Submitted Electronically via www.regulations.gov

August 6, 2020

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Suite 400
Washington, DC 20210

Re: **Application Nos. D-12011, ZRIN 1210-ZA29, and EBSA-2020-0003**
Improving Investment Advice for Workers and Retirees

Ladies and Gentlemen:

This will serve as comments of Cetera Financial Group, Inc. ("Cetera") with regard to the Notification of Proposed Class Exemption and accompanying comments published in the Federal Register by the Department of Labor (the "Department") on July 7, 2020. (We will refer to the Proposed Class Exemption herein as the "Proposed Exemption" and to the text of the notification in the Federal Register as the "Release".)

Cetera is the corporate parent of a group of eight broker-dealers and Registered Investment Advisers ("RIAs") with more than 7,500 individual representatives. Our firms collectively serve more than 1 million retail investors, the large majority of whom are individuals, families, and small businesses. We provide both transaction-based brokerage and fee-based investment advisory services. Our representatives have broad experience with both business models, the differing standards that are applicable to each, and the circumstances under which the interests of a client may be better served by one rather than the other. We currently provide investment-related services to more than 200,000 owners of Individual Retirement Accounts ("IRAs") and plans covered by the Employee Retirement Income Security Act ("ERISA"). The Proposed Exemption and accompanying material will have significant effects on the provision of financial advice to retirement investors, and we appreciate this opportunity to provide comments with respect to them.

Cetera strongly supports adoption of standards of care applicable to financial professionals providing advice to all investors. The Proposed Exemption takes a well-reasoned approach to individuals providing advice to accounts covered by ERISA and Section 4975 of the Internal Revenue Code (the "Code"). We support its' adoption, but we believe there are areas in which it should be clarified or improved. We will offer comments on those items and also with respect to

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other portions of the text in the Release (the "Preamble"). As we will discuss in further detail, we believe that the Preamble sets forth incorrect and unwarranted new interpretations of existing law that should be withdrawn or reconsidered by the Department.

I. Guiding Principles in Regulation of Investment Advice to Retirement Investors

In formulating any regulation to enhance protection for retirement investors, the Department should be guided by three primary objectives:

- **Preservation of investor choice.** Every investor is different. They should be allowed to choose how to engage with advisers, including the types of services they want and how they wish to pay for them.

- **A level playing field.** Regulation of investment advice and investment professionals should be neutral as to business models and compensation methods. In adopting Regulation Best Interest[1] ("Reg. BI") in 2019, the SEC considered and explicitly recognized the benefits to investors in maintaining access to both fee-based investment advisory and transaction-based brokerage services. Each works better for some customers and/or investment strategies. No regulation should create conditions that unduly limit the ability of financial institutions to offer services to customers in the ways that they wish to consume them.

- **Regulatory harmonization.** As the Department notes in the Release, financial institutions that provide investment advice to retirement investors are subject to regulation by the Department, the IRS, the SEC, FINRA, and state securities and insurance authorities. Consistency among regulatory regimes helps financial advisers understand their obligations, but it also benefits investors by providing them with a clear roadmap and set of expectations regarding how they will engage with providers of financial advice. Inconsistent regulations also increase the cost of compliance for regulated entities. It is axiomatic in economics that there is no free lunch. The cost of compliance for regulated industries is ultimately paid for by the consumers of the service. In this case, that will be retirement investors.

II. Background

The starting point in consideration of the Proposed Exemption and other comments in the Release is the circumstances under which a Financial Institution or Investment Professional is deemed to be acting as a fiduciary with respect to a plan covered by ERISA or an IRA subject to the provisions of the Code. This determination has historically been made through analysis of five elements which have become known as the "Five-Part Test".[2] In order to be deemed an "advice fiduciary", a Financial Institution or Investment Professional must:

[1] SEC Release No. 34-86031(2019).
[2] 29 CFR 2510.3-21(c)(2).

- Render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property;
- On a ***regular basis;***
- Pursuant to a ***mutual agreement***, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan;
- Such services will serve as a ***primary basis*** for investment decisions with respect to such plan assets; and,
- The investment advice must be individualized based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

(Emphasis and italics added.) It should be noted that, in order to be deemed an advice fiduciary, a Financial Institution or Investment Professional must satisfy all five parts of the test.

