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U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5655
Washington, DC 20210

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Suite 400
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Re: Definition of the Term "Fiduciary:" Conflict of Interest Rule (RIN 1210-AB32)
Proposed Amendment to Proposed Partial Revocation of Prohibited Transaction Exemption 84-24
(ZRIN 1210-ZA25)
Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)

To Whom It May Concern:

Lincoln Financial Group is the marketing name for Lincoln National Corporation and its affiliates (collectively, "Lincoln"). Lincoln appreciates this opportunity to provide the following comments on the Department of Labor's ("Department's") proposed fiduciary advice regulation and related prohibited transaction exemptions (the "Proposal").

Summary of Position

Founded in 1905, Lincoln has been in business for 110 years, making us one of oldest insurance companies in the United States. Through our subsidiaries we design, manufacture and market a wide range of retail insurance and investment products that provide accumulation, protection and guaranteed lifetime retirement income to Americans of all income levels. These products include fixed and indexed annuities, variable annuities and employer-sponsored retirement plan recordkeeping and administrative services. Today, Lincoln is one of the largest insurance companies in the retirement market, serving more than 2.4 million retirement plan and IRA customers.

We strongly believe in the competitive value of our products and the excellence of our services. We stand behind this by distributing the majority of our products through financial advisors who have no obligation to sell our products. These advisors can and do evaluate and compare products across the marketplace, and recommend those that they believe bring the best value to the clients that they serve. We believe that this "open architecture" model of distribution provides a great benefit to retirement savers when they receive individualized financial planning from their advisors.

At Lincoln, we believe that insurance products with lifetime income guarantees have never been more vital for helping consumers achieve their retirement objectives. Historically, lifetime income guarantees were available to middle class Americans through employer-sponsored defined benefit plans. However, the number of traditional pensions has decreased significantly over the past several decades. In 1985, private pension plans accounted for

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almost 50% of retirement savings; in 2014, this number had decreased to less than 20%.¹ Defined benefit plans have been replaced with defined contribution plans, such as 401(k) plans, in which the savings burden is largely shifted to employees. This burden is not one that most employees are well-equipped to bear. Wage stagnation has ensured that middle income savers have less money to set aside for retirement than ever before. Most retirement savers also lack investment expertise, a fact that became painfully apparent during the 2008 financial crisis, when trillions of dollars of household wealth was destroyed. At the same time, the future availability of Social Security as the primary source of retirement income remains in doubt, a problem that becomes more acute as baby boomers begin to retire. In this environment, consumers cite increasing concern that they will not have enough money to live comfortably in retirement,² burden their children, and live in poverty at the end of their lives.

In this era of do-it-yourself retirement planning, the American middle class desperately needs help to ensure its own retirement security. The insurance industry, with its unique ability to turn individual savings into guaranteed income for life through annuities, is well positioned to address this need. In this regard, we point out that today, less than 5% of retirement savers who are covered by a defined contribution plan have access to guaranteed lifetime income through that plan. For the remaining 95%, and for the many retirement savers with no access to an employer-sponsored plan, the only way to get these protections is through an individual fixed or variable IRA annuity.³

Lincoln agrees with the Department that retirement savers should receive investment advice that is in their best interest. To achieve this goal without limiting consumers' access to vital lifetime income protections, we recommend changes to the Proposal that focus on the following areas:⁴

- Ensuring that products with guarantees are not hamstrung under the Proposal, by retaining a workable exemption for the sale of commissionable investments. In particular, PTE 84-24 should continue to cover variable annuity transactions and the Best Interest Contract Exemption (BICE) should not unfairly handicap annuity sales.
- Modifying the proposed "Best Interest" standard and the BICE to better reflect today's marketplace, existing business models and regulatory realities.
- Prospective application of the final regulation and a transition timeline that takes into consideration the massive change that will be required.
- Narrowing the scope of the fiduciary definition so that insurance companies can continue to provide critical services to small businesses and middle income retirement savers as a product manufacturer and retirement plan record keeper.

Annuities with guarantees are demonstrably different from mutual funds and other investments that provide no guarantee and should be treated differently, so that they are not unfairly handicapped by the regulation. Guarantee purchases are long-term "buy and hold" investments with durations that can reach 30 years or more. (These long-term durations are not theoretical: for Lincoln's annuity business, redemptions were only 7% of

¹ IRI Factbook 2015

² 2015 Annual consumer tracking survey by EBRI, 41% of **workers** are *not confident* that they will have enough money to live comfortably throughout their retirement years. This represents an increase from 29% in 2007.

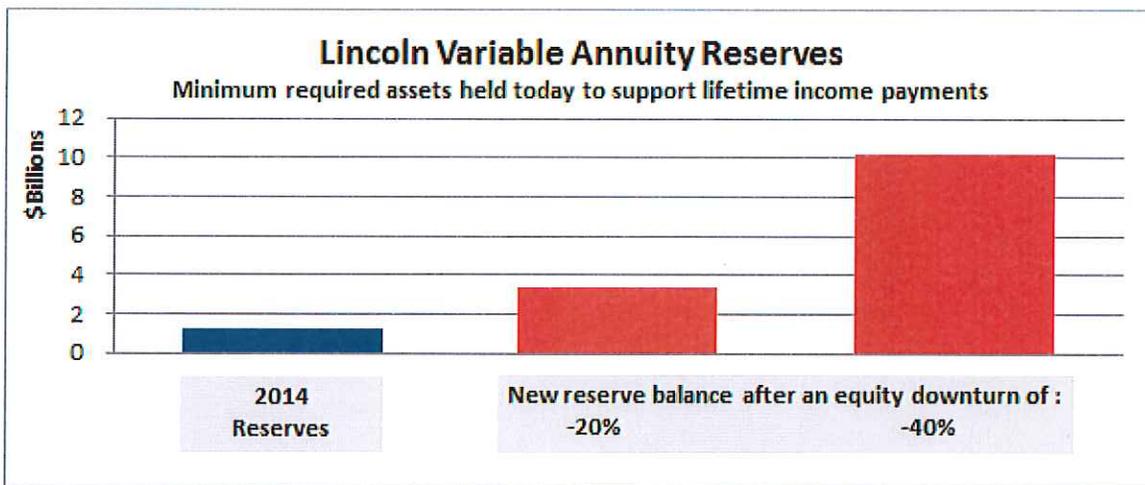
³ LIMRA Secure Retirement Institute "In-plan Income Guarantee Availability and Election Tracking Survey – 2014" (guaranteed income products available in 33,500 qualified plans representing less than 5% of all plans and less than 1% of defined contribution assets)

⁴ Lincoln has prepared specific recommended changes to the Proposal, which are set forth in Appendices A, B and C. Appendix A focuses on PTE 84-24, Appendix B focuses on the BICE and Appendix C contains recommended changes to the proposed investment advice regulation.

account values in 2013 and 2014, whereas the mutual fund redemption rate during this time period was in excess of 24%.⁵) Savers pay an annual fee for an option to receive guaranteed lifetime income in the future that does not decrease in falling markets. This option is provided through a contract with the insurance company. This effectively creates a second safety net for retirement savers. The first is the nest egg itself and mutual funds can certainly be a vehicle for setting aside that savings. The second is the insurance company's guarantee that the nest egg will support a lifetime income stream that will not lose value in falling markets.

Mutual funds cannot provide this future protection. In fact, the value of a mutual fund is based on its past performance and there is expressly no guarantee that this performance will continue in the future. The asset manager has no risk or obligation to set aside reserves and, consequently, can simply charge a fee for the service of investment management. By contrast, an annuity does guarantee a future outcome, and an insurance company is required by state insurance laws to set aside reserves to ensure that those guarantees will be met. The amount of required reserves varies considerably with market movements. Insurance companies, rather than retirement savers, bear this risk.

The exhibit below shows how much Lincoln's risk, and resulting reserve requirements, can increase when there is a market downturn. It shows clearly that the risk associated with providing guarantees is very real and can be substantial.



If the final rule handicaps the availability of guarantees and/or creates uncertainty for advisors in recommending guarantees, then the result will be that more savers will bear the risk of down markets and potentially sacrifice their retirement security. Traditional asset manager fee for the service of investment management will not provide the retirement income security that middle class Americans desperately need.

There are good reasons for retirement savers to choose to pay for investment advice relating to long-term investments such as insurance guarantees through commissions. Consumers who consider buying an insurance product need to first determine that the product is right for them, and that they are paying the right price for it. These are obviously considerations for any purchase, but they are even more critical given the long term and financially significant commitment that an insurance product purchase requires. This is particularly true for middle income savers, who do not have a lot of money to set aside. For them, this is a very big decision.

⁵ 2015 Investment Company Factbook, Investment Company Institute

Selecting the right product requires extensive and personalized education about the many types of products available (e.g., variable annuity with guaranteed income benefit, immediate annuity, deferred income annuity), their various benefits and features, and associated costs. To assist consumers with this, financial advisors use advanced planning tools that clearly depict in easy, visual terms the comparison of investment options and income that will be distributed through various products. This analysis is specific to each client's particular needs and is essential for comprehensive planning. Insurance companies also provide financial advisors with detailed and personalized illustrations of their products' projected future benefits, to use with their clients. Over the last five years, Lincoln has provided over 1.4 million of these illustrations to financial advisors. Not surprisingly, discussing all of this information with customers takes a significant amount of time and effort. For a Lincoln financial advisor recommending an annuity as part of a client's holistic financial plan, it generally involves at least three one-hour face to face meetings and many hours of work behind the scenes. This thorough analysis is in stark contrast to a simple mutual fund investment, where none of this up front time and effort is necessary. Mutual funds are routinely purchased by consumers who only receive a prospectus and a past performance track record without any projection, much less promise, of a future result.

In addition, because of the length of the commitment, buy and hold investors generally pay less for advice through commission-based arrangements than they do under fee-based arrangements. Consumer preferences validate that commission-based compensation structures are an important option that must remain an available choice for retirement savers. A recent study shows that consumers across all income levels prefer to pay for financial services through commission-based compensation (40%) than through asset-based fee compensation (30%)⁶. In the end, commission-based compensation is not a mechanism for maximizing advisor compensation, as the Department appears to assume. Rather, it is often the model that best reflects the services being provided and is the most fair to the consumer.

It therefore makes sense that annuities have been sold on a commission basis for over 30 years under prohibited transaction exemption (PTE) 84-24. The Proposal's bias against commission-based compensation structures should be eliminated so that retirement savers continue have a choice in how they pay for advice.

In addition, a "best interest" standard of care to protect retirement savers makes sense. However, this standard, along with all other requirements of any prohibited transaction exemption, must be workable so that the exemptions can actually be used.

Lincoln also believes that any final regulation should be applied on a prospective basis and provide a reasonable timeline for implementation that takes into consideration the realities of the marketplace, the millions of savers currently being served who would be disrupted, and the technology and administrative system builds and industry training that would be required to ensure compliance.

Last, employers and savers should not lose access to important services such as retirement plan enrollment and participant education services, and product-related customer services, because of an overly expansive definition of fiduciary advice.⁷

With our recommended changes, the Proposal will advance the goal of increasing middle class Americans' retirement security rather than thwarting that goal by limiting access to critical insurance products with lifetime guarantees. The changes to the Proposal set forth in this letter will also ensure that financial advisors can

⁶ Phoenix Marketing International, Cerulli Associates "Clients' Preferred Fee Structure by Investable Assets, 2013

⁷ The attached Appendix C contains specific recommended changes, and the arguments supporting these changes, to the proposed investment advice regulation so that insurance companies can continue to provide critical services to small businesses and individual retirement savers as product manufacturers and retirement plan record-keepers.

continue to help consumers understand the financial products and solutions available to them and determine which one is the right product, at the right price, for them.

I. The Importance of Annuities in the Retirement Market

As noted above, unlike mutual funds, annuities provide a wide variety of benefit options that can protect against an untimely death, provide principal guarantees, assure a specified amount of income when the contract is annuitized, and guarantee income for life. These protections have historically been available to low and middle income savers through employer-sponsored defined benefit plans. However, the number of traditional pensions has plummeted over the past several decades and today, the vast majority of American workers who are covered by an employer-sponsored retirement plan are in a defined contribution plan, which typically does not offer any of these protections. The insurance industry is actively working to correct this by developing guaranteed lifetime income products for the defined contribution plan marketplace. But employer adoption has been slow—impeded in part by regulatory hurdles that the Department is well aware of—and today access to these products in defined contribution plans is very limited. **This means that individual fixed and variable annuities are the only way for these workers and for the many retirement savers without access to an employer-sponsored plan to get access to guaranteed lifetime income.** Retirement savers acutely need this access. Nearly two thirds (64%) of pre-retirees do not expect to receive enough income from Social Security and employer pensions to cover their basic living expenses in retirement.⁸ Retirement savers recognize that annuities are an important way to cover this shortfall: over half (52%) of deferred annuity buyers purchase the annuity to supplement Social Security or pension income.⁹ Importantly, this includes middle income savers. According to a 2013 Gallup survey of individual annuity owners, the median household income of individual annuity owners is \$64,000, and 80% have total annual household incomes under \$100,000. Six in ten (60%) are below \$75,000 in annual household income and over one-third (35%) are below \$50,000.¹⁰

The Secretary of Labor has spoken of Americans' retirement security using the common analogy of a three-legged stool. The first leg is Social Security and the second and third legs are personal and employment based savings. In a recent speech, the Secretary made the case for strengthening the legs of this stool and stated his belief that the private sector has an important role to play.¹¹ We agree and would like to emphasize in particular the vital role that insurance products play today in holding up that stool. Seventy-five million Americans currently rely on the guarantees and protection that only the life insurance industry can provide. Life insurance companies pay out \$1.5 billion in benefits every day to American families, and 20% of Americans' long term savings are in insurance products. Handicapping advisors' and insurance companies' ability to continue bringing these important protections and benefits to American savers, as the Proposal threatens to do, weakens rather than strengthens the retirement stool.

These critically important insurance protections are frequently delivered through variable annuities, which offer a wide variety of guarantees to protect a retirement saver's investment. Living benefit features protect against investment and/or longevity risk by providing guarantees that cover income, accumulation, and withdrawals for either a fixed number of years or for life. Death benefits provide principal protection in the event a retirement

⁸ LIMRA Secure Retirement Institute, *LIMRA Retirement Study*, 2012

⁹ LIMRA Secure Retirement Institute, *U.S. Deferred Annuity Buyer Attitudes and Behaviors*, 2014

¹⁰ Note that this survey only looked at nonqualified annuities, but the results clearly reflect the value of annuities generally to middle income retirement savers.

¹¹ Remarks by U.S. Secretary of Labor Tom Perez to the Brookings Institution, The Hamilton Project, Forum on Promoting Financial Well-Being in Retirement, Washington, DC, June 23, 2015 ("The second and third legs of the stool, which need fortification, are personal savings and employment-based savings. We need to tighten the bolts on both of them, and both the federal government and state governments — and the private sector — can play a critical role.")

saver dies during a market downturn. The unique benefits of variable annuities are squarely in line with the Department's desire to ensure that Americans have access to guaranteed lifetime income in retirement.

A. Variable Annuities with Guaranteed Lifetime Income

Guaranteed lifetime income is a unique feature available in variable annuity contracts that provides retirement savers the opportunity to invest in mutual funds, index funds and exchange traded funds, while also having a guaranteed lifetime income stream that is protected from market downturns. This is done by investing the individual's savings in a portfolio of funds within the variable annuity contract that will appreciate in value when the markets rise. This market appreciation is locked in periodically for purposes of determining the saver's guaranteed lifetime income payments, meaning they can increase with market appreciation but will never decrease (as long as the saver's withdrawals do not exceed the guaranteed income amount). One cannot say the same about mutual funds, bonds, or even Social Security benefits.

Retirement savers recognize the enhanced security that these products give them. As one responder to a 2011 Lincoln study indicated, "Annuities gave us a feeling of independence and security that you don't have to worry about the markets going up and down. That security was like the same feeling as knowing that your kids are doing well. It's really a comfort level. My parents lived until their 90s. I expect to have a long, full, healthy life. I don't want to be in a position where I have to depend totally on Social Security or food stamps or whatever the government has to give me. It means standing on my own. Knowing that money is there means I won't be dependent on our children. It means I'm independent."¹²

It is therefore not surprising that over the past decade, the popularity of variable annuities with guaranteed lifetime income has increased. In 2014, over 70% of industry variable annuity sales were in products offering these types of benefits.¹³ In fact, the lion's share of guaranteed lifetime income today is being delivered through variable annuities. Of the total \$564 billion in guaranteed income sales over the last five years, 75% was through variable annuities.¹⁴ And at Lincoln, just over 70% of variable annuity contracts provide lifetime income benefits, amounting to \$73.4 billion in variable annuity assets under management.¹⁵

Like the responder to the Lincoln study, 83% of retirement savers who purchase a variable annuity do so with the intent of using the annuity as a source of secured retirement income for life.¹⁶ Variable annuities are popular because they allow retirement savers to participate in the market as they would in a mutual fund, while also having access to a variety of benefit payment options not available in mutual funds, including guaranteed payments for the life of the retirement saver (and if the saver chooses, for the life of his or her spouse). As the Lincoln study respondent noted, variable annuities also address Americans' increasing uncertainty that Social Security will provide them with adequate, or even any, retirement security in the future.

