January 2, 2024

Assistant Secretary Gomez
Employee Benefits Security Administration
US Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: RIN 1210-AC02, Application No. D-12057, and Application No. D-12060, Application No. D-12094

Dear Secretary Gomez,

SIFMA[1] and SIFMA AMG[2] appreciate the opportunity to provide comments regarding the Department of Labor's ("Department") proposed regulation under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") that would redefine the term "fiduciary" under section 3(21) of ERISA and section 4975(e) of the Internal Revenue Code of 1986, as amended (the "Code") as well as comments on the proposed amendments to PTE 77-4, PTE 80-83, PTE 83-1, PTE 84-24, PTE 86-128 and PTE 2020-02. While we appreciate the opportunity to provide these comments to the Department as it assesses the impact of the proposal on retirement investors, we believe that this proposal is not tailored appropriately to address the Department's stated goals and we urge the Department to withdraw its proposal. Moreover, the required cost analysis is incomplete and flawed, and the scope of these proposals is inconsistent with the decision of the Fifth Circuit Court of Appeals in *Chamber of Commerce of United States of America v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018) ("*Chamber of Commerce*").[3]

[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

[2] SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

[3] A copy of the Court's decision is appended as Appendix II to this comment as an integral part of the comment. The decision's criticisms of the Department's statutory interpretation, and of the Department's misuse of the authorities it does possess, are incorporated by reference.

This comment letter will take each of these pieces of the regulatory package in turn, as well as specifically address the Department's cost analysis.

Table of Contents

Executive Summary……………………………………………………………………………………………..**3**

Part 1: Amendments to the Regulation Defining Investment Advice Fiduciary……………………………….5

The Proposal is Too Broad and the Exemptions are Too Narrow……………………………………………..7

The New Definition of Investment Advice Fiduciary is Inconsistent with the Common Law Definition of Fiduciary……………………………………………………………………………………………………..8

Information Regarding Distributions and Transfers is Not Fiduciary Advice…………………………………13

The Preamble is Not a Substitute for the Law…………………………………………………………………15

Institutional Clients Will Lose Valuable Market Information…………………………………………………18

Small Businesses and Individuals Will Lose Valuable Options if Platform Providers are Deemed to be Fiduciaries………………………………………………………………………………………………...19

The Proposed Regulation Fails to Exclude Model Portfolios, Wholesaling Services and Advice on Settlor Functions ……………………………………………………………………………………………………20

The Proposed Regulation Flies in the Face of the Fifth Circuit's Holding that "Hire Me" Conversations are Not Fiduciary Advice …………………………………………………………………………………………21

The Exception for Price and Date Discretion is Inconsistent with Securities Law…………………………….22

The Truncated Comment Period and Timing of the Hearing Discourages Comprehensive Comment………..23

Implementing Changes by the Effective Date is Not Possible………………………………………..….…….24

The Department has Not Adequately Shown Why the Proposed Regulatory and Exemptive Package is Needed and Its Cost Analysis is Flawed ……………………………………………………………………..……25

The Proposed Rule is inconsistent with the Holding of the Fifth Circuit Court of Appeals Decision in *Chamber of Commerce v. Acosta* 25

Part 2: Proposed Amendments to PTE 2020-02.. **29**

The Ineligibility Provisions are Punitive, Less Focused than the Current Exemption and Lack Due Process ...29

The Principal Transactions Limitations Reduce Access to Investments that Retirement Investors in Brokerage Accounts Enjoy Today……………………………………………………………………………………….34

The Written Statement of The Best Interest Standard May Create Contractual Rights Under State Law…………………………………………………………………………..……………….……36

The Remaining Changes in the Proposal Should be Abandoned…………………………….……………39

Part 3: Proposed Amendments to PTE 77-4, PTE 80-83, PTE 83-1, PTE 84-24, PTE 86-128...........................**49**

The Proposed Amendments to PTE 84-24 Have Greater Consequences Than the Department Acknowledges……………………………………………………………………………………………..50

The Proposed Amendments to Pte 75-1 Will Create Confusion with Regard to the Provision of Research, Analysis and Reports to Issuers and Others…………………………………………………………………53

The Proposed Amendments to PTE 77-4, PTE 80-83 and PTE 83-1 are Unnecessary and Unexplained 54

The Proposed Amendments to PTE 86-128 are Not Tailored for Retail Clients and are Duplicative of Securities Law Disclosure 54

Appendix

Appendix I – Cost Benefit Analysis Review 56
Appendix II – Decision of the Fifth Circuit Court of Appeals – Chamber of Commerce of United States of America v. United States Department of Labor, 885 F.3d 360 (5th Cir. 2018) 73
Appendix III – Email from the Deputy Assistant Secretary with regard to the Effective Date with regard to Foreign Convictions 112
Appendix IV – SIFMA Request for an Advisory Opinion Regarding Foreign Convictions 114
Appendix V – Response of the Solicitor of Labor Regarding Foreign Convictions 126
Appendix VI – Withdrawal of the Solicitor of Labor's Letter Regarding Foreign Convictions........ 132

Executive Summary

We urge the Department to abandon its latest attempt to amend its definition of fiduciary regulation defining investment advice fiduciary, as well as the accompanying prohibited transaction exemption ("PTE") amendment changes. This version will not survive judicial scrutiny. Virtually the entire proposal is inconsistent with the Fifth Circuit's decision in *Chamber of Commerce*,[4] including the various new exemption changes, which are overly prescriptive and unnecessary. Moreover, the Department's inadequate comment period, truncated and interrupted by a hearing and multiple holidays (both federal and state, as well as days of religious observances), adversely and unfairly affects this rulemaking.

This proposal includes an overly broad new definition of fiduciary, with overly narrow exemptive relief. It is clear from this proposal that the Department intends to turn many ordinary communications between individuals into ERISA fiduciary conversations. Then, once the Department makes these conversations ERISA fiduciary conversations, individuals will only be able to receive relief by fitting within PTE 2020-02. The Department is using a one-size-fits-all approach which was never the intent of Congress when providing the Department with the ability to issue exemptions. Even more troubling, the Department's herding of financial institutions and transactions into a single, highly prescriptive exemption is plainly an improper attempt to regulate both plans and IRAs using its deregulatory authority to issue exemptions from the prohibited transaction provisions of ERISA and the Tax Code—just like it did with the 2016 package.[5]

Among other problems with this proposal is a new definition of investment advice fiduciary that is inconsistent with the common law definition of fiduciary and contrary to the Fifth Circuit Court of Appeals decision in *Chamber of Commerce*. The proposal designates a huge variety of conversations as fiduciary, including information about distributions, market information, and well established settlor information.

The Department has provided no competent evidence that the proposal is necessary. We have spent the past thirteen years working with regulators to improve the standard of care that individual investors receive. Since the Department first undertook this project, we now have the

[4] *Chamber of Commerce*, 885 F.3d 360.

[5] We note that the Department refers to the whole proposed package as a proposed regulation.

SEC's Regulation Best Interest, the Department's PTE 2020-02, and the NAIC's best interest standard. Our member firms have made substantial changes to implement Regulation Best Interest, and many firms have instituted further changes to their practices to comply with PTE 2020-02. Flexibility in practices and firm arrangements provide individual investors with substantial choice in the marketplace, while still getting the benefit of financial professional looking out for their best interest.

It is especially frustrating that the Department is making changes to its own exemption that has not even been effective for two years. Firms that chose to use PTE 2020-02 made changes to their business practices to make this exemption work, but now the Department is making further changes without having undertaken any study or analysis of the impact of making such changes.[6] The Department provides no evidence that the current exemption is not working. It also makes no claim that it has empirical evidence of the need for these proposed amendments.

Some of the changes, especially those that may amount to a written contractual undertaking on the standard of care, present the same issues that the now vacated Best Interest Contract Exemption ("the BIC Exemption") presented, and not only exceed the Department's authority under *Chamber of Commerce*[7], but are likely to invalidate the newest changes to the exemption, making adoption of the exemption by the industry seem an unwise waste of resources in the face of a likely court determination that the proposed amendments are beyond the Department's authority.

We urge the Department not to finalize these amendments. In the few years that the exemption has been in use, our members that are using the exemption have found it to be workable. While our members have some reservations about certain of the conditions of the existing PTE 2020-02, all of which we raised during the comment period in 2020, other members have been able to use the exemption.

We believe that retirement investors are well protected under the current exemption. For those advisory firms that are already using PTE 2020-02, the Department has not analyzed the cost to retirement investors if these amendments prove so difficult to operationalize that they offer only advisory fee accounts using a fee schedule based on a percentage of assets under advice. Indeed, it appears that the Department has neither estimated the benefits of the changes or accurately and completely analyzed the costs of compliance, and the cost to retirement investors if financial institutions using the exemption abandon it and change their service model.

SIFMA urges the Department to retain the current version of PTE 2020-02. The proposed changes will increase costs retirement investors with no discernable benefit.[8]

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[6] See Cost Analysis at Attachment I.

[7] *Chamber of Commerce*, 885 F.3d 360.

[8] See Cost Analysis at Attachment I. In Michigan v. EPA, 135 S. Ct. 2699 (2015), the Court reviewed an EPA rule, noting that:

> In accordance with Executive Order, the Agency issued a "Regulatory Impact Analysis" alongside its regulation. This analysis estimated that the regulation would force power plants to bear costs of $9.6 billion per

We disagree as well with the changes to the other exemptions in this regulatory package. Those proposed changes highlight a fundamental problem with the proposal: the Department's one-size-fits-all approach is designed to claim regulatory power for the Department that Congress did not grant it.

Recent regulatory history is unfortunate: flawed regulation, massive industry investment in changing advice structures and/or terminating client relationships, only to have a court correctly overturn the rule, resulting in another expensive regulatory failure. This is avoidable: the Department's stated rationale for this project was largely to address a reasonable method of compliance for independent insurance agents to avoid "regulatory arbitrage". They could have worked on a narrow solution. Instead, they have put together a proposal that will raise costs, limit options and provide no benefit to investors saving for retirement.

Part 1: Amendments to the Regulation Defining Investment Advice Fiduciary

The Department's proposed revision of its regulation defining investment advice fiduciary seeks to go beyond the statutory definition of investment advice fiduciary differently from its 2011 and 2016 attempts, but the end result remains the same: to attempt to impose fiduciary status on every financial professional who interacts with a plan sponsor, other

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year. *Id.,* at 9306. The Agency could not fully quantify the benefits of reducing power plants' emissions of hazardous air pollutants; to the extent it could, it estimated that these benefits were worth $4 to $6 million per year. *Ibid.* The costs to power plants were thus between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of hazardous air pollutants. The Agency continued that its regulations would have ancillary benefits—including cutting power plants' emissions of particulate matter and sulfur dioxide, substances that are not covered by the hazardous-air-pollutants program. Although the Agency's appropriate-and-necessary finding did not rest on these ancillary effects, *id.,* at 9320, the regulatory impact analysis took them into account, increasing the Agency's estimate of the quantifiable benefits of its regulation to $37 to $90 billion per year, *id.,* at 9306. EPA concedes that the regulatory impact analysis "played no role" in its appropriate-and-necessary finding. Brief for Federal Respondents 14.

The Court also noted:

Federal administrative agencies are required to engage in "reasoned decisionmaking." *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U. S. 359, 374 (1998) (internal quotation marks omitted). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Ibid.* It follows that agency action is lawful only if it rests "on a consideration of the relevant factors." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (internal quotation marks omitted).

The Court held:

Our reasoning so far establishes that it was unreasonable for EPA to read §7412(n)(1)(A) to mean that cost is irrelevant to the initial decision to regulate power plants. The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary. We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost.

fiduciary, plan participant or IRA owner. As with the prior attempted reconfigurations, however, the Department's proposal departs significantly from Congressional intent and the statute's text, abandons the touchstones of fiduciary status that have been in place for nearly 50 years, is inconsistent with the limits on Department's authority laid out by the Fifth Circuit in *Chamber of Commerce*[9] and untethers the definition of investment advice from the common law of trusts and the realities of the market.[10] The Department offers no empirical evidence of any harm or abuse. Nor does the Department even try to quantify the benefits of the proposed changes. This rulemaking does not pass muster.

The preamble argues that the breadth of the approach is necessary in order to avoid harmful conflicts and impose a best interest standard on those who deal with retirement plans. We disagree. Fiduciary advice is individualized advice from financial professionals who hold an established position of trust and confidence with the retirement investor with respect to the particular plan and advice at issue. Advice that does not meet the current five part test renders the statutory language in ERISA section 3(21) -- "to the extent" -- a nullity.[11] If all advice were covered, these words would have been unnecessary. And, as the Supreme Court held in *John Hancock Mutual Life Insurance v. Harris Trust & Savings Bank*, 510 U.S. 865, 96-97 (1993), these are words of limitation. The effect of the proposed regulatory change is to read these words out of the statute. The current regulatory definition achieves that result. The proposed amendments do not. The proposed amendments look at how these retirement investors have arranged for the investment of their other accounts, and what other businesses the financial institution might be involved in. It should not matter what the "regular business" of the financial professional is, or what the firm's or its affiliates' "regular business" is. These new proposed tests are no more cogent than the Department's last effort.

