TIAA

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Attn: Investment Advice Regulation RFI (RIN 1210-AB79)
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-5655
Washington, DC 20210

Re: Request for Information – Fiduciary Regulation

Ladies and Gentlemen:

Teachers Insurance and Annuity Association of America ("TIAA") is pleased to share our perspectives on questions raised in the Department's Request for Information concerning the final rule defining who is a "fiduciary" of an employee benefit plan as a result of giving investment advice for a fee or other compensation (the "Rule") and the associated new and amended administrative class exemptions from the prohibited transaction provisions (collectively, the "PTEs").[1]

About TIAA.

TIAA was founded in 1918 on the core belief that those who serve others should retire with financial security – and we have continued to deliver on that promise for nearly 100 years. As a mission-driven organization, TIAA is proud of its longstanding engagement in the policymaking process. Consistent with that commitment, we are grateful for the many opportunities during the multiyear rulemaking to offer comments to the Department.

TIAA's unique corporate structure allows us to focus our efforts on our clients' long-term financial needs. TIAA has no outside shareholders, other than the TIAA Board of Overseers, which is a not-for-profit entity. Importantly, under TIAA's corporate charter, TIAA functions without profit to the corporation or its shareholders. As a result, our corporate interests are aligned with those of our clients – both at the plan and individual investor level. This structure makes TIAA particularly sensitive to the potential for additional costs, which ultimately fall to our participants through additional fees and/or lower investment returns.

[1] Unless expressly defined in this letter, all defined term used herein take their meaning from the Rule and/or PTEs.

TIAA supports a clear and enforceable best-interest standard.

"Put the customer first" has always been a core TIAA value. One way we measure our success in aligning our interests with participants is through a short "Put Your Interests First" survey question that we present to every individual participant after an advice session discussing plan accounts or IRAs. The survey question asks: "How strongly do you agree or disagree that [Name of TIAA Employee] puts your interests first?" From 2012 through May 2015, between 95% and 98% of respondents either agreed or strongly agreed that their TIAA employee consultant "put their interests first." We are proud of this record and strive to maintain it. In fact, our business processes include having a director-level supervisor call clients who have scored us less favorably to understand why and be sure their needs have been met.

We believe that putting the client first should not just be TIAA's standard, it should also be the standard across the industry. Accordingly, we view the Department's rationale in promulgating the Rule as consistent with TIAA's values, how we historically have run our business, and how we value the participants in the plans and the IRA Owners we serve.

The same standard that applies to in-plan advice should also apply to distribution advice.

We highlight our agreement with the Rule that individualized distribution advice – including whether to roll over – should be subject to the very same fiduciary standard as all other advice. IRA assets have grown from $2.6 trillion in 2000 to $8.2 trillion in the first quarter of 2017 – now eclipsing plan assets.[2] This growth has been driven overwhelmingly by rollovers; about 96% of contributions to IRAs are not new monies but rather are roll-ins from retirement plans or other IRAs.[3] The amount rolling into IRAs is projected to reach $550 billion by 2018.

We have seen situations where an adviser encourages a participant to roll over from a plan to an IRA without, for instance, understanding that the new investments have a much different risk and expense profile – such as a move from a guaranteed fixed annuity with a high interest-crediting rate to a long-term bond fund that carries low interest rates along with substantial principal risk, or from an institutional mutual-fund share class into a retail one. To be sure, there are situations when rolling into an IRA will be in the participant's best interest. But an IRA provider should not render advice to roll over in ways counter to the participant's best interest.

As a financial-services provider that helps participants plan both to and through retirement, we have seen that many participants are best served by keeping their assets within a plan. The advantages are many. First, participants benefit from ERISA protections and can take comfort that their employer must engage in a robust process when designing the plan menu and choosing a plan provider. Second, participants often benefit from institutional share class pricing, which generally keeps fees lower than retail shares. Third, plans that choose TIAA can provide in-plan, built-in lifetime-income features. This results in higher annuitization rates and improved retirement outcomes. Participants often benefit from allocating money over time to fixed annuity

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[2] *See* Investment Company Institute, *Retirement Assets Total $26.1 Trillion in First Quarter 2017*, *available at*: https://www.ici.org/research/stats/retirement/ret_17_q1, tbl. 1.

[3] *Id*., tbl. 9.

contracts, with interest-crediting rates that can be dramatically higher than any new investment can offer.

We see no basis in logic or public policy for applying an ERISA fiduciary standard to advice related to the investment of an employee's contributions during her working years and then, at the moment she retires, waiving that fiduciary standard for advice about whether and how to distribute those accumulated contributions. Rather, subjecting distribution advice to the same fiduciary standard will help protect retirement-plan participants from potentially harmful practices.

Modifications to the Rule and Exemptions are essential to ensure retirement-plan participants and retail investors continue to have access to the advice and educational resources that enable them to effectively plan for retirement.

Given our alignment with the Department's intent, TIAA has been *directionally* supportive of the Rule. But while articulating this directional support, we have consistently highlighted concerns that the operational and technical aspects not become impractical, overly complex, or unnecessary to accomplish the Department's goals. As now structured, some aspects of the Rule and PTEs could undermine our ability to fulfill our mission.

TIAA has previously recommended specific refinements to the Rule and PTEs that can ensure that retirement-plan participants and IRA Owners can achieve successful retirement outcomes – without causing unnecessary burdens on service providers like TIAA and its affiliates.[4] We are grateful for this additional opportunity to offer these views – many which we have previously shared with the Department.