The potential advantages of guaranteed lifetime income can be illustrated with a recent real life example involving an actual Lincoln customer:

Retiree Betty Wright had \$500,000 in savings, spread across a fee-based IRA account and a trust. In 2005, she had nearly depleted her IRA assets and wanted to maintain her lifestyle in retirement and provide for her family. To keep her other assets intact, and obtain guaranteed lifetime income, her financial advisor recommended investing

¹² Lincoln i4Life® Study, 2011

¹³ IRI FACT BOOK 2015, A Guide to Information, Trends, and Data in the Retirement Income Industry

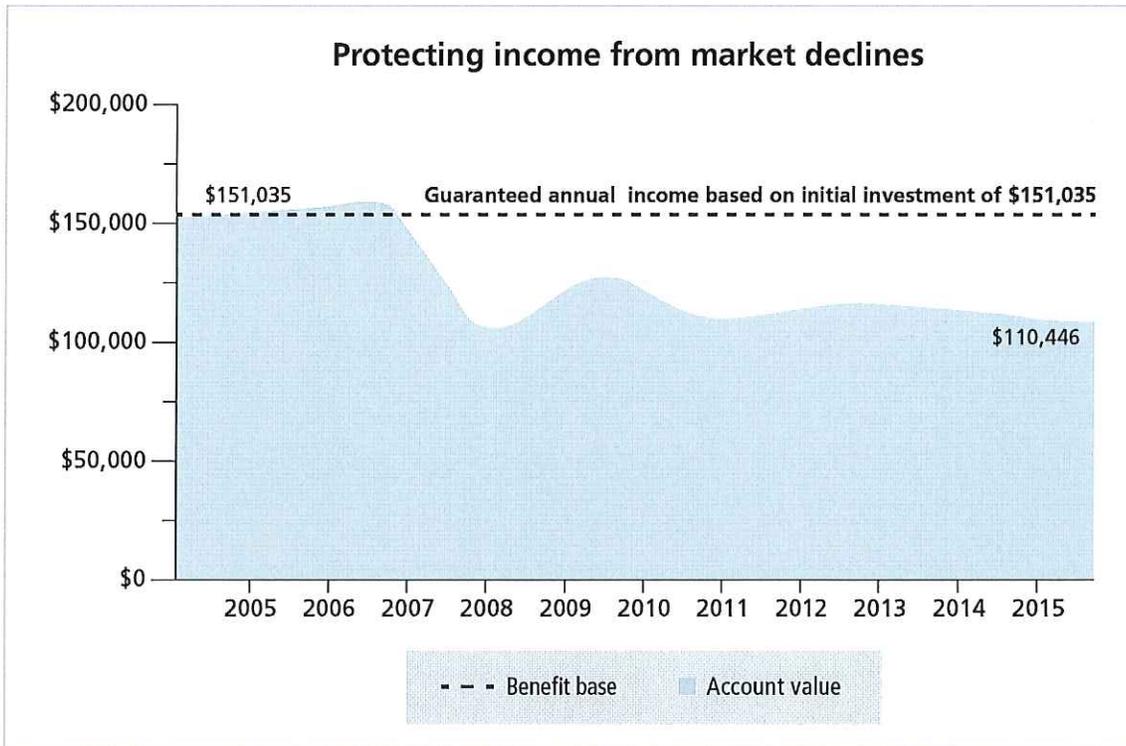
¹⁴ LIMRA Secure Retirement Institute, U.S. Individual Annuity Sales Survey (2010-1Q2015)

¹⁵ As of March 31, 2015.

¹⁶ The Gallup Organization with Greenwald & Associates, 2013 Survey of Non-qualified Annuity Contracts

the remaining \$151,035 in her IRA account in a variable annuity with a lifetime income guarantee benefit. After the market crash in 2008, the account value fell to \$122,000. However, her guaranteed monthly income payments of \$608 were not affected in any way because they were based on her higher initial investment. In addition, because of later positive market performance, in some years she was able to receive additional income over her guaranteed \$608. In 2015, she continues to draw on this monthly income and will do so for life. Had Betty placed her IRA assets into a traditional mutual fund or remained in the fee-based account, there would have been a dramatic impact on her account value that would not have produced the same level of monthly income.

The graphic below shows how Betty’s guaranteed lifetime income protected her in this example.



There are numerous other similar real-life examples. Two more are described below, both showing how consumers, including those with modest savings, can and do benefit from guaranteed living benefits.

Example 1:

In 2007, Alice Flamini was referred to a financial advisor to help her gain a better understanding of the investments she inherited from her husband who had recently passed away. Her main concern was income. She owned a handful of individual stocks, bond mutual funds and a fixed annuity. The total value was \$75,000. She was overwhelmed by the number of investments she was dealing with and she was barely getting by with her current income. Her advisor totaled up her assets and ran an annuity illustration with a guaranteed living benefit. She purchased the annuity and started taking income immediately. The following year (2008), the market crashed. The annuity had a guaranteed income floor and even though the account value fell, Alice’s income level was unchanged. Since opening the contract, Alice has withdrawn nearly \$35,000 from the contract and has been very happy that her purchase helped her maintain a dignified lifestyle in retirement.

Example 2:

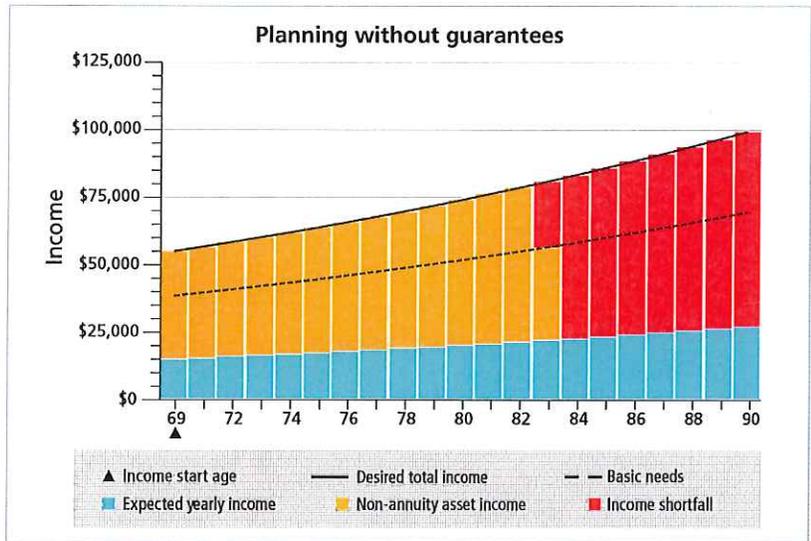
In 2007, a customer¹⁷ purchased a variable annuity contract with a living benefit for \$731,000. After the market crash in 2008, the account value fell to \$484,276. Frightened by the market decline, the customer asked his advisor to liquidate the annuity and move it to cash like so many other investors did during this time. His adviser reminded him that the benefit he had purchased protected the benefit base at his initial investment level for income. The client was relieved and did not liquidate his annuity. At any time, this client could begin taking a guaranteed lifetime income in an amount based on his initial \$731,000 premium, even though the account value was much lower. By staying invested as advised because of the income protection, this client's account value had nearly fully recovered by 2013. In 2013, the client began taking income from his contract based on his initial \$731,000 premium. To date, he has received more than \$135,000 in total income from the contract and his account value has grown steadily. Had his money been invested in stocks and mutual funds, there would have been nothing in place to protect his income. If he had not had the help of his adviser, he most likely would have moved his money to the sidelines, missed the recovery in the market and would now be forced to either withdraw a much higher percentage from a smaller pool of money to fund his retirement and risk exhausting his retirement assets too soon or withdraw a smaller amount to stretch the smaller pool of retirement assets for his lifetime.

As these examples show, participation in the market when it does well, protection when it does poorly, flexibility and independence are all strong reasons why variable annuities make sense for so many retirement savers, particularly those with limited assets that need to last through retirement. In the aftermath of the 2008 financial crisis, none of these success stories would have been possible without the protection of the insurance guarantees that these savers were able to get through variable annuities.

With the decline in defined benefit plans and increasing uncertainty over the future of Social Security benefits, annuities are increasingly becoming a central part of the retirement income planning process for retirement savers and their financial advisors. The hypothetical example below has been used by financial advisors to show middle income retirement savers how a variable annuity can secure a reliable and adequate income stream that cannot be outlived, even with a modest investment amount:

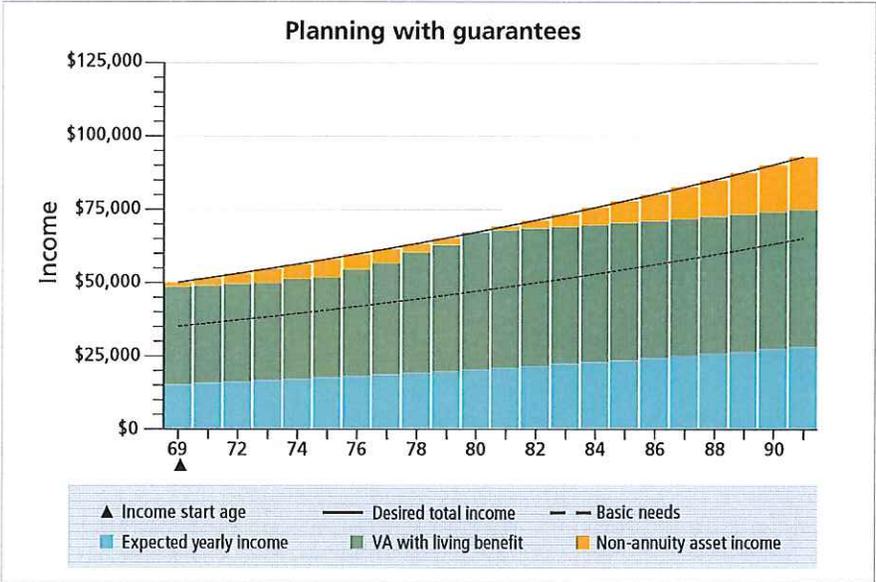
- Bob and Harriet were 64 years old. They wanted to retire in 4 years and plan for income that would cover their life expectancy.
- They were most concerned about having enough income throughout their retirement that would cover both their basic needs and, if possible, life's extras.
- Working with a financial advisor, they knew they needed at least \$40,000 a year to cover their basic needs and it needed to keep pace with inflation. They were hoping to have \$15,000 additional each year as a cushion to protect against unknown events.
- The advisor ran an illustration, shown below, which clearly showed them the real risk they faced of running out of income less than 15 years into their retirement (note that "expected yearly income" represents expected Social Security income).

¹⁷ Unlike the other two case studies, we were not given permission to identify this customer by name.



Returning to the three-legged stool analogy, picture the three legs being (1) Social Security income, (2) non-annuity asset income (shown in yellow above) that can run out and (3) lifetime annuity income that cannot run out. The picture above indicates that for this couple, the retirement security stool is quite wobbly, because it only has two legs. The non-annuity asset income will only cover them for the first 15 years of their retirement. Since at 64, they are likely to live longer than 15 more years, they face a real risk of living in poverty at the end of their lives, with nothing but Social Security, itself an uncertain resource, to rely on. But the story continues:

- The advisor then presented an annuity illustration with a lifetime income benefit.
- By repositioning their assets into the annuity, their basic needs were projected to be completely covered by the lifetime income feature and their non-annuity assets could be used to help them maintain their lifestyle throughout their retirement.
- Additionally, if Bob or Harriet were to pass away, the survivor would be able to continue receiving guaranteed income for his or her lifetime.



Continuing the retirement security stool analogy, with the purchase of an annuity, this couple added the crucial third leg. With the guaranteed lifetime income provided by the annuity added to their non-annuity asset income and Social Security income, this couple has now ensured that their savings will last for the rest of their lives.

This example also illustrates the level of personalized time, attention and individually relevant information provided to prospective buyers of annuity products. This level of advisor and consumer engagement on a single investment decision, along with future projections of outcomes, cannot be obtained by dialing an 800 number, or with an online investment tool, such as a robo-advisor. We believe that these limited services, with their standardized assumptions and the limited amount of personal information they consider, not to mention their lack of any element of human judgment, would not be appropriate for a consumer who is deciding whether to purchase an annuity. The SEC has recognized the limitations, and even potential dangers, of automated investment advice and has alerted the public to this concern.¹⁸ We urge the Department to further consider the limitations of these services as well.

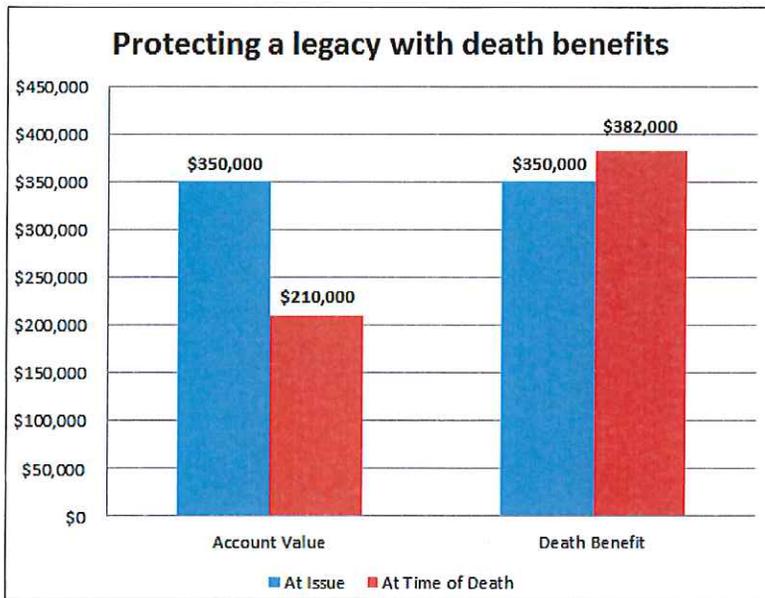
B. Variable Annuity Death Benefits

Another major benefit of a variable annuity contract is the existence of a death benefit. When the retirement saver dies, his or her beneficiary is generally guaranteed to receive no less than the original investment, less any benefits that have been paid. The following example involving an actual Lincoln customer illustrates this:

A 73 year-old customer purchased a \$350,000 annuity with a death benefit, naming his wife as the beneficiary. During the 2008 financial crisis, the account value was reduced dramatically. However, the death benefit option the customer chose locked in the all-time contract high of \$382,000. The customer died in January, 2015. At the time of his death, his contract was worth \$210,000 due to income withdrawals and market performance. Thanks to the death benefit, his spouse received the locked in amount of \$382,000 which was more than \$170,000 greater than the account value and more than \$30,000 higher than the initial investment.

The graph below provides a visual picture of this benefit to this customer:

¹⁸ SEC Investor Alert: Automated Investment Tools (May 8, 2015), available at <http://www.sec.gov/oiea/investor-alerts-bulletins/autolistingtoolshtm.html>



Value of the Annuity

- Annuity death benefit guaranteed—no principal loss
- Surviving spouse has peace of mind and retirement security
- Mutual fund, exchange traded fund or index fund would have resulted in loss of 38% with no guarantee for the spouse

Since 2001, Lincoln has paid out nearly \$600 million more in death benefits than the market value of the related contracts. This is nearly \$600 million in benefits that would not have been paid to retirement savers' beneficiaries had the retirement accounts been invested in mutual funds. Over half of this amount (\$324 million) was paid in the years 2008—2010 as a result of the 2008 financial crisis. This is a powerful and recent reminder of the value of insurance guarantees and how they come through when people need them the most.

II. PTE 84-24 Should Continue to Cover the Sale of Variable Annuities to IRA Owners

Commissions and other related compensation have been allowed by ERISA PTE 84-24 for the sale of variable IRA annuities for over 30 years. In the Proposal, the Department suggests taking variable IRA annuities out of the scope of this exemption. This change is a mistake for several reasons.

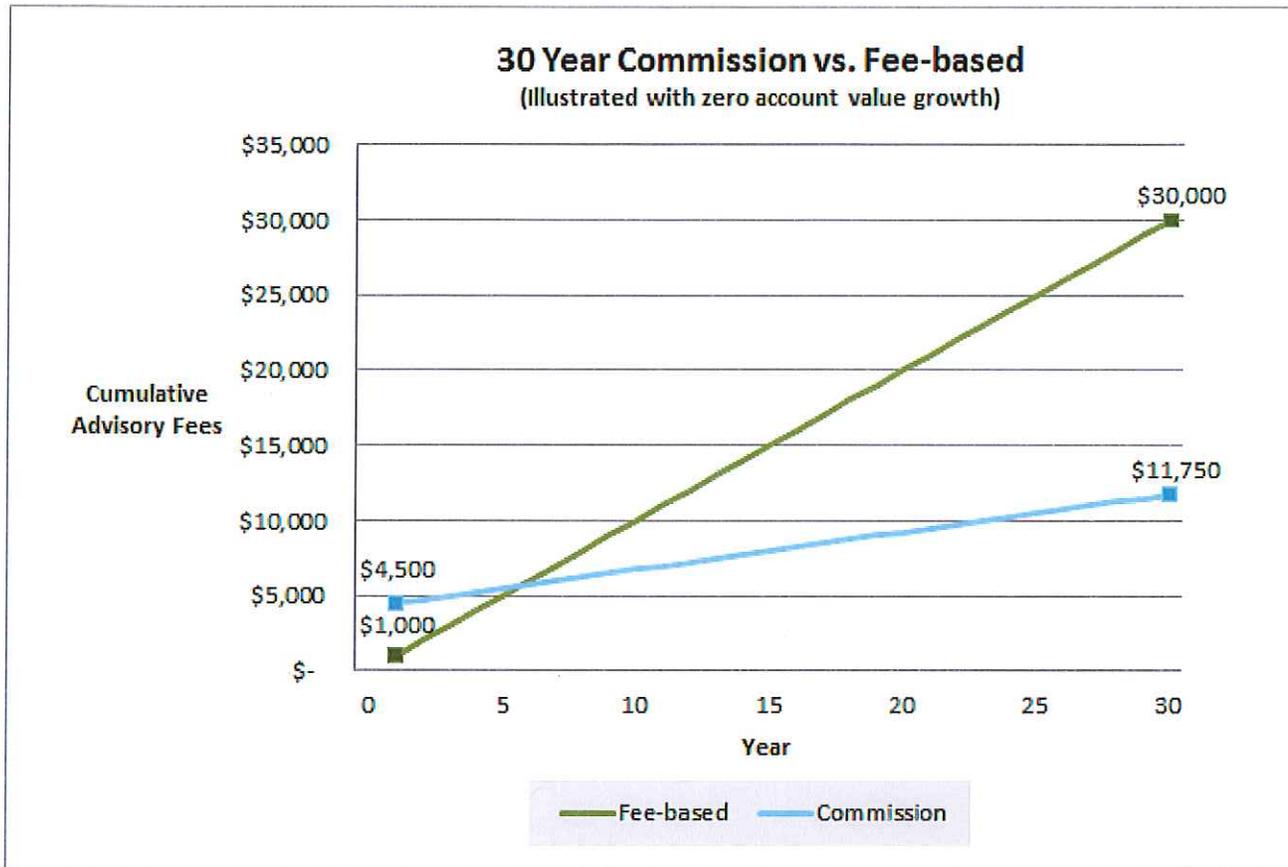
First, the proposed change is based upon an apparent misunderstanding of how variable annuities work. The Department's rationale for excluding variable IRA annuities from PTE 84-24 is that it "believes that the provisions of the Best Interest Contract Exemption better protect the interests of IRAs with respect to investment advice regarding securities products." This appears to be based on a belief that if a variable annuity is considered to be a security under the Federal securities laws, it must be just like a mutual fund. However, as explained above, variable annuities are not just bundles of mutual funds. They are, like fixed annuities, insurance products that provide critical lifetime income guarantees and death benefits to retirement savers. The BICE, as currently written, with its focus on fees/expenses and investment performance comparisons, would harm insurance products because a significant portion of product fees pays for insurance guarantees, not only investment management. We are very concerned that this would discourage firms and financial advisors from recommending annuities, when they are in a consumer's best interest, out of fear that it will be viewed in hindsight as too costly in relation to the product's investment performance. As our graphic exhibits above demonstrate so clearly, cost and performance alone are not appropriate criteria for evaluating a consumer's need for insurance products with guarantees.