This proposal neither takes into account the changes that have occurred in the industry since the original proposal in 2010 (withdrawn by the Department after notice and comment on its own accord) nor the 2016 amendments (vacated by the Fifth Circuit in *Chamber of Commerce*). Nor does this proposal take into account the potential negative impact of the proposed rule on plans and their participants. [12] We are concerned that by significantly expanding the definition of "fiduciary", and using that expansive definition to leverage tightened requirements under an amended PTE 2020-02, the Department is inviting litigation that will invalidate not merely these new amendments but also the original PTE 2020-02, which, while imperfect, had gained a measure of acceptance within the industry.[13]

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[9] *Chamber of Commerce*, 885 F.3d 360.

[10] https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-chair-foxx-urge-dol-to-halt-further-fiduciary-rule-action

[11] ERISA section 3(21).

[12] See https://hispanicleadershipfund.org/new-research-shows-damaging-effect-of-fiduciary-rule-on-retirement-savings-and-wealth-gap/

[13] As the Department is aware, the limitations period has not expired for a challenge to PTE 2020-02.

The preamble states that the Department's approach is consistent with the SEC's Regulation Best Interest ("Reg BI"). It is not.[14] We urge the Department to reconsider the proposed regulation and the proposed amendments to class exemptions that will govern accounts subject to the rule.

I. The Proposed Rule is Too Broad and the Exemptions are Too Narrow

The changes proposed by the Department significantly broaden the definition of investment advice fiduciary. The accompanying proposed amendments to the exemptions limit the ability of the investment markets to continue to work effectively. More specifically, the proposed amendments to the exemptions force all investment advice fiduciaries into reliance on PTE 2020-02 and through that exemption, the Department inappropriately limits the investments available to retirement investors such as certain classes of investments sold on a principal basis and fully paid securities lending. It reserves to itself expansive authority to make financial professionals ineligible to use the exemption, effectively barring them from the industry and unable to provide fiduciary investment advisory services, and other services to retirement investors.[15] We disagree with the Department's approach, and fail to understand why the Department wants, or believes it is authorized under the statute, to limit choices of retirement investors and, without resort to a court and without meaningful due process, disqualify advisors from serving retirement investors.[16]

The ineligibility provisions in the proposed amendments to PTE 2020-02 give the Department authority to effectively bar an advisor from providing advice to retirement investors, through a process that is based either on the advisor's or an affiliate's criminal conviction (despite Congress' much sharper focus on the U.S. or state conviction of the fiduciary itself (and

[14] Reg BI does not limit the securities or other products that can be sold if a financial professional is acting in the client's best interest. Reg BI does not give the SEC the ability to deregister a broker for a series of missteps. See also *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022). Even the disclosure required under both regimes is inconsistent and will be confusing to retirement investors.

[15] The Department's regulatory and exemptive package, taken as a whole, violates the Supreme Court's major questions doctrine. Here, the Department would deploy an overbroad definition of "fiduciary" and its authority to reduce regulatory burdens as a means to exert new powers that Congress never gave it—the regulation of IRAs, of broker-dealers overseen by the SEC, and of insurance agents regulated by the States. There must be "clear" statutory authority for actions of such vast economic significance, yet the Department has no such authority at all. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (describing the Court's articulation of the major questions doctrine as a clear statement rule). The Department exceeds its statutory mandate in other ways as well. For example, Congress determined that a corporation convicted of certain crimes could be debarred from acting as a fiduciary to plans, but only if a court determined, at sentencing, that this debarment was appropriate. The Department has used its ability to issue trading exemptions to take on this authority for itself, without a court determination, and to apply it to all of a convicted entities' affiliate, and not just to the convicted entity itself, as Congress did in section 411. We note that there is no such debarment principle *at all* in the Internal Revenue Code.

[16] Exemptions were intended by Congress as relief for trading issues, not as blunt instrument in the Department's enforcement program. The Department claims that ineligible investment advice professionals can use other exemptions but it is quite clear that the five amended exemptions will make that continued service impossible.

not its affiliates and not under foreign law) in ERISA section 411), in a proceeding that lacks the due process commensurate with such an enormously consequential result.[17]

There is no evidence that Congress ceded this authority to the Department. Among the many practical problems it presents is the risk that an advisor with a conviction might not timely receive the individualized exemption the Proposal provides for, leaving retirement investors concerned and unsettled. Moreover, the relief is entirely within the Department's administrative discretion, subject only to the arbitrary and capricious standard, raising real due process concerns.[18]

We note that the proposed regulation states that the regulation and exemptions are severable. We strongly believe they are not. The Department's own analysis and justification of the Proposal rests on an assumption that the expanded definition of "fiduciary" will be accompanied by the supposed benefits of the proposed exemption. Moreover, no amendment to current exemptions is necessary if the proposed rule is invalidated. If the proposed rule is upheld, we continue to believe that the current exemptions are administrable and protective and should not be altered.

II. The New Definition of Investment Advice Fiduciary is Inconsistent with the Common Law Definition of Fiduciary

The Department has proposed to eliminate the tests for determining investment advice fiduciary status that have been hallmarks of the law since 1975:

- That the advice provider provides advice to the retirement investor on a regular basis;
- That the provider and the client *mutually agree* that the provider has been engaged to provide *individualized advice* which will be a *primary basis* for the client's decision-making.

This existing definition avoids the pitfalls that this new proposal presents:

- that a mere suggestion of what is on offer makes the provider a "trusted" advisor;[19]

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[17] See *Jaresky v. SEC*, 34 F. 4th 446.

[18] Congress gave no explicit authority to the Department to limit their exemptive relief in such a manner. The Department's track record on analogous exemptions is instructive. Under the QPAM exemption, some institutions received one-year exemptions followed by three-year exemptions. Others, for no particular reason, received one-year exemptions followed by 5-year exemptions. One entity received a ten-year exemption only to have it revoked entirely on its second crime. Others have received exemptions with more crimes. It would be hard to argue that this process is a model of consistency.

[19] This entire notion is completely divorced from the whole idea of a trusted relationship; the reason for the "regular basis" requirement is that, without it, the investment prong of the definition of fiduciary would be untethered to the common law of trusts. Making it worse, a fiduciary relationship under the proposed regulation can be created using a vague and unworkable test founded on "circumstances indicating that a recommendation is individualized" and "may be relied on", all of which can be delivered indirectly. As the 5th Circuit notes in concluding that the FOL lacked the authority to jettison the "regular basis" test, the DOL's 1975 regulation flowed directly from contemporary understanding of "investment advice for a fee," which contemplated an intimate relationship between

- that a provider becomes a fiduciary if an affiliated entity or another person operating through the same entity, has discretionary control over other assets of the plan *or* the sponsor/fiduciary of the plan;[20]
- that the provider becomes a fiduciary by representing or acknowledging that it is acting as a fiduciary when making investment recommendations in another context;
- that a broker-dealer compliant with Reg BI is *for that reason* also a "fiduciary" under ERISA and the Code.

These tests are overbroad and vague.[21] They go far beyond the Department's authority, as delineated by the U.S. Court of Appeals for the Fifth Circuit in *Chamber of Commerce*.[22]

Take, for example, a financial institution with both a retail broker-dealer affiliate and a trust company affiliate. The trust company makes pooled funds available to retail accounts and an investor invests his personal nonretirement assets in that pooled fund. Assume further that the

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adviser and client beyond ordinary buyer-seller interactions." As was the case with the now vacated 2016 attempt to broaden who is deemed to be an investment advice fiduciary, this new attempt "is at odds with that understanding."

[20] This prong of the proposed new test is particularly at odds with the statutory language that makes one a fiduciary to a particular plan if it has discretion and control over *that* plan, not to any other account.

[21] Indeed, in some respects, the Department has made the same drafting errors as in the 2016 rule. In that rule, the Department used the term "directly or indirectly (through or together with an affiliate). SIFMA noted at the time:

> Section (a)(2)(i) of the proposal provides:
>
> (2) Such person, either directly or indirectly (*e.g.*, through or together with any affiliate),-
>
> (i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to the advice described in paragraph (a)(1) of this section;
>
> This provision needs to be narrowed in two important ways. First, the language "directly or indirectly (*e.g.* through or together with an affiliate)" is too broad. A representation that a person is a fiduciary should be explicit and express and not just an inference. That statement should be made by that person. It is too important a concept, with too much potential liability, to infer such status through loose language or comments made by an affiliate. Nor do we understand what it means to say "through an affiliate". The definition of fiduciary is a functional test and one becomes a fiduciary because of one's recommendations, not because one's affiliate has made a recommendation. See Advisory Opinion 97-16:
>
> "You have assumed that ALIC, an affiliate under common control with ALIAC, is a fiduciary with respect to the Plans by virtue of exercising authority or control over Plan assets invested in separate accounts maintained by ALIC. There is nothing, however, in your submission to indicate that ALIAC is in a position to (or in fact does) exercise any authority or control over those assets. Accordingly it does not appear that ALIAC would be considered a fiduciary merely as a result of its affiliation with ALIC."
>
> In addition, SIFMA believes the language should be clarified to say "with respect to a particular account and a particular recommendation or series of recommendations". Unless that clarification is made, a representation that one is acting as a fiduciary with respect to particular advice given with respect to one account could automatically render the financial professional a fiduciary with respect to *all* accounts in a self-directed plan, regardless of whether individualized advice is given to more than one participant, or with respect to other plans of the same advice recipient plan sponsor, or several accounts of one individual, such as a person's individual account, his IRA, and his business accounts.

[22] *Chamber of Commerce*, 885 F.3d 360.

trust company or its broker-dealer affiliate[23] suggests various available treasury issues, equity IPOs, hedge funds or closed-end funds or mutual funds at a widely attended business meeting, at an investment club or in another group setting at which the investor is present. Under the proposal, it would appear that the broker-dealer might automatically be a fiduciary with respect to the investor's IRA, despite the fact that there is no agreement or understanding whatsoever that the investor will rely on the suggestions *at all* and certainly no individualized advice or communication directly with the retirement investor. This is an unacceptable result. Each prong of the test must require an individualized recommendation.

In addition, the Department should, at minimum, acknowledge and provide in the body of any final rule that when a financial institution agrees with a customer expressly, clearly, and in writing that it is providing brokerage services only, that agreement is determinative, regardless of whether any other assets of the investor are managed on a discretionary basis by that financial institution or one of its affiliates. Such a provision is essential to ensuring that the Department stays within the scope of authority conferred on it by Congress, and to avoiding unnecessary confusion, compliance expense, and loss of access to valuable brokerage services for investors.

As another example, under the Department's proposal, if a financial institution, in an advertisement on television, suggests that it wants to be the television audience's "trusted advisor," is that an acknowledgement or representation that makes every employee or agent of that investment firm a fiduciary when making a recommendation? If marketing materials provide that the financial institution acts in the best interest of its customers, is that an acknowledgement or representation that they are acting as a fiduciary with respect to every account of every investor who sees the material? These examples show the lack of clarity in the Department's proposal.

As another example involving institutional plan clients, the proposal appears to suggest that if a financial institution has discretion over a plan's assets in a particular strategy, it would be a fiduciary with respect to market color on broader investment strategy, if those conversations were deemed recommendations. This could occur even when there is no agreement or understanding that the plan fiduciary is seeking fiduciary advice from the financial institution on any other assets of the plan or with respect to such market color or broader investment strategy. In outsourcing and other similar kinds of arrangements, it is a common and valuable practice for plan fiduciaries to be able to receive information and discuss ideas on investment transactions or investment strategies without having the financial institution become an investment advice fiduciary subject to all the prohibitions that would result. These conversations are important: overall strategy and market color conversations allow plan committees and other fiduciaries to have a fuller context in which to make prudent investment and investment manager decisions. Under the proposed changes, these plans would lose access to information and offerings without an ability to agree that such information, even where provided by an institution acting as a section 3(38) investment manager, is not fiduciary in nature. These types of plans are represented by qualified fiduciaries who oversee millions, if not billions, in institutional assets

[23] The phrasing of the proposed rule is fraught with ambiguity. Is there a different result if the discretionary manager and the broker-dealer talking to a retail account are in the same corporate entity? If so, will this rule cause financial institutions to rearrange their corporate structure, solely to respond to this proposal?

and can distinguish between education and analyses versus advice being given in their best interest.