In 2016, the Department adopted new regulations governing investment advice to retirement investors.[3] The 2016 regulations became known as the "Fiduciary Rule", and dramatically changed the criteria for determining advice fiduciary status. The Fiduciary Rule effectively eliminated the Five – Part Test and replaced it with a much broader definition of individuals and entities that would be deemed fiduciaries. In 2018, the Fifth U.S. Circuit Court of Appeals vacated the Fiduciary Rule in its decision in ***Chamber of Commerce of the United States v. U.S. Department of Labor*** ("***Chamber of Commerce***"). [4] Among other things, the Court found that the Department had exceeded its statutory authority in adopting the Fiduciary Rule, particularly as it applied to Financial Institutions and Investment Professionals that had not previously been considered fiduciaries.

With the Proposed Exemption, the Department also issued a technical correction which reinstated the Five - Part Test as the operative framework for determining advice fiduciary status. We commend the Department for this action. The framework created by the Five-Part Test has served both investors and financial advisers well for 45 years and represents an appropriate framework for all rulemaking in this area. However, in the Preamble, the Department included commentary reinterpreting several elements of the Five - Part Test in ways that are novel, surprising, and not consistent with ERISA, the Fifth Circuit decision, or what we believe to be the realities of how investment advice to retirement investors is provided.

In our comments below, we will first address the terms of the Proposed Class Exemption. We will also offer specific comments regarding the reinterpretation of elements of the Five-Part Test, which we believe the Department should either withdraw or substantially revise.

[3] 29 CFR 2509, 2510, and 2550 (2016).
[4] 885 F.3d 360 (5th Cir., 2018).

III. The Proposed Exemption

We support the approach the Department has taken in the Proposed Exemption. It is largely consistent with the principles noted above, and gives financial advisers flexibility to accommodate multiple business models and compensation practices in providing services to retirement investors. There are, however, a few areas in which we believe that it should be modified to better meet the needs and interests of all parties.

A. Acknowledgment of Fiduciary Status.

Section II(b)(1) of the Proposed Exemption would require a Financial Institution to acknowledge that they are acting as a fiduciary with respect to investment advice provided to retirement investors in order to avail themselves of the exemption. We believe that this acknowledgment does not meaningfully add to investor protection and will have negative and unintended collateral affects. Requiring acknowledgment of fiduciary status under these circumstances places the cart before the horse. At the outset of the relationship between the customer and the adviser, it will not always be clear if all elements of the five-part test are met and the adviser is acting as a fiduciary. (*Please also see our comments below regarding the "primary basis" and "regular basis" prongs of the Five-Part Test.*) If the Financial Institution or adviser is unsure about whether or not they will be deemed a fiduciary, they may feel compelled to comply with the terms of the Proposed Exemption simply to protect themselves. This would have the somewhat illogical effect of encouraging advisers to acknowledge fiduciary status when they may not be acting as fiduciaries at all. (Comments in the Preamble suggest that meeting the "regular basis" test will be very dependent on the facts and circumstances surrounding the interaction between the investor and the Financial Institution or Investment Professional.)

Section II(a) of the Class Exemption includes a provision requiring Financial Institutions and Investment Professionals to act in the best interest of the retirement investor in giving advice with respect to investments. These best interest provisions are in and of themselves very similar to a fiduciary standard, and the requirement to acknowledge fiduciary status does not add to investor protection. We note that Reg. BI includes a requirement that all financial advisers disclose their status and legal obligations to customers at the outset of their relationship in a document entitled Form CRS.[5] Rather than requiring Financial Institutions to acknowledge fiduciary status as a condition of the Proposed Exemption, they should be required to clearly disclose the capacity in which they are acting. This allows the investor to make an informed choice about the services they wish to utilize and pay for without diminishing the investor protection mechanisms in the Proposed Exemption.

We would also note that several states have either adopted or are considering adoption of their own conduct standards with respect to investment advice. In particular, the State of Massachusetts has adopted regulations covering investment

[5] SEC Release Nos. 34-86032 and IA-5247 (2019).

advice that becomes effective in September, 2020.[6] The Massachusetts regulations provide that if a financial adviser has a contractual fiduciary obligation to the customer, they would be required to provide ongoing monitoring with respect to investment recommendations.[7] In most fee-based investment advisory relationships, the client pays the adviser an ongoing fee to provide advice and monitoring of investment recommendations. By contrast, transaction-based brokerage arrangements generally do not include ongoing monitoring services. This is in recognition of the fact that investment advice in brokerage arrangements is usually episodic and provided only when requested by the client. It is not intended to be either ongoing or fiduciary in nature.