In addition, the product-neutral, continuing fee-for-advice compensation structure favored by the BICE may work for asset managers providing ongoing advice to high net worth investors, but it does not work for insurance companies who manufacture and offer guaranteed insurance products to consumers of all economic levels. In

fact, and as noted earlier, many consumers prefer commission-based compensation structures over fee-for-advice structures. This preference makes particular sense for insurance products, which are typically very long-term commitments, requiring a legal contract that can bind the insurance company for 30 years, or more. Mutual fund investments do not require this “buy-and-hold” commitment; investors typically buy and sell mutual funds continuously in response to market conditions, often, appropriately in this case, with ongoing fee-for-service advice.

This underscores again the fact that retirement savers deserve and need to fully understand how an insurance product will work for them before committing to a long-term investment in that product and paying for insurance protections that are not reflected in investment performance. Retirement savers get this through individualized quotes, illustrations and product explanations from their financial advisors, who spend significant amounts of time helping them to determine whether to make a purchase decision. This does not happen with mutual fund investments, where investment decisions are often made based on standardized information and materials such as (in addition to the prospectus) forms and questionnaires, generic FAQs developed by the fund issuers and general performance benchmark information. This difference explains why most insurance products are commissions-based. With an insurance product, the commission structure more appropriately reflects the extensive and personalized services provided, and generally results in lower long-term costs to consumers versus a continuing fee for advice (fee-based) structure. In fact, one of the more striking aspects of our conversations with financial advisors is how many have shared that they will earn more if they move from a commission-based compensation model to a fee-based model. The Department is rightly concerned about the effect of high advisor compensation and fees on long retirement savings accumulation. However, it would be a mistake to assume that fee-based compensation models are always better for retirement savers than commission-based models.

This is not just our opinion—we did the math. Below is a graph exhibit which depicts the cumulative compensation a financial advisor would earn over a long term holding period (30 years). As shown below, financial advisors do not necessarily make more money from commission-based sales than they do from fee-based sales. In the case of long-term purchases, financial advisors often earn less under the commission-based model. We show this with an example of a \$100,000 annuity purchase of a typical B-share class variable annuity providing an upfront 4.5% advisor commission and a 25 basis point ongoing advisor commission for service, compared to fee-based advisor compensation of 1%. For simplicity, we show a zero rate of return. The commission-based model pays higher compensation in year one, but the fee-based model pays much higher compensation over the long-term:



The exact point at which a buy-and-hold investor pays less than in a comparable fee-based arrangement depends on a variety of factors, including the cost of the fee-based program, investment returns and the level of annuity commissions, but there is no real question that paying a financial advisor for investment advice through commissions is a reasonable choice for many. This is not to suggest that fee-based arrangements are problematic or that commissionable investments are always preferable, but is to say that the manner in which retirement savers pay for advice should be a matter of choice. That choice is necessary because different types of financial products and compensation models provide different benefits, have different consumer impacts, and meet different consumer needs. To assume they are all alike and develop rules around a single preferred model fails to recognize this reality and ultimately harms consumers by limiting their access to important financial products and potentially more cost-effective services.

As we have explained, the factors that distinguish insurance product sales from sales of other investments have nothing to do with whether or not the investment in question is a security. Rather, they relate to the presence of long-term insurance guarantees, which requires different criteria for evaluating these products, and the different compensation structures for financial advisors who recommend them, which reflects the extensive and personalized services that the financial advisors provide. PTE 84-24 was built for insurance product sales and in its current form appropriately accommodates these differences for all annuities. For the reasons outlined above, it is critical that this exemption remain available for all annuity sales in the qualified retirement market.

III. PTE 84-24 Should Cover All Forms of Compensation Attendant to the Sale of an Annuity

PTE 84-24 allows a financial advisor to receive an “insurance commission” in connection with the purchase of an insurance or annuity contract by a plan or IRA if certain conditions are met. The Department proposes to amend

the exemption to precisely define insurance commission to mean only a sales commission paid by the insurance company or its affiliate for the service of effecting the purchase or sale. This definition includes renewal fees and trailers, but now expressly excludes revenue sharing payments, administrative fees or marketing payments, or payments from parties other than the insurance company or its affiliates. The Department's rationale for this change is only that it wants to provide certainty as to the types of payments allowed by the exemption. It states no reason why payments other than commissions, renewal fees and trailers should not be allowed. All of these types of payments are common in the industry and pay the financial advisor for the same things as traditional sales commissions do: effecting the purchase or sale of the insurance or annuity contract,¹⁹ related services, including the individualized quotes, illustrations and personally relevant product information that goes into the sale, and ongoing customer service after the product is sold. If the Department has determined that insurance contract sales should be enabled through this exemption, it should allow all common forms of compensation attendant to the sale, regardless of the source, so that advisors who are fiduciaries can continue to provide the important personalized services that go with helping middle class Americans obtain guaranteed lifetime income. This would recognize the fact that, as in many other industries, sales compensation comes in many forms and from many sources. We also note that this would align with current regulations under ERISA section 408(b)(2), which recognize the reality of these other types of payments (e.g., revenue sharing and other third party payments, as well as expense-ratio type investment fees), and simply requires their disclosure. Provided that consumers' rights are protected through disclosure and reasonable compensation requirements, we can think of no policy reason for the exemption to disallow certain types of compensation. We urge the Department to ensure the utility of this exemption by expanding its scope to cover all compensation as long as it is reasonable in amount and disclosed.

In addition, we urge the Department to confirm that, where necessary, Section I(a)(4) of PTE 84-24 covers an insurance company's receipt of the compensation and profit (e.g., interest rate spread, contract fees, etc.) that is the necessary result of the sale. This exemption is critical for the sale of proprietary annuities by an insurance company, including its employees, and sales by financial advisors associated with affiliated selling firms. If the insurance company's compensation is not permitted, this exemption will have no utility for proprietary product sales, which we do not believe is the Department's intent.

IV. The "Best Interest" Standard Should Be Revised

In both PTE 84-24 and in the proposed BICE, the Department defines the "best interest" standard as requiring investment advice to be provided with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or retirement saver, *"without regard to the financial or other interests of the fiduciary, any affiliate, or other party [emphasis added]."*

This language can easily be interpreted to say that a financial advisor who has any interest in getting paid for his or her services, through a sales commission or otherwise, will have automatically violated the best interest

¹⁹ Likewise, it is unclear if the definition of "insurance commission" allows the insurance company to pay 'gross dealer concession' or 'overrides' which are common forms of commission payment within the industry. Gross dealer concession is commission paid to the adviser's broker dealer for sales, education and promotional activities, enrollment, and other services performed by the adviser. The broker dealer uses part of the gross dealer concession to pay the adviser's compensation and part is retained by the broker dealer. Overrides are commissions paid by an insurer to an agent or managing general agent for premium volume produced by other agents in a given geographic territory. We are also concerned that the definition may not cover other common types of compensation to advisers who sell proprietary products, such as benefits, training and sales support. Please see Section VI of this letter for a more detailed discussion of these other types of compensation. We urge the Department to make clear that all of these types of compensation are allowed to ensure the usefulness of this exemption.

standard. This makes no sense. Financial advisors provide valuable services to their clients and deserve to be paid for their efforts. ERISA sensibly allows retirement service providers to charge for their services provided their fees are reasonable. As long as the advisor's fees are reasonable and clearly disclosed to the consumer, the advisor should be allowed to have an interest in getting paid for his or her services.

In addition, if the Department truly intends for the prohibited transaction exemptions to be conditioned on an absolute disregard for any business interest of the financial advisor, its affiliates and other parties, the Department will have created a fiduciary standard of care that does not exist today. As noted in the preamble to the BICE, courts have consistently held that a fiduciary must put the best interests of its clients first. This standard does not mean that the fiduciary cannot benefit from a transaction. It simply means the fiduciary must do what is in the best interest of the client, even if that means the fiduciary will receive less compensation.

We do not believe the Department intends to harm retirement savers by taking away their access to lifetime income guarantees, or to expand the fiduciary standard of care beyond the limits of current law. Rather, the Department has consistently described the best interest standard of care as requiring "retirement investment advisers to put their clients' best interest first."²⁰ Similarly, Secretary Perez recently testified before Congress that "retirement advisers should put the best interests of their clients above their own financial interests."²¹

Putting the best interest of retirement savers first is very different than requiring a financial advisor to completely disregard any business interest he or she may have in providing investment advice. To align the Department's definition of best interest with current legal requirements and the Department's own statements, we urge the Department to replace the phrase "without regard to the financial or other interests of the fiduciary, any affiliate, or other party" in PTE 84-24 with "by placing the interest of the plan or IRA before the interests of the fiduciary, any affiliate or other party." For the proposed BICE, the current phrase should be replaced with, "by placing the interest of the Retirement Investor before the interests of the Adviser, Financial Institution, Related Entity, or any Affiliate, Related Entity, or other party."

V. The BICE Should Not Harm Insurance Products

Lincoln believes that the BICE is unworkable as currently written and needs to be changed significantly to have any utility in the retirement market. Lincoln Financial Group's retail distribution affiliates, operating under the marketing name of Lincoln Financial Network (LFN) have separately submitted a comment letter detailing these concerns. In this letter, we highlight our specific concerns with the ways in which the BICE would handicap insurance products and discourage financial advisors and selling firms from recommending them. Consumers should have access to the right products, at the right price, with a complete understanding of the costs. That is all that should matter and all that the Department's rules should seek to achieve. As currently written, the Proposal in general, and the BICE in particular, fails to achieve this because it is so burdensome and unworkable that financial advisors and firms will not be able to use it. And it harms insurance products in particular by discouraging commission-based compensation. This bias only serves to reduce consumers' access to retirement products and services, particularly when the right product for a consumer is an insurance product.

We are particularly concerned about the BICE's requirement that firms contractually promise not to "use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions to the extent they would tend to encourage individual advisers to make recommendations that are not in the Best Interest of the Retirement Investor." Insurance product sales commissions are generally higher

²⁰ DOL Conflict of Interest Rule Fact Sheet; DOL Conflict of Interest Rule FAQs: Protecting Retirement Savings

²¹ Secretary Perez's Testimony before the Health, Employment, Labor and Pensions Subcommittee Committee on Education and the Workforce, United States House of Representatives (June 17, 2015)

than mutual fund sales commissions. This difference is justified by a number of factors, including the extensive and personalized consumer education and service mentioned before that must be provided by the financial advisor. The BICE does say that firms can pay differential compensation based on different products, but it implies that the selling firm must precisely justify this differential based on “neutral factors such as time and analysis necessary to provide prudent advice.” Selling firms are not in a position to justify these differentials because insurance commissions are set by the insurance company, not the selling firm (the same is true for mutual funds). We are concerned that firms who want to comply with the BICE will decide that they are unable to offer insurance products alongside mutual funds on their platforms for retirement savers because of the risk that the higher commissions paid for these products would be found, in the hindsight context of litigation, to have “tended to encourage” recommendations that are not in a retirement saver’s best interest—simply because they are higher relative to other investment products.

The Department has said that the BICE is meant to be flexible and accommodate all manner of products and compensation structures. The BICE will not achieve that goal unless this bias toward product-neutral compensation is eliminated. We therefore urge the Department to tie acceptable compensation to customary market rates set by product manufacturers and remove the “tend to encourage” language referenced above. If not removed, this language would allow a disgruntled investor to challenge an investment recommendation based solely on compensation differentials among products. Investors should be required to prove that the recommendation actually was contrary to their best interest based on the totality of relevant factors, not just advisor compensation.

We are also concerned that the BICE will not accommodate common practices in connection with the sale of proprietary products through broker-dealers that are affiliated with an insurance company. Our concern is based primarily on the required contractual promise quoted above, which appears to ban affiliated firms from offering any incentive for financial advisors to sell proprietary products. Like many other industries, such incentives are common in the insurance industry. For example, many insurance companies sponsor benefit plans for financial advisors who qualify for coverage based on their sales of proprietary products, or cover office rents, training and sales support expenses based on such sales. The reason for these incentives is that a significant purpose of an affiliated firm, even one that is “open architecture” (*i.e.*, sells products by other manufacturers alongside proprietary products), is to sell the affiliated insurance company’s products. In this context, incentives to encourage those sales make sense and if they are not allowed, insurance companies will need to reconsider whether to continue selling through affiliated firms. Since we know that the Department intends for the BICE to permit the continuation of common business models that may include inherent conflicts of interest, including proprietary product sales generally, we do not believe that this result is intended. We are also concerned that this result would further reduce access to the critical insured retirement products discussed earlier in this letter. We therefore urge the Department to remove this warranty requirement and simply require disclosure of these types of incentives along with all other types of compensation received by the financial advisor.

Again, all that should matter is that consumers have access to the right products, at the right price, with a complete understanding of the costs. We urge the Department to make the changes we propose to achieve that goal.

VI. The Transition Period Should Be At Least 36 Months and Application Should be Prospective

In recent remarks, the Secretary of Labor Thomas Perez stated that “completing this rule is one of the single most important things we can accomplish in the remaining . . . days [of the Obama Administration].”²² The Proposal is

²² Patrick Temple-West, *Perez Says Technology Companies Support Labor Department’s Proposed Fiduciary Rule*, (June 23, 2015), available at <<https://www.politicopro.com/financialservices/whiteboard/?wbid=56096>>.

enormous and arguably the most significant in the history of ERISA. Even if the Department makes substantial modifications to ensure the Proposal is workable, compliance will be a monumental undertaking and cannot be accomplished in the remaining months of the Obama Administration, as Secretary Perez suggests.

For example, in the United Kingdom, the Financial Services Authority (FSA),²³ the regulator of all financial services in the UK, began a conceptually similar regulatory change in 2006. The Retail Distribution Review (RDR) made it clear that “it is not, and should not be, the job of a regulator to dictate business models or market solutions.”²⁴ Rather, the FSA engaged stakeholders from across the industry (banks, insurers, financial advisors, etc.), senior FSA staff and consumers to influence the RDR rulemaking process. The FSA published a “Discussion Paper” titled *A Review of Retail Distribution* to shape the dialogue and encourage collaboration among stakeholders. The FSA then set timetables for feedback and, at the end of this initial consultation phase, published an *Interim Report* in April 2008 outlining challenges within the regulatory landscape.

In November 2008, the FSA published its comprehensive *Feedback Statement*, outlining the high level changes that the FSA would implement as well as the impact to the capital markets. The FSA continued to consult with stakeholders on all details of the new requirements and then released a *Consultation Paper* in June 2009 describing the proposed changes and draft rules. In March 2010 and then in January 2011, the FSA issued its *Policy Statements* containing final policy and rules. The new policy and rules went into effect in January 2013, **six-and-a-half years** after collaboration with the industry and other stakeholders began.

Importantly, when the FSA released the proposed changes and draft rules, it did not, like the Department’s Proposal, contain in excess of ninety-nine (99) questions with multiple sub-parts that must be answered and incorporated into a final rule, all in a matter of months. Instead, the FSA collaborated with stakeholders across the industry over multiple years to address questions and issues during the process and then released reports, statements and other consultation papers throughout the rule-making process. Even with this level of collaboration, the FSA permitted an implementation period of almost three (3) years (from March 2010 to January 2013). We respectfully request that the Department, who has relied heavily on the FSA process to validate the need for this rule-making, follow the lead of the UK and allow for an implementation period of at least thirty-six (36) months.

We also urge the Department to make application of the final regulation, including changes to prohibited transaction exemptions (particularly PTE 84-24) prospective only, meaning that it would only apply to advice with respect to retirement accounts opened or insurance contracts issued after the regulation’s compliance date. Prospective application would allow for ongoing advice, including hold recommendations, for existing accounts. This is particularly important for existing commission-based annuity contracts, where retirement investors may have already paid for investment advice. Transitioning to fee-based arrangements (if the Proposal is applied retroactively) would likely be more expensive for consumers than maintaining the existing commission-based structure. If financial advisors are compelled to change their arrangements with existing contract holders from commission-based to fee-based, this could cause significant disruption and additional costs to the modest accounts of middle income retirement savers, including possible surrender charges. Also, variable annuity IRA contracts sold in reliance on PTE 84-24 would suddenly have no protection, and the Proposal does not appear to contain any recourse for advisors and consumers who have relied on this exemption in good faith. We are concerned that without grandfathering, these contracts would have to be surrendered to avoid prohibited transactions under the new rules.

²³ The Financial Services Authority is now known as the Financial Conduct Authority (FCA).

²⁴ FSA Managing Director (Retail Markets), Clive Briault, Remarks at *FSA Cazalet Consulting Conference* (November 2, 2006) available at FINRA Chief Executive Officer, Richard G. Ketchum, Remarks from the *2015 FINRA Annual Conference* (May 27, 2015) available at <http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2006/1102_cb.shtml>.

In addition, if the Proposal is applied retroactively, retirement savers, particularly middle income savers, may no longer receive any advice if firms and financial advisors are unwilling to assume ERISA fiduciary status or cannot comply with the BICE or other provisions of the Proposal. We believe this latter outcome is particularly likely if the transition period is so short that firms and financial advisors do not have the time to make the changes necessary to comply. Middle class retirement savers cannot afford this outcome and the Department should agree that it is not in their best interest.