Still another example is the potential lack of proximity between the financial professional talking about trusted advice or making an investment recommendation and the financial professional with whom the retirement investor is dealing when he actually acts on the advice. Nor is there any time proximity requirement. Assume that financial professional A visits with a retirement investor in January 2025, and suggests an asset allocation and several mutual funds maintained and advised by the financial professional's employer, XYZ. The retirement investor takes no action on this advice, but a year later, the retirement investor directs financial professional B, also employed by XYZ to purchase those mutual funds for his IRA. The rule must require a time proximity and must focus on the same financial advisor, absent evidence of a scheme to intentionally circumvent the rule.[24]

These overbroad changes to the definition of investment advice fiduciary are not helpful and are not necessary.[25] Financial institutions have spent tens of millions of dollars to comply with two sets of withdrawn or vacated Department of Labor rules, NAIC rules, Reg BI, and these new proposed rules from the Department promise another set of required changes in offerings

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[24] This is a very difficult rule to operationalize. If the second financial professional did not know that the securities he is being directed to purchase had been recommended by another financial professional in what could be a large financial institution, they would see the direction as an unsolicited trade, and would not even know that they needed to rely on PTE 2020-02 for the transaction. See also https://www.sec.gov/tm/faq-regulation-best-interest:

Q: If an associated person from Firm A makes a recommendation to an existing retail customer who then executes the transaction with Firm B, does Regulation Best Interest apply to Firm A?

A: Yes. As discussed above, a retail customer has "used" a recommendation when the retail customer has an existing account with the broker-dealer and receives a recommendation from the broker-dealer, regardless of whether the broker-dealer receives or will receive compensation, directly or indirectly, as a result of that recommendation.

Regulation Best Interest applies at the time the broker-dealer makes the recommendation, and associated persons, when making a recommendation, should gather sufficient information that would enable them to comply with Regulation Best Interest at the time the recommendation is made. Firm A's recommendation must comply with Regulation Best Interest at the time it was made, even if the recommendation is ultimately not executed with Firm A by the retail customer. (Posted May 7, 2020)

Q: Does Regulation Best Interest apply to Firm B in this scenario?

A: Whether Regulation Best Interest applies to Firm B depends on whether Firm B made a recommendation to the retail customer. If the retail customer executes the transaction in a self-directed account, and Firm B has not recommended the transaction, Regulation Best Interest would not apply to Firm B. However, if the retail customer discusses the potential transaction with Firm B, Regulation Best Interest would apply if, based on the facts and circumstances of the particular communication, such communication rises to the level of a recommendation. (Posted May 7, 2020)

[25] The Department has suggested that the reason for the changes is to avoid regulatory arbitrage: that independent insurance agents should be subject to the same rules as broker-dealers. This explanation fails explain why the definition of fiduciary, and 6 exemptions need to be amended to achieve that purpose. In addition, the Department has not provided evidence or support for its position other than vague references.

and services to investors, systems, training, policies and procedures, all in an effort to try to comply with vague, overreaching rules.

SIFMA members do not believe that the 1975 rule needs changing but if it is to change, there needs to be, *for each prong of any new test*, the concept that the recommendation is **individualized** to a particular account, delivered to a retirement investor, who has reached **an agreement or understanding with the financial professional**, that the information provided is consistent with a relationship of **trust and confidence** and not a sales pitch or an institutional dealer and counterparty relationship. Any revision must avoid the proposed rule's coverage of non-individualized advice given by a sales person to a third party or independent fiduciary of a retirement investor, and not to the retirement investor. The current rule has preserved access to investment information and suggestions, while protecting retirement investors. The Department has provided no factual evidence for the need for these sweeping changes.

The proposed rule adds the following additional condition to the definition: "(iv) For purposes of this paragraph, when advice is directed to a plan or IRA fiduciary, the relevant retirement investor is both the plan or IRA and the fiduciary". The purpose of this condition is unclear; however, if it means that when a financial professional gives advice with respect to a particular account of an IRA owner, he will be deemed to be giving fiduciary advice to all of the accounts of the IRA owner, then we strongly oppose the proposed language. It is overbroad and beyond the Department's authority. It reads out of the statute the very critical words "to the extent". Congress specifically used the qualifying term "to the extent".[26]

We want to be certain that:

- Individual conversations related to brokerage accounts are not covered by the definition where both parties agree that non advisory services are what they intend. As noted above, no regulation will survive judicial scrutiny if it ignores the express disavowal of the parties regarding a fiduciary relationship.

- Institutional sellers of securities and commodities do not become fiduciaries by disseminating research, providing requested analytics, providing proxy voting material, responding to RFPs or other less formal requests.[27] The securities and commodities markets depend on the dissemination of research, analytics and other materials that are not intended as investment advice, and not "heard" by the investor as advice from a trusted advisor. The costs to plans of eliminating plans and their managers from distribution lists for this material would be enormous. Moreover, since managers will want to continue receiving this material for their nonplan clients, once they receive the

[26] As the Fifth Circuit said in interpreting these words: "*See John Hancock Mut. Life Ins. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 96–97, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993) (the words "to the extent" in ERISA are "words of limitation")." *Chamber of Commerce*, 885 F.3d at 371

[27] For example, a large defined benefit plan considering interest rate hedging might ask 3 or 4 dealers to propose a trade that would be responsive to the plan's expressed goals.

research, it would be nearly impossible to demonstrate that it was not "used" in connection with the management of retirement investors.

- The proposed regulatory language confirms that the recognition of the pre-existing CFTC and SEC rules, consistent with the Department's stated intent to avoid conflict with these requirements. We also want to be certain that a person will not fall within the scope of the proposed rule where they are acting pursuant to applicable CFTC and SEC safe harbors under 17 CFR § 23.440 and 240.15Fh-5, respectively.

- Institutional sellers do not become fiduciaries by calling on or otherwise engaging with investment managers regarding available securities or commodities. The dealer markets depend entirely on investors understanding what securities or commodities are available or being offered and their market price and other relevant features; plans would be at a severe disadvantage if they could not receive this information and investment managers managing both plan and nonplan accounts would be unable to prove that they did not "listen" to the information provided with respect to their plan clients.

- Self-directed brokerage accounts, which are by definition not fiduciary accounts, and other brokerage accounts where the parties have an express mutual understanding that the firm is merely taking orders are also not fiduciary accounts. Accordingly, retirement investors can purchase any investment they choose, including those investments sold on a principal basis which are not permitted under PTE 2020-02, including asset backed trusts, foreign equity securities, currency, foreign corporate bonds, foreign government bonds, Rule 144A securities, privately issued real estate securities, closed-end funds, equity IPOs, debt IPOs, assuming appropriate documentation and a mutual understanding that the advisor is not providing fiduciary advice.[28]

- Mere suggestions, indications of what securities and other products are offered, and other market information are not a recommendation.

III. Information and Education Regarding Distributions and Transfers Is Not Fiduciary Advice

The proposed regulation defines investment recommendation to include distribution advice including:
(i) As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, **or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA**

[28] We do not understand why the Department would prefer these investments to be sold outside the fiduciary context and the Department has not provided any rationale for deviating from its practice of neither encouraging or disfavoring any particular investment.

We continue to believe that advice given to a plan participant to rollover assets is not investment advice,[29] but even if it were, to the extent that the advice is focused on how those proceeds should be invested in a plan or account not subject to Title I of ERISA, the Middle District of Florida has already ruled that such advice is not covered under Title I of ERISA.[30] The Department seems to use this decision as a justification for the proposed rule, but the court was acknowledging the obvious: advice with respect to a yet to be established non-title I plan is not advice under Title I.[31] We note that the same reasoning applies to two distinct Title II covered plans: rollover or transfer advice given to the first IRA may be distribution advice, but advice about how to invest those proceeds if the retirement investor opens another IRA is not advice to the first IRA. To the extent that the Department means to connect the two in section (c)(1)(iv) of the proposed rule, under Section 3(21(A) of ERISA "a person is a fiduciary with respect to a plan to the extent . . . he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan (not to all or an investor's accounts that may exist now or in the future). Both Title I and Title II of ERISA are plan-by-plan regimes: advice given to a fiduciary of a Fortune 100 company plan is not advice given to his individual IRA. Imprecision with respect to the term "retirement investor" cannot enhance the coverage of the statutory definition. That is beyond the Department's authority.

Put differently, if a financial professional and their client agree expressly, clearly and in writing that any advice to be given will concern how to dispose of assets once removed from a Title I plan, and that no advice will be given regarding whether to remove the assets from that plan – and if the advice given is in fact so limited – the Department has no authority to contend nonetheless that the professional advised on a matter that the professional and their client expressly agreed was outside the scope of their relationship. The Department should acknowledge this limitation on its authority and include a clear proviso respecting the ability of a retirement investor and a financial professional to define their relationship in this way.[32]

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[29] We note that the Department itself took the same position in DOL Advisory Opinion 2005-23A (the "Deseret Letter") prior to withdrawing the Desert Letter in the preamble to PTE 2020-02.

[30] *ASA v. U.S. Dep't of Labor,* No. 8:22–cv–330-VMC–CPT, 2023 WL 1967573, at *14-*19 (M.D. Fla. Feb. 13, 2023).

[31] Further, the court held that, ''[b]efore a rollover occurs, a professional who gives rollover advice does so with respect to an ERISA governed plan. However, after the rollover, any future advice will be with respect to a new non-ERISA plan, such as an IRA that contains new assets from the rollover. The professional's one-time rollover advice is thus the last advice that he or she makes to the specific plan.'' *Id.* at *17.

[32] We do not agree with the Department's continued insistence that that there is no difference between sales conversations and advice. As we noted in 2015:

Recent research suggests consumers can distinguish between a sales call and fiduciary advice. People don't trust sales calls or other unsolicited advice. See, e.g., "Trust and Financial Advice," J. Burke and A. Hung, RAND Labor and Population Working Paper, WR-1075 (Jan. 2015), at 1. ("...we find that financial trust is correlated with advice usage and likelihood of seeking advisory services. Analysis of the experiment shows that trust is an important predictor of who chooses to receive advice, even after controlling for demographic characteristics and financial literacy. However, providing unsolicited advice has little impact on behavior, even for individuals with high levels of trust." This finding underscores SIFMA's view that unsolicited advice – sales conversations – should not be deemed fiduciary advice.

IV. The Preamble is Not a Substitute for the Law

In the preamble to the proposal, the Department has included language that appears intended to provide clarity on issues that created difficulties in 2016, including proxy voting[33], recommendations of people who are not in the investment business[34], the continued ability of retirement investors to specifically agree with the financial professional that an account is *not* a fiduciary account,[35] wholesaling[36], platform providers[37], and swap dealers[38]. On all of these issues, however, the appropriate clarification belongs in the regulation, and not in the preamble. The Department has changed its interpretation of fiduciary advice and other core concepts in preambles many times in the past; these issues are too important to leave to future informal clarifications such as FAQ's that are issued without full notice and comment. If the Department does not abandon this rulemaking in its entirety, it should at the very least withdraw the proposal and reissue a new proposed rule, with appropriate exemptions, that address these important issues in the regulatory text.

The Department must include in the regulation's text exceptions to make clear that the regulation does not apply to a variety of areas which are left within the overly broad definition of fiduciary (i.e., by changing the regulatory text to explicitly carve out the following from the definition of fiduciary advice): the creation of model portfolios sold to broker-dealers and registered investment advisors by investment managers; market information provided during execution by brokers, clearing brokers, futures merchants, prime brokerage services, exchanges, alternative trading systems, electronic communication networks, and custody services; information asset managers provide to retirement plan fiduciaries regarding a decision to invest in a fund; information regarding the different kinds of roboadvisors; and responses by investment managers to questions in requests for proposals or other inquiries for discretionary management. These areas were pointed out repeatedly to the Department in the public hearing; once the transcript is received, we will supplement this comment to the extent necessary. Furthermore, as SIFMA noted in 2015, making a referral should not result in fiduciary status.

SIFMA 2015 Comment, footnote 20. And of course, the Fifth Circuit in *Chamber of Commerce* itself rejected the Department's claim that no genuine distinction could be drawn between sales and advice – particularly advice given for a fee.

[33] 88 FR 75906

[34] 88 FR 75902

[35] 88 FR 759093; see also 88 FR 759110-11:

> The regulation's scope remains limited to advice relationships, as delineated in its text, and does not cover transactions that are executed pursuant to specific direction in which no advice is provided.

[36] 88 FR 75907

[37] 88 FR 75907-8

[38] 88 FR 75908

> Many financial institutions have programs that provide compensation to professionals (*e.g.*, lawyers or accountants) for referrals (as regulated by SEC Rule 206(4)-3). Under these programs, an estate planning lawyer might refer their client to a financial institution for investment services or advice relating to their IRA and other non-retirement assets. Under the proposal, such referrals would likely be considered fiduciary advice because they could be construed to be a recommendation of an investment adviser or manager. Yet the referral would not be subject to the counterparty carve-out because IRAs are not included. These referral programs are beneficial to consumers. Furthermore, these programs are already regulated by the SEC, which requires extensive conflict disclosures to the consumer.[39]

Respectfully, moreover, the Department simply errs in stating that making a referral is "no different than recommendations of investments." 88 Fed. Reg. at 75905/3. There is a critical difference: one is "investment advice" within the meaning of the statutory language when other criteria are met, whereas the other is just a referral.[40] Again, to allow meaningful comment and adequately consider these issues, the Department should withdraw and reissue the proposal with new proposed regulatory text and an appropriate and complete regulatory impact analysis that address these issues.