When an investor begins a relationship with a financial institution, they typically execute a written account agreement. In the case of IRAs, this is often referred to as an Adoption Agreement, and it sets forth the terms of the relationship. If the Proposed Exemption requires individuals who may not actually be advice fiduciaries to acknowledge fiduciary status in IRA Adoption Agreements or similar documents, we are concerned that this will create an obligation on the part of the Financial Institution or Investment Professional to provide ongoing monitoring with respect to prior investment recommendations. This is inconsistent with the intent of the parties and could subject Financial Institutions and/or Investment Professionals to obligations to which they have not otherwise agreed and for which they are not being compensated, all without creating any additional investor protection.

In connection with the adoption of Reg. BI, the SEC published guidance with respect to circumstances in which financial institutions or advisers would be deemed to be acting as RIAs and could not avail themselves of the "solely incidental" exclusion from the Investment Advisers Act of 1940.[8] The SEC stated that two primary distinctions between investment advice that is rendered by brokers that is "solely incidental" to the execution of securities transactions and investment advice that falls within the coverage of the Advisers Act are grants of discretionary investment authority and ongoing monitoring of investment recommendations.[9] If an Investment Professional in a transaction-based brokerage arrangement provides ongoing monitoring of prior investment recommendations, they may not be able to rely on the solely incidental exclusion and could be deemed to be acting as an RIA. The practical consequence of this would be to impose the fiduciary obligations of the Investment Advisers Act on broker-dealers when that is not the intent of the parties.

As we have noted above, one of the guiding principles of any rulemaking with respect to investment advice should be to maintain a level playing field among business models. Fee-based investment advisory relationships represent the best approach for many retirement investors, but many prefer to engage with their financial adviser on

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[6] 950 CMR 12.204, et. seq.
[7] 950 CMR 12.207(1).
[8] SEC Release No. IA-5249 (2019).
[9] SEC Release No. IA-5249 at 18.

an episodic basis and pay only for the services that they utilize. If IRA Adoption Agreements or other account agreements include acknowledgments of fiduciary status, Financial Institutions may be required to perform services that they heretofore have not. More importantly, they will need to be compensated for providing those services, and customers will be asked to pay for them. This will create a disincentive for institutions to offer transaction-based brokerage arrangements to retirement investors. In response to the initial version of the Massachusetts regulations discussed above, many large financial institutions announced their intention to do precisely that.[10] This is clearly not in the interest of retirement investors or anyone else.

B. Ongoing Monitoring Requirements Involving Risky or Complex Investments

In the text discussing the Proposed Exemption, the Department states that neither the best interest standard nor any other condition of the exemption would establish a monitoring requirement for Financial Institutions or Investment Professionals. However, it goes on to state that "… Financial Institutions should carefully consider whether certain investments can be prudently recommended to the individual Retirement Investor in the first place without ongoing monitoring of the investment. Investments that possess unusual complexity and risk, for example, may require ongoing monitoring to protect the investor's interests. An Investment Professional may be unable to satisfy the exemption's best interest standard without a mechanism in place for such monitoring."[11]

We submit that this formulation represents a vast departure from current regulation and conflates the best interest standard with ongoing monitoring in a way that is both illogical and will not benefit investors. Investment Professionals accept and embrace the idea that investment recommendations must be in the best interest of the investor at the time that they are made. The best interest determination takes into account both the characteristics of the investment and the circumstances of the investor, including investment objectives, risk tolerance, income, assets, investment time horizon, liquidity needs, and other factors.[12] If a given investment is too complex for the investor to understand or it is not consistent with their other circumstances, it very likely does not meet the best interest standard at the time of the recommendation or at any time thereafter. Monitoring an unsuitable investment does not render it consistent with the best interest standard, but in the Department's formulation, certain categories of investments may require ongoing monitoring in order to make them comply with it. This is problematic for several reasons:

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[10] https://www.investmentnews.com/article/20161024/FREE/161029956/commonwealth-financial-eliminates-commission-based-retirement; https://www.investmentnews.com/article/20161006/FREE/161009942/merrill-lynch-eliminates-commission-ira-business-in-response-to-dol
[11] Release, at 40843
[12] See FINRA Rules 2090 and 2111

- As discussed above, any requirement to provide ongoing monitoring with respect to an investment recommendation may have the effect of rendering the relationship between the Investment Professional and the retirement investor subject to either state fiduciary regulations or the Investment Advisers Act.