VII. Proposal Must Not Prevent Critical Product Manufacturer and Retirement Plan Recordkeeping Services

As a product manufacturer and retirement plan record keeper, Lincoln provides a number of services to employers and individual retirement savers that are critical to retirement security. These services include:

- Routine customer service functions such as responding to customer inquiries and explaining product and service attributes.
- Providing participant enrollment and education services, and distribution services to prevent leakage from the retirement system.
- Marketing and sale of group variable annuities and other investment platforms to plans and IRA owners.
- Selling, including wholesaling, to independent fiduciary advisors.

As written, the Proposal unnecessarily defines many of these services as fiduciary functions, forcing product manufacturers and record-keepers to either become fiduciaries or stop providing these critical services. This outcome will decrease employers' and individual retirement savers' access to services that they expect and deserve and that they vitally need to ensure their own and their employees' retirement security.

Conclusion

As recently as 2011, this Administration affirmed its commitment to ensuring that Federal regulations are less burdensome and intrusive and do not restrict consumer choice.²⁵ As we have explained, the Proposal as currently written is immensely burdensome, extremely intrusive and would dramatically limit retirement consumers' choices in the financial products and services available to them, as well as how they pay for them. We urge the Department to change the Proposal so that it is consistent with the Administration's commitment to reasonable regulation.

²⁵ Op-Ed, President Barak Obama, *Toward a 21st Century Regulatory System*, Wall Street Journal (Jan. 18, 2011). The President's Op-Ed coincided with his issuance of Executive Order 13,563, which set strict standards for cost-benefit analysis in federal agency rulemaking.

Thank you for the opportunity to comment on this important initiative. We would welcome the opportunity to meet with the Department to discuss our comments in further detail.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis R. Glass". The signature is fluid and cursive, with a large initial "D" and a long, sweeping tail.

Dennis R. Glass
President and Chief Executive Officer
Lincoln Financial Group

APPENDIX A

Appendix A

Proposed Amendment to PTE 84-24

Under section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644 (October 27, 2011)), the Department proposes to amend and restate PTE 84-24 as set forth below:

Section I. Covered Transactions

(a) Exemptions. The restrictions of ERISA section 406(a)(1)(A) through (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(A) through (F), do not apply to any of the following transactions if the conditions set forth in Sections II, III, IV and V, as applicable, are met:

(1) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of an Insurance Commission from an insurance company in connection with the purchase, with plan or IRA assets, of an insurance or annuity contract.

(2) The receipt of a Mutual Fund Commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (an investment company) in connection with the purchase, with plan or IRA assets, of securities issued by an investment company.

(3) The effecting by an insurance agent or broker, pension consultant or investment company principal underwriter of a transaction for the purchase, with plan or IRA assets, of an insurance or annuity contract or securities issued by an investment company.

Appendix A

(4) The purchase, with plan or IRA assets, of an insurance or annuity contract from an insurance company and the resulting receipt of compensation by the insurance company in connection with the purchase of the insurance or annuity contract.ⁱ

(5) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a Master or Prototype Plan.

(6) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when the investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (A) the sponsorship of a Master or Prototype Plan; or (B) the provision of Nondiscretionary Trust Services to the plan; or (C) both (A) and (B).

~~(b) Scope of these Exemptions. The exemptions set forth in Section I(a) do not apply to the purchase by an Individual Retirement Account as defined in Section VI, of (1) a variable annuity contract or other annuity contract that is a security under federal securities laws, or (2) mutual fund shares.~~ⁱⁱ

Section II. Impartial Conduct Standards

If the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter is a fiduciary within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) with respect to the assets involved in the transaction, the following conditions must be satisfied with respect to the transaction to the extent they are applicable to the fiduciary's actions:

Appendix A

(a) When exercising fiduciary authority described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) with respect to the assets involved in the transaction, the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter acts in the Best Interest of the plan or IRA; and

(b) The statements by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter about recommended investments, fees, Material Conflicts of Interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. For this purpose, the insurance agent's or broker's, pension consultant's, insurance company's or investment company Principal Underwriter's failure to disclose a Material Conflict of Interest relevant to the services it is providing or other actions it is taking in relation to a plan's or IRA owner's investment decisions is deemed to be a misleading statement.

Section III. General Conditions

(a) The transaction is effected by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter in the ordinary course of its business as such a person.

(b) The transaction is on terms at least as favorable to the plan or IRA as an arm's length transaction with an unrelated party would be.

(c) The combined total of all fees, Insurance Commissions, Mutual Fund Commissions and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter:

Appendix A

(1) For the provision of services to the plan or IRA; and

(2) In connection with the purchase of insurance or annuity contracts or securities issued by an investment company is not in excess of “reasonable compensation” within the contemplation of ERISA section 408(b)(2) and 408(c)(2) and Code section 4975(d)(2) and 4975(d)(10). If the total is in excess of “reasonable compensation,” the “amount involved” for purposes of the civil penalties of ERISA section 502(i) and the excise taxes imposed by Code section 4975 (a) and (b) is the amount of compensation in excess of “reasonable compensation.”

Section IV. Conditions for Transactions Described in Section I(a)(1) through (4)

The following conditions apply solely to a transaction described in paragraphs (a)(1), (2), (3) or (4) of Section I:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter is not (1) a trustee of the plan or IRA (other than a Nondiscretionary Trustee who does not render investment advice with respect to any assets of the plan), (2) a plan administrator (within the meaning of ERISA section 3(16)(A) and Code section 414(g)), (3) a fiduciary who is expressly authorized in writing to manage, acquire or dispose of the assets of the plan or IRA on a discretionary basis, or (4) an employer any of whose employees are covered by the plan. Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter that is Affiliated with a trustee or an investment manager (within the meaning of Section VI(e)) with respect to a plan or IRA may engage in a transaction described in Section I(a)(1)-(4) of this exemption (if permitted under Section I(b)) on behalf of the plan or IRA if the trustee or

Appendix A

investment manager has no discretionary authority or control over the assets of the plan or IRA involved in the transaction other than as a Nondiscretionary Trustee.

(b) (1) With respect to a transaction involving the purchase with plan or IRA assets of an insurance or annuity contract or the receipt of an Insurance Commission thereon, the insurance agent or broker or pension consultant provides to an independent fiduciary or IRA owner with respect to the plan or IRA prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary or IRA owner who has no special expertise in insurance or investment matters:

(A) If the agent, broker, or consultant is an Affiliate of the insurance company whose contract is being recommended, or if the ability of the agent, broker or consultant to recommend insurance or annuity contracts is limited by any agreement with the insurance company, the nature of the affiliation, limitation, or relationship;

(B) The Insurance Commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the recommended contract; and

(C) A description of any charges, fees, discounts, penalties or adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination or sale of the contract.

(2) Following the receipt of the information required to be disclosed in paragraph (b)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner acknowledges in writing receipt of the information and approves the transaction on behalf of the

Appendix A

plan or IRA. Unless facts or circumstances would indicate the contrary, the approval may be presumed if the fiduciary or IRA owner permits the transaction to proceed after receipt of the written disclosure.ⁱⁱⁱ The fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or broker, pension consultant or insurance company involved in the transaction. The fiduciary may not receive, directly or indirectly (*e.g.*, through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(c) (1) With respect to a transaction involving the purchase with plan assets of securities issued by an investment company or the receipt of a Mutual Fund Commission thereon by an investment company Principal Underwriter, the investment company Principal Underwriter provides to an independent fiduciary with respect to the plan, prior to the execution of the transaction, the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the person recommending securities issued by an investment company is the Principal Underwriter of the investment company whose securities are being recommended, the nature of the relationship and of any limitation it places upon the Principal Underwriter's ability to recommend investment company securities;

(B) The Mutual Fund commission, expressed as a percentage of the dollar amount of the plan's gross payment and of the amount actually invested, that will be received by the Principal Underwriter in connection with the purchase of the recommended securities issued by the investment company; and

Appendix A

(C) A description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination or sale of the securities.

(2) Following the receipt of the information required to be disclosed in paragraph (c)(1), and prior to the execution of the transaction, the independent fiduciary approves the transaction on behalf of the plan. Unless facts or circumstances would indicate the contrary, the approval may be presumed if the fiduciary permits the transaction to proceed after receipt of the written disclosure. The fiduciary may be an employer of employees covered by the plan, but may not be a Principal Underwriter involved in the transaction. The fiduciary may not receive, directly or indirectly (*e.g.*, through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(d) With respect to additional purchases of insurance or annuity contracts or securities issued by an investment company, the written disclosure required under paragraphs (b) and (c) of this Section IV need not be repeated, unless:

(1) More than three years have passed since the disclosure was made with respect to the same kind of contract or security, or

(2) The contract or security being recommended for purchase or the Insurance Commission or Mutual Fund Commission with respect thereto is materially different from that for which the approval described in paragraphs (b) and (c) of this Section was obtained.

Section V. Recordkeeping Requirements

Appendix A

(a) The insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter engaging in the covered transactions maintains or causes to be maintained for a period of six years, in a manner that is accessible for audit and examination, the records necessary to enable the persons described in Section V(b) to determine whether the conditions of this exemption have been met, except that:

(1) if the records necessary to enable the persons described in Section V(b) below to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter shall be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b) if the records are not maintained or are not available for examination as required by paragraph (b) below; and

(b) (1) Except as provided below in subparagraph (2) and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in the above paragraph are unconditionally available at their customary location for examination during normal business hours by --

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

Appendix A

(B) Any fiduciary of the plan or any duly authorized employee or representative of the fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the plan or the duly authorized representative of the participant or beneficiary or IRA owner; and

(2) None of the persons described in subparagraph (1)(B)-(D) above shall be authorized to examine trade secrets or commercial or financial information of the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter which is privileged or confidential.

(3) Should the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter refuse to disclose information on the basis that the information is exempt from disclosure, the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request the information.

Section VI. Definitions

For purposes of this exemption:

(a) The term "Affiliate" of a person means:

(1) Any person directly or indirectly controlling, controlled by, or under common control with the person;

Appendix A

(2) Any officer, director, employee (including, in the case of Principal Underwriter, any registered representative thereof, whether or not the person is a common law employee of the Principal Underwriter), or relative of any such person, or any partner in such person; or

(3) Any corporation or partnership of which the person is an officer, director, or employee, or in which the person is a partner.

(b) The insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter that is a fiduciary acts in the “Best Interest” of the plan or IRA is when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances and needs of the plan or IRA, ~~without regard to the financial or other interests of the fiduciary~~ by placing the interest of the plan or IRA before ahead of the interests of the fiduciary^{iv}, any affiliate or other party.

(c) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The terms “Individual Retirement Account” means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(e) The terms “insurance agent or broker,” “pension consultant,” “insurance company,” “investment company,” and “Principal Underwriter” mean such persons and any Affiliates thereof.

Appendix A

(f) The term “Insurance Commission” mean (1) a sales commission or other form of compensation paid by the insurance company or an Affiliate to the insurance agent or broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including renewal fees ~~and~~, trailers, gross dealer concessions and overrides, and (2) ~~but not~~ revenue sharing payments, administrative fees ~~or~~, marketing payments, and other or payments from parties other than the insurance company or its Affiliates^v.

(g) The term “Master or Prototype Plan” means a plan which is approved by the Service under Rev. Proc. 2011-49, 2011-44 I.R.B. 608 (10/31/2011), as modified, or its successors.

(h) A “Material Conflict of Interest” exists when a person has a material^{vi} financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA.

(i) The term “Mutual Fund Commission” means a commission or sales load paid either by the plan or the investment company for the service of effecting or executing the purchase or sale of investment company shares, but does not include a 12b-1 fee, revenue sharing payment, administrative fee or marketing fee.

(j) The term “Nondiscretionary Trust Services” means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1). The term “Nondiscretionary Trustee” of a plan or IRA means a trustee whose powers and duties with respect to the plan are limited to the provision of Nondiscretionary Trust Services. For purposes of this exemption, a person who is otherwise a Nondiscretionary Trustee will not fail to be a Nondiscretionary Trustee solely by reason of his having been delegated, by the sponsor of a Master or Prototype Plan, the power to amend the plan.

Appendix A

(k) The term “Principal Underwriter” is defined in the same manner as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(29)).

(l) The term “relative” means a “relative” as that term is defined in ERISA section 3(15) (or a “member of the family” as that term is defined in Code section 4975(e)(6)), or a brother, a sister, or a spouse of a brother or a sister.

ⁱ We ask the Department to confirm that Section I(a)(4) of PTE 84-24 permits an insurance company’s receipt of the compensation and profit that is a necessary result of the purchase of its own contract if the insurance company becomes a fiduciary under an expanded definition of fiduciary investment advice.

When an insurance company sells an annuity, the contract generally provides the insurance company several kinds of compensation in exchange for the benefits of the contract. First, the insurance company will receive any spread between the amount guaranteed in the form of guaranteed return or annuity payments and the earnings in the insurance company’s general account. Second, the insurance company may assess mortality and expense and similar contract charges to cover the cost of the guarantees. Third, insurance-dedicated mutual funds and other investments that support the separate account of a variable annuity contract will provide payments to compensate the insurance company for issuing the contract and providing services to the policyholder. Finally, if the contract includes proprietary investments, the insurance company or an affiliate will receive a management fee. It is entirely appropriate for PTE 84-24 to cover all of these payments, as long as the purchase is in the Best Interest of the plan or IRA and the reasonable compensation and disclosure requirements contained in this exemption are met. If PTE 84-24 does not cover these forms of compensation, it will have no utility for proprietary products sales, which we do not believe is the Department’s intent. One indicator of this is section IV(b)(A) of the exemption which requires pre-sale disclosure of any limitations on the fiduciary’s ability to recommend insurance or annuity contracts because of an agreement or affiliation with the insurance company. This provision would not be necessary if the exemption only covered sales by unaffiliated firms and advisers. Please also see Section III of Lincoln Financial Group’s comment letter.

ⁱⁱ For supporting arguments related to this change, please see Section III of Lincoln Financial Group’s comment letter.

ⁱⁱⁱ We know of no reason why this negative consent process is permitted for mutual fund transactions under this exemption but is not permitted for insurance and annuity contract purchases. We urge the Department to remove this disparity, which we believe unnecessarily and unfairly disadvantages insurance product sales to mutual fund sales.

Appendix A

iv For the supporting arguments related to this change, please see Section IV of Lincoln Financial Group's comment letter.

v For supporting arguments related to this change, please see Section III of Lincoln Financial Group's comment letter.

vi We are concerned that without this materiality modifier, there is a risk that an inadvertent failure to disclose something minor, for example the fiduciary's receipt of a minor benefit such as a routine lunch or dinner paid for by the insurance company issuing the insurance or annuity contract, would result in the transaction and all attendant compensation being prohibited and subject to disgorgement and excise taxes. This result would be harmful and wholly disproportionate to any possible harm caused by the inadvertent disclosure failure.

APPENDIX B

APPENDIX B

Proposed Exemption

Section I – Best Interest Contract Exemption

(a) In general. ERISA and the Internal Revenue Code prohibit fiduciary advisers to employee benefit plans (Plans) and individual retirement plans (IRAs) from receiving compensation that varies based on their investment recommendations. Similarly, fiduciary advisers are prohibited from receiving compensation from third parties in connection with their advice. This exemption permits certain persons who provide investment advice to Retirement Investors, and their associated financial institutions, affiliates and other related entities, to receive such otherwise prohibited compensation as described below.

(b) Covered transactions. This exemption permits Advisers ~~and~~, Financial Institutions, ~~and their Affiliates and Related Entities~~ to receive otherwise prohibited compensation for services provided in connection with a purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or IRA, as a result of the Adviser's ~~and Financial Institution's~~ initial or ongoing advice to any of the following "Retirement Investors:"

- (1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution;
- (2) The beneficial owner of an IRA acting on behalf of the IRA; or
- (3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof) of a ~~non-participant directed~~ Plan subject to Title I of ERISA ~~with fewer than 100 participants~~, to the extent it acts as a fiduciary who has authority to make investment decisions for the Plan.ⁱ

For purposes of prohibiting receipt of compensation that varies based on investment advice, ERISA and the Internal Revenue Code permit compensation received by an Affiliate or Related Entity to

vary based on the investment advice of the Adviser, provided the advice is in the Best Interest of the Retirement Investor. This exemption also permits Affiliates and Related Entities of the Adviser and Financial Institution to receive compensation as a result of the Adviser's advice to Retirement Investors, if it is otherwise prohibited because the Adviser has a financial interest in the Affiliate's or Related Entity's receipt of such compensation that that could affect the exercise of the Adviser's best judgment as a fiduciary in rendering advice to a Retirement Investor regarding an Asset.ⁱⁱ

As detailed below, parties seeking to rely on the exemption must contractually agree to adhere to Impartial Conduct Standards in rendering advice regarding Assets; ~~warrant that they have adopted policies and procedures designed to mitigate the dangers posed by Material Conflicts of Interest; and disclose important information relating to fees, compensation, and Material Conflicts of Interest; and retain documents and data relating to investment recommendations regarding Assets.~~ⁱⁱⁱ The

exemption provides relief from the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F). The Adviser and Financial Institution must comply with the conditions of Sections II-V to rely on this exemption.

(c) Exclusions. This exemption does not apply if:

- (1) The Plan is covered by Title I of ERISA, and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser or Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide advice to the Plan by a fiduciary who is not Independent;
- (2) The compensation is received as a result of a transaction in which the Adviser is acting on behalf of its own account or the account of the Financial Institution, or the account of a person directly or indirectly, through one or more intermediaries, controlling,

controlled by, or under common control with the Financial Institution (i.e., a principal transaction);

- (3) The compensation is received as a result of investment advice to a Retirement Investor generated solely by an interactive website in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the website without any personal interaction or advice from an individual Adviser (i.e., “robo advice”); or
- (4) The Adviser (i) exercises any discretionary authority or discretionary control respecting management of the Plan or IRA assets involved in the transaction or exercises any authority or control respecting management or disposition of the assets, or (ii) has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA.