We note again that the proposed rule defining "fiduciary" and the six exemptions proposed to be amended are one package, inseparable, through which the Department casts a wide net regarding who will be deemed a fiduciary and then exercises its potentially capricious exemptive power to limit plan investment[41] and make financial institutions ineligible to effectively provide investment advice to retirement investors.[42] The Department lacks the

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[39] SEC Rule 206(4)-3 was amended in 2020; https://www.sec.gov/files/rules/final/2020/ia-5653.pdf

[40] We are concerned that the rule will have unintended consequences. For example, trusts and estates lawyers and accountants often recommend financial professionals to their clients so that at the same time as their wills are being created, their financial affairs can be reviewed to determine whether they are consistent with those testamentary wishes. This "advice" or recommendation appears to be captured by this rule, even though we doubt that this is the Department's intention. Presumably, the Department is not intending to sweep into this regulatory construct personal recommendations of lawyers and accountants. A clarification would be helpful.

[41] While we discuss exemption issues in more detail in our comments later in this letter on the proposed changes to PTE 2020-02, we are also concerned at the Department's apparent strategy here: require all advisors to use a single class exemption, and then limit that class exemption to investments acceptable to the Department. The Department's cost analysis fails to analyze the access to investments that will be lost by retirement investors. No such limitations exist in Reg BI, where the SEC is responsible for determining whether retail investors can access particular markets. Reg BI contains both a best interest standard of care, and access to a full panoply of investment choices.

[42] While this unauthorized power to bar advisors from providing advice by crippling their exemptive relief will be discussed later in this letter, the Department's conditioning of relief on the absence of foreign criminal convictions is not likely to withstand judicial scrutiny. See Appendices IV, V and VI to this comment, which include SIFMA's request for an advisory opinion that an analogous exemption cannot disqualify an investment manager due to its, or an affiliate's conviction of a crime in a foreign jurisdiction, the Department's response to the request, concurring in our respects with SIFMA, and the Department's withdrawal of the opinion early in the new Administration.

statutory authority to prescribe the products that may or may not be offered to IRA holders, for example[43] and we continue to believe that the interests of retirement investors would be better served if the exemption did not limit the investments that fiduciary advisors may sell on a principal basis under PTE 2020-02. At the least, however, the cost analysis must cover the cost of retirement investors being unable to purchase these investments and the effect on the market for these securities.

We do not believe that Congress intended the Department to depart so dramatically from the statute, and to keep for itself the ability to bar advisors from the retirement market by making them ineligible to use basic trading exemptions. In attempting to justify the new rules, the Department suggests that it is simply trying to harmonize ERISA's regulation of investment advice with SEC rules on a best interest standard. While SIFMA's members comply with the SEC's Reg BI standard, and believe it is a strong standard, this proposal is inconsistent with many aspects of Reg BI.[44] These inconsistencies will almost certainly create turmoil in both the retail and dealer markets and they are a notable legal vulnerability for the Department. A rule that purports to harmonize must do so, and yet:

- Nothing in Reg BI covers recommendations that are not individualized to the client. But under this proposed rule, casual suggestions to large groups can constitute fiduciary advice if other assets are managed by an affiliate. The Department must make explicit that neither statements in marketing materials or marketing in public media is an acknowledgement of fiduciary status.

- Reg BI's best interest standard applies when making an individualized recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer. But in this proposal, if other accounts of the retirement investor are managed on a discretionary basis by the financial professional or an affiliate, a non-individualized recommendation can be subject to the fiduciary rule. We think this is the wrong approach. All recommendations must be individualized to constitute fiduciary advice.

In short, rather than appropriately implementing current law, and in the face of Court of Appeals caution to the contrary, the Department once again is trying to change the law. Indeed, many of the changes proposed in 2023 are more troublesome than those proposed in 2010 and 2016. They will not withstand judicial scrutiny.

We believe the proposed amendments will hurt investors, limit the offerings in fiduciary accounts, and require retirement investors to open self-directed brokerage accounts in addition to their advisory account, solely to access the range of investments that they have today. Moreover,

[43] The Department should make clear that all investment choices will be able to be purchased in retirement investors' self-directed brokerage accounts, and that retirement investors can explicitly agree with their financial professionals that a nonadvisory self-directed brokerage account can continue to be maintained.

[44] The SEC did a large amount of investor testing to determine the optimum disclosure; the Department's proposed disclosure requirements vary significantly from that required by Reg BI, requiring additional compensation disclosure allocated to each transaction, which no other regulator has required.

many financial institutions will offer only advised accounts, as many did in 2016. Once again, retirement investors will be told that their access to the markets must change because of these new rules. This kind of regulatory inconsistency does not motivate retirement investors to save. It makes that goal harder to achieve, not easier.[45]

VI. Institutional Clients Will Lose Valuable Market Information

The proposed rule has no seller's exception, no sophisticated investor test, and no institutional sales test. The Department's spokespeople have said that the absence of these exceptions is to accommodate the reasoning of the Fifth Circuit Court of Appeals in *Chamber of Commerce*, i.e., that the Court's conclusion that the regulation was overbroad was buttressed by the fact that it required so many exceptions.[46] This does not change the rule's overbreadth, and it is not an adequate reason for sacrificing clarity and certainty. Indeed, such an approach puts the Department in the legally vulnerable position of adopting an overbroad rule while taking no steps to rectify its obvious overbreadth.

In the institutional markets, sophisticated investors, registered investment advisors and ERISA section 3(38) managers look to counterparties for market color, new issues, market availability and pricing, liquidity and issuer background. Under the Department's proposal, all of this background could be deemed fiduciary advice. That result is unworkable. Market information, research and other analytics are provided to investment managers for all of their clients and to chief investment officers (CIOs) or client committees who look after multiple pools of assets. These managers, CIOs and client committees cannot "unhear" the information with respect to their retirement clients or retirement pools. It is not fiduciary advice for either category of client or pool. The markets would be far less efficient if investment managers, CIOs and client committees were required to refuse to accept this market information for fear of not being able to trade with the dealer who provides it because of this expansion of the definition of fiduciary.

A seller's exception for institutional accounts is critical. We feel certain that the Department did not intend to extend fiduciary responsibilities to these interactions. In addition, this result is inconsistent with Reg BI which does not cover institutional clients.[47] And, it is inconsistent with market practice. Since investment managers manage many kinds of institutional assets, it would be impossible to limit dissemination of this information so as to avoid retirement accounts. Nor should retirement accounts be second class citizens in the marketplace.

Similarly, it appears that a financial institution that manages plan assets of an institutional plan client as a section 3(38) investment manager could not provide information and analyses

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[45] We support the Department's decision not to tackle the very difficult area of valuation and appraisal. We also support the Department's decision not to redefine investment education under Interpretative Bulletin 96-1.

[46] Remarks of Deputy Assistant Secretary Hauser, Practicing Law Institute, Pension Plan Investments 2023: Advanced Perspectives; November 14, 2023; available at https://www.pli.edu/programs/pension-plan-investments.

[47] Under Reg BI, institutional clients do not include personal trusts.

relating to topics such as strategic asset allocation, liability driven investing or other investment strategies without triggering fiduciary status.[48] It is a common and valuable practice for plan fiduciaries to be able to receive information and discuss ideas on investment transactions or investment strategies from plan managers without having the manager become an investment advice fiduciary subject to all the prohibitions that would result. Institutional plan clients also benefit from receiving information from their managers on other products and offerings that may be of interest to them. If that manager has discretion over plan assets, that information would be fiduciary advice, which is an unworkable result. This is especially unnecessary given the nature of these institutional plan clients who are overseeing large portfolios and talking to many managers about these topics.

VII. **Small Businesses and IRAs Will Lose Valuable Options if Platform Providers are Deemed to be Fiduciaries**

The preamble suggests that the rule does not encompass platform providers who maintain an inventory of available funds from which retirement investors can choose or from which plan sponsors or other fiduciaries create a menu for their plans, with educational assistance from the provider. The preamble suggests this would not be considered under the proposal to be making a recommendation. However, the proposed rule itself provides no comfort whatsoever in this regard. There should be a clear exception for platform providers, both with respect to their menus and their call centers.[49] The exception must apply to all plans, and all participants.

Platform providers are not in the business of providing individualized advice to investors. Assistance in narrowing platforms is helpful to retirement investors, especially where they

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[48] Consistent with the reasoning of the Fifth Circuit Court of Appeals in *Chamber of Commerce*, the definition of investment advice should exclude interactions with sophisticated counterparties and potential clients. The condition of a "mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that [] the advice will serve as a primary basis for investment decisions with respect to plan assets" should be retained. In any event, there should at least be an explicit exception for information provided to financial institutions acting as ERISA section 3(21) fiduciaries or other sophisticated fiduciaries.

[49] As SIFMA noted in its 2015 comment:

7. Platform Providers

SIFMA seeks three clarifications with respect to this carve-out. The first, as noted above, would make this exception applicable to all accounts, including plan participants and IRAs. It is a serious omission, and not at all in the interest of IRAs, to preclude a mutual fund complex or broker-dealer or other financial institution from narrowing the offerings available to IRAs so as to make the choices more manageable for the investor, without recommending particular options from the remaining list of funds. There are more than eight thousand mutual funds and ETFs available in the market; it is unfair and burdensome to tell IRA owners that they are on their own. See ICI April 2015. The Department's sincere effort to protect IRAs may well be leading to their abandonment in the financial markets. In addition, if IRA and self-directed brokerage account platforms are not included in the carve-out, it could be impossible for financial institutions to avoid fiduciary status for IRAs and self-directed brokerage accounts even if they offer a nonfiduciary "self-directed/execution only" IRA accounts (i.e., if any limits are placed on the available universe of investment options, a platform may be created). SIFMA members do not think that such a path is good policy or in the interest of American retirement investors. Second, the carve-out should apply to the marketing and provision of brokerage window services and factual information provided to participants through such brokerage windows. Third, the carve-out should explicitly apply to call centers. So long as the information provided to plan participants and IRA owners does not vary from caller to caller, there is no reason why the Department would want to make call centers useless to participants and IRAs.

provide clarity on share classes and are grouped in easy to understand and comparable subclasses. The Department will have done a disservice to retirement investors if the platform providers are effectively forced to offer plans a roster of investment options that is so broad as to include any and all publicly traded funds. Such a result will paralyze, not facilitate, retirement investing. The platform provider exception should apply to the marketing and provision of brokerage window services and factual information provided to participants through such brokerage windows. In particular, smaller retirement plans look to the ease and responsiveness of the potential relationship with the platform provider, the platform's security, ease of use, and flexibility and other non-monetary factors to select financial providers.

The exception for platform providers should also explicitly apply to call centers. So long as the information provided to plan participants and IRA owners is educational, there is no reason for the Department to diminish the usefulness of call centers to participants and IRAs. Finally, we assume the Department would want, and we concur with the concept, prominent disclosure on the website for the investment menu that the provider is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

VIII. The Proposed Regulation Fails to Exclude Model Portfolios, Wholesaling Activities and Settlor Functions

Many broker-dealers and registered investment advisors provide small plans or IRAs with a managed account strategy, using models created by well-known and well regarded investment managers in the asset class. Under the proposal, the model provider would be a fiduciary if it represented it is a fiduciary in any context or if it were managing any other assets of the retirement investor. That result is undesirable for retirement investors. These models are provided for any client of the broker-dealer or registered investment advisor, and are not limited to retirement accounts. They are not constructed with any particular investor in mind and are not individualized in any way. The model provider has no relationship with the underlying client and likely does not know, or have any contractual agreement with, the underlying client. The rule itself (and not merely the preamble) needs to make clear that the provision of these models is not fiduciary advice.

A common practice in the investment space is for broker-dealers to provide educational forums for their financial professionals, inviting various product manufacturer investment professionals to give seminars on current economic issues, market color, and investment issues unique to particular global markets or industries. Any product information, suggestions or recommendations are provided only to the broker-dealer and are not individualized to any client. These meetings and seminars are part of a broker-dealer's educational program for its employees and the meetings keep the financial professionals up to date and well educated. The fact that such activities are swept within the rule demonstrates the overbreadth of the new proposed "fiduciary" definition. These wholesaling activities are not fiduciary advice to a retirement investor.

An intermediary that may be acting as a plan fiduciary should be able to receive sales suggestions from wholesalers and platform providers to better inform their own recommendations to the plan administrator/fiduciary (the plan). They receive this information

for all of their clients; it is simply not operationally possible for an advisor to "unhear" these suggestions with respect to their retirement clients. The information includes RFPs, information on plan- and participant-level advisory services, and sample fund menus. Even if such information is ultimately reviewed by the plan sponsor/committee or IRA owner, if it was not specifically prepared for that client, it should not be fiduciary advice.

