's holding in *U.S. Chamber of Commerce*.

III. The Discussion of the Five-Part Test in the Preamble is Inconsistent with the Ruling in *U.S. Chamber of Commerce*, the Administrative Procedures Act, and the Goal of Regulatory Harmonization, and Therefore Must Be Withdrawn.

While the Department helpfully confirmed the reinstatement of the 1975 Regulation and the applicability of the Five-Part Test, the Preamble reinterprets the Five-Part Test in ways that are new, surprising, and in some cases, contrary even to plain English. That such new color is found in the preamble to a Proposed Exemption defies reasonable expectations. We believe that the cumulative effect of the new color the Department adds on a 45 year-old reinstated rule would be to disrupt the very purpose of reinstating the rule: creating greater certainty and achieving fidelity to the Fifth Circuit's opinion in *U.S. Chamber of Commerce.*

Moreover, this result is incompatible with the Department's stated goal of harmonizing the Proposed Exemption with other regulatory mandates, such as Reg BI and Model Regulation 275, which deliberately eschewed the characterization of broker-dealers and insurance producers, respectively, as fiduciaries and took great pains to preserve both commission-based and fee-based business models. In this regard, the SEC stated: "Our concerns about the ramifications for investor access, choice, and cost from adopting either of these approaches are not theoretical. With the adoption of the now vacated [2016 Rule] there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances."

Without having been subject to the typical administrative review and rulemaking procedures, it is questionable whether a court or other proceeding would uphold such standards, thereby leading to confusion as to the appropriate legal standard to be applied in determining whether fiduciary status has been established.

The Preamble acknowledges that all five prongs of the Five-Part Test must be met, and correctly points out as well that "an isolated and independent transaction" would not result in a determination of fiduciary status. However, the entire thrust of the remainder of the Preamble on this point is new and can only be read as an attempt to stretch the Five-Part Test well beyond its historical meaning to sweep broadly to encompass many more transactions and relationships than in the past, without regard for whether the reinterpreted Five-Part Test will still operate to distinguish true fiduciary relationships based on trust and confidence and on individualized tailored advice on a regular basis pursuant to a mutual agreement.

While the Department proceeds in this manner ostensibly to protect consumers, the Fifth Circuit was abundantly clear that well-intentioned policy objectives cannot be the basis for ignoring the legal definition of "fiduciary." In seeking to correct what the Department may perceive as technical loopholes, the Department is undercutting essential ingredients of the Five-Part Test that have stood for 45 years. In the Preamble, three specific "clarifications" made by the Department, in particular, are objectionable because in combination they operate to thwart the true objective of identifying fiduciaries consistent with the trust and confidence standard.

A. *The Regular Basis Prong of the Five-Part Test Should Not Be Interpreted So Broadly as to Cover Nearly All Interactions with Retirement Investors.*

The Department signals adoption of a much broader interpretation of the "regular basis" element of the Five-Part Test, which is expansive and in many ways inconsistent with the accepted meaning of the word "regular" as "recurring, attending or functioning at fixed, uniform or normal intervals."[47] While making clear there is an exception for an "isolated and independent transaction," nearly any other engagement between a financial professional and a retirement investor appears to constitute a regular relationship.

This construct seemingly disregards the short-term transactional dealings that often occur between a financial professional and a client, as well as other kinds of interactions that may occur more than once but should not be deemed to satisfy the "regular basis" prong unless truly part of ongoing relationship built on trust and confidence. Episodic and periodic interactions between broker-dealers, insurance agents, and other financial institutions on the one hand and clients on the other hand do not necessarily occur at "fixed, uniform or normal intervals." Each of the SEC and the NAIC have understood this, and Reg. BI and Model Regulation 275 reflect this understanding. A financial professional that calls a client when an opportunity avails itself should not have to become an investment advice fiduciary merely because opportunity also knocked earlier in the year. Reg. BI and Model Regulation 275 do not anticipate such a result, and neither should the Five-Part Test.

Thus, we urge the Department not to eliminate those common practice arrangements in which interactions between financial professionals and retirement clients may occur on an as-appropriate basis. Such arrangements, pursued over whatever time horizon, should not be viewed as a "regular basis." The Department acknowledges that a one-time sales transaction, such as the one-time sale of an insurance or securities product, does not by itself confer fiduciary status. This acknowledgment, however, does not go far enough. Such transactions are rarely so simple or isolated. Even a one-time sale of a financial product often requires multiple meetings or calls between agent and client. The Preamble's approach, therefore, leaves little room for any financial services relationship to be other than fiduciary.

For example, the Department states that, "for an investment advice provider who establishes a new relationship with a Plan participant and advises a rollover of assets from the Plan to an IRA, the rollover recommendation may be seen as the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test." This formulation requires a financial services provider to foresee whether there will be future regular interaction with the client and undertake the duties of a fiduciary based merely on an anticipated relationship even absent any affirmative agreement to serve as the client's fiduciary advisor. Institutions and financial professionals cannot be crystal ball gazers. More fundamentally, such an "expectation-based" reading of the term "regular basis" is contrary to the accepted meaning of the word "regular" which would require an actual, ongoing established pattern of interaction. Query whether the regular-basis prong of the Five-Part Test should be considered to have been satisfied *even before* the relationship has developed into one where advice is being regularly

[47] Merriam-Webster Dictionary. See also Oxford Encyclopedic English Dictionary (defining "regular" as acting or done or recurring uniformly or calculably in time or manner; habitual, constant, orderly).

provided. Would that have been a natural read of this provision for the past 45 years in the absence of a change to the regulatory text?

Separate from advice regarding rollovers, the Preamble goes so far as to suggest that agents who receive trail commissions on annuity transactions are engaged in an ongoing relationship that apparently will be sufficient to find fiduciary status[48] when in fact the agent is merely providing services for an existing policy rather than providing ongoing advice that is *the* primary basis for investment decision-making. Once again, this would seem to run afoul of a natural and reasonable reading of the term "regular basis."