Section II – Contract, Impartial Conduct, and Other Requirements

- (a) Contract. ~~Prior to recommending that the Plan, participant or beneficiary account, or IRA purchase, sell or hold the Asset, t~~The Adviser and Financial Institution will enter into a written contract with the Retirement Investor that incorporates the terms required by Section II(b)-(c) (e) to formalize the Adviser / Retirement Investor relationship after both parties have assented to the advisory services, including payment for those services.^{iv} The Adviser and Financial Institution will adopt policies and procedures in accordance with terms required by Section II(d).^v ~~The Adviser and Financial Institution will adopt policies and procedures in accordance with terms required by Section II(d).~~
 - (1) Failure to Execute a Written Contract. In the event a Retirement Investor does not enter into a written contract, the Adviser, Financial Institution and their Affiliates and Related Entities

are permitted to receive otherwise prohibited compensation so long as they otherwise comply with all of the other terms and conditions of this exemption.^{vi}

(b) Fiduciary. The written contract affirmatively states that the Adviser and Financial Institution are fiduciaries under ERISA or the Code, or both, with respect to any investment recommendations made to the Retirement Investor.

(c) Impartial Conduct Standards. The Adviser and the Financial Institution affirmatively agree to, ~~and comply with,~~^{vii} the following:

(1) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (i.e., advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, by placing the interest of the Retirement Investor before the interests of the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party);^{viii} ~~without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party~~);

(2) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will not recommend an Asset if the total amount of compensation anticipated to be received by the Adviser, and Financial Institution, ~~Affiliates and Related Entities~~ in connection with the purchase, sale or holding of the Asset by the Plan, participant or beneficiary account, or IRA, will exceed that which is

reasonable and customary for the products and ~~compensation in relation to the total~~
services ~~they provided~~ to the Retirement Investor; and^{ix}

- (3) The Adviser's and Financial Institution's statements about the Asset, fees, Material Conflicts of Interest, and any other matters relevant to a Retirement Investor's investment decisions, will not be misleading.

(d) ~~Policies and Procedures Warranties~~. The Adviser and Financial Institution ~~affirmatively warrant~~
will adopt the following policies and procedures:

- (1) The Adviser, Financial Institution, and Affiliates will adopt policies and procedures
reasonably designed to prevent violations of ~~will comply with all~~ applicable provisions of
ERISA and the Internal Revenue Code ~~federal and state laws~~ regarding the rendering of
the investment advice, the purchase, sale and holding of the Asset, and the payment of
compensation related to the purchase, sale and holding of the Asset;
- (~~1~~2) The Financial Institution ~~has~~ will ~~adopted~~ written policies and procedures reasonably
designed to mitigate the impact of Material Conflicts of Interest and ensure that its
individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c);
and
- (3) In formulating its policies and procedures, the Financial Institution has specifically
identified Material Conflicts of Interest and adopted reasonable measures designed to
prevent the Material Conflicts of Interest from causing violations of the Impartial
Conduct Standards set forth in Section II(c); ~~and~~.
- (~~4~~) ~~Neither the Financial Institution nor (to the best of its knowledge) any Affiliate or~~
~~Related Entity uses quotas, appraisals, performance or personnel actions, bonuses,~~
~~contests, special awards, differential compensation or other actions or incentives to the~~
~~extent they would tend to encourage individual Advisers to make recommendations that~~

~~are not in the Best Interest of the Retirement Investor. Notwithstanding the foregoing, the contractual warranty set forth in this Section II(d)(4) does not prevent the Financial Institution or its Affiliates and Related Entities from providing Advisers with differential compensation based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent such compensation would not encourage advice that runs counter to the Best Interest of the Retirement Investor (e.g., differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible).~~^x

(e) Disclosures. The written contract must specifically:

- (1) Identify and disclose any Material Conflicts of Interest;
- (2) Inform the Retirement Investor that the Retirement Investor has the right to obtain complete information about all the fees currently associated with the Assets in which it is invested, including all of the direct and indirect fees paid payable to the Adviser, Financial Institution, and any Affiliates; and
- (3) Disclose to the Retirement Investor whether the Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the purchase, sale or holding of any Asset, ~~and of the address of the website required by Section III(c) that discloses the compensation arrangements entered into by Advisers and the Financial Institution.~~^{xi}

(f) Prohibited Contractual Provisions. The written contract shall not contain the following:

~~(1) any Exculpatory-exculpatory provisions disclaiming or otherwise limiting liability of the Adviser or Financial Institution for a violation of the contract's terms. Notwithstanding the foregoing, the written contract may limit the scope of the services or advice provided to the Retirement Investor (e.g., an Adviser may limit services provided to a Retirement Investor to one particular investment, one Asset class, or to a single recommendation).~~^{xii}; and

~~(2) A provision under which the Plan, IRA or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution.~~

Section III – Disclosure Requirements

(a) ~~Transaction Compensation Disclosure.~~^{xiii} Prior to the execution of the purchase of an Asset by the Plan, participant or beneficiary account, or IRA, the Adviser and Financial Institution must furnish to the Retirement Investor a disclosure of compensation required by this paragraph (a) of Section II.

~~(1) Direct Compensation. A description of all Direct Compensation, either in the aggregate or by service, that the Adviser and Financial Institution reasonably expect to receive in connection with the contract described in Section II(a). For this purpose, “Direct Compensation” is compensation received directly from the Retirement Investor Disclosure. Prior to the execution of the purchase of the Asset by the Plan, participant or beneficiary account, or IRA, the Adviser furnishes to the Retirement Investor a chart that provides, with respect to each Asset recommended, the Total Cost to the Plan, participant or beneficiary account, or IRA, of investing in the Asset for 1, 5- and 10-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the Adviser and reasonable assumptions about investment performance that are disclosed. The disclosure chart required by this section need not be provided with respect to a subsequent recommendation to purchase the same investment product if the chart was previously provided to the Retirement Investor within the past twelve months and the Total Cost has not materially changed.~~

(2)- Indirect Compensation. A description of all Indirect Compensation that the Adviser and Financial Institution reasonably expect to receive in connection with the contract described in Section II(a); identification of the payer of the Indirect Compensation; and a description of the arrangement between the payer and the Affiliate and Financial Institution, as applicable, pursuant to which such Indirect Compensation is paid. For this purpose, “Indirect Compensation” is compensation received from any source other than the Retirement Investor, Affiliate or Related Entity~~Total Cost. The “Total Cost” of investing in an Asset means the sum of the~~

~~following, as applicable:~~

~~(A) Acquisition costs. Any costs of acquiring the Asset that are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or that reduce the amount invested in the Asset (e.g., any loads, commissions, or mark-ups on Assets bought from dealers, and account opening fees, if applicable).~~

~~(B) Ongoing costs. Any ongoing (e.g., annual) costs attributable to fees and expenses charged for the operation of an Asset that is a pooled investment fund (e.g., mutual fund, bank collective investment fund, insurance company pooled separate account) that reduces the Asset’s rate of return (e.g., amounts attributable~~

~~to a mutual fund expense ratio and account fees). This includes amounts paid by the pooled investment fund to intermediaries, such as sub-TA fees, sub-accounting fees, etc.~~

~~(C) Disposition costs. Any costs of disposing of or redeeming an interest in the Asset that are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or that reduce the amounts received by the Plan, participant or beneficiary account, or IRA (e.g., surrender fees, back-end loads, etc., that are always applicable (i.e., do not sunset), mark-downs on assets sold to dealers, and account closing fees, if applicable).~~

~~(D) Others. Any costs not described in (A)–(C) that reduce the Asset’s rate of return, are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or reduce the amounts received by the Plan, participant or beneficiary account, or IRA (e.g., contingent fees, such as back-end loads that phase out over time (with such terms explained beneath the table)).~~

(3) Compensation paid among related parties. A description of any compensation that will be paid among the Adviser, Financial Institution, Affiliate and Related Entity in connection with the contract described in Section II(a) if such compensation is set on a transaction basis (e.g., commissions, soft dollars, finder’s fees or other similar incentive compensation based on business placed or retained) or is charged directly against the Retirement Investor’s Asset and reflected in the net value of the Asset (e.g., Rule 12b–1 fees); including identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation. This paragraph shall not apply to compensation received by an employee from his or her employer on account of work performed by the employee. ~~Model Chart. Appendix II to this exemption contains a model chart that may be used to provide the information required under this Section III(a). Use of the model chart is not mandatory. However, use of an appropriately completed model chart will be deemed to satisfy the requirements of this Section III(a).~~

(4) Compensation for termination of contract or arrangement. A description of any compensation that the Affiliate or Financial Institution reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.

(5) Compensation description. A description of compensation may be expressed as a monetary amount, formula, percentage of the Retirement Investor’s Assets under management in the contract described in Section II(a) or, if the compensation cannot

reasonably be expressed in such terms, by any other reasonable method. The description may include a reasonable and good faith estimate if the Adviser and Financial Institution cannot otherwise readily describe compensation and the Adviser and Financial Institution explain the methodology and assumptions used to prepare such estimate. Any description must contain sufficient information to permit evaluation of the reasonableness of the compensation.

(b) Annual Disclosure. The Adviser or Financial Institution must provides ~~a the following~~ written description of compensation in this Section III ~~information~~ to the Retirement Investor, annually, within 45 days of the end of the applicable year, ~~in a succinct single disclosure:~~

~~(1) A list identifying each Asset purchased or sold during the applicable period and the price at which the Asset was purchased or sold;~~

~~(2) A statement of the total dollar amount of all fees and expenses paid by the Plan, participant or beneficiary account, or IRA (directly and indirectly) with respect to each Asset purchased, held or sold during the applicable period; and~~

~~(3) A statement of the total dollar amount of all compensation received by the Adviser and Financial Institution, directly or indirectly, from any party, as a result of each Asset sold, purchased or held by the Plan, participant or beneficiary account, or IRA during the applicable period.~~

(c) Webpage Reliance on 29 C.F.R. §2550.408b-2 Disclosure. An Adviser may rely on disclosures provided to a Plan under 29 C.F.R. §2550.408b-2 to satisfy the disclosure requirements of this Section III. Reliance on 29 C.F.R. §2550.408b-2 does not alleviate the requirement to make an annual disclosure in accordance with paragraph (b) of this section.

~~(1) The Financial Institution maintains a webpage, freely accessible to the public, which shows the following information:~~

~~(A) — The direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate for services provided in connection with each Asset (or, if uniform across a class of~~

~~Assets, the class of Assets) that a Plan, participant or beneficiary account, or an IRA is able to purchase, hold, or sell through the Adviser or Financial Institution, and that a Plan, participant or beneficiary account, or an IRA has purchased, held, or sold within the last 365 days. The compensation may be expressed as a monetary amount, formula or percentage of the assets involved in the purchase, sale or holding; and~~

~~(B) — The source of the compensation, and how the compensation varies within and among Assets.~~

~~(2) The Financial Institution's webpage provides access to the information in (1)(A) and (B) in a machine readable format.~~

Section IV – Range of Investment Options

(a) General. The Financial Institution offers for purchase, sale or holding, and the Adviser makes available to the Plan, participant or beneficiary account, or IRA for purchase, sale or holding, a range of Assets that is broad enough to enable the Adviser to make recommendations with respect to all of the asset classes reasonably necessary to serve the Best Interests of the Retirement Investor in light of its investment objectives, risk tolerance, and specific financial circumstances.

(b) Limited Range of Investment Options. Section (a) notwithstanding, a Financial Institution may limit the Assets available for purchase, sale or holding based on whether the Assets are Proprietary Products, generate Third Party Payments, or for other reasons, and still rely on the exemption, provided that:

~~(1) The Financial Institution makes a specific written finding that the limitations it has placed on the Assets made available to an Adviser for purchase, sale or holding by Plans, participant and beneficiary accounts, and IRAs do not prevent the Adviser from providing advice that is in the Best Interest of the Retirement Investor (i.e., advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on~~

~~the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor or otherwise adhering to the Impartial Conduct Standards;~~^{xiv}

(12) Any compensation received in connection with a purchase, sale or holding of the Asset by a Plan, participant or beneficiary account, or an IRA, is reasonable and customary for the products and in relation to the value of the specific services provided to the Retirement Investor ~~in exchange for the payments and not in excess of the services' fair market value;~~

(23) Before giving investment recommendations to Retirement Investors, the Adviser or Financial Institution gives the Retirement Investor clear written notice of the limitations placed on the Assets that the Adviser may offer for purchase, sale or holding by a Plan, participant or beneficiary account, or an IRA. Notice is insufficient if it merely states that the Financial Institution or Adviser "may" limit investment recommendations based on whether the Assets are Proprietary Products or generate Third Party Payments, or for other reasons, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis; and

(34) The Adviser notifies the Retirement Investor if the Adviser does not recommend a sufficiently broad range of Assets to meet the Retirement Investor's needs.

(c) ERISA plan participants and beneficiaries. Some Advisers and Financial Institutions provide advice to participants in ERISA-covered participant directed individual account Plans in which the menu of investment options is selected by an Independent Plan fiduciary. In such cases, provided the Adviser and Financial Institution did not provide investment advice to the Plan fiduciary regarding the composition of the menu, the Adviser and Financial Institution do not have to comply with Section IV(a)-(c) in connection with their advice to individual participants and beneficiaries on the selection of Assets from the menu provided. This exception is not

available for advice with respect to investments within open brokerage windows or otherwise outside the Plan's designated investment options.

~~Section V—Disclosure to the Department and Recordkeeping~~^{XV}

~~(a) EBSA Disclosure. Before receiving compensation in reliance on the exemption in Section I, the Financial Institution notifies the Department of Labor of the intention to rely on this class exemption. The notice will remain in effect until revoked in writing by the Financial Institution. The notice need not identify any Plan or IRA.~~

~~(b) Data Request. The Financial Institution maintains the data that is subject to request pursuant to Section IX in a manner that is accessible for examination by the Department for six (6) years from the date of the transaction subject to relief hereunder. No party, other than the Financial Institution responsible for complying with this paragraph (b), will be subject to the taxes imposed by Code section 4975(a) and (b), if applicable, if the data is not maintained or not available for examination as required by paragraph (b).~~

~~(c) Recordkeeping. The Financial Institution maintains for a period of six (6) years, in a manner that is accessible for examination, the records necessary to enable the persons described in paragraph (d) of this Section to determine whether the conditions of this exemption have been met, except that:~~

~~(1) If such records are lost or destroyed, due to circumstances beyond the control of the Financial Institution, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and~~

~~(2) No party, other than the Financial Institution responsible for complying with this paragraph (c), will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b), if applicable, if the~~

~~records are not maintained or are not available for examination as required by paragraph (d), below.~~

~~(d) — (1) Except as provided in paragraph (d)(2) of this Section, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in paragraph (c) of this Section are unconditionally available at their customary location for examination during normal business hours by:~~

~~(A) Any authorized employee or representative of the Department or the Internal Revenue Service;~~

~~(B) Any fiduciary of a Plan that engaged in a purchase, sale or holding of an Asset described in this exemption, or any authorized employee or representative of such fiduciary;~~

~~(C) Any contributing employer and any employee organization whose members are covered by a Plan described in paragraph (d)(1)(B), or any authorized employee or representative of these entities; or~~

~~(D) Any participant or beneficiary of a Plan described in paragraph (B), IRA owner, or the authorized representative of such participant, beneficiary or owner; and~~

~~(2) None of the persons described in paragraph (d)(1)(B) - (D) of this Section are authorized to examine privileged trade secrets or privileged commercial or financial information, of the Financial Institution, or information identifying other individuals.~~

~~(3) Should the Financial Institution refuse to disclose information on the basis that the information is exempt from disclosure, the Financial Institution must, by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.~~

Section VI – Insurance and Annuity Contract Exemption

(a) In general. In addition to prohibiting fiduciaries from receiving compensation from third parties and compensation that varies on the basis of the fiduciaries' investment advice, ERISA and the Internal Revenue Code prohibit the purchase by a Plan, participant or beneficiary account, or IRA of an insurance or annuity product from an insurance company that is a service provider to the Plan or IRA. This exemption permits a Plan, participant or beneficiary account, or IRA to purchase an Asset that is an insurance or annuity contract in accordance with an Adviser's advice, from a Financial Institution that is an insurance company and that is a service provider to the Plan or IRA. This exemption is provided because purchases of insurance and annuity products are often prohibited purchases and sales involving insurance companies that have a pre-existing party in interest relationship to the Plan or IRA.

(b) Covered transaction. The restrictions of ERISA section 406(a)(1)(A) and (D), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) and (D), shall not apply to a fiduciary's causing the purchase of an Asset that is an insurance or annuity contract by a ~~non-participant directed~~ Plan subject to Title I of ERISA ~~that has fewer than 100~~ participants,^{xvi} participant or beneficiary account, or IRA, from a Financial Institution that is an insurance company and that is a party in interest or disqualified person, if:

- (1) The transaction is effected by the insurance company in the ordinary course of its business as an insurance company;
- (2) The combined total of all fees and compensation received by the insurance company and any Affiliate is not in excess of reasonable compensation under the circumstances;
- (3) The purchase is for cash only; and
- (4) The terms of the purchase are at least as favorable to the Plan, participant or beneficiary account, or IRA as the terms generally available in an arm's length transaction with an unrelated party.

- (c) Exclusion. The exemption in this Section VI does not apply if the Plan is covered by Title I of ERISA, and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser and Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide advice to the plan by a fiduciary who is not Independent.