Financial professionals often provide small businesses with information regarding plan type, potential plan service providers like lawyers or accountants or actuaries, or providers of off-the-shelf tax qualified plans, benefit structures, governance information and other settlor functions. Settlor information is not investment advice. This information is generally the support that allows a small employer who believes that it is simply beyond their abilities to establish or maintain a plan; if such information is no longer made available for fear of it being deemed fiduciary activity, in the end, uncovered participants will be the ones who suffer.[50]

IX. The Proposed Regulation Flies in the Face of the Fifth Circuit's Holding that "Hire Me" Conversations Are Not Fiduciary Advice

The Department's proposal fails to recognize the realities of a retirement investor choosing to hire a particular professional. Every investor, including retirement investors, ought to be asking for the professional's best ideas. At that point in time, they have no relationship, let alone one of trust and confidence. They are merely engaging in prudent due diligence, which the Department ordinarily wants to encourage. Generalized "good ideas" and "interesting strategies" before a client has hired a financial professional should not be deemed fiduciary advice.

While we appreciate the preamble language that states that financial professionals are not fiduciaries when recommending their own services, the Department must include within the text of the regulation a clear carve-out for "hire-me" recommendations. The idea that such recommendations were covered by adding the word "other" in the phrase "recommendations …selection of other persons to provide investment advice or investment management services" is not sufficient. The Department needs to explain how a financial professional can recommend their services without triggering its prohibition on making recommendations as to how to invest assets after they have been rolled over from the Plan or IRA. For example, if the financial professional limits their conversation to a discussion of the pros and cons of leaving money in an employer sponsored retirement plan vs. an IRA rollover and the plan participant decides to rollover, the regulation must clearly permit the financial professional to recommend specific products and services to invest in.

In addition, the proposed regulation and its preamble fail to recognize market realities in connection with RFPs issued by plans to discretionary managers and other service providers. Plans typically ask for specific investment ideas in the RFPs. Under the proposed regulation, it seems that a financial institution could be deemed a fiduciary merely by responding to questions and providing information about their services. The risk is notably higher if the manager has

[50] We note that the Department's cost analysis fails to analyze the adverse effect on plan formation by small business if these amendments are adopted as well as the effect on retirement security for employees of those businesses.

discretion over any of the retirement investor's assets. We are concerned that if this activity is considered to render an RFP respondent a fiduciary, then no investment manager or other service provider seeking new business will respond with specificity out of concern that they would be taking on fiduciary risk by promoting its investment acumen.

The Department's request for comment on titles

We note that the Department asks for comments on: "the extent to which particular titles are commonly perceived to convey that the investment professional is providing individualized recommendations that may be relied upon as a basis for investment decisions in a retirement investor's best interest (and if not, why such titles are used). The Department also requests comment on whether other types of conduct, communication, representation, and terms of engagement of investment advice providers should merit similar treatment." We do not believe that titles or any other types of conduct, communication or representation should, in and of itself, be determinative of whether an individual meets the definition of fiduciary. Indeed, that is just the point: there is no easy word or phrase or title or type of communication that makes one a fiduciary. What matters is the course of conduct, based on the relationship with the client, taken as a whole.

Moreover, the statute provides that one is a fiduciary "to the extent" that it meets the statutory test; it is entirely inconsistent with the statute to proclaim that regardless of whether one meets the statutory test, his or her title is determinative. Since the preamble itself acknowledges the functional fiduciary test, we cannot understand how the Department can consider the use of particular titles or any other types of conduct are in keeping with the statutory requirement. In addition, the SEC has already well addressed this issue, and we urge the Department not to issue a competing or inconsistent rule.[51]

X. The Exception for Price and Date Discretion is Inconsistent with the Securities Laws

Subsection (d) of the proposed rule is inconsistent with FINRA's rules, and fails to take into account any markets other than the agency equity market. As SIFMA requested in 2015, this language needs to be modernized to take into account changes in the marketplace, particularly because "modernization" seems to be one of the Department's principal justification for changing the rule in all other respects. As we said in 2015:

> SIFMA urges the Department to modernize the safe harbor in 2510.3-21(d). The entire basis of the Department's new rule is that times have changed and the rule needs to take into consideration the effects of current plan and market conditions. That being said, the safe harbor should permit trade orders to be given to foreign broker-dealers who are registered under broker-dealer laws in their countries. In addition, it should cover transactions in fixed income securities, options, and currency that are not executed on an agency basis. This regulation is not simply about participant directed plans: it covers

[51] See https://www.sec.gov/tm/faq-regulation-best-interest.

plans of all sizes and types, and this subsection, which is intended to make sure that limited timing or trade venue decisions does not make one into a fiduciary, needs to cover any market broker or dealer, and not just those in the United States.

Accordingly, we suggest the following clarification:
(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, ***or a bank or broker-dealer covered under the laws of a foreign jurisdiction***, 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 ***or currency on behalf of such plan or involving 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:
(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and
(ii) The instructions specify:
(A) The security ***or currency*** to be purchased or sold;
(B) A price range within which such security *or currency* is to be purchased or sold, ***or that the security or currency is to be executed at the current market price,*** 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 CFR270.22c1);
(C) A time span during which such security ***or currency*** may be purchased or sold (not to exceed five business days); and
(D) The minimum or maximum quantity of such security ***or currency*** 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. (changes in italics and bold)

XI. The Truncated Comment Period and Timing of Hearing Will Predictably Discourage Comprehensive Comment

As the Department is aware, SIFMA was one of the 18 trade groups that asked the Department for a delay in the due date for comments on this voluminous proposal, especially considering that it took the Department 4 years to propose it, and the 60 days provided for comment include the Thanksgiving weekend, the Christmas weekend, and the New Year's weekend and the week in-between. The trade groups also sought a hearing after the comment period had closed, so that witnesses at the hearing could respond to other commenters. We know

of no other case in which EBSA has ever imbedded a public hearing in the middle of the comment period. The refusal to provide an extension could be an effort to make it impossible for commenters to provide their best, most probing comments, or an attempt to complete the Department's review within the potential deadline of a Congressional Review Act challenge. Or it could signal that the Department did not intend to pay attention to comments or testimony because the outcome is predetermined.

We urge the Department to reconsider. It is not the public's fault that the Department waited until the 34th month of this Administration to propose far-reaching new rules.[52] And, for the record, and to be clear: The brief comment period has made it impossible for SIFMA, on behalf of its members, to comment fully on this immensely consequential package of proposals.

XII. Implementing Changes by the Effective Date is Not Possible

The proposal notes that it will be effective 60 days after publication in the Federal Register. As the Department well knows, this 2 month period is inadequate to change existing agreements, create or change policies and procedures, create or change and conduct training, enhance current systems to ensure robust compliance, and amend all counterparty agreements for swaps and other derivatives. Especially in light of the failure to include an explicit exclusion for swap counterparties, every single ISDA and trading agreement will need to be amended to make sure that the parties have a clear and contractual meeting of the minds on the fact that their communications are not fiduciary advice to the extent this is even possible under the language of the proposed amendments to the rule. Negotiation of these documents generally takes weeks if not months, and in a recent CFTC rulemaking, in recognition of the time and complexity of these renegotiations, the CFTC gave the markets three years to come into compliance with the rule.

For those financial institutions not using PTE 2020-02 or using it only for certain aspects of their business, putting in place all of the requirements of that class exemption will take months. At the very least, even institutions currently using PTE 2020-02 will have to provide written information under that exemption to every single retirement client.[53] As the Department knows, it gave a full year of nonenforcement when PTE 2020-02 was granted in December 2020.[54]

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[52] https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409759#:~:text=WASHINGTON%20%E2%80%93%20Today%2C%20Education%20and%20the,comment%20period%20closes%20on%20its; "*Stakeholders in the retirement community are expressing concerns that EBSA does not intend to consider fully the filed comments and that the agency has already determined a course of action. … It appears that EBSA designed the comment period to prevent fulsome interaction with the community that would be charged with implementing its disastrous proposal.*"

[53] The additional burdens on current users of PTE 2020-02 are discussed in more detail in SIFMA's comments on the amendments to that class exemption.

[54] "The Department further announces that FAB 2018–02 will remain in effect until December 20, 2021. This will provide a transition period for parties to develop mechanisms to comply with the provisions in the new exemption. See 85 FR 82799."

These rules, if finalized, should be implemented as smoothly and effectively as possible. A 60-day effective period will not accomplish that goal.[55]

XIII. The Department has not adequately shown why the proposed regulatory and exemptive package is needed and its cost analysis is flawed

The Department has suggested that the proposed rules are rooted in a concern for "junk fees". It has also suggested that the reason for the changes is to avoid regulatory arbitrage: that independent insurance agents should be subject to the same rules as broker-dealers. It speaks vaguely to gaps but then claims that it is aligned with Reg BI and state insurance rules that impose a best interest standard.

This explanation fails to explain why the definition of fiduciary and six exemptions need to be amended to achieve that purpose. None of these reasons warrant the breadth of the regulatory package and the disruption that it will cause in the industry, and with respect to plans, IRAs, the securities and commodities markets, and access to investment products. Comments on the Department's Regulatory Analysis are found in Attachment I.

XIV. Flaws of the Proposed Rule under the Fifth Circuit Court of Appeals Decision in *Chamber of Commerce*

The Department's last effort to amend this regulation ended in the Fifth Circuit's *Chamber of Commerce* vacating the entire rule and all of the new class exemptions and amendments to the existing exemptions. This judicial result capped two years of massive investment by financial institutions to try to comply with the rules. In that effort, tens of millions of IRAs were either required to find new financial institutions by their existing financial institution or offered only advisory accounts. Small accounts had their services terminated altogether. We are extremely concerned that the same result will obtain with this version, to the disadvantage of retirement investors, financial institutions and the markets in general.

In 2016, the Department eliminated the three central tests of fiduciary status: advice is provided on a **regular basis**, based on a **mutual understanding** that the advice would be a **primary basis** on which the retirement investor decided how to proceed. The Fifth Circuit's view of that course was emphatically negative.

> For the past forty years, DOL has considered the hallmarks of an "investment advice" fiduciary's business to be its "regular" work on behalf of a client and the client's reliance on that advice as the "primary basis" for her investment decisions. 29 C.F.R. § 2510.3-21(c)(1) (2015) The text, structure, and the overall statutory scheme are among the pertinent "traditional tools of statutory construction." See *Chevron,* 467 U.S. at 843 n.9.[56]

[55] A Department of Labor enforcement policy will not address excise taxes and other penalties under the Code.

[56] *Chamber of Commerce*, 885 F.3d at 369.

> We conclude that DOL's interpretation of an "investment advice fiduciary" relies too narrowly on a purely semantic construction of one isolated provision and wrongly presupposes that the provision is inherently ambiguous. Properly construed, the statutory text is not ambiguous. Ambiguity, to the contrary, "is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Moreover, all relevant sources indicate that Congress codified the touchstone of common law fiduciary status—the parties' underlying relationship of trust and confidence—and nothing in the statute "requires" departing from the touchstone.[57]

Not only did the Court find that the Department's redefinition of "investment advice fiduciary" had departed from the requisite relationship of trust and confidence, it also held that the Department lacked the authority to go beyond Congressional intent, regardless of how the world has changed since 1975.

> Expanding the scope of DOL regulation in vast and novel ways is valid only if it is authorized by ERISA Titles I and II. A regulator's authority is constrained by the authority that Congress delegated it by statute. Where the text and structure of a statute unambiguously foreclose an agency's statutory interpretation, the intent of Congress is clear, and "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43. To decide whether the statute is sufficiently capacious to include the Fiduciary Rule, we rely on the conventional standards of statutory interpretation and authoritative Supreme Court decisions.[58]
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> The common law understanding of fiduciary status is not only the proper starting point in this analysis, but is as specific as it is venerable. Fiduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and client. "The concept of fiduciary responsibility dates back to fiducia of Roman law," and "[t]he entire concept was founded on concepts of sanctity, trust, confidence, honesty, fidelity, and integrity." George M. Turner, *Revocable Trusts* § 3:2 (Sept. 2016 Update). Indeed, "[t]he development of the term in legal history under the Common Law suggested a situation wherein a person assumed the character of a trustee, or an analogous relationship, where there was an underlying confidence involved that required scrupulous fidelity and honesty." *Id*. Another treatise addresses relationships "which require trust and confidence," and explains that "[e]quity has always taken an active interest in fostering and protecting these intimate relationships which it calls 'fiduciary.'" GEORGE G. BOGERT, ET AL., TRUSTS & TRUSTEES § 481 (2017 Update). Yet another treatise describes fiduciaries as "individuals or corporations who appear to accept, expressly or impliedly, an obligation to act in a position of trust or confidence for the benefit of

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[57] *Chamber of Commerce*, 885 F.3d at 369.