As the Department reevaluates the Rule and PTEs, our central objective is to assist the Department in avoiding a fiduciary framework so rigid and restrictive that it would become legally or economically impractical for TIAA to help our participants and IRA Owners achieve a secure retirement. Modifications to the Rule and PTEs can ensure that participants and IRA Owners continue to have access to advice and educational resources that enable them to plan

[4] TIAA's comment on the proposed rule, dated July 20, 2015, is available on the Department's website at: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00540.pdf September 24. Our supplemental comment letter, dated September 24, 2015, is available on the Department's website at: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/03033.pdf. And on April 17, 2017, we submitted additional comments on "questions raised in the Presidential Memorandum, and generally on questions of law and policy concerning the [Rule] and PTEs." These comments are available on the Department's website at: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00251.pdf. Finally, in response to the question in this RFI concerning the possibility of a delay to the January 1, 2018 applicability date for certain provisions associated with the Rule – including the Best Interest Contract Prohibited Transaction Exemption, Principal Transaction Exemption, and revisions to Prohibited Transaction Exemption 84-24 – we submitted a letter dated July 21, 2017 that is available on the Department's website at: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00251.pdf. Additionally, TIAA offered testimony at the Department's hearing on August 12, 2015; the written testimony is available on the Department's website at: https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/written-testimony-11.pdf.

effectively for retirement. Below, we offer perspectives – keyed to certain RFI questions – on aspects of the Rule and PTEs.

1. **<u>Would a delay in the January 1, 2018, applicability date of the provisions in the BIC Exemption, Principal Transactions Exemption and amendments to PTE 84-24 reduce burdens on financial services providers and benefit retirement investors by allowing for more efficient implementation responsive to recent market developments? Would such a delay carry any risk? Would a delay otherwise be advantageous to advisers or investors? What costs and benefits would be associated with such a delay?</u>**

In a letter to the Department dated July 21, 2017, TIAA urged the Department to delay the January 1, 2018 applicability date (for PTE provisions that have not yet become applicable) until at least one year after the Department has promulgated changes to the Rule and the PTEs.

2. **<u>What has the regulated community done to comply with the Rule and PTEs to date, particularly including the period since the June 9, 2017, applicability date? Are there market innovations that the Department should be aware of beyond those discussed herein that should be considered in making changes to the Rule?</u>**

TIAA has committed extensive resources to analyzing the full range of our interactions with retirement-plan sponsors, participants, and beneficiaries, and IRA Owners, to determine which of our current interactions would constitute "investment advice" under the Rule.

Upon making this determination, we have planned carefully and methodically to comply with the Rule. We have developed business, compliance, and audit procedures. We have also committed significant resources to training our thousands of client-facing personnel – whether those personnel engage with clients at the worksites of the more than 15,000 plan sponsors we serve; in any of our more than 200 offices nationwide; or by telephone at our National Contact Centers.

We continue to build systems in anticipation of a January 1, 2018, applicability date for the phased-in requirements under the BIC Exemption, including its disclosure requirements. The short timeline between finalization of the rule and applicability of the disclosure requirements under the BIC Exemption has presented particular resource challenges. We note that the Department's disclosure regulation under ERISA section 408(b)(2) did not become effective until two full years after publication of the interim final rule. And the Department's disclosure regulation under ERISA section 404a-5 did not become effective until more than one-and-one-half years after publication of the final rule. But the Rule dwarfs both of those projects in scope, cost, and importance. With the Department now considering substantive changes to the Rule and Exemptions, we urged in our July 21 letter that the Department delay applicability of provisions slated for January 1, 2018, to become applicable at least one year after any changes are finalized.

3. <u>Do the Rule and PTEs appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest? Do they effectively allow Advisers to provide a wide range of products that can meet each investor's particular needs?</u>

As noted above, TIAA has been consistent in its directional support for the Rule. However, we have also consistently urged that the Department ensure that the Rule not be unduly restrictive. Adjustments to the Rule and PTEs can ensure greater balance between consumers' interests in receiving broad-based investment advice while protecting consumers from conflicts of interest.

Context: The importance of advice.

Advice is important to ensuring successful outcomes in retirement, and is directly related to our mission of helping the people we serve achieve a financially secure retirement. In 2015, TIAA engaged an independent research firm to poll a random, nationwide sample of financial decision makers in households with at least $250,000 in investable assets to understand better their approach to saving for retirement. While this surveyed group of participants is well above the current average balance of plan participants across the industry, this survey demonstrates that a large part of the success of this group is because they had access to and used advisers. For example, one finding of this survey was that more than half (53%) of respondents first met with an adviser between the ages of 25 and 44. Of these, 27% first met with an adviser between the ages of 25 and 34. We believe that when investors talk to an adviser to receive basic guidance and education early in their careers, when they likely have little savings, they are more likely to succeed over the long-term in achieving a financially secure retirement.

In examining how these financial decision makers manage their assets and what they do to prepare for retirement, some important findings emerged. For one, saving for retirement is a top priority among these investors. According to the survey, 50% say their investment goal is to generate income in retirement, and 41% say their top goal is to accumulate savings for retirement.

What do they do to reach their goals? About 60% said they use a financial adviser to help them manage their investments. In assessing reliable sources of information, 57% of respondents said that an adviser is the most reliable, followed distantly by financial newspapers (23%) and financial websites (20%). Survey respondents noted several areas where advisers helped them make good decisions, including: determining which investment vehicles are appropriate for their goals (97%); recommending how to divide investments among asset classes such as stocks and bonds (97%); explaining how to turn savings into lifetime income in retirement (93%); and strategizing about financial legacy and estate planning (93%).

The value of advice is measurable also in terms of outcomes. Independent research suggests that the impact of making intelligent financial planning decisions has a quantifiable impact on a client's outcomes. Meanwhile, investors who "go it alone" find the learning curve steep and time consuming. There also is a hidden cost to the investor of poor decision making. Research has shown that providing information alone has not resulted in material improvements in a client's financial decision making. Conversely, as the Department's own research has shown, providing guidance at pivotal decision points leads to better decision making.