As stated by the Fifth Circuit, "for the past forty years, [the Department] has considered the hallmarks of an 'investment advice' fiduciary's business to be its 'regular' work on behalf of a client and the client's reliance on that advice as the 'primary basis' for her investment decisions." Similar to its approach in the 2016 Regulation, which was vacated by *U.S. Chamber of Commerce*, the Department's approach in the Preamble seems to be changing the paradigm that has existed for over 40 years in ways that will turn many brokers and agents into fiduciaries absent the kind of relationship described in *U.S. Chamber of Commerce*.

1. *Analysis of Rollover Advice and Later IRA Advice Under the "Regular Basis" Prong*

IRI is concerned by the Department's express withdrawal of the *Deseret* advisory opinion[49] (the "Deseret Letter") to the extent it could mean the Department is directly or indirectly extending its jurisdiction over IRA transactions involving the rollover of ERISA plan assets. IRI respectfully requests that the Final Exemption restore and reaffirm the Deseret Letter. Absent the Department's affirmation of the Deseret Letter, IRI respectfully requests that the Department confirm that (i) the recommendation to roll over assets from an ERISA-governed plan to another ERISA-governed plan, or from an IRA to another IRA, should be disregarded in determining whether there is a "regular basis" under the Five-Part Test and (ii) a recommendation to roll over assets from an ERISA-governed plan to an IRA may only be considered as establishing a "regular basis" when the parties clearly establish at the time of the rollover that there is an expectation of an ongoing relationship that will follow the rollover.

More fundamentally, IRI respectfully submits that there may be a basic flaw in the Preamble's reasoning that advice relating to the decision to roll over assets from an ERISA-governed plan to an IRA (or another plan) can ever constitute the first actions or steps in a pattern of "regular" advice. Prior to the rollover, the advice being provided regarding the making of the rollover is presumably being provided with respect to assets of an ERISA-governed transferor plan.[50] At this stage, the IRA may not even exist. Following the rollover, however, the advice is being provided exclusively with respect to an IRA. While

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[48] *See* Release at 48,840, fn. 41.

[49] Dep't of Labor, Advisory Op. 2005-23A.

[50] *See generally* 81 Fed. Reg. at 20,964 (preamble to the final version of the 2016 Regulation) ("Even if the assets will not be covered by ERISA or the Code when they are moved outside the plan or IRA, the recommendation to change the plan or IRA investments is investment advice under ERISA and the Code. Thus, recommendations on distributions (including rollovers or transfers into another plan or IRA) or recommendations to entrust plan or IRA assets to a particular IRA provider would fall within the scope of investment advice in this regulation, and would be covered by Title I of ERISA, including the enforcement provisions of section 502(a).").

the Preamble in discussing the Deseret Letter seems to focus on the transferor Plan and not on the transferee IRA, the pattern of advice would be broken at the time of the rollover, as the two vehicles for holding the retirement assets – pre- and post-rollover – are different plans.[51]

The Department, in issuing the 2016 Regulation, appears to have viewed the Five-Part Test in this way. In this regard, the preamble to the 2015 proposal that led to the 2016 Regulation appears to acknowledge that the "regular basis" prong of the Five-Part Test would not be met with respect to rollovers, and thus argued for a change to the actual regulatory language, stating:

> One example of the five-part test's *shortcomings* is the requirement that advice be furnished on a "regular basis" . . . . [T]he "regular basis" requirement also deprives individual participants and IRA owners of statutory protection when they seek specialized advice on a one-time basis, even if the advice concerns the investment of all or substantially all of the assets held in their account (e.g., as in the case of an annuity purchase or a roll-over from a plan to an IRA or from one IRA to another). . . . *The proposed regulation, if finalized, would supersede Advisory Opinion 2005-23A.* Thus, recommendations to take distributions (and thereby withdraw assets from existing plan or IRA investments or roll over into a plan or IRA) or to entrust plan or IRA assets to particular money managers, advisers, or investments would fall within the scope of covered advice.[52] [emphasis added]

It would seem, then, that the Department in 2015 and 2016 recognized that that the Deseret Letter did correctly interpret and apply the Five-Part Test. Indeed, as a result, the Department at that time successfully sought a major revision to the regulatory text, essentially eliminating the "regular basis" prong. No effort to revise the regulatory text is being (or should be) pursued in the Release. As a result, the Department should acknowledge the validity of its 2015/16 confirmation that the Deseret Letter correctly interpreted the Five-Part Test, and should further expressly conclude that the Preamble misconstrued the regular basis prong thereof by incorrectly grouping advice with respect to a transferor plan with possible later advice with respect to a transferee IRA.[53]

There are additional issues with the Preamble's analysis of the regular basis prong in the rollover context. The Preamble cites sources saying "a common purpose of advice to roll over Plan assets is to establish an ongoing relationship in which advice is provided on a regular basis outside of the Plan,"[54] that advisers have an "economic incentive to encourage an investor to roll Plan assets into an IRA that

[51] *See, e.g.,* Release at 40,839 ("A recommendation to roll assets out of a Plan is necessarily a recommendation to liquidate or transfer the Plan's property interest in the affected assets, the participant's associated property interest in the Plan investments, and the fiduciary oversight structure that applies to the assets.").
[52] *See also* 81 Fed. Reg. at 20,961 (noting that "paragraph (a)(1)(i) cover[ed] recommendations regarding the investment of plan or IRA assets, including recommendations regarding the investment of assets that are being rolled over or otherwise distributed from plans to IRAs").
[53] The 2016 Regulation specifically added categories of investment advice that would render one an investment advice fiduciary, including "[a] recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property or a recommendation 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." 81 Fed. Reg. at 20,948.
[54] *See* Release at 40,839.

[the adviser] will represent as a either a broker-dealer or investment adviser," and that providers engage in "cross-selling," all or any of which, according to the Preamble, would apparently satisfy the "regular basis" prong. However, it is only the providing of *investment advice* on a "regular basis" – *i.e.*, a constant, continuing, habitual or expected basis – for a fee that could create the type of "trust-and-confidence" relationship that triggers a fiduciary duty.