[58] *Chamber of Commerce*, 885 F.3d at 369.

another or who have accepted a status or relationship understood to entail such an obligation, generating the beneficiary's justifiable expectations of loyalty." 3 DAN B. DOBBS, ET AL., THE LAW OF TORTS § 697 (2d ed. June 2017 Update). Notably, DOL does not dispute that a relationship of trust and confidence is the *sine qua non* of fiduciary status.[59]

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In short, whether one looks at DOL's original regulation, the SEC, federal and state legislation governing investment adviser fiduciary status vis- à-vis broker-dealers, or case law tying investment advice for a fee to ongoing relationships between adviser and client, the answer is the same: "investment advice for a fee" was widely interpreted hand in hand with the relationship of trust and confidence that characterizes fiduciary status.

DOL's invocation of two dictionary definitions of "investment" and "advice" pales in comparison to this historical evidence. That DOL contradicts its own longstanding, contemporary interpretation of an "investment advice fiduciary" and cannot point to a single contemporary source that interprets the term to include stockbrokers and insurance agents indicates that the Rule is far afield from its enabling legislation. DOL admits as much in conceding that the new Rule would "sweep in some relationships" that "the Department does not believe Congress intended to cover as fiduciary."

Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Assn's, Inc.*, 531 U.S. 457, 468 (2001). Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so. This is particularly true where such abrogation portends consequences that "are undeniably significant." Accordingly, the Fiduciary Rule's interpretation of "investment advice fiduciary" fatally conflicts with the statutory text and contemporary understandings. [60]

We believe the result here will be the same if significant changes are not made, including those discussed herein. This regulation will suffer the same fate as the 2016 version if recommendations are not required to be individualized, if they can be made to faceless listeners on a podcast and not directly to the retirement investor, if fiduciary status depends not on a relationship of trust and confidence with a particular retirement investor but instead on being in the business of giving advice to others, or if fiduciary status with respect to a particular retirement investor attaches if anyone in the entire affiliated group of companies has discretionary authority over any assets of the retirement investor. So too, will that result obtain if any sales pitch to a potential client is enough, or if advising that a rollover is an option that might

[59] *Chamber of Commerce*, 885 F.3d at 370-371.

[60] *Chamber of Commerce*, 885 F.3d at 376.

be considered, or broad outlines of the products available at the broker-dealer if a rollover were to occur.

What all of these examples have in common is that they illustrate the fundamental problem with the Department's proposed redefinition of investment advice fiduciary: the proposal would eviscerate the common-law relationship of trust and confidence between the financial professional (the trustee) and the investor (the beneficiary), which the Fifth Circuit in *Chamber of Commerce* held was part and parcel of ERISA's fiduciary definitions. The Department asserts that the proposal accounts for the Fifth Circuit's decision in *Chamber of Commerce*, but it cannot square that assertion with the blatant disregard for that court's holdings.

Nowhere is that disregard more plain than the Department's frank statement that it "rejects the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products." 88 Fed. Reg. at 75907/2. The Fifth Circuit in *Chamber of Commerce* was crystal clear—and correct—that the distinction between sales and advice is a foundational aspect of our country's financial laws and regulations and inherent in the statutory definition of investment advice fiduciary. For a fiduciary, advice is the service for which a fee is provided — fiduciaries get paid regardless of a sale, whereas brokers typically are paid only if there is a sale. As the Fifth Circuit in *Chamber of Commerce* noted, the "regular basis" requirement of the current rule is linked to the notion that when "advice was procured on a 'fee basis,' it entailed a substantial ongoing relationship." *Chamber of Commerce*, 885 F.3d at 375. Indeed, fiduciaries are prohibited from receiving compensation in connection with a fiduciary transaction unless an exemption applies. Yet, the Department bases its determination that a broker-dealer or insurance agent is a fiduciary on the very fact that those professionals make and are compensated based on sales. Once again, moreover, the Department points to its provision of exemptive relief as proof that its proposal is reasonable. But the Department's definition of investment advice fiduciary must stand on its own two legs, as the Fifth Circuit in *Chamber of Commerce* made clear.

In fact, the principal rationale given by the Department for the rule illustrates why the rule exceeds the Department's authority. Throughout the proposal, the Department references its ability to create a "uniform" fiduciary standard, and the benefits of extending fiduciary duties to financial professionals who offer IRAs. But as the Fifth Circuit in *Chamber of Commerce* made clear, that is an authority that Congress did not give the Department, just as it did not confer authority to "correct" what the Department views as a lack of foresight about IRAs when Congress enacted ERISA in 1974.[61] As explained above, the Department cannot use deregulatory authority to regulate. As the Fifth Circuit stated:

"That times have changed, the financial market has become more complex, and IRA accounts have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority. A perceived "need" does not empower DOL to craft de facto statutory amendments or to act beyond its expressly defined authority."

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[61] *Chamber of Commerce*, 885 F.3d at 371.

While challenges to the validity of the regulation wind their way through the courts, hundreds of millions of dollars will be spent for no reason. Retirement investors will once again be told that they cannot work with their advisor, they may only trade on the internet, that only advisory accounts will be available, that investments that they currently hold will need to be liquidated. We believe this would be a very unfortunate result. We urge the Department to rethink the regulation and the "one-size-fits-all" exemptions before moving forward.

Part 2: Proposed Amendments to PTE 2020-02

This section of SIFMA's comments on the Department's proposed fiduciary package relates to the Department's proposed amendments to PTE 2020-02. This exemption was issued in final form in December of 2020, and did not become fully effective until early 2022. We respectfully suggest that it is far too early to determine whether or how to amend this exemption. The Department has not cited to or offered any data to support whether the exemption is not working as intended, nor has it provided evidence to evaluate whether the exemption is not administrable and protective and in the interest of participants and beneficiaries.[62] Three years ago, it concluded that the exemption that the exemption was administrable, protective and in the interest of participants. The Department provides no evidence that the data that supported that conclusion has changed. With no data to support these amendments, we believe they are premature and based only on speculation and a change in the Administration. The cost of change to the industry, and then in turn to retirement investors is enormous. Premature amendment is in no one's interest.

With that said, many of SIFMA's members are using the class exemption for rollovers and other investment advice and have found it workable.[63] The majority of the changes proposed by the Department are quite significant and will add new complexity to an already complex exemption. As a result, institutions may again, as they did in 2016, revise the services they provide, and the clients to whom they provide services, to avoid the burdens and risks of the amended exemption. There also is a real possibility that the unworkability of these amendments will draw a legal challenge not just to the amendments, but to PTE 2020-02 itself. This result is foreseeable and the Department should not move forward with this proposal as written.

I. The Ineligibility Provisions are Punitive, Less Focused than the Current Exemption and Lack Due Process

[62] This is the standard that must be met under ERISA. Section 408 (a) of ERISA: "The Secretary may not grant an exemption under this subsection unless he finds that such exemption is (1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan."

[63] SIFMA reiterates that the comment period is inadequate. SIFMA's comments on this exemption would particularly benefit from more time to determine whether the changes made in this exemption can be operationalized, and if so, how, especially since it is the Department's intention that this is the *only* exemption that advisors can use. It will be to no one's benefit if the industry comments are less focused and helpful because of the short time available to comment and the long planned end of year vacation schedules of operational personnel.

The Department has proposed an entire structure to make advisors and financial institutions ineligible to use the exemption. As we noted in our comments on the original proposed PTE 2020-02, we disagreed with the Department's decision to add a criminal conviction disqualification and an administrative disqualification process on vague and subjective grounds in the proposed 2020 exemption. No other statutory or class exemption has such a provision, other than the Qualified Professional Asset Manager ("QPAM") exemption. This 2023 proposed amendment to that provision even further increases potential inability to use the exemption, even though a conviction of an affiliate does not reflect in any way on the policies, procedures, or compliance of the affiliated investment advisory firm. Such a conviction has absolutely nothing to do with an investment advisory firm's adherence to the Impartial Conduct Standards. To the extent that the Department is relying on its experience with the QPAM exemption, we note that it has failed to analyze the difference between the institutional discretionary asset management market, which is affected by section I(g) of QPAM and the retail market, which would be affected by the ineligibility provisions of PTE 2020-02 and the widespread disruption caused by these disqualification provisions in an exemption used in millions of retail accounts.

As we noted in our comments in 2020, giving the exemption staff of the Department the authority to decide what are "systematic violations" of the exemption, without an opportunity for a hearing before an administrative law judge and due process, will not survive court challenge. This exemption, particularly with these new amendments to the ineligibility provision, does not provide for due process. As we have seen in the QPAM context, the staff's distinctions among crimes and applicants have created confusion, inconsistent treatment and significant hardships for plans and QPAMs. Moreover, the list of leading financial institutions—respected the world over—that would be disqualified under the QPAM exemption but for the individual exemptions they received is compelling evidence that an affiliate's conviction is *not* presumptively indicative that an affiliated firm may not be trusted to act as a fiduciary.

PTE 2020-02 currently is one of several exemptions that fiduciaries can use to transact for their clients. Many of our members use PTE 75-1, PTE 84-24 and PTE 86-128 instead. The Department has failed to analyze the benefits of forcing all financial institutions into a single model, if there are any. Nor has it analyzed the costs of doing so. The Department proposes to take away a firm's ability to use PTE 2020-02 if they view that firm as having a "pattern or practice" of non-compliance – which means clients will no longer be served and puts that firm out of business. Essentially, like it did in previous fiduciary efforts, the Department could determine it doesn't favor certain compensation practices and conclude that they never were in a client's best interest and then take away the exemption from firms with those customary practices. The recourse proposed lacks due process.

We strongly urge the Department not to adopt *any* of these proposals. The proposed amendments will lead to all of the costs, delay, uncertainty, inconsistency and confusion that has resulted from its attempts to administer section I(g) of QPAM. However, introducing these provisions in the retail customer context significantly exacerbates the negative potential impact on plans and IRAs. Here, unlike in institutional asset management, retirement investors typically lack the expert consultants who have historically helped maintain stability when the status of a QPAM is at risk. And since the retail client arena is largely driven by personal relationships and

not institutional capability, even the threat of ineligibility will give rise to substantial shifts in financial professional affiliation and client continuity at any particular institution. The resulting upheaval in employment for tens of thousands of financial professionals and contractual arrangements for millions of retail accounts will be costly and disruptive. The Department's economic analysis has entirely overlooked the potential impact of these proposed ineligibility provisions. While one can better accept the potential market disruption where the fiduciary investment advice entity is itself convicted of a crime in the context of providing advice covered by the exemption – the standard in the existing exemption – the Department has not articulated any reason that justifies such a consequence when an investment advice entity's affiliate is convicted of a crime unrelated to the transactions covered by the exemption.

Regardless, the Department is obligated to estimate how frequently firms would be disqualified by this provision, and the impact this would have on the firms, individual financial advisers, and their customers. Recent experience with the QPAM exemption suggest there will be frequent potential disqualifications; the Department must assess, among other things, how the movement of financial advisers among firms due to frequent threats of disqualification will increase the cost and complexity of the recordkeeping and disclosure requirements the amendments are imposing on firms.

Under the current PTE 2020-02, an advisor is ineligible to use the exemption if it is convicted of a crime that has the severity of a felony and that arose in the context of providing advice covered by the exemption. SIFMA opposed this provision in 2020. As we said at the time, ERISA Section 411 was Congress' method of addressing criminal misconduct: a specific list of federal and state crimes, the requirement of an individual's criminal conviction, and not just the Department's potentially arbitrary and punitive views of repeated violations. Section 411 requires, in the case of a corporate entity, not only a criminal conviction but also the Department convincing a court that the entity should be barred from continuing to act as a fiduciary.

Because the criminal conviction provision ultimately adopted in 2020 was narrowly tailored to transactions covered by the exemption, despite our concerns about the Department's authority to make a financial institution ineligible, many in the industry are using this exemption. Abandoning PTE 2020-02's targeted approach, the Department now seeks to punish those relying on the exemption by greatly expanding the entities that can be convicted, the crimes that may form the basis of the conviction, and the administrative authority reserved only to the Department to take away an advisor's ability to use the exemption.

The current proposal would make the exemption unavailable to any entity in any affiliated group of companies if one of those affiliates was convicted of a felony, in the United States or in any foreign country.[64] No other statutory or class exemption has such a provision,

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[64] The exemption is automatically lost in the case of a foreign conviction unless the institution petitions the Department for relief. This petition process does not compensate for the overbreadth and lack of authority in connection with including foreign crimes at all. Moreover, the Department has already demonstrated that a petition by a financial institution is unlikely to meet with success: in a recent case in Africa where the criminal proceeding was brought by a private party in the context of a commercial dispute, the Department refused to rule that the prosecution lacked due process or should not result in disqualification under QPAM. It is nearly impossible to

other than the QPAM exemption, which largely affects institutional accounts, rather than retail accounts.[65] Further, the Department has identified no basis for disqualifying firms from providing fiduciary services on the basis of convictions that Congress, when expressly addressing the same issue, did not deem disqualifying of fiduciary status. Such a provision will have a very disruptive effect on individual retirement investors, whose financial professionals may leave the institution rather than take the risk that it will not receive an individual exemption, communicating that uncertainty to individual retirement investors who do not want to lose their advisor.