Against this backdrop, we highlight how adjustments to the framework established by the Rule and PTEs can ensure participants can appropriately access broad-based investment advice.

The definition of "Best Interest" should mirror ERISA's "prudent man standard of care" under ERISA section 404(a) for all retirement investors.

As we note above, TIAA supports the extension of an enforceable best-interest standard for investment advice to the retirement investor. But we continue to believe that the standard should be phrased so it is identical to the duties of prudence and loyalty under section 404(a) of ERISA, as further developed by regulations and case-law.

Given the robust 40+ years of ERISA jurisprudence, adding a "Best Interest" standard that is articulated differently from the ERISA fiduciary standard will only increase compliance and litigation risk. The consequent potential for increased litigation to discern the meaning of the new standard will impose costs that, for a service provider like TIAA, will be directly borne by participants. As is widely appreciated, ERISA's is already the highest fiduciary standard under law. There is no discernible need for enhancement of that standard in the BIC Exemption context.

Absent a "call to action," interactive investment materials and asset-allocation models should be permitted to reference specific investments and distribution options offered through the Financial Institution without triggering fiduciary status.

In the context of interactive investment materials and asset-allocation models, the Rule offers a narrow definition of "education," to exclude communications that reference *specific* investment or distribution options under a plan or IRA (unless the investment or distribution option is specified by a plan participant or IRA owner, or a specific investment is a designated investment alternative in an ERISA plan). In essence, the Rule presumes that, absent one of its limited exceptions, merely referencing specific investments or distribution options available under a plan or IRA in the asset-allocation models or interactive materials is tantamount to a call to action – and thus fiduciary advice. Such a narrowing would severely limit a Financial Institution's ability to educate retirement investors about important features, benefits, and risks of particular investments and distribution options offered through the Financial Institution – some of which will have unique attributes that cannot be adequately explained without *specific* reference in interactive investment materials or asset-allocation models.

We are particularly concerned by the negative consequences this limitation will have for annuities. As the only investment vehicle that can guarantee retirees will not outlive their savings, lifetime annuities are central to TIAA's mission. And as the nation's largest nongovernmental provider of annuity income, TIAA understands that considerable explanation and illustration are often required to help retirement investors understand annuities – particularly as compared to other investments available in the marketplace. For example, the features of a particular annuity will turn not only on its type (deferred/immediate; fixed/variable), but also across providers and within product sets available through a single provider. Variations can occur across multiple axes – actuarial assumptions and calculations, fees and costs, liquidity restrictions, guaranteed rates, and the availability and limitations of various riders and other benefits. Each variation can affect the decision-making process of a retirement investor in determining the appropriateness of a specific investment product or distribution option.

The Rule suggests that a Financial Institution is unable, absent a limited exception, to illustrate an *actual* product within interactive investment materials or asset-allocation models without becoming a fiduciary. If this is the case, retirement investors will have diminished ability to determine actual annuity payouts and other key features, benefits, and risks. We urge that as long as there is no "call to action" and it is clear the illustration is presented solely as an example, illustrations of projected annuity payouts based on specific investments or distribution options should be non-fiduciary education. (For instance, educational tools that allow a retirement investor to understand a lifetime-income stream that considers specific annuity products available through the Financial Institution, based on input that that the retirement investor is considering a lifetime-income stream, should be educational.)

Similarly, it is unclear under the Rule whether simple illustrative calculators and tools that help a retirement investor narrow a range of investments would qualify as educational interactive investment material. For example, tools that calculate the specific target-date fund closest to the retirement investor's anticipated retirement date based on an arithmetic formula and the retirement investor's data inputs, or that present pre-screened or sortable lists of mutual funds based on objective and disclosed criteria (*e.g*., asset class, Morningstar rating, fees and expenses or product manufacturer), should be *per se* educational. These kinds of tools foster financial literacy and help retirement investors effectively navigate their investment options.

We urge the Department to consider expanding the education exclusion in the context of asset-allocation models and interactive materials. Doing so would provide retirement investors with continued access to important educational tools and materials about specific investment products and distribution options that, without a "call to action," can meaningfully aid the investor's decision-making.

To accommodate plans with multiple recordkeepers, the Department should revisit the requirement that a recordkeeper identify *all* similar "designated investment alternatives" in asset-allocation models and interactive investment materials.

The Rule provides that asset-allocation models and interactive investment materials for plan participants can be populated with specific funds and still qualify as non-fiduciary education, but only if the identified investments are the plan's "designated investment alternatives." When that condition is satisfied, the Department deems plan participants' interests to be protected by fiduciary oversight and monitoring of the designated investment alternatives, as required under ERISA. But in those instances, the Rule also requires the models and materials to identify *all* designated investment alternatives with similar risk and return characteristics.

This particular requirement presents unique challenges in the multivendor context, which is common across plans in the higher-education and not-for-profit sectors. When it is not the sole recordkeeper, the Financial Institution generating the models and materials will be constrained in satisfying this requirement. Requiring a recordkeeper to present investment options available only through another recordkeeper would necessitate a web of intricate arrangements between or among each Financial Institution and the plan fiduciary – creating administrative burdens and driving up costs. As a consequence, participants in plans with multiple recordkeepers will likely lose access to the valuable resources that participants in sole recordkept plans will enjoy.

Accordingly, we urge the Department to revisit this requirement. One potential solution would be to require the Financial Institution generating the models and materials to identify similar designated investments on its recordkeeping platform and, consistent with principles under Interpretive Bulletin 96-1,[5] also to disclose that other similar designated investments may be available and identify potential sources for further information (such as the employer's benefits office or its website, the other service provider, or participant disclosures under ERISA section 404a-5).