Section VII – Exemption for Pre-Existing Accounts and Contracts Transactions

- (a) In general. ERISA and the Internal Revenue Code prohibit Advisers, Financial Institutions and their Affiliates and Related Entities from receiving variable or third-party compensation as a result of the Adviser's and Financial Institution's advice to a Plan, participant or beneficiary, or IRA owner. Some Advisers and Financial Institutions did not consider themselves fiduciaries within the meaning of 29 CFR section 2510-3.21 before the applicability date of the amendment to 29 CFR section 2510-3.21 (the Applicability Date). Other Advisers and Financial Institutions entered into transactions involving Plans, participant or beneficiary accounts, or IRAs before the Applicability Date, in accordance with the terms of a prohibited transaction exemption that has since been amended. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities, to continue to receive compensation, such as 12b-1 fees, on and after the Applicability Date in connection with the purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or an IRA, as a result of the Adviser's and Financial Institution's advice, that occurred prior to the Applicability Date, as described and limited below.
- (b) Covered transaction. Subject to the applicable conditions described below, the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F), shall not apply to the receipt of compensation on or after the Applicability Date by an Adviser, Financial Institution, and any Affiliate and Related Entity, for services provided in connection with the purchase, holding or sale of an Asset, as a result of the Adviser's and Financial Institution's advice, that was

purchased, sold, or held by a Plan, participant or beneficiary account, or an IRA before the Applicability Date if:

- (1) The compensation is not excluded pursuant to Section I(c) of the Best Interest Contract Exemption; and
- (2) The compensation is received pursuant to an agreement, arrangement or understanding that was entered into prior to the Applicability Date;
- ~~(3) The Adviser and Financial Institution do not provide additional advice to the Plan regarding the purchase, sale or holding of the Asset after the Applicability Date; and~~
- ~~(4) The purchase or sale of the Asset was not a non-exempt prohibited transaction pursuant to ERISA section 406 and Code section 4975 on the date it occurred. ^{xvii}~~

Section VIII – Definitions

For purposes of these exemptions:

(a) “Adviser” means an individual who:

- (1) Is a fiduciary of a Plan or IRA solely by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B), or both, and the applicable regulations, with respect to the Assets involved in the transaction;
- (2) Is an employee, independent contractor, agent, or registered representative of a Financial Institution; and
- (3) Satisfies the applicable federal and state regulatory and licensing requirements of insurance, banking, and securities laws with respect to the covered transaction.

(b) “Affiliate” of an Adviser or Financial Institution means –

- (1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution. For this

purpose, “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, employee, agent, registered representative, relative (as defined in ERISA section 3(15)), member of family (as defined in Code section 4975(e)(6)) of, or partner in, the Adviser or Financial Institution; and

(3) Any corporation or partnership of which the Adviser or Financial Institution is an officer, director or employee or in which the Adviser or Financial Institution is a partner.

(c) An “Asset,” for purposes of this exemption, includes, but is not limited to, ~~only~~ the following investment products: bank deposits, certificates of deposit (CDs), shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(l) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts, guaranteed investment contracts, and equity securities within the meaning of 17 CFR section 230.405 that are exchange-traded securities within the meaning of 17 CFR 242.600. ~~Excluded from this definition is any equity security that is a security future or a put, call, straddle, or other option or privilege of buying an equity security from or selling an equity security to another without being bound to do so.~~ ^{xviii}

(d) Investment advice is in the “Best Interest” of the Retirement Investor when the Adviser and Financial Institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, by placing the interest of the Retirement Investor before the interests of the Adviser, Financial

Institution or any Affiliate, Related Entity, or other party.^{xix} ~~without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.~~

(e) “Financial Institution” means the entity that employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 USC 80b-1 et seq.) or under the laws of the state in which the adviser maintains its principal office and place of business;

(2) A bank or similar financial institution supervised by the United States or state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 USC 1813(b)(1))), but only if the advice resulting in the compensation is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by federal or state banking authorities;

(3) An insurance company qualified to do business under the laws of a state, provided that such insurance company:

(A) Has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended,

(B) Has undergone and shall continue to undergo an examination by an Independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state’s insurance commissioner within the preceding 5 years, and

(C) Is domiciled in a state whose law requires that actuarial review of reserves be conducted annually by an Independent firm of actuaries and reported to the appropriate regulatory authority; or

(4) A broker or dealer registered under the Securities Exchange Act of 1934 (15 USC 78a et seq.).

(f) “Independent” means a person that:

- (1) Is not the Adviser, the Financial Institution or any Affiliate relying on the exemption,
- (2) Does not receive compensation or other consideration for his or her own account from the Adviser, the Financial Institution or Affiliate; and
- (3) Does not have a relationship to or an interest in the Adviser, the Financial Institution or Affiliate that might affect the exercise of the person’s best judgment in connection with transactions described in this exemption.

(g) “Individual Retirement Account” or “IRA” means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(h) A “Material Conflict of Interest” exists when an Adviser or Financial Institution has a material^{xx} financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding an Asset.

(i) “Plan” means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code.

(j) “Proprietary Product” means a product that is managed by the Financial Institution or any of its Affiliates.

(k) “Related Entity” means any entity other than an Affiliate in which the Adviser or Financial Institution has an interest which may affect the exercise of its best judgment as a fiduciary.

(l) “Retirement Investor” means –

- (1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution,
- (2) The beneficial owner of an IRA acting on behalf of the IRA, or
- (3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof), of a ~~non-participant directed~~ Plan subject to Title I of ERISA ~~that has fewer than 100 participants~~, to the extent it acts as a fiduciary with authority to make investment decisions for the Plan.^{xxi}
- (m) “Third-Party Payments” mean sales charges when not paid directly by the Plan, participant or beneficiary account, or IRA, 12b-1 fees and other payments paid to the Financial Institution or an Affiliate or Related Entity by a third party as a result of the purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or IRA.

Section IX – Data Request^{xxii}

~~Upon request by the Department, a Financial Institution that relies on the exemption in Section I shall provide, within a reasonable time, but in no event longer than six (6) months, after receipt of the request, the following information for the preceding six (6) year period:~~

~~(a) Inflows. At the Financial Institution level, for each Asset purchased, for each quarter:~~

- ~~(1) The aggregate number and identity of shares/units bought;~~
- ~~(2) The aggregate dollar amount invested and the cost to the Plan, participant or beneficiary account, or IRA associated with the purchase;~~
- ~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the purchase of each Asset disaggregated by source; and~~
- ~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(b) Outflows. At the Financial Institution level for each Asset sold, for each quarter:~~

- ~~(1) The aggregate number of and identity of shares/units sold;~~
- ~~(2) The aggregate dollar amount received and the cost to the Plan, participant or beneficiary account, or IRA, associated with the sale;~~
- ~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the sale of each Asset disaggregated by source; and~~
- ~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(c) Holdings. At the Financial Institution level for each Asset held at any time during each quarter:~~

- ~~(1) The aggregate number and identity of shares/units held at the end of such quarter;~~
- ~~(2) The aggregate cost incurred by the Plan, participant or beneficiary account, or IRA, during such quarter in connection with the holdings;~~
- ~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the holding of each Asset during such quarter for each Asset disaggregated by source; and~~
- ~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(d) Returns. At the Retirement Investor level:~~

~~For purposes of this subparagraph (d), "Portfolio" means the Retirement Investor's combined holding of assets held in a Plan account or IRA advised by the Adviser.~~

- ~~(1) The identity of the Adviser;~~
- ~~(2) The beginning of quarter value of the Retirement Investor's Portfolio;~~
- ~~(3) The end of quarter value of the Retirement Investor's Portfolio; and~~
- ~~(4) Each external cash flow to or from the Retirement Investor's Portfolio during the quarter and the date on which it occurred.~~

~~(e) Public Disclosure. The Department reserves the right to publicly disclose information provided by the Financial Institution pursuant to subparagraph (d). If publicly disclosed, such information would be aggregated at the Adviser level, and the Department would not disclose any individually identifiable financial information regarding Retirement Investor accounts.~~

Signed at Washington, DC, this 14th day of April, 2015

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

i As drafted, BICE is not available for advice provided to small participant-directed plans or large plans of any kind. The Department requested comments on the appropriateness of this limitation. Lincoln believes to the extent an Adviser and Financial Institution can meet the BICE requirements, BICE should be available for advice provided to participant-directed plans of any size. Lincoln respectfully disagrees with the Department's statement that "including large plans within the definition of Retirement Investor could have the undesirable consequence of reducing protections provided under existing law to these investors, without offsetting benefits." Provided the Department makes meaningful changes to BICE to make it workable, Lincoln believes BICE should be available to Advisers to ensure all participant-directed plans, especially small participant-directed plans, have access to advice that is in their best interest.

ii This change is necessary to make clear that an Affiliate's or Related Entity's (such as an affiliated insurance company's) receipt of compensation is not prohibited under ERISA section 406(b) or Code section 4975(c)(1)(D), (E) and (F) if the Adviser does not have a conflict of interest with respect to the Affiliate or Related Entity that would affect the exercise of his best judgment in providing advice to the Retirement Investor.

iii For supporting arguments related to this change, please see end note (xiii) below.

iv An essential element to forming a contract is both parties assenting to the terms of the contract. (*Murray on Contracts*, 3rd Edition (1990.)) Entering into a contract before a Retirement Investor has determined to engage an Adviser is awkward, impractical and counter to U.S. customary practices and contract law. Retirement Investors understandably would be hesitant to enter into a contract for services when they have not even been informed of what those services will entail. Likewise, an Adviser would be negligent in entering into a contract prior to ensuring the Adviser is able to commit to the services proposed. Therefore, 'hire me' discussions must take place before a contract for services is entered into under the Proposal. As such, the BICE should be amended to provide a contract is required to formalize the Adviser / Retirement Investor relationship at the point when both parties assent to the advisor services, including payment of compensation.

v For supporting arguments related to this change, please see Section III(C) of the Lincoln Financial Network comment letter. Please note, Lincoln Financial Group (the marketing name for Lincoln National Corporation and its affiliates) submitted a comment letter regarding the Department's proposed fiduciary advice regulation and related prohibited transaction exemptions. Lincoln Financial Network (the marketing name for Lincoln's retail distribution affiliates) separately submitted a comment letter detailing concerns regarding BICE.

vi For supporting arguments related to this change, please see Section III(B)(1) of the Lincoln Financial Network comment letter.

vii For supporting arguments related to this change, please see Section III(C) of the Lincoln Financial Network comment letter.

viii For supporting arguments related to this change, please see Section IV of the Lincoln Financial Group comment letter.

ix Consistent with 29 C.F.R. §2550.408g-1, BICE should be revised to provide an Affiliate or Related Entity's receipt of compensation is not taken into account in determining whether the total amount of compensation anticipated to be received by the Adviser and Financial Institution is reasonable. Forcing the Adviser and Financial Institution to take into account compensation of an Affiliate or Related Entity (such an affiliated insurance company's) would unintentionally place proprietary Assets at a disadvantage. For example, assume two manufacturers receive the same compensation for a similarly situated annuity contract. An Adviser would be required to take into account the compensation of his or her Affiliate or Related Entity in determining the reasonableness of the compensation if a proprietary Asset is recommended, but would not be required to take into account the compensation of the unrelated manufacturer if the non-proprietary Asset is recommended. To avoid a bias against proprietary Assets, BICE should be amended to provide an Affiliate or Related Entity's receipt of compensation is not taken into account in determining whether the total amount of compensation anticipated to be received by the Adviser and Financial Institution is reasonable.

x For supporting arguments related to this change, please see Section V of the Lincoln Financial Group comment letter.

xi For supporting arguments related to this change, please see end note (xiii) below.

xii Fiduciary status under ERISA is functional in nature. It has long been understood that an Adviser can limit the scope of its services to a portion of assets so that Adviser would a fiduciary over specific assets, but is not deemed a fiduciary for the remaining plan assets. See 29 C.F.R. §2510.3-21(c)(2). As written, Section II(f)(1) appears to prohibit an Adviser from limiting the scope of his or her services. Therefore, Section II(f)(1) should be clarified to reflect the tenants of 29 C.F.R. §2510.3-21(c)(2) and long standing ERISA jurisprudence.

xiii The disclosure requirements of Section III are excessive and unnecessary. The SEC has already regulated Asset disclosure in the form of prospectuses successfully for many years. A prospectus provides a Retirement Investor with information about the Asset's investment objectives, risks, past performance, and expenses in a standardized format across the industry. In addition, the SEC has carefully crafted and honed the prospectus format to account for differences in Assets such as registered annuities. If the Department believes prospectus disclosure is somehow deficient, the Department should raise its concerns with the SEC. Lincoln is also concerned that the Department did not take into account the significant regulatory disclosure regime it recently implemented in 29 C.F.R. §

2550.408b-2 in drafting Section III's disclosure requirements. For plan sponsors, the compensation disclosures under Section III appear to duplicate compensation disclosures under DOL Regulation § 2550.408b-2 and thus are unnecessary. For participants and IRA owners, Section III duplicates the tenants of 29 C.F.R. § 2550.408b-2 for such Retirement Investors. As such, Lincoln recommends revising Section III to reflect the compensation disclosure requirements of 29 C.F.R. § 2550.408b-2 for Retirement Investors and clarify that an Adviser may rely on a 408b-2 disclosure previously provided to a plan sponsor to satisfy Section III disclosure requirements. Finally, Section III disclosure requirements appear to violate securities laws and place Advisers in an untenable position of having to violate one federal law to comply with another. (Please see Section III(B)(2) of the Lincoln Financial Network comment letter for supporting commentary.)

xiv Section IV(b)(1) should be deleted in its entirety. The Adviser and Financial Institution already must provide investment advice that is in the Best Interest of the Retirement Investor in accordance with Section II(c) and applicable federal laws regarding investment advice. If an Adviser believed he or she is prevented from providing advice that is in the Best Interest of the Retirement Investor because of the limited range of investments, the Adviser and Financial Institution would not be able to comply with Section II(c). Therefore, Section IV(b)(1) is unnecessary and excessive. As such, Section IV(b)(1) should be deleted.

xv Sections V and IX should be deleted in their entirety. The stated purpose of the Sections is to "assist the Department in assessing the effectiveness of the exemption." The Department provides no justification for the amount and type data requested and does not provide any analysis of how the data would be helpful in assessing the effectiveness of exemption. In addition, as evidenced by the recent data breach at the Office of Personnel Management, Lincoln is concerned that the Department may not have adequate privacy controls in place to ensure safeguarding of the data provided. Finally, the Department has reserved the right in Section IX to publicly disclose the information without adequately explaining or justifying the purpose or need for public disclosure of confidential business information.

xvi For supporting arguments related to this change, please see end note (i) above.

xvii Grandfathering transactions that occurred prior to the Applicability Date is unnecessary, provided such transactions satisfied existing law in effect at the time of their occurrence. Grandfathering transactions (provision of investment advice in exchange for compensation) that occur on or after the Applicability Date for existing accounts and contracts is needed. Please see Section III(B)(1) of the Lincoln Financial Network comment for supporting arguments related to this change.

xviii For supporting arguments related to this change, please see Section III(B)(3) of the Lincoln Financial Network comment letter.

xix For the supporting arguments related to this change, please see Section IV of the Lincoln Financial Group comment letter.

xx The definition of Material Conflict of Interest should be clarified to focus on *material* financial interests. Without clarification, the definition will lead to numerous, frivolous law suits that are without merit and serve only the interests of class action plaintiff attorneys.

xxi For supporting arguments related to this change, please see end note (i) above.

xxii For supporting arguments related to this change, please see end note (xiii) above.

APPENDIX C

Appendix C

Subchapter B—Definitions and Coverage under the Employee Retirement Income Security Act of 1974

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

3. The authority citation for part 2510 is revised to read as follows:

AUTHORITY: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order 1-2011, 77 FR 1088; Secs. 2510.3-21, 2510.3-101 and 2510.3-102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237. Section 2510.3-38 also issued under Pub. L. 105-72, Sec. 1(b), 111 Stat. 1457 (1997).

4. Revise § 2510.3-21 to read as follows:

§ 2510.3-21 Definition of "Fiduciary."

(a) Investment advice. For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (Act) and section 4975(e)(3)(B) of the Internal Revenue Code (Code), except as provided in paragraph (b) of this section, a person renders investment advice with respect to moneys or other property of a plan or IRA described in paragraph (f)(2) of this section if—

(1) Such person provides, directly to ~~a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner~~ ⁱ an investor the following types of investment advice in exchange for a fee or other compensation, whether direct or indirect:

(i) A recommendation as to the advisability of acquiring, holding, disposing or exchanging ~~investments securities or other property~~, including a recommendation to take a distribution of benefits ~~or that also includes~~ ⁱⁱ -a recommendation as to the investment of securities moneys or other property to be rolled over or otherwise distributed from the plan or IRA;

(ii) A recommendation as to the management of ~~securities or other property~~ investments, including recommendations as to the management of ~~securities moneys~~ or other property to be rolled over or otherwise distributed from the plan or IRA;

(iii) ~~An appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA~~ ⁱⁱⁱ ; and

(iv) ~~A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (i) through (iii); and~~ ^{iv}

Appendix C

(2) Such person, ~~either directly or indirectly (e.g., through or together with any affiliate)^v,—~~

(i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to the investment advice described in paragraph (a)(1) of this section; or

(ii) Renders the investment advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to meet the specific investment goals of the investor, and is provided at the request of the investor pursuant to that agreement, arrangement, or

understanding.^{vi} ~~, or that such advice is specifically directed to, the advice recipient for~~

~~consideration^{vii} in making investment or management decisions with respect to securities or other property of the plan or IRA.~~

(b) Carve-outs – investment advice. Except for persons described in paragraph (a)(2)(i) of this section, the rendering of advice or other communications in conformance with a carve-out set forth in paragraph (b)(1) through (6) of this section shall not cause the person who renders the advice to be treated as a fiduciary under paragraph (a) of this section.

(1) Counterparties to the plan— (i) ~~Counterparty transaction with plan fiduciary with financial expertise.~~ (A) In such person's capacity as a counterparty (or representative of a counterparty) to an employee benefit plan (as described in section 3(3) of the Act), the person provides advice to a plan fiduciary who is independent of such person and who exercises authority or control with respect to the management or disposition of the plan's assets, with respect to an arm's length sale, purchase, loan or bilateral service or other^{viii} contract between the plan and the counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral service or other contract, if, prior to providing any recommendation with respect to the transaction, such person satisfies the requirements of ~~either~~ paragraph (b)(1)(i)(B) ~~or (C)~~ of this section.

(B) Such person—

(1) Fairly informs the independent plan fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity;^{ix} ~~Obtains a written representation from the independent plan fiduciary that the independent fiduciary exercises authority or control with respect to the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act), that the employee benefit plan has 100 or more participants covered under the plan, and that the independent fiduciary will not rely on the person to~~

Appendix C

~~act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity;~~^x

(2) Fairly informs the independent plan fiduciary of the existence and nature of the person's financial interests in the transaction;

(3) Does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction; and

(4) Knows or reasonably believes that the independent plan fiduciary has sufficient expertise to evaluate the transaction and to determine whether the transaction is prudent and in the best interest of the plan participants (the person may rely on written representations from the plan or the plan fiduciary to satisfy this subsection (b)(1)(i)(B)(4)).