- The standards for investments or categories of investments that would be deemed risky or complex are amorphous and by definition somewhat arbitrary. (FINRA has published guidance regarding investments that may be deemed risky or complex. The list of both factors and investments is lengthy.)[13] Financial Institutions need certainty with respect to their obligations at the time that they make investment recommendations. Without more guidance and specificity, Financial Institutions and Investment Professionals would have to assume that all investments could be deemed complex or risky at some point in the future and therefore require ongoing monitoring in order to meet the terms of the Proposed Exemption. In order to protect against this eventuality, Investment Professionals are likely to do one of two things: Either cease recommending certain investments that may be deemed risky or complex, or recommend that all clients enter into fee-based advisory relationships that include ongoing monitoring and its attendant cost. In the first instance, investors may not get access to investment products that would be useful or valuable to them. In the second, investors who do not need or want ongoing advisory services will be asked to pay for them. Neither is a desirable outcome.

The Department should clarify the terms of the Proposed Exemption to make it clear that ongoing monitoring may be part of the relationship between the retirement investor and the adviser, but only if it is made part of a mutual agreement between the parties.

C. Annual Reports and Certifications

Section II(d) of the Proposed Exemption includes a provision requiring that the Financial Institution review the effectiveness of its policies and procedures, prepare a report relating to compliance with the Impartial Conduct Standards in the Proposed Exemption, and to certify its compliance with those standards on an annual basis. The chief executive officer of the institution would be required to sign the report to ensure that more than one person determines whether the Financial Institution is complying with the conditions of the exemption and avoiding non-exempt prohibited transactions. The Department notes that "If the chief executive officer does not have the experience or expertise to determine whether to make the certification, he or she would be expected to consult with a knowledgeable compliance professional to be able to do so."

[13] See, for example, FINRA Regulatory Notice 12-03 (2012).

FINRA member firms are currently subject to a similar but more limited requirement to perform annual reviews of their process and procedures[14], as are RIAs[15]. We do not see any significant investor protection benefit resulting from another layer of review of one specific area of a Financial Institution's activities. FINRA Rule 3120 allows FINRA

member firms to focus their annual reviews on areas of their business that they believe are particularly material or represent heightened levels of risk or other concerns. Many Financial Institutions devote only a small part of their business to serving retirement investors. Requiring a review focused specifically on that may represent an inefficient allocation of resources that could be more productively applied elsewhere. Any limited enhancement of investor protection is more than offset by the cost and effort involved in performing this review and certification process.

The annual certification requirement should be eliminated from the final version of the Proposed Exemption. Alternatively, if some form of it is included, it should provide that Financial Institutions have flexibility to determine when and under what circumstances review of their processes and procedures specific to the Proposed Exemption are included as part of their annual review mandated by FINRA Rule 3120 or SEC Rule 206(4)-7. If an annual certification or review is deemed necessary, the institution should also be allowed to designate another employee such as the Chief Compliance Officer of the firm to execute the certification.

D. Best Execution Requirements

Section II(a)(2)(B) of the Proposed Class Exemption would require Financial Institutions and Investment Professionals to obtain the "best execution" of investment transactions. The Release refers to the federal securities laws and FINRA rules 2121 and 5310 as creating similar obligations for broker-dealers executing transactions for customers.

The FINRA rules cited are designed primarily to protect investors in circumstances involving securities traded in public markets in which the financial institution is a market-maker or performs transactions with customers in a principal capacity. We support the intent and operation of these rules to the extent that they protect investors form unreasonable markups in principal transactions or where active trading markets require limits on conduct of broker-dealers. However, we would note that there have been multiple instances in the past several years in which the concept of "best execution" has been expanded to cover instances involving sales of mutual funds and variable annuities that do not involve instruments traded on exchanges or other public markets. Some of these instances indicate that "best execution" has become something of a code for "lowest-cost investment alternative". We do not believe that

[14] FINRA Rule 3120.
[15] SEC Rule 206(4)-7

this is necessarily the intent of the best execution provision in the Proposed Exemption, but the Department should confirm that in this context, the best execution requirement is limited to circumstances similar to those covered by FINRA rules 2121 and 5310. In Reg. BI, the SEC specifically noted that, while the cost of an investment is an important component in meeting the best interest obligation, it is not the only one. In making recommendations that satisfy the best interest standard, Financial Institutions and Investment Professionals must also consider the other risk and potential benefits of any investment recommendation.