Recommendations concerning subsequent investment or use of Required Minimum Distributions ("RMD") payments should not be fiduciary advice.

In sub-regulatory guidance, the Department indicated that a financial representative would not be deemed to have recommended a distribution from a plan or IRA "simply by explaining the tax requirements and telling the plan participant that the law requires those distributions."[6] But the Department then stated that if a recommendation is made as to the application of the RMD payments (for example, a life insurance agent recommending a life policy and receiving an associated sales commission), then fiduciary advice has been rendered. We respectfully find this statement to be overreaching. Clearly, selling life insurance outside of a plan is not investment advice under the Rule. And, as the Department acknowledges, RMD payments are required by law – and thus are not, by their very nature, a recommendation to take a distribution from a plan or IRA. However, the sub-regulatory guidance would deem a mere suggestion related to using such payments – such as purchasing a life insurance with the proceeds as noted above, or even opening a bank account – to be fiduciary advice. We urge the Department to reconsider this position, so that it is not fiduciary investment advice to recommend how an individual might direct proceeds of RMD payments.

Consistent with the Rule's Preamble and a plain reading of the Rule text, the "hire-me" exclusion should cover the promotion of a single service.

During the rulemaking process, TIAA and other commenters urged the Department to clarify that recommending one's own (or affiliated) investment management or advisory services is not a fiduciary recommendation. We appreciate that, in finalizing the Rule, the Department recognized the strong rationale to create such a "hire-me" exclusion. The Rule's Preamble[7] and text[8] clarify

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5 29 C.F.R. § 2509.96-1.

6 *See* U.S. Department of Labor, Employee Benefits Security Administration, Conflict of Interest FAQs, Part II – Rule, No. 4 (Jan. 2017).

7 "It was not the intent of the Department … that one could become a fiduciary merely by engaging in the normal activity of marketing oneself or an affiliate as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making an investment recommendation covered by (a)(1)(i) or (ii). Thus, the final rule was revised to state, as an example of a covered recommendation on investment management, a recommendation on the

that one does not become a fiduciary merely by marketing oneself (or an affiliate) as a potential advice fiduciary, *unless* the marketing comes with an investment recommendation of the type covered by the Rule (*e.g.*, a rollover recommendation).

Given the clarity of the Rule's Preamble and text, we were puzzled that sub-regulatory guidance released in January appears to narrow the hire-me exclusion by distinguishing between situations when a Financial Institution promotes a *range* of available fiduciary services as opposed to a *particular* fiduciary service. This sub-regulatory guidance suggests that the hire-me exclusion is available only in the context of a range of services.[9]

The Department should clarify the scope of the hire-me exclusion to conform with the Rule's Preamble and text, to ensure that a provider can market its full suite of services, including any one service in particular. If the underlying fiduciary services are themselves provided under applicable ERISA standards, a Financial Institution should be able to sell its own services in a non-fiduciary manner *regardless* of whether the Financial Institution is promoting its fiduciary services in general or selling a particular fiduciary service. The Department's suggestion in the January sub-regulatory guidance that selling a particular fiduciary service would require exemptive relief separate from the relief available for the underlying service itself is neither warranted under the Rule nor necessary from a consumer-protection standpoint.

We urge the Department to affirm that the hire-me exclusion's scope is consistent with the Rule's plain meaning, as well as the Department's rationale articulated in the Rule's Preamble. In our view, a Financial Institution should be able to sell its own services in non-fiduciary manner as long as the services are provided in accordance with applicable ERISA standards – regardless of whether the sale is of a particular service or rather touting its fiduciary services in general.

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selection of 'other persons' to provide investment advice or investment management services. Accordingly, a person or firm can tout the quality of his, her, or its own advisory or investment management services or those of any other person known by the investor to be, or fairly identified by the adviser as, an affiliate, without triggering fiduciary obligations." 81 Fed. Reg. 20,946, 20,968 (Apr. 8, 2016).

[8] "A recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of *other persons* to provide investment advice or investment management services, selection of investment account arrangements (*e.g.*, brokerage versus advisory); or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made…." 29 C.F.R. § 2510.3–21(a)(1)(ii) (emphasis added).

[9] *See* U.S. Department of Labor, Employee Benefits Security Administration, Conflict of Interest FAQs, Part II – Rule, No. 19 (Jan. 2017) (concluding that while a "description of the range of services that the financial institution can provide does not constitute a recommendation of any particular account type as appropriate for the prospective customer merely because the financial institution represented that it provides high-quality services for competitive fees … [if] the financial institution actually recommends a particular account type or service, that would be a fiduciary investment advice recommendation under the Rule.").

Recommending a third-party consultant to a plan-sponsor fiduciary should not itself be a fiduciary act.

In the retirement-plan context, a plan-sponsor fiduciary will commonly engage one or more third parties to provide fiduciary services to a plan. Such an engagement will enable the plan-sponsor fiduciary to satisfy its own fiduciary duties of seeking an expert where it is prudent do so. To identify an appropriate third-party consultant, the plan-sponsor fiduciary will commonly turn to its recordkeeper(s) for guidance and assistance.

But in such contexts, the Rule would be unduly restrictive, as it includes within the scope of "investment advice" a recommendation to a plan fiduciary of another person to provide investment advice or investment management services. But while recommendations to hire independent fiduciaries, just like recommendations to hire non-fiduciary service providers, are important, they present no particular conflicts or consumer-protection concerns that would warrant subjecting them to the Rule. Requiring the Financial Institution to assume fiduciary responsibility for recommending other fiduciaries would discourage such recommendations – to the detriment of plan sponsors. Accordingly, we urge that when such a recommendation is provided as an accommodation to help a plan-sponsor fiduciary manage its own fiduciary responsibilities, and when the Financial Institution is not receiving direct compensation for making the recommendation, this type of recommendation should not be considered investment advice.