Finally, we note that such a conclusion would be consistent with the SEC's approach. The SEC has showed equal focus on the importance of rollover recommendations by stating that broker-dealers' recommendations regarding rollovers are specifically covered by Reg BI. However, the SEC did not take the view that broker-dealers who provide advice about rollovers are acting as investment advisers requiring registration under the Advisers Act.

Absent a reaffirmation of the Deseret Letter, as we request above, the Department should provide clearer guidelines regarding when the facts and circumstances would justify consideration of rollover advice in evaluating whether the "regular basis" prong of the Five-Part Test is satisfied. IRI notes that advice regarding moving assets from one ERISA-governed plan to another, or from one IRA to another, do not implicate the concern of removing assets from a retirement plan structure in which there are, as a matter of course, a number of named fiduciaries that are responsible for, among other things, selecting investment options and otherwise administering plan assets. Thus, IRI submits that any advice regarding rolling over assets between two ERISA-governed plans or two IRAs should not be considered in establishing whether there was a regular basis.

Similarly, the Department's implication that a rollover recommendation is advice subject to ERISA, as opposed to the Code, should be clarified in particular to not include situations where the participant decides on his or her own to withdraw assets from an employer plan and rollover funds to an IRA recommended by a financial professional. It is important in those situations to distinguish between the recommendation of the rollover itself and the investment of the assets of the IRA following the rollover. This result is especially appropriate in cases where the participant may have long ago separated from his or her employment with a plan sponsor.

The Department, in connection with the issuance of the Final Exemption, should recognize that plan participants may control their own accounts and exercise independent discretion such that the decision to rollover to an IRA and the decision to purchase investments within an IRA can be separate acts so that financial professionals are viewed as becoming fiduciaries if they only advise as to the latter and leave the decision to withdraw from the ERISA-governed plan solely to the participant. Obviously it would be incumbent in those situations for the financial professional who is the provider of the IRA to make this distinction explicit to the plan participant and advise that any information or advice about the retirement plan account itself – including the decision to liquidate the account – be provided by the plan sponsor or another fiduciary. A written statement that the scope of the financial professional's advice does not include advice regarding the rollover decision should be sufficient to exclude the rollover from the analysis of whether a "regular basis" exists under the Five-Part Test.

2. *Other Considerations with Respect to the Regular Basis Prong.*

The Preamble strongly implies that regular interactions between a financial professional and a retirement investor will nearly always equate to regular interactions involving individualized investment advice. We strongly disagree with this implication. For example, the Department appears to suggest that the receipt of trailing commissions on an annuity may invite fiduciary status because trailing commissions may be accompanied by ongoing recommendations or service with respect to the annuity, and that this type of compensation contemplates an ongoing advice relationship.[55] Put another way, just as the Department seems to now assert that the start of a conversation about rollovers is more likely than not to imply the beginning of an advice relationship, the Department also seemingly concludes that the receipt of trail commissions signals the start of a new (ongoing) relationship triggering fiduciary status under ERISA. Trail commissions are commonly intended to encourage ongoing servicing, and in the case of an annuity, such compensation does not necessarily invite or assume future recommendations by the insurance agent. We urge the Department not to adopt interpretations based on their own expectations or preconceived notions, especially when those perspectives are unfounded. We continue to suggest that the parties to the commercial arrangement should have the final say as to the nature of their relationship and the obligations attached thereto.

No less problematic are the implications of such "expectations-based" or "anticipatory" thinking to other regimes. The Department's discussion about trailing commissions and the implication that certain episodic relationships naturally translate into ones that involve monitoring should be carefully considered in light of other authority with which the Department seeks to harmonize the Five-Part Test. The Department seems to ignore the very real differences between transactional or episodic relationships on the one hand, and adviser-based relationships on the other hand. The federal securities rules, by contrast, were carefully constructed to recognize and preserve those differences. Broker-dealers that provide information, and in some cases, even certain advice, that is solely incidental to their conduct of business as a broker-dealer are not required to register as investment advisers under the Advisers Act.[56] Broker-dealers that make recommendations that trigger the enhanced standards of Reg BI, are of course, subject to Reg BI, but as noted above, in crafting Reg BI, the SEC expressly rejected the call to adopt a uniform "one size fits all" approach by labeling all broker-dealers – even those that provide episodic advice under the "solely incidental" test – as subject to a fiduciary standard.[57]

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[55] *See* Release at 40,839.

[56] Broker-dealers that provide certain investment advice that is "solely incidental" to their business as broker-dealers and who not receive special compensation for such advice are excluded from the definition of "investment adviser" in Section 202(a)(11) of the Advisers Act. In *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser*, 84 Fed. Reg. 33,681 (July 12, 2019), the SEC made clear that investment discretion (rather than price and time discretion when executing a customer's order) and account monitoring pursuant to an agreement (rather than a broker's voluntary review of a customer's account and holdings) constitutes investment advice that is not "solely incidental" to the business of a broker-dealer. Nevertheless, not all account monitoring constitutes the provision of investment advice by a broker-dealer. "[A] broker-dealer that agrees to monitor a retail customer's account on a periodic basis for purposes of buy, sell or hold recommendations may still be considered to provide advice in connection with and reasonably related to effecting securities transactions [and thus, qualify for the "solely incidental" exception]."

[57] See supra, note11.

The Massachusetts Securities Division proposed a similar amendment in December 2019 before removing that section in the final version in response to similar feedback.[58] The Department should heed the example of other regulators in endeavoring to align their rulebook with other standards of conduct.[59] If financial professionals do not have certainty regarding the scope of their obligations to provide ongoing monitoring of investment recommendations, they will in many cases be forced to assume that such obligations apply to all investments in the client's portfolio. Like any other group of professionals, financial advisers must be compensated for the time, effort, and expenses that they incur in providing those services. If they believe they are obligated to provide ongoing monitoring, they will of necessity recommend that clients establish fee-based advisory accounts. As discussed above, this is not in the economic interest of many clients and is in direct conflict with the goals of Reg BI in maintaining a level playing field among service models.