~~(C) Such person—~~

~~(1) Knows or reasonably believes that the independent plan fiduciary has responsibility for managing at least \$100 million in employee benefit plan assets (for purposes of this paragraph (b)(1)(i)(C), when dealing with an individual employee benefit plan, a person may rely on the information on the most recent Form 5500 Annual Return/Report filed for the plan to determine the value and, in the case of an independent fiduciary acting as an asset manager for multiple employee benefit plans, a person may rely on representations from the independent plan fiduciary regarding the value of employee benefit plan assets under management);~~

~~(2) Fairly informs the independent plan fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity; and~~

~~(3) Does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction.~~

xi

(ii) Swap and security-based swap transactions. The person is a counterparty to an employee benefit plan (as described in section 3(3) of the Act) in connection with a swap or security-based swap, as defined in section 1(a) of the Commodity Exchange Act (7 U.S.C. 1(a) and section 3(a) of the Securities Exchange Act (15 U.S.C. 78c(a)), if—

(A) The plan is represented by a fiduciary independent of the person;

(B) The person is a swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant;

Appendix C

(C) The person (if a swap dealer or security-based swap dealer), is not acting as an advisor to the plan (within the meaning of section 4s(h) of the Commodity Exchange Act or section 15F(h) of the Securities Exchange Act of 1934) in connection with the transaction; and

(D) In advance of providing any recommendations with respect to the transaction, the person obtains a written representation from the independent plan fiduciary, that the fiduciary will not rely on recommendations provided by the person.

(2) Employees. In his or her capacity as an employee of any employer or employee organization sponsoring the employee benefit plan (as described in section 3(3) of the Act), the person provides the advice to a plan fiduciary, and he or she receives no fee or other compensation, direct or indirect, in connection with the advice beyond the employee's normal compensation for work performed for the employer or employee organization.

(3) Platform providers. The person merely markets and makes available to an employee benefit plan (as described in section 3(3) of the Act) or to any plan described in section 4975(e)(1) of the Code, including an IRA, without regard to the individualized needs of the plan, its participants, or beneficiaries, IRA, or IRA owner, securities or other property investments through a platform (including a ^{xii} variable annuity contract) or similar mechanism from which a plan fiduciary or IRA owner^{xiii} may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, if the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

(4) Selection and monitoring assistance. In connection with the activities described in paragraph (b)(3) of this section with respect to an employee benefit plan (as described in section 3(3) of the Act), the person –

(i) Merely identifies investment alternatives that meet objective criteria specified by the plan fiduciary (e.g., stated parameters concerning expense ratios, size of fund, type of asset, credit quality) or that are not individualized to the plan^{xiv}; or

(ii) Merely provides objective financial data and comparisons with independent benchmarks to the plan fiduciary.

~~(5) Financial reports and valuations. The person provides an appraisal, fairness opinion, or statement of value to—~~

Appendix C

~~(i) An employee stock ownership plan (as defined in section 407(d)(6) of the Act) regarding employer securities (as defined section 407(d)(5) of the Act);~~

~~(ii) An investment fund, such as a collective investment fund or pooled separate account, in which more than one unaffiliated plan has an investment, or which holds plan assets of more than one unaffiliated plan under 29 CFR 2510.3-101; or~~

~~(iii) A plan, a plan fiduciary, a plan participant or beneficiary, an IRA or IRA owner solely for purposes of compliance with the reporting and disclosure provisions under the Act, the Code, and the regulations, forms and schedules issued thereunder, or any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization rule or regulation ^{xv}.~~

(6) Investment education. The person furnishes or makes available any of the following categories of investment-related information and materials described in paragraphs (b)(6)(i) through (iv) of this section to a plan, plan fiduciary, participant or beneficiary, IRA or IRA owner irrespective of who provides or makes available the information and materials (e.g., plan sponsor, fiduciary or service provider), the frequency with which the information and materials are provided, the form in which the information and materials are provided (e.g., on an individual or group basis, in writing or orally, or via call center, video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of information and materials identified in paragraphs (b)(6)(i) through (iv), provided that the information and materials do not include (standing alone or in combination with other materials) recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations on investment, management, or value of a particular security or securities, or other property.

(i) Plan information. Information and materials that, without reference to the appropriateness of any individual investment alternative ~~or any individual benefit distribution option ^{xvi}~~ for the plan or IRA, or a particular participant or beneficiary or IRA owner, describe the terms or operation of the plan or IRA, inform a plan fiduciary, participant, beneficiary, or IRA owner about the benefits of plan or IRA participation, the benefits of increasing plan or IRA contributions, the impact of preretirement withdrawals on retirement income, retirement income needs, varying forms of available distribution options, including rollovers, annuitization and other forms of lifetime income payment options (e.g., immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions, or describe

Appendix C

investment objectives and philosophies, risk and return characteristics, historical return information or related prospectuses of investment alternatives under the plan or IRA.

(ii) General financial, investment and retirement information. Information and materials on financial, investment and retirement matters that do not ~~address~~ include (standing alone or in combination with other materials) a recommendation as to the appropriateness of any specific investment products, specific plan or IRA alternatives or distribution options available to the plan or IRA or to participants, beneficiaries and IRA owners, or specific alternatives or services offered outside the plan or IRA, and inform the plan fiduciary, participant or beneficiary, or IRA owner about —

(A) General financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment;

(B) Historic differences in rates of return between different asset classes (e.g., equities, bonds, or cash) based on standard market indices;

(C) Effects of inflation;

(D) Estimating future retirement income needs;

(E) Determining investment time horizons;

(F) Assessing risk tolerance;

(G) Retirement-related risks (e.g., longevity risks, market/interest rates, inflation, health care and other expenses); and

(H) General methods and strategies for managing assets in retirement (e.g., systematic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits), including those offered outside the plan or IRA.

(I) Designated investment alternatives available in a plan within the meaning of DOL Regulation § 2550.404a-5, including investment-related information and materials ^{xvii}; and

(J) Specific plan provisions, investment products, plan alternatives and distribution options available to participants and beneficiaries, or specific alternatives or services offered outside the plan when such products, services and information are reviewed, approved and directed by a plan sponsor to be provided to participants. ^{xviii}

Notwithstanding the foregoing, a recommendation as to the appropriateness of any product or service that is not subject to Title I of the Act or the prohibited transaction rules of the section 4975

Appendix C

of the Code is not investment advice for purposes of section 3(21)(A)(ii) of the Act and section 4975(e)(3)(B) of the Code.^{xix}

(iii) Asset allocation models. Information and materials (e.g., pie charts, graphs, or case studies) that provide a plan fiduciary, participant or beneficiary, or IRA owner with models of asset allocation portfolios of hypothetical individuals with different time horizons (which may extend beyond an individual's retirement date) and risk profiles, where—

(A) Such models are based on generally accepted investments theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time;

(B) All material facts and assumptions on which such models are based (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) accompany the models;

(C) To the extent that an asset allocation model identifies any specific investment alternative available under the plan or IRA, the model is accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan or IRA and identifying where information on those investment alternatives may be obtained.~~Such models do not include or identify any specific investment product or specific alternative available under the plan or IRA.~~^{xx}; and

(D) The asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual situations, participants, beneficiaries, or IRA owners should consider their other assets, income, and investments (e.g., equity in a home, Social Security benefits, individual retirement plan investments, savings accounts and interests in other qualified and non-qualified plans) in addition to their interests in the plan or IRA, to the extent those items are not taken into account in the model or estimate.

(iv) Interactive investment materials. Questionnaires, worksheets, software, and similar materials which provide a plan fiduciary, participant or beneficiary, or IRA owners the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income; questionnaires, worksheets, software and similar materials which allow a plan fiduciary, participant or beneficiary, or IRA owners to evaluate distribution options, products or vehicles by providing information under paragraphs (b)(6)(i) and (ii) of this section; questionnaires, worksheets, software, and similar materials that provide a plan fiduciary, participant or beneficiary,

Appendix C

or IRA owner the means to estimate a retirement income stream that could be generated by an actual or hypothetical account balance, where —

(A) Such materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time;

(B) There is an objective correlation between the asset allocations generated by the materials and the information and data supplied by the participant, beneficiary or IRA owner;

(C) There is an objective correlation between the income stream generated by the materials and the information and data supplied by the participant, beneficiary or IRA owner;

(D) All material facts and assumptions (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, rates of return and other features and rates specific to income annuities or systematic withdrawal plan) that may affect a participant's, beneficiary's or IRA owner's assessment of the different asset allocations or different income streams accompany the materials or are specified by the participant, beneficiary or IRA owner;

(E) To the extent that an asset allocation generated by the materials identifies any specific investment alternative available under the plan or IRA, the asset allocation is accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan or IRA and identifying where information on those investment alternatives may be obtained (this paragraph (b)(6)(iv)(E) shall not apply if the materials do not include or identify any specific investment alternative available or distribution option available under the plan or IRA, unless ^{xxi} such alternative or option is specified by the participant, beneficiary or IRA owner; and

(F) The materials either take into account other assets, income and investments (e.g., equity in a home, Social Security benefits, individual retirement account/ annuity investments, savings accounts, and interests in other qualified and non-qualified plans) or are accompanied by a statement indicating that, in applying particular asset allocations to their individual situations, or in assessing the adequacy of an estimated income stream, participants, beneficiaries or IRA owners should consider their other assets, income, and investments in addition to their interests in the plan or IRA.

(v) Anti-cashout information. General methods and strategies that encourage participants to avoid in-service distributions when possible or suggest alternative post-distribution retirement plan savings vehicles designed to preserve retirement savings, including IRAs and similar products,

Appendix C

provided that no specific IRA or other product is identified unless permitted under paragraph

(b)(6)(ii)(J). ^{xxii}

(vi) The information and materials described in paragraphs (b)(6)(i) through (iv) of this section represent examples of the type of information and materials that may be furnished to participants, beneficiaries and IRA owners without such information and materials constituting investment advice. Determinations as to whether the provision of any information, materials or educational services not described herein constitutes the rendering of investment advice must be made by reference to the criteria set forth in paragraph (a) of this section.

(c) Scope of fiduciary duty – investment advice. A person who is a fiduciary with respect to an employee benefit plan or IRA by reason of rendering investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, direct or indirect, with respect to any securities or other property of such plan, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (a)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(1) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(2) Exclude such person from the definition of the term “party in interest” (as set forth in section 3(14)(B) of the Act or “disqualified person” as set forth in section 4975(e)(2) of the Code) with respect to a plan.

(d) Execution of securities transactions. (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code, with respect to an employee benefit plan or IRA solely because such person executes transactions for the purchase or sale of securities on behalf of such plan in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA, if:

Appendix C

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) The instructions specify:

(A) The security to be purchased or sold;

(B) A price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, *et seq.*), a price which is determined in accordance with Rule 22c1 under the Investment Company Act of 1940 (17 CFR 270.22c1);

(C) A time span during which such security may be purchased or sold (not to exceed five business days); and

(D) The minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to an employee benefit plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA, or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the provisions of paragraph (d)(1) of this section, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition of the term party in interest (as set forth in section 3(14)(B) of the Act) or disqualified person 4975(e)(2) of the Code with respect to any assets of the plan or IRA.

Appendix C

(e) Internal Revenue Code. Section 4975(e)(3) of the Code contains provisions parallel to section 3(21)(A) of the Act which define the term “fiduciary” for purposes of the prohibited transaction provisions in Code section 4975. Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237 transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. All references herein to section 3(21)(A) of the Act should be read to include reference to the parallel provisions of section 4975(e)(3) of the Code. Furthermore, the provisions of this section shall apply for purposes of the application of Code section 4975 with respect to any plan described in Code section 4975(e)(1).

(f) Definitions. For purposes of this section—

(1) “Recommendation” means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.

(2)(i) “Plan” means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code, and

(ii) “IRA” means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(3) “Plan participant” means for a plan described in section 3(3) of the Act, a person described in section 3(7) of the Act.

(4) “IRA owner” means with respect to an IRA either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) “Plan fiduciary” means a person described in section 3(21) of the Act and 4975(e)(3) of the Code.

(6) “Fee or other compensation, direct or indirect” for purposes of this section and section 3(21)(A)(ii) of the Act, means any fee or compensation for the advice received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. The term fee or other compensation includes, for example, brokerage fees, mutual fund and insurance sales commissions.

(7) “Affiliate” includes: any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such person; and any corporation or partnership of which such person is an officer, director or partner.

Appendix C

(8) “Control” for purposes of paragraph (f)(7) of this section means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Signed at Washington, DC, this 14th day of April, 2015.

(9) “Investor” means a plan, plan fiduciary (other than a plan fiduciary who has been hired by the plan to provide investment advice)^{xxiii}, plan participant of beneficiary, IRA, or IRA owner.

(10) “Investments” means securities, insurance and annuity contracts, property or other financial instruments held by a plan or IRA. The term “investments” does not include a contract issued by an insurance company to a plan described in section 3(1) of the Act for the provision of benefits under such plan where that contract contains no investment return element.^{xxiv}

Appendix C

i Because the extremely broad sweep of the Proposal would turn most sales activity into fiduciary advice, this change is necessary to ensure that wholesaling activity, i.e., product manufacturer sales activity directed to financial intermediaries that advise plans and IRA owners, will not trigger fiduciary status for wholesalers and their employers. Without this change, wholesalers would be defined as fiduciaries by reason of their selling activity to intermediaries, who under the Proposal would also be fiduciaries by reason of giving investment advice. We do not believe that retirement investors need, or that the Department intends, this duplicative and confusing “daisy chain” of fiduciaries serving the same investor. If a retirement investor is already represented by an investment advice fiduciary, a wholesaler promoting one financial institution’s products to that fiduciary should not be fiduciary advice.

ii The Proposal takes a significant step back in promoting participants’ retirement security. Making any discussion about the specific distribution options available to an individual (leave in the plan, roll to an IRA or new plan, take a cash distribution, withdraw in a lump sum, installments or annuitization) into fiduciary investment advice will effectively cut off retirement savers’ access to this critical information. In addition, without a contemporaneous recommendation regarding investment of retirement assets, discussion of specific distribution options is not investment advice under any common interpretation of that term. Making any discussion of individual benefit distribution options an act of fiduciary advice is a significant and unnecessary impediment to ensuring that participants have access to the information they need to make informed decisions about their retirement options.

iii Lincoln is concerned that the proposal inadvertently sweeps in routine valuations performed on behalf of retirement investors. Some examples of activities that are routinely outsourced to record keepers and include valuations that would be considered to be fiduciary advice under the Proposal include: account values contained in enrollment materials, 402(f) notices and 404(a) notices; account values provided for purposes of determining required minimum distributions, Roth conversions and death benefits; and insurance company determinations of market value adjustments under their fixed annuity contracts or determinations of guaranteed income amounts under a guaranteed minimum withdrawal benefit (GMWB) contract. All of these account valuations are provided in connection with potential transactions that retirement investors are contemplating (contributions to the account after enrollment would be an acquisition of securities, a distribution or annuity contract surrender or income commencement would be a disposition). Lincoln urges the Department to either clarify that such routine valuations are not advice, or delete valuation activities entirely from the definition of fiduciary advice. Given that the problems that the Department has identified in connection with valuations have primarily involved valuations of employer stock, and ESOP valuations have been carved out of the Proposal, it is actually unclear to us what problem the Department is trying to solve with this provision.

iv Under the proposal, recommending an investment manager or adviser to a plan would be fiduciary advice. As part of our service offering, Lincoln introduces prospective clients to certain third party

Appendix C

investment advisers and managers so clients can have access, if desired, to fiduciary services that Lincoln cannot provide. Lincoln believes this practice is in line with ERISA's requirement that fiduciaries hire investment experts where they do not have the requisite expertise. Lincoln understands the Department is concerned that service providers may be profiting from these introductions or is in some other way conflicted. In Lincoln's case, it is necessary to have a relationship with a limited group of fiduciary providers whose systems can interface with Lincoln's systems. But Lincoln does not profit from making the introductions. As such, the Department should clarify that introductions to third party investment advisers and managers is not fiduciary advice, absent a representation as to their suitability for a particular retirement investor. To do otherwise would create significant roadblocks for plan sponsors who are trying to fulfill their fiduciary duty to hire independent experts.

^v We do not know what activity this language is intended to capture and are concerned that it might inadvertently make service providers into fiduciaries when they represent fiduciary status relating to a service other than investment advice. For example, many service providers, including Lincoln, provide directed trustee services to ERISA plans. We are concerned that our representation to plan sponsors that we will function as a fiduciary for them in this limited way will cause us to be considered an investment advice fiduciary under the Proposal because we have, through an affiliate, represented and acknowledged fiduciary status. We realize that the provision can be interpreted more narrowly than this but our point is that we cannot identify what it is intended to cover under the narrower interpretation. If it doesn't cover activities that can be clearly identified under a narrower interpretation, there is risk that it will be interpreted more broadly. Therefore, unless the Department can point to specific activity that this language is meant to reach, it should be deleted.

^{vi} Lincoln believes that the proposal's definition of fiduciary advice is overly broad and inappropriately classifies all manner of selling and marketing communications as fiduciary advice. The Department's stated rationale for expanding the definition of advice is to protect consumers from the conflicts of interest that may cause advisers to provide advice that is not in the best interest of their clients. It is clear that the Department seeks to cover relationships where the adviser is in a position of trust with respect to the advice recipient. However, the expanded definition under the proposal sweeps traditional sales and marketing activity, in situations where there is no reasonable expectation of impartiality, into the definition of fiduciary advice. Under Paragraph (a)(2)(ii) of the Proposal, fiduciary status is triggered any time a communication is made that is in any way suggestive of an investment, investment management, or distribution decision if it is either "individualized" or "specifically directed to" an advice recipient for "consideration." In this regard, a product manufacturer like Lincoln would ostensibly be providing fiduciary advice any time it engaged in marketing and sales activity, even when recipients of such sales and marketing activity would have no reasonable expectation that they were receiving fiduciary advice (e.g., Lincoln mails a brochure marketing its products, and the mailing is "specifically directed" to the individual to whom that brochure is addressed).