The BIC Exemption should be made more broadly available.

As the primary means of exemptive relief from the Rule, it is essential that the BIC Exemption be appropriately calibrated.

First, the BIC Exemption should be made available for all plans (as well as all IRAs), regardless of their level of assets. Currently, the BIC Exemption is available to transactions with a plan fiduciary that meets certain criteria (*i.e.*, being ineligible for the exception available to independent fiduciaries with financial expertise). In the Preamble to the BIC Exemption, the Department explains that the BIC Exemption is not available to transactions with independent fiduciaries with financial expertise because a Financial Institution can instead access the exclusion for communications with these fiduciaries.[10] But that exclusion does not obviate the importance of exemptive relief should a service provider seek to provide fiduciary investment advice to a plan, with an undertaking to do so in the plan's best interest and in compliance with many other safeguards required under the BIC Exemption. Rather than *per se* denying availability of the BIC Exemption in those contexts, we urge that the BIC Exemption be modified to enable a Financial Institution to determine for itself when it seeks to provide investment advice and assume fiduciary status in doing so. Extending the BIC Exemption would be consistent with the goal of enabling more retirement investors to access advice.

[10] Best Interest Contract Exemption, 81 Fed. Reg. 21,002, 21,013 (Apr. 8, 2016).

Second, the BIC Exemption should also be available for "robo-advice"[11] even if the Financial Institution is unable to charge level fees. Under the current construct, the BIC Exemption is available for robo-advice, but only if the robo-advice provider is a Level Fee Fiduciary.[12] This limitation effectively prevents a Financial Institution unable to use level fees – because, for instance, its robo-advice platform include products that the Financial Institution itself manufactures – from providing rollover and distribution advice through robo-advice models. We urge the Department to make the BIC Exemption available to robo-advice provided by such Financial Institutions. (Of course, this should be conditioned on the advice complying with the BIC Exemption's requirements.) Such an extension would follow the Department's stated purpose for creating the BIC Exemption – to facilitate various types of common fee arrangements when subject to an enforceable best-interest standard.[13] Failing to make this accommodation to all Financial Institutions creates an uneven and restricted playing field in favor of robo-advisers that are independent from product manufacturers.

Third, in-house plans and participants in those plans should be eligible for relief under the BIC. In earlier submissions to the Department, we noted concerns that TIAA will not be able to make available our own investment products and services – including advising on our lifetime annuity distribution options – to employees and former employees who participate in TIAA's ERISA-covered plans.[14] Since the final Rule did not scale back this exclusion, we continue to have these concerns. By way of example, the decision to take a lifetime annuity is a complex decision and participants and beneficiaries of TIAA's employee plans benefit significantly from advice TIAA should be able to provide under the Impartial Conduct Standards.

The Department explained its unchanged position in the Rule's Preamble by referring to a concern about abuse where a participant or beneficiary receives advice from his/her own employer "upon whom he or she depends for a job." The Department believes that, to protect employees from abuse, "employers generally should not be in a position to use their employees' retirement benefits as a potential revenue or profit source, without stringent safeguards." But this

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[11] *I.e.*, investment advice provided through an interactive website powered by computer software-based models/applications, using personal information the investor supplies through the website/application to provide the advice, and with no personal interaction or advice from an individual Adviser.

[12] A fiduciary is a Level Fee Fiduciary if the only fee or compensation received by the Financial Institution providing the advice, its Advisors, and any Affiliates in connection with the advice provided is a fixed, asset-based fee or set fee that does not vary based on the investment selected. Best Interest Contract Exemption, § VIII(h).

[13] In the preamble to the BIC Exemption, the Department notes: "Certain types of fees and compensation common in the retail market, such as brokerage or insurance communications, 12b-1 fees and revenue sharing payments, may fall within these prohibitions when received by fiduciaries as a result of transactions involving advice to the plan, plan participants and beneficiaries and IRA owners. To facilitate continued provision advice to such retail investors under conditions designed to safeguard the interests of these investors, the exemption allows investment advice fiduciaries, including investment advisers registered under the Investment Advisers Act of 1940 or state law, broker-dealers, and insurance companies and their agents and representatives, to receive various forms of compensation that, in the absence of an exemption, would not be permitted under ERISA or the Code." 81 Fed. Reg. at 21,002.

[14] This concern stems from the fact that the BIC Exemption does not apply if "[t]he Plan is covered by Title I of ERISA, and . . . the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan …." 81 Fed. Reg. at 21,076.

explanation falls short of clarifying why the BIC Exemption – with all of its stringent conditions designed to mitigate the harmful impact of conflicts of interest – does not provide an adequate safeguard. As the Department itself has recognized on multiple occasions, the employer's decision to hire or retain an employee is a business decision completely separate from a fiduciary act of providing investment advice, including any resulting indirect benefit. In fact, any perceived abuse related to performing these two separate functions would be addressed by the ability of a fiduciary delivering investment advice to mitigate conflicts by complying with the BIC Exemption's stringent safeguards.

Accordingly, we urge the Department to make exemptive relief available to Advisers, Financial Institutions, and any affiliates that make their own products and services available to employees and former employees participating in their employer-sponsored plans.