B. ***The Primary Basis Prong is Essential to Distinguishing Relationships of Trust and Confidence from Transactional Interactions, and Should Not Be Interpreted Out of Existence.***

The Department explains that advice must only serve as "a" primary basis and not as "the" primary basis of the recommendation. We acknowledge that this is the language actually used in the Five-Part Test,

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[58] "Section 12.207(1)(b)4 of the Proposal also extended the fiduciary duty beyond the time a recommendation is made. This section of the Proposal imposed a fiduciary duty during any time in which the broker-dealer or agent received ongoing compensation or provided investment advice to the customer in connection with other non-brokerage financial advice. Many commenters wrote that this extended duty may run contrary to the "incidental" exemption from the Advisers Act. These commenters claimed that this section would require broker-dealers and agents to conduct ongoing monitoring, which in turn would be outside the scope of the "incidental" exemption. As such, according to these commenters, broker-dealers would be required to register with the SEC as investment advisers. Commenters also asserted that the ongoing monitoring resulting from Section 12.207(1)(b)4 of the Proposal would impose additional costs for the broker-dealers and their agents, which may then be passed on to the customers. These commenters then predicted that any increased operational costs would be substantial and would result in material restrictions on the broker-dealer model in Massachusetts. They further asserted that this ongoing duty would result in higher costs, less choice, and limited services for the customer. In response to these comments, the Division has removed Section 12.207(1)(b)4 from the Final Regulations. Commenters likewise argued that Section 12.207(1)(b)5 extends the fiduciary duty beyond what is agreed upon with the customer, and would impose an ongoing duty where one otherwise would not exist. A number of commenters wrote that any customer contact could lead a customer to have a reasonable expectation that the broker-dealer or agent would monitor their accounts on an ongoing basis. For example, one commenter expressed the concern that the section would prevent them from sending out "helpful reminders" and other informational notices. Similar to the arguments made above, commenters wrote that this would impose an ongoing duty on the broker-dealer or agent that would take them outside the scope of the "incidental" exemption in the Advisers Act. In response to these comments, the Division has removed Section 12.207(1)(b)5 from the Final Regulations." *See* Massachusetts Securities Division, Amendments to Standard of Conduct Applicable to Broker-Dealers and Agents (February 21, 2020), *available at* http://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/Adopting-Release.pdf

[59] "State regulators and standards-setting bodies also have focused on conduct standards… The Massachusetts Securities Division has amended its regulations for broker-dealers to apply a fiduciary conduct standard … The approach in this proposal includes Impartial Conduct Standards that are, in the Department's view, aligned with those of the other regulators. In this way, the proposal is designed to promote regulatory efficiencies that might not otherwise exist under the Department's existing administrative exemptions for investment advice fiduciaries." *See* Release at 40,836.

but we suggest that the Department's strong reliance on these words and seeming disregard for the equally important modifying adjective, "primary," reflects a pre-conceived objective to expand the Five-Part Test. Such an emphasis unfairly shades the meaning of the words on the page to a reading that is inconsistent with the historical meaning of this prong of the test. The "primary basis" prong of the Five-Part Test plays a critical role in distinguishing between a true fiduciary relationship (*i.e.,* one based upon trust and confidence) as opposed to a transactional one or an episodic one. Accordingly, we urge the Department to interpret the phrase "a primary basis" in a manner that is consistent with the dictionary definition of "primary" as "of first rank, importance or value." [60]

The Preamble seemingly interprets the "primary basis" prong out of the Five-Part Test by suggesting it is likely to be satisfied merely because an agent or broker is required to comply with other regulatory "best interest" requirements now mandated by Reg BI, Model Regulation 275, or comparable state laws. Notably, the Preamble states, "When financial service professionals make recommendations to a Retirement Investor, particularly pursuant to a best interest standard such as the one in the [Reg BI], or another requirement to provide advice based on the individualized needs of the Retirement Investor, the parties typically should reasonably understand that the advice will serve as at least a primary basis for the investment decision."

This analysis correlates to the determination of whether a recommendation has been made that would trigger the requirements of Reg BI. The SEC has consistently recognized that this determination is highly dependent on the relevant facts and circumstances, and has therefore resisted the creation of a bright-line test to determine whether or not a recommendation has been made. We note that FINRA has issued guidance indicating that a specific "call to action" can serve as an indicator that a recommendation has been made. However, FINRA also places significant importance on the individualized nature of the call.

The Department seems to assume that the primary basis prong would be satisfied whenever a recommendation is made by a financial professional. That assumption, however, is simply not consistent with the established views of the SEC and FINRA,[61] and would run counter to established understanding of the words on the page that have been in the Five-Part Test for 45 years. Moreover, it is inconsistent

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[60] *See* Merriam Webster Dictionary; s*ee also* Oxford Encyclopedic English Dictionary (defining "primary" to be of first importance, or of the first rank in a series).

[61] Notice to Members 01-23, FINRA states: "[T]he more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater likelihood that the communication may be viewed as a 'recommendation.' [footnote incorporated into text]" Notice to Members 01-23 further states that there is a recommendation when "[a] member sends its customers an e-mail stating that customers should be invested in stocks from a particular sector (such as technology) and urges customers to purchase one or more stocks from a list with 'buy' recommendations." FINRA has also noted that an explicit recommendation to hold a particular security is tantamount to a "call to action" in the sense of a suggestion that the customer stay the course with the investment, and that a communication with customers to generally use a bond ladder would similarly be treated as a recommendation for these purposes. FINRA further noted that "recommendations to customers to invest in more specific types of securities, such as high dividend companies or the 'Dogs of the Dow'" would also be regarded as a recommendation that triggered suitability. FINRA Rule 2111 (Suitability) FAQ, available at https://www.finra.org/rules-guidance/key-topics/suitability/faq.

and incompatible with applicable state laws and rules, [62] and would likely exacerbate the growing risk of a patchwork of conflicting outcomes in otherwise identical circumstances.

C. The Preamble's Interpretation of the Mutual Understanding Prong Would Impair the Rights of Consumers and Financial Professionals to Dictate the Terms of their Relationship.