In our view, it is inappropriate, unfair, and beyond the Department's authority for the Department to insert such an expansive ineligibility provision in ***the only advice class exemption that any financial institution will be able to use.*** We strongly oppose this expansion of an ineligibility test that is not linked to a conviction of the fiduciary advisor for a crime involving transactions covered by the exemption.

We further note that the proposed amendments have been drafted to make instantly ineligible more than a dozen financial institutions whose affiliates have been convicted of crimes in the past 10 years. Individuals at the Department have clarified that this as an error in written and oral communications, but we urge the Department to make explicit in the exemption's operative language that if the provision is retained, it only applies to convictions after the applicability date.[66]

The proposal also allows the Department to disqualify financial institutions from using the exemption based on the Department's subjective view of a financial institution's repeated infractions. We do not believe the Department has the authority to reserve for itself such discretion, and we think its existence here raises constitutional issues. For the last 45 years, not a single statutory or class exemption has given the Department the authority to essentially put a

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imagine the upholding of this position in light of the Supreme Court's decision in *Small v. U.S.*, 544 U.S. 385 (2005). See SIFMA Advisory Opinion Request to the Department, dated December 18, 2018, the Department's formal response from the Solicitor of Labor, dated November 3, 2020 and the Department's subsequent withdrawal of that letter after the change in Administration dated March 23, 2021 (copies attached as Attachment IV).

[65] Even the exemptions that serve the same purpose as QPAM, issued both before and after QPAM, have not included this provision. See PTE 90-1, PTE 91-38, PTE 96-23, PTE 95-60. See also ERISA section 408(b)(17) and section 408(g). Moreover, Congress specifically gave the Department the authority to take action if an entity is convicted of a criminal violation under ERISA section 411. In such a situation, the Department can appear before the sentencing court and seek a bar from that entity acting as a fiduciary. Further, in the case of an individual, the bar is automatic. Since an entity can continue to act as a fiduciary, earning fees under any number of different exemptions, we do not understand why this particular exemption would be treated differently. We think it instructive that when Congress enacted an investment advice exemption, it included no such disqualification. Nor does the explicit disqualification in ERISA section 411 cover any entity other than the convicted entity. As the Fifth Circuit court of appeals said in *Chamber of Commerce v. Acosta*, "[w]hen Congress has acted with a scalpel, it is not for the agency to wield a cudgel." We urge the Department to heed the Fifth Circuit's advice and to abandon this misguided broadening of the crimes provision in PTE 2020-02.

[66] The same change will need to be made in PTE 84-24.

retail advisor or financial institution out of business, other than PTE 2020-02.[67] Congress did not give the Department such broad authority. Instead, it granted the Department a much more limited authority in Section 411 of ERISA. These proposed amendments expand the Department's authority to threaten, and even make ineligible, any advisor (and apparently its affiliates) whose affiliates have reached settlements with the Department of Justice[68] or with regulators abroad, if such settlements cast doubt, *in the Department's sole judgment,* on the advisor's integrity or where the Department believes that a financial institution is unworthy of being able to use the exemption because of multiple violations. This authority will lead to results that are arbitrary and capricious.[69]

We believe that the proposed amendment exceeds any agency's power under the Administrative Procedure Act. The proposed amendment sets up a system where the Department can put an entire financial institution out of the fiduciary investment advice business and make supplicants of any institution which has been (or the affiliates of which have been) convicted of a crime anywhere in the world.[70] This is not only flawed as a matter of law; it is fundamentally

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[67] From SIFMA's 2020 comment letter on proposed PTE 2020-02: "We further urge the Department to reconsider disqualifying an entity's use of the exemption for systemic violations. As we noted in our comments on the BIC exemption in 2016, giving the exemption staff of the Department the authority to decide what are "systematic violations" of the exemption, without an opportunity for a hearing before an administrative law judge and due process, is a mistake. We recognize the Department provides for an opportunity to be "heard." However, that opportunity is narrowed to one in-person conference before the Office of Exemption Determinations. This proposal simply does not provide for an appropriate due process opportunity and would lead to inconsistency and unfair administrative process. As we have seen in the QPAM context, the staff's distinctions among crimes and applicants have created significant hardships for plans and QPAMs. We urge the Department to remove this disqualification condition. Ultimately, we do not believe a condition of an exemption should be used as a substitute for the Department's enforcement. If the Department finds, in the course of a particular investigation, that a financial professional has "mis-sold" a particular kind of investment, it can require, as part of its investigation settlement, that the financial professional no longer sell this investment to retirement accounts. If the Department's aim is to be able to investigate IRAs, which it does not now have the authority to do, we think bootstrapping investigative and enforcement authority over IRAs into this proposed exemption is inappropriate and inconsistent with the Department's authority under ERISA and the Code, the decision of the Fifth Circuit Court of Appeals and the Reorganization Plan of 1978.

[68] Of course, many of these settlements and other resolutions are ones in which the prosecutor chooses not to move forward and the entity admits no guilt. There is no basis for the Department to use the regulatory setting to effectively overturn and second guess those prosecutorial resolutions, particularly without extending full due process protections to those involved.

[69] The disruption caused by this expansion of the Department's authority has grown exponentially in the past 10 years. Where once applicants received 10 years of individual exemptive relief after an affiliate had committed a crime, the Department in recent years has parceled out exemptions for one, three and five-year periods, causing repeated applications and unnecessary cost and client confusion.

[70] Financial Institutions have spent untold hours and millions of dollars trying to predict how the Department would view licensing crimes in Canada and Hong Kong, criminal cases brought by individuals in Africa under criminal laws which bear no resemblance to ours, summary crimes in Switzerland, the UK and other foreign jurisdictions where the process resembles the U.S. local traffic infractions summons and conviction. In no respect has the Department attempted to calculate these costs and we suggest that there is no benefit to plans from these types of questions.

unfair.[71] The Department cannot point to *a single case* in which a crime has occurred in a non-asset management affiliate which has cast any doubt on the integrity of separately managed and entirely innocent and uninvolved affiliates.

The Department can point to no place in ERISA or the Code where Congress gave the agency the power that it hopes to exercise here. We therefore urge the Department not to abandon the disqualification section in the current PTE 2020-02.

II. The Principal Transactions Limitations, Coupled with the Expanded Definition of Fiduciary, Reduce Access to Investments that Retirement Investors in Brokerage Accounts Enjoy Today

In 2020, one of SIFMA's strongest criticisms of the PTE 2020-02 related to the limitations on principal transactions. The securities markets are both agency and dealer markets, and we do not believe that the Department has the authority to substitute its judgment for that of retirement investors and their advisors and determine that retirement investors cannot purchase a whole range of securities from their advisor. As we noted earlier in this comment, the proposed amendments establish a construct in which every financial professional is forced to act as a fiduciary and for the first time in nearly 50 years, will have only a single class exemption to rely on. For all of the investments that are traded only on a principal basis, and which retirement investors have had uninterrupted access to, the proposed amendments to PTE 2020-02 will eliminate that access entirely. The Department offers no policy reason for making these investments entirely unavailable to retirement investors, nor does it offer any evidence that eliminating this access is necessary to protect plans or make the

In looking at the overall package of changes that the Department is proposing, we are concerned that in the name of addressing "regulatory arbitrage", the Department is forcing all fiduciary investment advice relief into a single exemption that excludes many of the transactions that are permitted currently. There are several problems with that approach. The first is that the Department proposes to remove various transactions that have been permitted since 1977 under PTE 84-24 (and its predecessor PTE 77-9) from being covered under that exemption, yet the proposed amendments to PTE 2020-02, into which all fiduciary investment advice will be shoehorned, does not permit these transactions at all. The preamble fails to identify the transactions being excluded from relief or explain the Department's rationale for excluding from relief transactions that fiduciaries have been permitted to engage in since ERISA was passed. These issues were raised by SIFMA, the Investment Company Institute and others in 2016, and in 2020; on both occasions, the Department failed to address these concerns in its cost analysis. The Administrative Procedure Act, and Executive Orders 12866 and 13563 preclude this kind of sleight-of-hand rulemaking.

[71] We note that the 6-month period for the financial institution to apply for individual relief is entirely inadequate. The Department's history with these exemptions proves the point. It is rare that the Department has been able to issue an exemption in under a year.

All of the following investments cannot be traded in the dealer market under PTE 2020-02 as it currently exists: equities (U.S. and foreign), asset-backed trusts, U.S. bonds of entities other than corporations,[72] certain structured notes issued by US corporations and subject to registration requirements under the Securities Act of 1933, currency, foreign corporate bonds, foreign government bonds, Rule 144A securities, privately issued real estate securities, closed-end funds, equity IPOs, and debt IPOs.[73]

While the Department's proposal appears to allow retirement investors to choose to maintain a brokerage account to make these investments so long as the advisor does not recommend that they be purchased, we think that path makes little sense. It is burdensome, confusing and expensive. Nor do we understand why the Department would prefer these investments be offered outside a fiduciary context.[74]

We also note that the Department does not analyze the harm to retirement investors in having to purchase these securities away from its advisor, assuming for the sake of argument that a third party advisor would be willing to share its market allocation with some other firm's client, or the harm to the investment, fund or issuer itself in restricting retirement purchases.[75] If the best

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

[73] The "Covered Principal Transaction" exemption should be expanded to include equity syndicate offerings. Existing federal securities laws offer safeguards for these transactions in addition to ERISA. For example, syndicate transactions are sold via an offering document (either a prospectus or official statement) which includes robust disclosures about the issuer; details on compensation paid to the selling broker; a section on the underwriter's conflicts of interests. In addition, it should be expanded to permit principal transactions in fractional shares, which is critical to rationalizing dividends in retail accounts. For example, the price of a share of stock may be too great for one client, but a broker dealer could provide it as a fractional share in a principal transaction. To the extent that an IRA wants to invest in Amazon, which was trading at $3,186 a share on July 10, 2020, a broker-dealer would be able to make this available to a retail account in a fractional share.

[74] The SEC, in its best interest standard, does not take unto itself the right to limit the kinds of investments that a retail investor can buy. Indeed, all of these investments are permitted under Reg BI and subject to a best interest standard. The conflicts inherent in principal trades are addressed in Reg BI through mitigation, including disclosure and consent. The principal transaction restrictions would restrict what an advisor is permitted to do under applicable SEC rules.

[75] CEFs are one of three general types of investment companies identified in the Investment Company Act of 1940 ('40 Act); the other two are open-end funds (OEFs) and unit investment trusts. Exchange-traded funds are a newer investment company structure, and some describe them as a hybrid of an OEF and a CEF. There are many similarities between these four investment companies. Each is a pooled investment vehicle that offers shares almost exclusively through a public offering registered under the Securities Act of 1933, with all applicable fees, expenses, and offering costs fully disclosed in an initial prospectus. CEFs differ in that they generally do not continuously offer shares. They typically have a fixed number of shares; this number is established during an initial public offering (IPO). CEFs generally do not issue redeemable shares, but rather list shares on a national stock exchange

interest test has the vitality and strength that the Department claims, this exemption should broadly permit all principal transactions as the SEC does, with appropriate disclosure.

Moreover, brokerage customers lend securities to their broker to earn additional income with little added risk. ERISA section 408(b)(17) and PTE 2006-16 provide relief for these securities loan, but are unavailable to fiduciaries. Fully Paid Securities Lending is a common type of securities lending where customers can earn passive income by giving their broker permission to lend out shares of stocks that they have fully purchased. Brokers lend those shares to other financial institutions and market participants such as funds, brokers, banks, or proprietary trading firms who want to borrow them for different reasons — usually, to facilitate short sales, but also to settle trades or support more sophisticated trading strategies. The borrowers pay brokers a fee, and brokers share a percentage of that fee with their customers. Securities that are in short supply (sometimes called "hard-to-borrow" stocks) are more likely to be borrowed and command higher loan fees. The loans are collateralized in cash or cash instruments at 102% of the amount of the loaned securities. Clients consent to the program, generally in writing.

It will be enormously disruptive to the securities borrowing market to eliminate all of these accounts from the lending pool. We urge the Department to add relief for extensions of credit under ERISA section 406(a)(1)(B) and Code section 4975(c)(1)(B)) to PTE 2020-02.

III. The Written Statement of the Best Interest Standard May Create Contractual Rights Resulting in a Patchwork of State Law for Institutions Operating Nationally

The third major change is the creation of still another contractual obligation that may create a state law cause of action for IRAs that Congress did not authorize. The Department is proposing that financial institutions' initial disclosure contain a written statement of the best

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for trading at prices determined by secondary market participants. Share prices for CEFs are transparent throughout the trading day, and liquidity is offered continuously through market trading.

As of the end of 2022, the CEF universe included 441 funds with $252 billion in assets according to the Investment Company Institute (ICI). Of that amount, $153 billion are bond funds and $99 billion are equity funds. The ICI does not publish the proportion of these assets held in tax-deferred retirement savings plans, but estimates from financial intermediaries that offer CEFs suggest IRAs or other tax-deferred retirement plans hold about 25% of these funds. https://www.ici.org/cef/background/bro_g2_ce#:~:text=share%20price%20volatility.-,Total%20Assets%20of%20Closed%2DEnd%20Funds,total%20assets%20of%20%24252%20billion.