4. **<u>During the transition period from June 9, 2017, through January 1, 2018, Financial Institutions and Advisers who wish to utilize the BIC Exemption must adhere to the Impartial Conduct Standards only. Most of the questions in this RFI are intended to solicit comments on the additional exemption conditions that are currently scheduled to become applicable on January 1, 2018, such as the contract requirement for IRAs. To what extent do the incremental costs of the additional exemption conditions exceed the associated benefits and what are those costs and benefits? Are there better alternative approaches? What are the additional costs and benefits associated with such alternative approaches?</u>**

We offer our perspective on the BIC Exemption's structure in answers to Questions 5, 6, and 13, below.

5. **<u>What is the likely impact on Advisers' and firms' compliance incentives if the Department eliminated or substantially altered the contract requirement for IRAs? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the contract requirement and, if so, how?</u>**

We urge that the contract requirements under the BIC Exemption permit an agreement binding the Financial Institution to the Impartial Conduct Standards *without* requiring a signature from the IRA investor. This modification would enable Financial Institutions and their Advisers to provide real-time advice that is sensitive to market conditions (without the delay associated with obtaining a client signature on a paper agreement or via electronic means) while also providing the IRA investor with the meaningful protections under the BIC framework.

6. **<u>What is the likely impact on Advisers' and firms' compliance incentives if the Department eliminated or substantially altered the warranty requirements? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the warranty requirement and, if so, how?</u>**

We do not see the BIC's warranties as necessary to enforce the Impartial Conduct Standards. Rather, an affirmative undertaking by a Financial Institution that it and its Advisers will adhere to the "Impartial Conducts Standards" will adequately serve to protect the interests of the investors when receiving advice under the BIC Exemption. The warranties offer nothing of value to the participant – and, in fact, could encourage frivolous lawsuits – with the associated costs being borne by retirement-plan participants. Accordingly, we urge that the warranties be removed as a condition of exempting relief.

11. **<u>If the Securities and Exchange Commission or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors, could a streamlined exemption or other change be developed for advisers that comply with or are subject to those standards? To what extent does the existing regulatory regime for IRAs by the Securities and Exchange Commission, self-regulatory bodies (SROs) or other regulators provide consumer protections that could be incorporated into the Department's exemptions or that could serve as a basis for additional relief from the prohibited transaction rules?</u>**

The standards of conduct now applicable to providers of retail investor advice differ depending on *who* provides the advice – a suitability standard governs advice provided by a broker-dealer, and a securities-law fiduciary standard governs advice provided by a Registered Investment Advisor (RIA). But in our experience, many retail investors fail to understand these differences, both as to which type of provider is rendering advice and the standard applicable to that provider.

As we have previously urged the Securities and Exchange Commission (SEC), TIAA believes *all* advice should be subject to a fiduciary standard – even if provided by a broker-dealer. Raising the broker-dealer standard of care to that of the RIA will enable retail investors to assume advice is rendered in their best interest, regardless of the adviser's title.

Furthermore, as between the securities-law and ERISA fiduciary frameworks, we would urge the Department and the SEC to prioritize achieving a uniform, consistent, and pragmatic best-interest standard of conduct, reflecting duties of loyalty and care. Appreciating the significant distinctions between these frameworks, we believe harmonizing how the fiduciary standard is articulated would mitigate investor confusion and help protect retail investors' best interests. Consistent standards across regulatory regimes will help establish important investor protections that stretch across an individual's investing and savings portfolios and create cogent, easy-to-understand regulatory frameworks.

Principal Transactions

12. <u>Are there ways in which the Principal Transactions Exemption could be revised or expanded to better serve investor interests and provide market flexibility? If so, how?</u>

The Principal Transaction Prohibited Transaction Exemption (PTE) establishes very narrow exemptions for ERISA plans and IRAs to purchase securities offered in a principal transaction. But the exemptive relief does not extend to closed-end fund (CEF) initial public offerings (IPOs). Because of how these funds are offered, restricting purchases in IPOs will hurt retirement investors – and all other investors and the capital markets – in ways that cannot be remedied simply by allowing plans and IRAs to purchase these funds in the secondary market. Because CEFs are often designed and managed to offer strong income and cash flow, they are an important investment option for long-term investors in IRAs and tax-deferred accounts. In fact, of the total $177 billion in assets held in CEFs composed of taxable bond or equity funds, about 25% ($44 billion) is in IRAs and tax-deferred accounts. But unlike continuously offered funds, CEFs generally have a limited opportunity to raise investment capital through a brief IPO offering period – typically around 20 business days.

While we do not believe the Department meant to adversely impact the investment product, excluding 25% of the CEF universe's investor base from an initial offering would significantly reduce the scale of future CEFs. Such an exclusion would create disadvantages for *all* fund shareholders, including IRA investors who purchase shares after the IPO[15], through reduced income and return potential.[16] Correspondingly, the exclusion of 25% of the potential investor base from the CEF IPO process will impair the ability to raise capital for important areas of the economy – including issuers from infrastructure, technology, energy, and communications sectors.[17] By removing capital from the marketplace, these issuers will face challenges in efficiently funding essential projects through capital markets.

[15] For example, assume that today there is public interest of $250 million in a particular new CEF IPO and its asset class and investment strategy. Under the Rule, because of the IPO exclusion, the fund will be 25% smaller. That means higher fund expense ratios, reduced efficiency and investment choice in managing a fund's portfolio which may lead to less diversification, reduced or absent CEF analyst coverage (CEF analysts generally do not evaluate or publish information about smaller funds), and lower secondary market volume, leading to potentially wider bid/ask spreads. These diseconomies of scale affect current and future shareholders, taxable and retirement alike, as well as the capital markets being served by that asset class.

[16] Since the IPO is the only time a CEF investor can buy a known quantity of fund shares at a certain known price, forcing interested IRA investors into purchasing shares on the secondary market introduces price and quantity execution risk to those investors. But under the Rule, the share price set in the secondary market is quite likely to be higher once the retirement investor enters, given increased demand is chasing smaller supply. This is unlike the result of the restriction on an equity IPO; after the syndicate breaks, a retirement investor can still buy the very same investment product (the share of the company), and he or she pays either more or less for the privilege than he would have paid in the IPO. CEF IPOs are different.