The Department's interpretation of the Five-Part Test in the Preamble also essentially removes the concept that there must be an express understanding between the parties that the financial professional is intending to act as a fiduciary for the client rather than merely selling products. The Department's view that this understanding can simply be inferred from circumstances defies real-world interactions in which consumers either work with a professional to obtain investment advice or work with salespeople who provide products where advice is incidental to sales and there is no expectation of a fiduciary relationship. Removing or at least obscuring the requirement for an explicit understanding between the parties creates ambiguous standards for financial professionals and will lead to market confusion for consumers as well.

Contrary to the Preamble's approach, IRI believes that the Department should encourage financial institutions and retirement investors to have a contractual understanding of the nature of their relationship. This would benefit both financial institutions and consumers. The Department's assumptions about the nature of a bilateral commercial relationship should not override the reality of such relationships or the freedom of parties to define their relationship by contract. The intention of the parties involved should dictate whether a mutual understanding exists, rather than sweeping assumptions by the Department about the nature of all relationships. Consumers and their financial professionals have always had, and should continue to have, the freedom to decide for themselves what the nature of the relationship should be. The Department's musings should not trump freedom of contract.

D. The Interpretation of the Five-Part Test in the Preamble Fails to Meet the Standards Set by the U.S. Supreme Court for Deferring to an Agency's Interpretations of Its Own Rules.

Many of the interpretations in the Preamble are substantially new, especially as they pertain to the "regular basis" and "a primary basis" prongs. As noted above, in the case of the "regular basis" prong, the Department's 2016 Regulation seemed to recognize that a change in the 1975 Regulation was

[62] *See* 950 Mass. Code Regs. 12.204, 12.207; New York State Department of Financial Services Insurance Regulation 187, 11 NYCRR 224, First Amendment (2019) *available at* https://www.dfs.ny.gov/docs/insurance/r_finala/2018/rf187a1txt.pdf; NAIC Takes Action to Protect Annuity Consumers; *available at* https://content.naic.org/article/news_release_naic_takes_action_protect_annuity_consumers.html.

necessary to change the result of the *Deseret* Letter.[63] At a minimum, the Department should make clear that it will not pursue its new interpretations with retroactive effect.[64]

More generally, though, while we understand that the Department is entitled to appropriate deference to interpret its own rules,[65] we believe that recent U.S. Supreme Court authority indicates that there are important limits where an interpretation runs contrary to established expectations or would otherwise come as a surprise.[66] We therefore respectfully submit that the recognition of the reinstatement of to a rule promulgated in 1975 should not have been accompanied by material reinterpretations. The Supreme Court noted that deference is not appropriate "when lots of time has passed between the rule's issuance and its interpretation—especially if the interpretation differs from one that has come before."[67]

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[63] Cf. 81 Fed. Reg. at 20,964 ("Even if the assets will not be covered by ERISA or the Code when they are moved outside the plan or IRA, the recommendation to change the plan or IRA investments is investment advice under ERISA and the Code. Thus, recommendations on distributions (including rollovers or transfers into another plan or IRA) or recommendations to entrust plan or IRA assets to a particular IRA provider would fall within the scope of investment advice in this regulation, and would be covered by Title I of ERISA, including the enforcement provisions of section 502(a).").

[64] Cf., e.g., *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971) (articulating a three-factor test where, if all three criteria are met, a new judicial interpretation would be applied only prospectively if (i) the rule was genuinely new; (ii) retrospective application is not necessary to further the operation of that rule; and (iii) retroactivity could produce substantial inequitable results). See generally *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) ("*Harper* overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law.")

[65] *See Auer v. Robbins* 19 U.S. 452 (1997).

[66] See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (narrowing the circumstances under which a court will defer to an agency's interpretation of its own regulations). The case examined the so-called "*Auer* Deference," pursuant to which a court should ordinarily defer to the agency's construction of its own regulation. The Court concluded that *Auer* Deference should not be permitted unless all of the following five criteria are met:

1. Genuine ambiguity. "If uncertainty does not exist, there is no plausible reason for deference." Id. At 2415. To declare a regulation ambiguous, "a court must exhaust all the 'traditional tools' of construction." *Id*.
2. Reasonable construction. The agency's construction must be "reasonable." "In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2415-16.
3. Proper authority. The agency's construction "must be the agency's 'authoritative' or 'official' position." If the decision is "ad hoc," it does not warrant deference. Likewise, if the interpretation stems from an actor who cannot "make authoritative policy in the relevant context," no deference is appropriate. *Id*. at 2416.
4. Substantive expertise. Deference is limited to those agency's constructions that "in some way implicate its substantive expertise." If the interpretative task is one that "fall[s] more naturally into a judge's bailiwick," then deference is not appropriate. *Id*. at 2417.
5. No surprises. The agency's decision "must reflect 'fair and considered judgment.'" For this reason, "convenient litigating position[s]" and "post hoc rationalization[s]" do not trigger deference. Nor does an interpretation that "creates 'unfair surprise' to regulated parties." This often occurs when an agency changes its position, or when a new agency rule imposes retroactive liability. *Id*.

[67] *Id*. at 2412.

The Court also noted that an agency's reading of its own regulation must be reasonable.[68] We question whether it is reasonable now, with the passage of approximately 45 years since the original promulgation of the 1975 Regulation, for the Department to suddenly come to a reading that seems to defy a common sense or "plain English" interpretation of the term "regular basis." For example, the Department's new reading may suggest that the prong can be met on expectation alone, without even before the relationship has developed into one where advice is being regularly provided.

IV. The Department Should Clarify the Application of the Five-Part Test in Certain Contexts in the Preamble to the Final Exemption or Other Guidance.

A. The Department Should Acknowledge that the Facts and Circumstances Surrounding Insurance Recommendations Will Not Typically Trigger Fiduciary Status under the Five-Part Test.