Appendix C

vii The Department's proposed definition of fiduciary advice includes recommendations "for consideration in making investment or management decisions with respect to securities or other property of the plan." Lincoln believes that "for consideration" is an inappropriately low standard for triggering fiduciary status and would have the unintended consequence causing a product manufacturer or retirement plan record-keeper to be a fiduciary any time it provides a factual description of its own products or services. Nearly any communication to a plan sponsor or individual retirement investor that is related to the features of a product like an immediate fixed annuity, a deferred variable annuity or a guaranteed minimum withdrawal benefit could give rise to fiduciary status because, under the proposal those descriptions could easily be construed as a recommendation "for consideration in making investment or management decisions." Product manufacturers would be prevented from providing any assistance to individuals seeking to understand the features of complex financial products. The consequences of being unable to obtain that kind of assistance are severe. For example, Lincoln's *Secured Retirement Income*SM product ("SRI") provides a living benefit to ensure the retirement saver will receive a guaranteed stream of income payments for life provided no excess withdrawals are made from the contract. If a retirement saver mistakenly requests an excess withdrawal, it is important that Lincoln be able to educate the retirement saver about the consequences of the withdrawal. However, a Lincoln customer service representative may be prevented from providing such information for fear of becoming an advice fiduciary, because the Lincoln representative's warning about the consequences of the excess withdrawal would almost certainly be a "hold" recommendation under the Proposal. Lincoln must be able to educate plan sponsors and participants on the features of its products and services without concern that those communications will be deemed fiduciary advice.

viii We recommend that the carve-out clearly cover service agreements such as retirement plan record-keeping service agreements. The seller's carve-out should also cover all non-fiduciary services provided under the service agreement. For example, if a plan sponsor and a service provider agree in an arms-length transaction that the provider will educate participants about the specific funds, distribution options and annuity contract features available in the plan, and IRA options available outside of the plan, service providers should be able to provide these services as a non-fiduciary service pursuant to the direction of the plan sponsor. These kinds of services are commonly requested by plan sponsors and highly valued by plan sponsors and participants. Sponsors and participants will not be well served if these services are no longer available on a non-fiduciary basis.

ix As an initial matter, if the definition of fiduciary advice is not significantly narrowed, this requirement will be impossible to satisfy and will make this carve-out unusable in some situations, such as the "specifically directed" marketing and customer service activities mentioned above. In addition, we are concerned that if we have to require prospective customers to give us affirmative written representations about anything before we can even talk to them, our ability to engage them will be significantly limited. As a practical matter, these representations will be prepared by service providers and presented to plan sponsors to sign. Human nature being what it is, there will be natural reluctance and, likely in many cases, refusal to sign. This reluctance or refusal will not be based on an educated

Appendix C

assessment of the situation, but rather on a natural suspicion of being asked to sign something—because people assume when they are asked to sign something that they are being asked to commit to an obligation or to give up a right. We are concerned that this requirement will leave service providers unable to conduct sales activity when the prospective customer makes an uninformed decision not to sign the required representations. We also do not believe that a written representation is necessary to ensure that the buyer understands that it is not buying fiduciary advice. This goal can be accomplished just as effectively through prominent and easily understood disclosure. It is hard to see how an independent ERISA fiduciary, who is required to understand the significance of disclosures (or hire someone who does) would fail to understand that it is buying an investment product or recordkeeping service and not fiduciary investment advice.

^x The carve-out should cover sales to all plans regardless of size. The Department’s justification for making the seller’s carve-out unavailable for small plans is the concern that small plan fiduciaries are not equipped to understand or evaluate an arm’s length transaction. However, ERISA requires fiduciaries of large and small plans alike to act with the knowledge and skill necessary to evaluate investment products and services. All plan fiduciaries already have a fiduciary duty to hire an independent investment adviser if they lack the financial expertise necessary to make informed investment decisions. The Department’s assumption that a small plan fiduciary will always lack the ability to make informed investment decisions has not been adequately supported and is contrary to what ERISA requires of plan fiduciaries. The consequence of limiting the carve-out to communications with large plans is that small plans (but not large plans) will only be able to get assistance in establishing and maintaining a retirement plan by hiring a fiduciary adviser and paying for fiduciary advice. We do not believe that small plan fiduciaries should have their choices limited in this manner and are concerned that as a result fewer small employers will establish retirement plans.

^{xi} As noted above, we do not believe that the seller’s carve-out should be limited based on plan size or the financial sophistication of the fiduciary, because this assumes that small, less sophisticated fiduciaries cannot make informed decisions on behalf of their participants and beneficiaries. This assumption has not been adequately supported and is contrary to what ERISA requires of plan fiduciaries.

^{xii} The Department should clarify that a variable annuity contract constitutes a “platform” for purposes of the carve-out. Variable annuity contracts (“VAs”) are offered both in the group (retirement plan) and individual (IRA) markets. Group VAs offer employees access to a number of variable investment options called separate accounts, each of which generally invests in shares of a single underlying mutual fund, as well as a fixed option that provides guaranteed principal and fixed rates of return backed by the insurance company’s general account. Investors can direct their retirement plan account balances among the investment options. In the context of an ERISA-covered plan, the plan fiduciary may select which of the investment options will be made available under the plan (e.g., plan fiduciary may select 20 to 30 investment options from the hundreds available in the VA). A group VA therefore appears to meet

Appendix C

the definition of a “platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives...” We understand that the Department agrees that a group VA can qualify under the platform carve-out and ask that this be made clear in the final regulation.

xiii Lincoln believes there is no basis for treating individual VAs any different from group VAs for purposes of the platform carve-out. Individual VAs are constructed and marketed in the same manner as group VAs, that is, “without regard to the individualized needs” of any particular investor. The only difference is that they are for individual investors. Like group VAs, an individual VA contract makes a “platform” of numerous investment options available to the retirement saver. The insurance companies who market them do not engage any different or more individualized sales activity with respect to these products than they do with respect to group VAs. Notably, they do not assist individuals in selecting among the investments made available on the platform (an individual’s financial advisor might assist with this). Based on this, we do not think that the lack of a plan fiduciary to select a subset of options from among the available investment options on the platform for the individual saver is a relevant distinction that justifies excluding individual IRAs from this carve-out.

Individual VA products are also often made available to retirement plan participants who may be considering rolling their account balances out of an employer-sponsored plan to an IRA. Seventy percent of rollovers out of plans go to previously established accounts or relationships. This is true for rollovers that are self-directed (an adviser is not involved) and IRAs involving an adviser (Cerulli, *Evolution of the Retirement Investor – 2014*). Many record keepers that could comply with the platform exception for their employer-sponsored plan platform also have an IRA platform with similar investment options that is institutionally priced and less expensive than other retail IRA products. The platforms often utilize the same record keeping system and the same call center representatives or salary-based licensed investment consultants who process rollovers between platforms. Expansion of the platform carve-out to include IRAs would maintain this efficient, cost effective process.

xiv We believe that this change is necessary in order for this carve-out to have the utility that the Department intends. As the Department has acknowledged in providing this carve-out, platform providers need to be able to provide sample fund lineups to plan fiduciaries to assist them in selecting and monitoring investment alternatives. However, there are many situations in which plan fiduciaries do not give service providers specific criteria to respond to and in those cases, service providers will generally provide multiple sample lineups that are not individualized to the plan but are rather based on general criteria such as the cost/revenue sharing attributes of the funds. The samples might illustrate, for example, that with low expense ratio funds that do not share revenue, the wrap fee is higher than with a lineup containing funds with higher expense ratios and revenue sharing. The sample lineups are not a recommendation to use any of the funds in the sample or intended to indicate that the funds are appropriate for the particular plan. They simply intended to give the plan fiduciary and its advisers something to start with when making fund selections. The change we recommend here ensures that

Appendix C

providers can continue to provide sample lineups that are not responsive to specific criteria provided by the plan fiduciary as long as they are not individualized to the plan.

^{xv} We don't think this carve-out is necessary if, as we recommend, valuation activities are removed from the definition of fiduciary advice. See endnote iii above for further discussion. .

^{xvi} Under the proposed regulation, the Department incorporated much of Interpretive Bulletin 96-1's guidance concerning plan information investment education. However, the Department limited the scope of plan information investment education by making any discussion of individual benefit distribution options an act of fiduciary advice. This is counter to a common sense understanding of the term 'investment advice' under ERISA section 3(21)(A)(ii) and the general tenants of ERISA participant disclosure. The term 'investment advice' refers to counseling a participant regarding the investment of his or her plan account (e.g., recommending a specific asset allocation among funds available in the plan). Discussion of specific plan distribution options available to a participant is not investment advice. Rather, such discussion is educating a participant about his or her rights under the plan and federal law. Making any discussion of individual benefit distribution options an act of fiduciary advice is a significant and unnecessary impediment to ensuring that participants have access to the information they need to make informed decisions about their retirement options.

Cerulli estimates (Evolution of the Retirement Investor – 2014) that for every dollar eligible to be rolled over in 2014, approximately 1/3 (\$325 billion) was rolled over while approximately 2/3 (\$720 billion) stayed in the plan. The primary reason assets remained in the plan was that participants simply were unsure of what to do with their assets. Over the next 10 to 15 years, over one billion dollars will be rolled over every day and 10,000 baby boomers will retire every day. Manufacturers and record keepers are making available a variety of efficient retirement income products including managed payout accounts, guaranteed minimum withdrawal benefits, institutionally priced annuities, installment payments and other income generators to give participants options on what to do with their retirement nest egg. Plan sponsors often request that their service provider educate and promote these solutions to their participants so they can access the retirement income market with institutionally priced products. If these educational and promotional efforts are deemed to be fiduciary advice by the record keeper and manufacturer, it will add complexity, cost and time to the efficient delivery that has been developed and chill access to such services unnecessarily. Expanding the definition of education to rollovers and distributions and retirement income products for manufacturers and record keepers that act under the direction of the plan sponsor would enable defined contribution plans to become retirement income vehicles in addition to retirement savings vehicles.

^{xvii} Lincoln believes that providing specific objective financial data and comparisons with independent benchmarks regarding investment alternatives available to participants is investment education, provided a recommendation is not made as to the appropriateness of any individual investment alternative. DOL regulation § 2550.404a-5 requires a plan sponsor to furnish specific investment alternative performance data, benchmark information and fee and expense information to participants on an annual basis. In addition, the regulation requires investment-related information be furnished on

Appendix C

an Internet Web site address that is sufficiently specific to provide participants access to specific additional information about the investment options for those who want more or more current information. DOL regulation § 2550.404a-5 specifically requires the plan sponsor to provide the name, address and telephone number of the plan administrator (or a person or persons designated by the plan administrator to act on its behalf) to contact for detailed designated investment alternative performance and expense information. It would be incredulous to believe that providing information to a participant mandated by DOL Regulation § 2550.404a-5 would cause the plan sponsor or its service provider to have engaged in investment advice, absent a recommendation as to the appropriateness of any individual investment alternative. Lincoln does not believe the Department intended this outcome, but we seek clarification in the Proposal.

xviii

It is common for a plan sponsor to contract with a service provider to have a provider representative educate participants and employees regarding certain aspects of the plan. When reviewed, approved and directed by a plan sponsor, providing educational information and materials regarding specific plan provisions, specific investment products, specific plan or IRA alternatives or distribution options available to participants and beneficiaries, or specific alternatives or services offered outside the plan should be permitted as investment education as long as a recommendation is not made as to the appropriateness of any individual investment alternative.

Plan sponsors fully vet these services prior to contracting with the service provider and monitor the services thereafter to ensure the services are helping achieve retirement readiness success for their employees. In addition, the plan sponsor acknowledges that Lincoln may benefit economically if a participant purchases a Lincoln product or service. The key to the service offering is the neutrality of the information provided by the service provider and the absence of a recommendation of any sort regarding the participant's account. Service providers do not advise participants on particular plan investment alternatives or persuade participants to take a distribution or roll over a participant's account out of the plan. Rather, the goal and intention of such services is simply to provide participants with information necessary for the participant to make an informed decision about his or her retirement plan options at the request of the plan sponsor.

According to Chatham Partners Client Satisfaction Study – 2012, plan participants that meet one-on-one with a representative of the record keeper regarding their retirement plan account balance are three times more confident about their retirement security and 43% of participants that meet one-on-one with a representative of the record keeper increase their contribution level. Plan sponsors are also highly satisfied with one-on-one meetings as this level of interaction consistently is the most effective when measured by positive participant actions and behaviors and overall retirement security.

For example, after a Lincoln retirement consultant met with a plan sponsor's employees, the plan sponsor said to Lincoln "I wanted to quickly provide some feedback on the Educational Session Shelly [Lincoln Retirement Consultant] put together for us on the 18th. I thought she did an excellent job. She was very personable and engaging and she made it very easy to understand and relate to the content. I

Appendix C

think she opened the eyes of some of our employees who may not have realized the importance of retirement planning or the tools they have at their disposal through Lincoln. She gave us some great day to day tips on how to budget and she thoroughly explained the need for good long term goals. After the session I overheard our Chief Human Resources Officer talking to a Director about how great Shelly is. We are very fortunate to have her as our representative.”

Similarly, another plan sponsor indicated, “I wanted to reach out to you and let you know what a success our Retirement Planning seminars were last week. Lydia and Paige [Lincoln Retirement Consultants] did a wonderful job presenting the various topics to our employees. I have gotten many thank you’s from our employees who attended the sessions. Some employees who were not able to attend are already asking when we are going to have them again. Lydia and Paige not only did a great job presenting, they did extremely well in planning the classes. The one we had at 5:30 pm was hugely successful. We estimate approximately 100 employees and their family members attended. Lydia and Paige always do a good job at whatever they attempt. Their number one goal is to make sure our employees are serviced. We appreciate them and the quality service they bring to our team.”

The expanded definition of fiduciary advice in the Proposal will cause record keepers and service providers to emphasize those mediums that will ensure their organizations stay within the confines of the education carve out – namely written material and web-based information that is the least effective and satisfying form of communication between a record keeper and a plan sponsor and its participants. The curtailment of group meetings and one-on-one counselling will reduce America’s retirement security. The Department should expand the educational carve out and narrow the definition of fiduciary advice to exclude group meetings and one-on-one counselling that is directly requested by the plan fiduciary and monitored by the plan fiduciary. The current definition will cause a redundant and expensive regulatory regime that will not increase protections to participants and will cause service providers to curtail their most effective means of promoting retirement security.

^{xix} Lincoln believes furnishing a plan sponsor, participant or IRA holder with information and materials regarding products and services that are not subject to ERISA or the prohibited transaction rules of the Code is not investment advice within the meaning of ERISA section 3(21)(A)(ii) (e.g., discussion of personal term life insurance and non-qualified deferred annuities).

^{xx} Lincoln believes the tenants of paragraphs (d)(3)(iii) and (4)(iv) of IB 96–1 should be incorporated into the proposed regulation to permit the use of asset allocation models that refer to specific investment products available under the plan or IRA, as long as those references to specific products are accompanied by a statement that other investment alternatives having similar risk and return characteristics may be available. The industry has developed, and plan sponsors and participants have come to expect, models and retirement planning tools to include or identify specific investment products or specific alternatives available under the plan. For two decades, models and retirement planning tools have included or identified specific investment products or specific alternatives available

Appendix C

under the plan with the common understanding that the information was investment education. Participants do not have any expectation that a specific investment product or alternative identified is individualized or directed to the participant. In fact, IB 96-1 has been in place for nearly 20 years under three presidencies, 21 sessions of Congress, five Secretaries of Labor and six Assistant Secretaries of EBSA. To Lincoln's knowledge, the validity of paragraphs (d)(3)(iii) and (4)(iv) of IB 96-1 has never been questioned prior to this Proposal. As the Department concluded in 1996, the theoretical concern that a plan sponsor or service provider could steer participants to a specific investment alternative by identifying only one particular fund in connection with an asset allocation model or retirement planning tool can be mitigated or eliminated by appropriate disclosure. History has borne the Department's 1996 conclusion to be true.

xxi See endnote xx above.

xxii Lincoln supports the public interest in retaining participant assets in employer sponsored plans and IRAs. The average American worker changes jobs more than seven times over a 40-year career and the Employee Benefit Research Institute estimates that over a 10-year period, 401(k) cash outs will remove \$1.3 trillion from the system's collective future retirement income streams. This staggering leakage from our retirement system has informed the business strategies and practices of record keepers and product manufacturers to assist participants to maintain their retirement balances, avoid costly tax penalties and increase their retirement security. According to a Boston Research Group (BRG) report, 45% of defined contribution participants cash out their plan balances despite having to pay steep penalties and taxes. BRG, in its study found that: *"If no assistance is offered to complete the [rollover] process successfully, then participants are highly likely to opt out of the automatic rollover process and simply cash out."* The study revealed that terminating participants that received one-on-one retirement planning kept their retirement assets in the retirement system at twice the rate than participants that only received a notice and written educational information. Activities that discourage cash-outs for participants who are determined to leave their employer plan, including explaining the benefits of rollovers and providing education about the service provider's proprietary IRA products (since these are the only products that a service provider's employees can describe), must be permitted to support the efforts to reduce leakage from the retirement system.

xxiii As noted in endnote i, Lincoln believes that an unintended consequence of the proposed definition is that wholesaling activities may be considered fiduciary advice. The proposal sweeps into the definition of fiduciary advice almost any advice provided to any "plan fiduciary." Product manufacturers like Lincoln rely on distribution models whereby products are marketed to third party intermediaries, such as consultants and TPA's, who are most often fiduciaries themselves (or would be under the Proposal). A definition of investment advice that causes wholesaling activities to trigger fiduciary status is not only untenable (because it effectively forces Lincoln to be on both sides of the same transaction), but it creates redundant fiduciaries for a single investor. A wholesaling arrangement satisfies the

Appendix C

Department's interest in insuring that a qualified fiduciary is evaluating the product because that is the specific role of the third party intermediary.

xxiv This change, along with the clarification that the type of advice that is subject to the regulation is "investment advice" rather than just "advice," is necessary to ensure that the recommendation of insurance products issued to welfare benefit plans that do not have an investment component, such as life, disability and long-term care insurance products, does not trigger investment advice fiduciary status. Such products are not investments and should not be made subject to ERISA's investment advice rules.