[17] Consider, for example, the Build America Bond funds that were launched by several fund companies, including Nuveen, as part of the American Reinvestment and Recovery Act in 2009. If those funds were brought to market with the Rule in effect, the amount of CEF capital available to finance such infrastructure spending through CEFs would have been reduced by 25%, the diversification of the bond portfolio likely would be reduced, fund expenses would be higher, and the retirement investor, who could have purchased this fund only in the secondary market, would have a less attractive and less advantageous product to buy.

At a more micro level, we note that CEFs offer important investment features to retirement investors. In particular, retail investors choose CEFs for access to less liquid and more institutional-like asset classes – such as real assets, energy master limited partnerships, senior loans, preferred securities, Build America Bonds, and even investments in the Public-Private Investment Program under the Trouble Asset Relief Program. All these strategies have allowed CEF investors – including those investing for retirement in IRAs – to diversify their income portfolios away from more traditional sources while enjoying diversified, professionally managed investment portfolios.

Against this backdrop, we appreciate the Department's concerns about the risk of underwriters "dumping" shares on investors during the IPO process. But given differences in the IPO process for CEFs as compared to operating companies, those concerns are not present here. Consider the distinctions. In a typical operating company equity IPO, the issuer consults with its underwriters and sets a specific capital target the offering must raise at a valuation determined by a negotiation between the issuer and the underwriters. That capital goal is prominently featured on the front of the offering's preliminary prospectus. In contrast, the assets raised in a CEF IPO depend solely upon investor demand discerned during the initial offering period, not a predetermined capital goal. In addition, no valuation concerns are present as the CEF holds only cash proceeds immediately following the offering that are then promptly invested in a pool of securities in accordance with the fund's investment mandate. For the CEF IPO, the underwriting syndicate members are committing only to the shares needed to fill their clients' indications of interest – rather than issuer and syndicate goals. Beyond that, the underwriters hold little or no additional inventory. And for CEF IPOs, pricing is known at the outset and high transparency and liquidity opportunities continue after launch. Additionally, we highlight a further protection of the CEF IPO process: Syndicate members track aftermarket activity and will impose a claw-back of the sales concession in the event an Adviser engages in "flipping" shares purchased during the offering. This can remove financial incentives for an Adviser to dump the shares after the CEF offering was priced.[18]

In summary, the PTE's failure to accommodate IPOs in the CEF setting will harm the product for *all* investors, including retirement investors, while adversely affecting the overall market by impeding capital. We urge the Department to modify the PTE so IRA owners and other tax-deferred retirement savers can have the opportunity to participate in CEF IPOs.

[18] While there had been concerns in the 1970s over CEF liquidity, the CEF market has matured considerably – such that those concerns are no longer dominant. Listed CEFs, which do not issue redeemable shares, obtain investor liquidity through exchange listing and trading. But the more appropriate focus is on *secondary market* liquidity for CEF shares. The primary driver of CEF secondary-market liquidity is, perhaps obviously, fund size. Larger funds offer greater secondary market liquidity. In addition, CEF IPOs traditionally have been broadly syndicated, which means shares are sold to many investors across many different underwriting firms. Given (a) this highly fragmented investor base, (b) the average CEF share position relative to the average CEF average daily trading volume, and (c) insights from CEF designated market makers (DMMs) and other professional market participants, we believe that today, unlike 1977, it is highly likely the average CEF shareholder enjoys abundant liquidity in the markets. Our conclusion is that the average shareholder could sell all his or her shares at once, or buy up to six times the average share position, without affecting share prices significantly or perhaps at all.

13. **Are there ways to simplify the BIC Exemption disclosures or to focus the investor's attention on a few key issues, subject to more complete disclosure upon request? For example, would it be helpful for the Department to develop a simple up-front model disclosure that alerts the retirement investor to the fiduciary nature of the relationship, compensation structure, and potential sources of conflicts of interest, and invites the investor to obtain additional information from a designated source at the firm? The Department would welcome the submission of any model disclosures that could serve this purpose.**

We agree that retirement investors should be provided the cost and performance information needed to properly evaluate the investment advice provided. But the web disclosure requirements under the BIC Exemption should be eliminated, as they are warranted from neither a business standpoint (as they are costly and burdensome) nor from a consumer-protection standpoint (as they are highly unlikely to be used by individual retirement investors). Rather, the BIC disclosures should mirror the relevant investment-related fee and expense disclosures under the Department's 404a-5 participant disclosure regulations and, upon request, the Department's 408(b)(2) regulation.

14. **Should recommendations to make or increase contributions to a plan or IRA be expressly excluded from the definition of investment advice? Should there be an amendment to the Rule or streamlined exemption devoted to communications regarding contributions? If so, what conditions should apply to such an amendment or exemption?**

We appreciate the Department's latest position in its August sub-regulatory guidance,[19] which responds to significant concerns about its earlier FAQs as inhibiting the longstanding policy objective of encouraging savings for retirement. We now ask the Department to incorporate its conclusions from the August FAQs into the Rule itself. First, the Rule should explicitly declare that recommendations by service providers to enroll in, or make or increase contributions to, a plan or IRA are not investment advice under the Rule. Second, the Rule should explicitly provide that service providers can make plan design recommendations to plan fiduciaries regarding improvements in plan participation and increases in plan contributions (*e.g.,* automatic enrollment and auto-save provisions) without such recommendations being treated as investment advice.