As discussed in Section III above, we have significant concerns about the expansive new interpretation of the Five-Part Test and, in particular, the regular basis, primary basis, and mutual understanding prongs of that test. These concerns are particularly acute when considering how this new interpretation would apply to the segment of the insurance industry that offers annuities and other guaranteed lifetime income products.

Annuities are used to protect against a variety of risks, including longevity risk (the risk of outliving one's assets), inflation risk (the risk that the purchasing power of a retiree's income will not be able to keep up with his/her standard of living), and sequence-of-returns risk (the risk that an investor will experience poor portfolio performance early in retirement). These are all long-term considerations, and therefore, a relatively low percentage of consumers will purchase annuities more than once or twice in their lifetime.

With this in mind, the interaction and relationship between a consumer and an insurance agent will generally be highly transactional in nature. Regardless of whether the interaction is initiated by the consumer or the agent, the discussion will typically focus on evaluating the consumer's financial situation, insurance needs, and long-term objectives. Based on those factors, the agent will consider whether any of the products he or she is authorized to sell would align with the consumer's situation, needs, and objectives. If the consumer agrees, an application is completed and submitted to the insurance company for processing. For many consumers, the purchase would likely require the consumer to roll over assets from their 401(k) (where the vast majority of consumers hold most of their retirement savings) to an IRA.

Once the desired coverage is in place, the agent will typically remain available to assist the consumer with any administrative or ministerial actions, such as changes to designated beneficiaries, updates to contact information, and activation of various benefits that may be available to the consumer under the contract. None of these would constitute investment advice, and the agent will typically receive no additional compensation for providing this assistance beyond the initial commission paid in connection with the initial sale.

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[68] *Id*. at 2415-16.

Despite the transactional nature of this relationship, many insurance agents would likely find themselves subject to ERISA fiduciary status under the new interpretation of the Five-Part Test in the Preamble. The Department does acknowledge that "a one-time sale of an insurance product…does not by itself confer fiduciary status under ERISA or the Code…" Any clarity provided by this statement, however, is counteracted by the Department's comment in a footnote that "agents who receive trailing commissions on annuity transactions may continue to provide ongoing recommendations or service with respect to the annuity."[69] This comment, when viewed in the context of the assertion that a rollover recommendation could serve as "the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test…," seemingly implies that even a one-time sale of an insurance product would be sufficient to trigger fiduciary status.

We respectfully but strenuously assert that typical insurance recommendations should not give rise to fiduciary status. As the Fifth Circuit so eloquently stated in *U.S. Chamber of Commerce*, it is "inconceivable that…insurance agents will have an intimate relationship of trust and confidence with prospective purchasers." For the reasons outlined above, we believe the facts and circumstances surrounding insurance recommendations will not typically trigger fiduciary status because such recommendations typically occur on an infrequent basis and are not representative of the "trust and confidence" relationship contemplated by the Fifth Circuit analysis. We respectfully urge the Department to acknowledge and recognize this fact. Moreover, the Department should confirm that servicing of insurance and annuity contracts, as described above, does not constitute investment advice that would cause the totality of the circumstances to be viewed as the provision of investment advice on a regular basis under the Five-Part Test. To determine otherwise would potentially lead an insurance agent to think twice about going back to a consumer to assist with regular servicing requests out of fear that some unintended fiduciary relationship may spring from such interaction. This serves no one.

B. ***The Department Should Provide a Clear and Workable Path to Exemptive Relief for the Independent Insurance Distribution Channel by Allowing the Financial Institution Obligations of the Proposed Exemption to Be Met Through the Mechanisms Developed by State Insurance Regulators.***

As noted above, we do not believe the facts and circumstances surrounding most insurance recommendations would support the imposition of fiduciary status under the Five-Part Test. We recognize, however, that very specific and usually limited facts and circumstances may dictate a contrary outcome in particular situations. We also acknowledge that the Department may ultimately reject the arguments presented above and refuse to acknowledge that insurance recommendations will not typically cause a financial professional to be treated as a fiduciary under ERISA – though we believe that outcome is fundamentally flawed. In either case, we respectfully urge the Department to ensure that a workable path is provided for independent insurance agents to rely on the Proposed Exemption. The following comments are offered to assist the Department in this effort.

The Proposed Exemption would provide exemptive relief from ERISA's prohibited transaction rules for Financial Institutions (defined to include registered investment advisers, broker-dealers, banks, and

[69] Release at 40,840, fn. 41.

insurance companies), and Investment Professionals (defined to include the individual employees, agents, and representatives of Financial Institutions) that provide fiduciary investment advice to retirement investors.[70] Notably omitted from the definition of Financial Institution, however, are insurance intermediaries such as independent marketing organizations ("IMOs"), field marketing organizations ("FMOs"), and brokerage general agencies ("BGAs"), which provide marketing and other support for independent insurance agents.[71] As a result of this omission, insurance companies are the only type of entity involved in such transactions that are authorized to serve as the Financial Institution[72] (unless the relevant intermediary has obtained an individual PTE[73]).[74] [75] For the reasons described below, however, we do not believe this is a workable outcome in the independent insurance distribution channel pursuant to conditions currently contained in the Proposed Exemption.

As noted above, the Proposed Exemption contemplates important roles for both the financial professional providing advice to the retirement investor and a financial institution responsible for supervising the financial professional's conduct. Assuming that the Department adequately addresses the concerns identified in Section II above, we believe this two-tiered regulatory construct would provide a workable source of exemptive relief for recommendations and sales made through certain

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[70] "The Department assumes that 11,782 Financial Institutions, comprising 1,957 broker-dealers, 6,729 SEC-registered investment advisers, 2,710 state-registered investment advisers, and 386 insurers, are likely to engage in transactions covered under [the Proposed Exemption]." Release at 40,850, fn. 102.

[71] "Insurance intermediaries typically recruit, train and support independent insurance agents and market and distribute insurance products such as traditional fixed rate annuities and fixed indexed annuities. The intermediaries include organizations commonly referred to as independent marketing organizations . . . , field marketing organizations . . . and brokerage general agencies . . . . Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Fed. Reg. 7,336, 7,337 (Jan. 19, 2017) (the "*Proposed BIC Exemption*").