E. Eligibility to Utilize the Proposed Exemption

Section III(a) of the Proposed Exemption provides that a Financial Institution or Investment Professional will be ineligible to rely on it for a period of 10 years following the occurrence of specified events. These focus primarily on individuals or entities that are convicted of crimes or engage in systemic patterns or practices of violating the conditions of the exemption. If the Department determines that a Financial Institution or Investment Professional has violated the applicable provisions, it can declare them ineligible to rely on the terms of the Proposed Exemption.

Section III(c) establishes a process under which parties deemed to be ineligible can be heard in an attempt to change the determination of the Department. It allows the party to submit a petition to the Director of Exemption Determinations, who has essentially unlimited discretion to determining if relief should be granted.

We endorse the idea that the Department should have authority to enforce the terms of its own regulations, and in general, the Department is entitled to deference regarding the best way to accomplish that. However, we believe that the process under which Financial Institutions and Investment Professionals could appeal ineligibility determinations falls short of the necessary level of due process that must be afforded to those that are restricted from utilizing what should be considered a valuable privilege. Not only does the exemption fail to provide meaningful due process protections, but the Office of Exemption Determinations is not a judicial body. It is made up of non-officers of the United States (i.e., career staff who have not been appointed by the President). The structure contemplated by the proposed exemption fails the tests set out by the Supreme Court in *Lucia v. SEC*. [16]

We encourage the Department to eliminate or substantially modify the provisions under which certain individuals or entities could lose the ability to utilize the Proposed Exemption. As described above, ERISA and the Code already provide penalties for non-exempt prohibited transactions. The Department should not create additional penalties that Congress has not itself considered.

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[16] 585 U.S. __, 138 S.Ct. 2044 (2018).

IV. Determination of Fiduciary Status – New Interpretations of the Five-Part Test

As discussed above, we have concerns regarding comments made by the Department in the Preamble. We believe that many of them go far beyond any current understanding of the Five-Part Test, in some cases are not logical, and if they are to be implemented, would require a rulemaking process as specified in the Administrative Procedure Act. If the comments in the Preamble are applied as the Department suggests, the Five-Part Test will be effectively gutted. We do not believe that this is the Department's intent, and that it can be remedied with a

statement from the Department that these comments do not represent its official views and are of no legal effect. If the Department chooses not to do so on a blanket basis, it should, at a minimum address and correct the following specific issues:

A. "**Regular Basis**".

In ***Chamber of Commerce***, the Court noted that "The 1975 regulation captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client…the DOL's original regulation specified that a fiduciary relationship would exist only if, *inter alia,* the adviser's services were furnished 'regularly' and were the 'primary basis' for the client's investment decisions."[17]

In the Preamble, the Department has vastly expanded existing interpretations of the "regular basis" prong of the Five-Part Test. This expansion is misguided and inconsistent with the plain meaning of the term "regular". The logic of the Court in ***Chamber of Commerce*** makes clear that the term "regular" connotes a relationship that the parties intend to be ongoing, with communication at some sort of specified intervals. Many Investment Professionals offer advice regarding investments in securities in transaction-based brokerage arrangements that are by their nature episodic and not intended to be ongoing at all.

The Preamble also creates a sort of "springing" fiduciary status by assuming that an isolated event may give rise to a series of events that would render the relationship between the parties "regular" through some sort of "lookback". In Advisory Opinion 2005-23A, the Department took the position that advice to a participant in an ERISA-covered plan that they roll over assets from the plan to an IRA did not constitute investment advice. The recommendation to roll over the assets may be connected to subsequent investment advice which may be provided on a regular basis, but at the time the rollover recommendation is made it is not possible to make that determination. Despite this logical incongruity, the Department states in the Preamble that "…the regular basis prong of the five-part test would be satisfied when an entity with a pre-existing relationship with the Retirement Investor advises the Retirement Investor to roll over assets from a Plan to an IRA. Similarly, for an

[17] 885 F.3d at 365.

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 five-part test depending on the facts and circumstances.*[18] (Italics added.)