17. **If the Department provided an exemption for insurance intermediaries to serve as Financial Institutions under the BIC Exemption, would this facilitate advice regarding all types of annuities? Would it facilitate advice to expand the scope of PTE 84-24 to cover all types of annuities after the end of the transition period on January 1, 2018? What are the relative advantages and disadvantages of these two exemption approaches (*i.e.*, expanding the definition of Financial Institution or expanding the types of annuities covered under PTE 84-24)? To what extent would the ongoing availability of PTE 84-24 for specified annuity products, such as fixed**

[19] *See* U.S. Department of Labor, Employee Benefits Security Administration, Conflict of Interest FAQs (408b-2 Disclosure Transition Period, Recommendations to Increase Contributions and Plan Participation) (Aug. 2017).

indexed annuities, give these products a competitive advantage vis-à-vis other products covered only by the BIC Exemption, such as mutual fund shares?

We urge that PTE 84-24 be available for both fixed and variable annuities since a distinction between these two types of annuities appears to be artificial in this context.

18. **The Fiduciary Rule contains a specific exclusion for communications with independent fiduciaries with financial expertise. Specifically, a party's communications with an independent fiduciary of a plan or IRA in an arm's length transaction are excepted from the Rule if certain disclosure requirements are met and the party reasonably believes that the independent fiduciary of the plan or IRA is a bank, insurance carrier, or registered broker-dealer or investment adviser, or any other independent fiduciary who manages or controls at least $50 million. Some commenters have requested that the Department expand the scope of the exclusion. To the extent changes would be helpful, what are the changes and what are the issues best addressed by changes to the Rule or by providing additional relief through a prohibited transaction exemption?**

Excluded from the definition of "investment advice" are "investment-related communications" between a Financial Institution and "independent fiduciaries with financial expertise."[20] To make use of this exception, the Rule places the burden on the Financial Institution to know whether (or reasonably believe that) the independent fiduciary has the requisite expertise. Under the Rule, an independent fiduciary has the requisite expertise if it (i) is a certain type of financial entity (*e.g.*, Registered Investment Advisor), or holds, or has under management or control, total assets of at least $50 million, and (ii) is capable of evaluating investment risks independently (both generally and regarding particular transactions and investment strategies).[21]

By imposing this $50 million threshold, the Department takes the position that only fiduciaries of larger plans are capable of distinguishing between situations when a Financial Institution is selling a product or service, and those when the Financial Institution is providing investment advice. But ERISA provides no basis for such a financial threshold. In fact, the Rule's creation of such a financial threshold contravenes the fundamental premise that a plan fiduciary must act in accordance with ERISA's fiduciary-duty provisions *regardless of* the amount of assets the fiduciary manages. ERISA holds no plan fiduciary to a lesser standard merely because the fiduciary manages fewer assets. Rather, if the plan fiduciary lacks expertise to perform its duties, the fiduciary should engage a professional with the appropriate expertise to help the fiduciary meet its duties under ERISA.

As to the requirement's second prong, the Rule inappropriately delegates to the Financial Institution a duty to gauge the independent fiduciary's financial acumen. Again, ERISA already tasks a plan fiduciary with responsibility to evaluate investment risks; if the plan fiduciary lacks

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[20] 29 C.F.R. § 2510.3-21(c)(1). The exclusion is conditioned on certain disclosures being made and no direct fee being received by the Financial Institution.

[21] *Id*. § 2510.3-21(c)(1)(i), (ii).

the requisite expertise, the plan-sponsor fiduciary should hire professionals to help the fiduciary meet its ERISA duties.

The negative consent approach that the Department suggests in its sub-regulatory guidance[22] is somewhat helpful but still leaves a recordkeeper, which is acting in a ministerial capacity, in the uncomfortable position of assessing the financial acumen of a plan's fiduciaries. An assessment that the recordkeeper thought was reasonable could be second-guessed by a litigant or a court, with the drastic consequence of exposing the recordkeeper to the risk of being viewed as a fiduciary – an unintended status not consistent with the limited role and compensation of a recordkeeper. Furthermore, the negative consent approach does not address the $50 million threshold, which inappropriately distinguishes the availability of the exclusion based on the amount of assets a fiduciary manages. Accordingly, we continue to urge the Department to extend the exclusion to investment-related communications with *any* plan fiduciary, regardless of the assets it manages and its perceived investment acumen.

Furthermore, ordinary course Financial-Institution-to-Financial-Institution interactions should not be fiduciary advice. In the Rule's Preamble, the Department states that "use of the term 'plan fiduciary' in the proposed rule was not intended to suggest that ordinary business activities among Financial Institutions and licensed financial professionals should become fiduciary investment advice relationships merely because the institution or professional was acting on behalf of an ERISA plan or IRA."[23] We agree with the Department's intended outcome. Unfortunately, both the Rule's definition of the term "fiduciary" and the Rule's independent-fiduciary exception contain several confusing elements – which could trigger unnecessary market dislocations and inefficiencies, ultimately to the detriment of retirement savers.

As a threshold matter, if communications from a Financial Institution that manufactures a product are neither individualized nor specifically directed to an identified end-user plan or IRA, the manufacturer should be presumed *not* to be an investment advice fiduciary. To hold otherwise will likely have a chilling effect on the flow of information and ideas among financial professionals – ultimately to the detriment of plan and IRA end-users.

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TIAA remains committed to working with the Department to ensure that an enforceable best-interest standard is implemented in a streamlined and efficient manner. We would be pleased to discuss the foregoing comments. Thank you for your consideration.

Sincerely yours,

Derek B. Dorn

[22] *See* U.S. Department of Labor, Employee Benefits Security Administration, Conflict of Interest FAQs (Transition Period) (May 2017).

[23] 81 Fed. Reg. at 20,982.