[72] *See* Release at 40,846 ("Insurers could also create a system of oversight and compliance by contracting with an IMO to implement policies and procedures designed to ensure that all of the agents associated with the intermediary adhere to the conditions of this exemption. . . . This might involve the intermediary's review of documentation prepared by insurance agents to comply with the exemption, as may be required by the insurance company, or the use of third-party industry comparisons available in the marketplace to help independent insurance agents recommend products that are prudent for the Retirement Investors they advise.")

[73] *See* Release at 40,838 ("Additional types of entities, such as IMOs, FMOs, or BGAs, that are investment advice fiduciaries may separately apply for relief for the receipt of compensation in connection with the provision of investment advice on the same conditions as apply to the Financial Institutions covered by the [Proposed Exemption].").

[74] *See* Release at 40,846 ("Insurance companies can supervise independent insurance agents and they can also create oversight and compliance systems through contracts with intermediaries such as independent marketing organizations (IMOs), field marketing organizations (FMOs) or brokerage general agencies (BGAs).").

[75] "Pursuant to section VIII(e)(5) of the Best Interest Contract Exemption, the Department received 22 applications for individual exemptions from insurance intermediaries that contract with independent insurance agents to sell fixed annuities (applicants). The applicants describe themselves as ''independent marketing organizations,'' ''insurance marketing organizations'' and ''field marketing organizations.'' Collectively, the Department refers to the applicants and similar entities as either ''insurance intermediaries'' or ''IMOs.'' The applicants sought individual exemptions under the same conditions as the Best Interest Contract Exemption, but with a new definition of ''Financial Institution'' incorporating insurance intermediaries. Because of the large number of applications, the Department determined to propose, on its own motion, a class exemption for such intermediaries based on the facts and representations in the individual applications received by the Department." *See* Proposed BIC Exemption at 7,341.

insurance distribution channels, such as the broker-dealer channel, where the firm has direct authority to supervise and control the conduct of its registered representatives.

However, as discussed at greater length below, insurers are simply not able to supervise independent agents in the same way. Typically, independent agents represent multiple insurers, and while they may even primarily sell for one insurance company, they are not controlled by any single insurance company or intermediary. In this context, insurers merely manufacturer the products and therefore have no fiduciary relationship with consumers who purchase them. Insurance intermediaries such as IMOs, FMOs, and BGAs may, in some cases, be willing to serve as the Financial Institution, and we strongly urge the Department to revise the Proposed Exemption to establish clear, definitive, and objective circumstances under which an intermediary may fill this role should the IMO, FMO or BGA desire to go down this path.

Assuming at least at the outset that intermediaries will not be able to fulfill the role of Financial Institution, IRI disagrees with the Department's assertion that it is possible or reasonable for insurance carriers to "supervise independent insurance agents and… create oversight and compliance systems through contracts with intermediaries."[76]

Unfortunately, the construct of the Proposed Exemption would ultimately put the independent insurance distribution channel at a competitive disadvantage because it fails to properly recognize that, unlike other entities authorized to serve as financial institutions, insurers that distribute their products through independent agents do not have the requisite "control" over the conduct of independent agents that sell their products or the ability to manage the independent agent's product offerings or "product shelf."

As presently written, the Preamble fails to fully and properly account for the fact that a financial institution must have the authority and ability to exert "control" over the financial professional in order to effectively serve in the supervisory role contemplated by the Proposed Exemption. The Department does demonstrate some level of recognition that insurers' lack of control over independent agents would inhibit their ability to satisfy the supervisory requirements of the Proposed Exemption. Following the lead of the NAIC in Section 6.C.(4)(a) of Model Regulation 275, the Preamble states that insurers would not need to consider "unrelated and unaffiliated insurers" in their system of supervision. However, the Preamble stops short of fully embracing the approach taken by the NAIC. Section 6.C.(4)(b) of Model Regulation 275 further and importantly articulates that insurers don't have to consider "consideration of or comparison to options available to the producer or compensation relating to those options other than annuities or other products offered by the insurer." By including this language, the NAIC recognized that insurers not only cannot consider other companies' products, but also cannot consider the independent agent's product shelf or the commission arrangements or potential conflicts of interest presented to the independent agent (outside of any presented by the insurer itself). We believe the same should be recognized here.

IRI urges the Department to allow insurance companies that distribute their retirement products through independent third-party distributors to maintain these existing and important relationships

[76] *See* Release at 40,846.

without requiring them to serve as a Financial Institution under the Proposed Exemption in the same manner as other Financial Institutions. IRI would urge the Department to consider enabling insurance companies with independent agents to satisfy the conditions of the Proposed Exemption vis-à-vis the role of Financial Institution by complying with the specific obligations of supervision and oversight set forth in comparable state insurance laws such as NAIC Model Regulation 275. For reasons already explained, insurance companies should not be forced to declare themselves to be fiduciaries when they are not, but insurance companies can and should be subject to supervision as called for by the NAIC Model Regulation and related state insurance requirements.

As noted above, the NAIC worked diligently over the past two years to formulate enhancements to the standards of conduct and regulatory requirements for insurance producers that fit the insurance industry. Model Regulation 275 includes a best interest standard of conduct, as well as supervision and disclosure obligations, that overlap significantly with the Proposed Exemption's impartial conduct standards. For instance, insurers must develop procedures to (1) ensure required disclosures are provided to consumers, (2) eliminate sales contests and bonuses that are based on sales of specific annuities within a limited period of time (3) detect recommendations that are not in compliance with the producer's best interest standard, and (4) ensure each recommended annuity effectively addresses the consumer's needs, among other requirements.