The Preamble also suggests that insurance agents who receive trail commissions on annuity transactions are engaged in an ongoing relationship that would be sufficient to create fiduciary status[19] when in fact the agent is merely providing services in connection with an existing contract rather than providing ongoing advice that is the primary basis for investment decision-making. This would also seem to be inconsistent with a natural and reasonable reading of the term "regular basis."

We suggest that these are at best unwarranted extensions of current guidance. We strongly disagree with the Department's view to the effect that advice relating to the decision to roll over assets from an ERISA-covered plan to an IRA (or to another plan) or that receipt of ongoing payments with respect to prior investment recommendations would necessarily constitute any logical connection to a pattern of "regular" advice. The determination regarding whether something is conducted regularly could only be determined with the benefit of hindsight, and neither Financial Institutions nor Retirement Investors would know when or if the fiduciary obligation attached.

B. "**Primary basis**"

In the Preamble, the Department explains that in order to satisfy the "primary basis" prong of the Five-Part test, investment advice must only serve as "a" primary basis and not as "the" primary basis of a recommendation. While this is literally what the language says, we believe it is inconsistent with previous interpretations from the Department and the understanding of Financial Institutions. The word "primary," is defined as: "of first rank, importance or value".[20] We believe that the phrase "a primary basis" should be read as a whole in order to reach it's logical and intended meaning. The "regular basis" and "primary basis" prongs of the Five-Part Test play a critical role in distinguishing between a true fiduciary relationship (i.e., one based upon trust and confidence and expected to be ongoing in nature) and an episodic one such as that contemplated in transaction-based brokerage relationships. As with the Department's view of the term "regular", this interpretation is so imprecise as to render virtually any advice within its ambit. Absent more specificity, Financial Institutions would be forced to assume that any advice could fulfill the primary basis prong and that they would be considered advice fiduciaries in virtually all circumstances. Even if this is what the Department intended, we do not believe it is consistent with the objective of maintaining investor choice in selecting the types of

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[18] Release, at 40,840.
[19] Release, at 40,840, fn. 41
[20] Merriam-Webster Dictionary

services they wish to receive from Investment Professionals. The effects will do more harm than good.

C. Mutual Agreement and the Reasonable Expectations of the Parties

In its comments regarding "primary basis", the Department includes a discussion of the "mutual agreement" prong of the Five-Part Test. Specifically, it states that "…the determination of whether there is a mutual agreement, or understanding that the investment advice will serve as a primary basis is appropriately based on the *reasonable* expectations of the parties, if no mutual agreement or arrangement is demonstrated.

Written statements disclaiming a mutual understanding or forbidding reliance on the advice as a primary basis for investment decisions are not determinative…"[21]

The Department's comments have essentially removed the concept that there must be any express understanding between the parties is necessary to render the Investment Professional a fiduciary. The Department's view that this understanding can simply be inferred from circumstances defies real world interactions in which consumers either work with Investment Professionals to obtain ongoing investment advice or those who offer episodic transaction-based arrangements where 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.

We believe it is critical to both financial institutions and retirement investors that they have an explicit written understanding of the nature of their relationship. This would benefit both advisers and consumers. In the Fiduciary Rule, the Department created a Class Exemption referred to as the Best Interest Contract Exemption ("BICE"). The BICE was effectively eliminated by the decision in ***Chamber of Commerce***, but an important aspect of it was that parties to an any investment-related relationship were required to memorialize their understanding in a written agreement that sets forth the services the Financial Institution will provide, how they will be compensated, and their legal obligations to the investor. Equally important is the concept that a written agreement allows parties to agree on which services the Financial Institution ***will not*** provide. What matters is the mutual understanding and agreement of the parties. Freedom of choice for investors is and should continue to be a paramount concern in any rulemaking or interpretive guidance issued by the Department.

If the Department is concerned that Financial Institutions will seek to inappropriately disclaim their responsibilities under the Proposed Exemption or other applicable law, we believe that there are better ways to address that. For example, many state laws forbid RIAs from utilizing "exculpatory" clauses or waivers of certain types of

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[21] Release, at 40840.

remedies in advisory agreements. In addition, the Proposed Exemption specifically prohibits Financial Institutions from making untrue or misleading statements. Attempts to disclaim obligations that are imposed by either the Proposed Exemption or state law would surely violate this requirement. The Department's comments regarding mutual understanding will create more problems than they solve.

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We appreciate the opportunity to submit these comments. If we may offer any further information, please let me know.

Sincerely,

Mark Quinn
Director of Regulatory Affairs