While broad adoption of Model Regulation 275 across the states has been slower than originally expected due to the onset of the COVID-19 pandemic, it has already been finalized in two states (Arizona and Iowa) and four others (Idaho, Kentucky, Ohio, and Rhode Island) have publicly stated their intention to pursue adoption in late 2020 or early 2021. In addition, the enhancements to Model Regulation 275 were approved with only one "no" vote (from New York, which had already adopted its own enhanced annuity sales practices rule[77]). This is notable because NAIC rules generally require state regulators who vote for adoption of model regulations to pursue adoption in their states. Moreover, Section 989J of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires states to adopt Model Regulation 275 in order to avoid federal preemption with respect to the regulation of fixed-indexed annuities, thereby providing a strong incentive for states to take prompt action. With all this in mind, IRI anticipates that Model Regulation 275 will be adopted by the vast majority of states within the next two to three years.

IRI believes that satisfaction of the NAIC's standards should be considered by the Department as satisfying comparable requirements under ERISA and, in particular, the relevant conditions of the Proposed Exemption. This would avoid unnecessary duplication and inconsistency and ensure that the requirements of the Proposed Exemption are workable for independent agents and the insurers whose products they sell. We strongly encourage the Department to replicate this approach with a parallel safe harbor, or its equivalent, for insurance industry professionals who comply with NAIC standards and protocols. To address any concerns the Department may have about the limited adoption, to date, of the enhanced version of Model Regulation 275, the Department could require that independent agents and insurers seeking to rely on the Proposed Exemption implement the latest version of Model Regulation 275, even if it has not yet been adopted in the insurer's domicile state or the state in which

[77] 11 NYCRR 224.

the independent agent is licensed. This would bring the best interest approach for insurance producers in line with Reg BI – and satisfy appropriate PTE conditions should the Department rely on Model Regulation 275, as we strongly urge above.

C. The Department Should Clarify that "Hire Me" and Wholesaling Activities Do Not Meet the Five-Part Test to Avoid Uncertainty with Respect to Marketing, Educational and Ongoing Conversations and Interactions with Plan Sponsors and Other Sophisticated Investors.

Again, we commend the Department for restoring the Five-Part Test and structuring a generally balanced approach for the Proposed Exemption that seeks to align with other standard-of-conduct rules. However, IRI is concerned that the Department's reinterpretation of the Five-Part Test in the Preamble potentially implicates traditional sales relationships with plan sponsors and wholesaling activities provided to independent fiduciaries with financial expertise.

We note that absent the Department's reinterpretation of the Five-Part Test in the Preamble, discussions between financial institutions, on the one hand, and plan sponsors and other sophisticated financial entities, on the other, have not historically been considered fiduciary advice. While the Department seeks to address rollovers specifically, its analysis of the 'regular basis,' 'mutual agreement' and 'primary basis' prongs of the Five-Part Test can be extrapolated to a number of other interactions, including those outside the traditional individual advice context. As discussed extensively in this letter, the Department's statements about how it views these three prongs appear to depart from long-held historical interpretations of the Five-Part Test.

In particular, the Preamble's description about how one rollover transaction can snowball into presumed fiduciary advice can be easily correlated into a situation where a financial organization conducts a sales conversation with a plan sponsor, based on the sales conversation the plan sponsor then selects the financial organization to administer its retirement plan, and the financial organization subsequently enters into a long-standing service relationship with the plan sponsor. While neither the financial organization nor the plan sponsor entered into the relationship having a 'mutual agreement' that the financial institution would serve as a fiduciary to the plan sponsor (evidenced, for instance, by the plan sponsor executing a servicing agreement with the financial organization stating its understanding that the financial institution is not acting as a fiduciary), the Preamble implies that a mutual agreement can still occur in situations where investment advice will service as 'a primary basis.' Could 'primary basis' mean that a financial institution providing a sample fund line-up to a plan sponsor, along with information about fund alternatives through the life of the relationship, trigger fiduciary status under the Five-Part Test? Based on historical interpretations of the Five-Part Test prior to the Preamble, we believe that both plan sponsors and financial institutions would have answered 'No' to that question.

The courts have historically interpreted the Five-Part Test as not being met when a firm or financial professional "sells" their own services to a participant or IRA owner.[78] Consistent with that view, the Department expressly stated in the 2016 Regulation that ordinary-course attempts to be hired as a

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[78] *See*, *e.g.*, Schloegel v. Boswell, 994 F.2d 266, 273 (5th Cir. 1993); Farm King Supply, Inc. Integrated Profit Sharing Plan and Trust v. Edward D. Jones & Co., 884 F.2d 288, 293 (7th Cir. 1989).

service provider (i.e., so-called “hire me” communications) would not constitute fiduciary communications. The Department explained that it did not intend that “one could become a fiduciary merely by engaging in the normal activity of marketing oneself or an affiliate as a potential fiduciary.”[79]

Similarly, the Preamble makes no distinction of instances where financial organizations provide ‘wholesale’ services to non-plan sponsor independent fiduciaries, like broker-dealers, banks, and RIAs. We are concerned that those interactions, as well, could be considered fiduciary advice under the Department’s interpretation of the Five-Part Test in the Preamble despite parties’ intentions to the contrary.

We assume the Department opted not to any express comfort on these points in the Release because it does not propose to change the language of the 1975 Rule. However, given the expansiveness of the guidance in the Preamble, the Department, as it did in connection with the 2016 Regulation, should clearly reiterate its position that “hire me” efforts and wholesaling activities are not generally fiduciary communications. Put simply, if “hire me” and wholesaling communications were not fiduciary in nature under the dramatically expanded and revised 2016 Regulation, there can be no way that such communications are now somehow fiduciary in nature under an unrevised but reinterpreted 1975 Regulation.

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Thank you again for the opportunity to provide these comments. If you have questions about any of our views or recommendations, or if we can be of any further assistance in connection with this important regulatory effort, please feel free to contact the undersigned at jberkowitz@irionline.org.

Sincerely,

Jason Berkowitz
Chief Legal & Regulatory Affairs Officer
Insured Retirement Institute

Cc: The Honorable Eugene Scalia, Secretary, U.S. Department of Labor

The Honorable Jeanne Klinefelter Wilson, Acting Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor

[79] 81 Fed. Reg. at 20,968 (“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… An Adviser can recommend that a retirement investor enter into an advisory relationship with the adviser without acting as a fiduciary.”)