It is estimated that 25% of taxable fixed-income and equity CEFs are held in IRAs and tax-deferred accounts. CEFs generally have one opportunity to raise capital through an IPO offering, so to exclude potentially 25% of the investor base would significantly reduce the scale of future CEFs. Reduced scale means reduced expense economies, potentially reduced portfolio efficiencies, and lower secondary market volume, which generally translates into wider bid/ask spreads. These dis-economies of scale affect current and future shareholders, and ultimately provide reduced income and return potential to investors over time.

interest standard of care, for which the Department provides model language.[76] We strongly oppose this condition. To the extent that it is tantamount to a contractual obligation, for all the reasons SIFMA opposed the BIC exemption in 2016, and for all the reasons that the Fifth Circuit in *Chamber of Commerce* vacated the fiduciary package in 2018, such a condition is beyond the Department's authority. Any statement of the Impartial Conduct Standards needs to make clear that they are a condition of the exemption and do not confer any rights on a client. We point out, however, that this "statement" is unnecessary. The exemption has a condition on acting in the retirement investor's best interest and that condition must be met for the exemption to provide relief for any compensation. If not met, the exemption does not apply. Repeating in writing to the client something already required by law can reasonably be seen as an attempt to create a state cause of action. As the Fifth Circuit in *Chamber of Commerce* said, that "remedy" is not one Congress chose or intended.

In 2018, the Fifth Circuit Court of Appeals in *Chamber of Commerce* could not have more clearly held that the creation of this cause of action was beyond the Department's authority. Nonetheless, the Department has tried again by requiring financial institutions to agree in writing that they are acting as a fiduciary and provide the standard of care applicable to that status. The standard of care is already actionable under Title I of ERISA for ERISA covered plans; it should not need to be duplicated in contractual documents. For IRAs, this standard of care is simply not in the Code and not applicable under the law to IRAs.[77] Congress determined that the standard of care does not apply to IRAs; it does not fall to the Department to change that result.

Specifically, conditioning *the only available exemption* on a contractual commitment to meet the best interest standard is inconsistent with the Fifth Circuit's holding in *Chamber of Commerce*.[78] As the Fifth Circuit in *Chamber of Commerce* said of the contractual requirement in 2018:

> Unlike the BIC Exemption regulations, Congress's exemption did not require detailed contractual provisions or subject "fiduciaries" involved in Section 4975(d)(17) transactions to the possibility of class actions suits without damage limitations. When Congress has acted with a scalpel, it is not for the agency to wield a cudgel. See *Fin. Planning Ass'n. v. SEC*, 482 F.3d 481 (D.C. Cir. 2007) (overturning SEC's broad regulatory exemption contrary to Congress's narrower exemption).
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> Fourth, BICE extends far beyond creating "conditional" "exemptions" to ERISA's prohibited transactions provisions. Rather than ameliorate overbreadth, it deliberately extends ERISA Title I statutory duties of prudence and loyalty to brokers and insurance representatives who sell to IRA plans,

[76] The Department offers no transition period during which the industry would be required to send out notices to 50 million customers. While we have not ascertained how long it would take the largest institutions to accomplish this mailing, we are certain it would exceed the 60 day effective date period.

[77] *Chamber of Commerce*, 885 F.3d 360.

[78] *Chamber of Commerce*, 885 F.3d 360.

> although Title II has no such requirements. The BIC Exemption creates these duties and burdensome warranty and disclosure requirements by writing provisions for the regulated parties' contracts with IRA owners. The contractual mandates fulfilled a "critical" and "central goal" of BICE, ensuring IRA owners' ability to enforce them with lawsuits, 81 Fed. Reg. 21020, 21021, 21033. Incentives to private lawsuits include the BICE's additional provisions that reject damage limitations and class action waivers. In stark contrast to these entangling regulations, ERISA Title II only punishes violations of the "prohibited transactions" provision by means of IRS audits and excise taxes. And unlike § 1132 of ERISA Title I, Title II contains no private lawsuit provision. Together, the Fiduciary Rule and the BIC Exemption circumvent Congress's withholding from DOL of regulatory authority over IRA plans. The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties is unreasonable and arbitrary and capricious.

We reiterate a point we made in 2016 regarding the inclusion of the Impartial Conduct Standards as a condition of the exemption. These standards are, in part, based on subjective criteria, and the administrability of an exemption depends on objective conditions, which can be demonstrably proven to have been met. Those standards are already found in Title I of ERISA; in particular, there is a huge body of case law on the meaning of prudence. Including ERISA's prudence standard in the exemption is duplicative and adds a penalty for lack of prudence that Congress specifically chose not to apply. None of the statutory exemptions contain a condition so capable of subjective determinations as the exemption's prudence requirement. Moreover, the Department's individual exemptions often recite that compliance with exemptions does not relieve a fiduciary of its duty of prudence. By definition, prudence is based on facts and circumstances, measured in relation to what others might do (which itself is a very fluid concept). We urge the Department not to make a subjective concept a condition of a prohibited transaction exemption, but rather, as in other exemptions, require that the financial institutions have and enforce policies and procedures relating to prudence and the other Impartial Conduct Standards.[79]

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

The recitation of these standards in writing to a retirement investor – a contractual obligation in disguise -- is unacceptable.[80] If the Department declines to remove the Impartial Conduct

[79] No statutory exemption contains prudence or best interest requirements; Congress clearly did not believe that such subjective conditions belong in an exemption that could require reversal and the payment of excise taxes.

[80] The requirement of a declaration that one is a fiduciary is no different in intent or result than the contract requirement in the now vacated BIC exemption. In this context, we think the holding of *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) is controlling: Nothing in ERISA or the Code even hints that a state-law contract action can be brought against purported fiduciaries to enforce statutory provisions. ERISA's civil remedies are limited both in nature and scope, *Great-West. Life &Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209-10 (2002), and the statute

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

IV. The Remaining Changes in the Proposal Should Be Abandoned

The Exemption appears to suggest that a change from a brokerage account to an advisory account is a rollover. It is not. A rollover changes the sponsor or trustee of the IRA. A client who moves assets from a brokerage account to an investment advisory account is not engaging in a "rollover." This is important because the proposed exemption has various requirements regarding a rollover, and these requirements should not be applied to the mere change of the services one expects from its service provider – brokerage to investment advisory or vice versa. In addition, Reg BI already applies to such recommendations.

The Department Must Acknowledge that Education on Rollover Options Does Not Constitute a Transaction that Requires Relief under any Exemption

There appears to be ambiguity in the preamble regarding whether it is possible to provide rollover education, or whether any rollover conversation will be deemed to be fiduciary advice. Rollover education must be an exception under the rule. The Department seems to indicate that any recommendation on how rollover assets should be invested somehow implies a prior recommendation to make a rollover. However, the Department provides no clear basis or justification for this leap. ERISA and the Code provide that a person acts as a fiduciary "to the extent" that it provides investment advice for a fee. The financial professional does not become a fiduciary under ERISA and the Code in every conversation and for every subject, merely because it is acting as a fiduciary under ERISA or the Code for other purposes or in another plan. This also is clear under the Department's guidance in Interpretative Bulletin 96-1, which the Department indicates would remain effective. That guidance clearly excludes general financial, investment and retirement information from the scope of investment advice.

An explicit exception for rollover education must be included in the final exemption. Our members' experience is that rollover education is an effective option for some clients and we respectfully urge the Department to make this position clear in the exemption. Clients value

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broadly preempts most state law, including breach-of-contract actions, *Cromwell v. Equicor-Equitable HCA Corp*., 944 F.2d 1272, 1275 (6th Cir. 1991). Further, ERISA's remedies have no application to non-ERISA plans such as IRAs. See 29 U.S.C. § 1002(1) & (2). The remedies under the Code are even more restricted than ERISA's, extending only to conducting audits and imposing taxes. 26 U.S.C. § 4975; see also Reorganization Plan No. 4 of 1978, § 105. The Fifth Circuit Court of Appeals in *Chamber of Commerce* agreed. See also *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 254 (1993) (stating Court's "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly" (internal quotation marks omitted)); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.")

choice: as we have said for many years, there is no one-size-fits-all solution here. As SIFMA wrote in its comment on the proposed PTE 2020-02: "Some clients may rely on a financial professional for asset allocation advice, but merely seek education on rollovers."[81]

We see no reason why or how the Department can conclude that rollover education is impossible.

Specific cost and compensation information on every transaction cannot be operationalized.

The proposal requires that before entering into a transaction under the exemption, a retirement investor must be provided notice that, free of charge, the investor is entitled to receive specific information on the costs to the retirement investor, and the compensation to the financial entity with respect to any given transaction.

> (4) A written statement that the Retirement Investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present full and fair disclosure that is materially accurate in scope, magnitude, and nature, with sufficient detail to permit the Retirement Investor to make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest, and that describes how the Retirement Investor can get the information, free of charge;

There is no mention of the costs that would be incurred for a financial institution to be able to actually provide the cost and compensation information for every transaction. Systems would have to be built, solely to meet this requirement, which is required by no other regulator. The lack of any cost analysis on this point alone should invalidate the requirement. For retirement investors who trade often, the costs of actually compiling and supplying this information will be substantial. Today, clients receive transaction-related compensation information on their statements and other documents, like trade confirmations. They also receive robust compensation disclosures under Reg BI and ERISA Section 408(b)(2), which provide them with enough information to understand the compensation generated before transactions take place. Adding a requirement that there also be a retrospective individual analysis provided is unnecessarily burdensome without providing new information to the client.

We note that the proposed individual transaction cost information goes far beyond what the SEC requires in trade confirmations, SEC Reg BI disclosure and SEC Form CRS. The exemption unhelpfully appears to require that the financial institution include all types of remuneration, including those, like educational subsidies or other set amounts, that are impossible to associate with a particular transaction. It requires an analysis of whether the financial institution has received any third-party fees in connection with the client's transaction, and if so, by share class, what those amounts are. For these types of fees, determining an exact transaction-specific amount is difficult, if not impossible, with unclear benefit for the client who has already been provided information on the aggregate amounts received. The exemption

[81] https://www.sifma.org/resources/submissions/dol-pte-proposal-on-investment-advice/

appears to require that the financial institution disclose 12b-1 fees, service fees, sub transfer agency fees, revenue sharing, educational subsidies – who knows where the list ends.

In addition, the Department fails to make clear how gross fees should be presented. Can the disclosure say that the institution receives $20 million in revenue sharing from a particular mutual fund family or is the financial institution somehow required to break that down by transaction? This is currently not possible to provide. And we note that this scope of information is not required in the Form 5500, under section 408(b)(2) or in the context of any other exemption.[82]

We think this additional disclosure is needlessly prescriptive, expensive, and a trap for institutions who have already made the investment to comply with the existing PTE 2020-02 and would now be forced to comply with a new burdensome requirement. We note that this requirement is reminiscent of the now invalidated BIC exemption. This requirement should be eliminated, both because the Department has failed to analyze its benefit at all and has significantly erred in its cost analysis. In the cost analysis, the Department notes:

> The Department does not have data on how often investors would request a written description of the financial institutions' policies and procedures and information regarding costs, fees, and compensation. The Department assumes that, on average, each financial institution would receive 10 such requests annually and that most financial institutions already have such information available. The Department requests comment on these assumptions. The Department estimates it would take a clerical worker five minutes to prepare and send the disclosure, regardless of whether it is sent electronically or by mail. This results in an annual hour burden of 16,075 with an equivalent cost of $1,019,959.43. 88 FR 75995

First, it seems incredible that this huge, burdensome, systems dependent disclosure which is not now required under any law would need to be created for 10 requests a year. Surely, the cost-benefit analysis of that decision seems straightforward. Virtually any cost is not worth the extraordinarily minimal benefit of 10 requests a year. There is no analysis of the kinds of information that are not now reported, the cost of allocating those costs to each trade, the cost of building a system to calculate these costs and this compensation depending on the size of the

[82] "The Department is also proposing a new Section II(b)(4) which would require Financial Institutions to inform Retirement Investors of their right to obtain specific information regarding costs, fees, and compensation that is described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, and nature. The Financial Institution must provide the information in sufficient detail for the Retirement Investor to make an informed judgment about the costs of the transaction and the significance and severity of Conflicts of Interest. This includes the total compensation that the Financial Institution and Investment Professional receive, not just the costs directly paid by the Retirement Investor. This disclosure also must describe how the Retirement Investor can receive the information free of charge. The Department is not proposing to require Financial Institutions to maintain records of every transaction or be able to quickly provide specific information regarding costs or fees generated by specific transactions. However, the Department is proposing to require Financial Institutions to maintain sufficient records to allow them to meaningfully respond to Retirement Investors' requests to demonstrate how the Financial Institution and its Investment Professionals are compensated in connection with their recommendations." 88 FR 75985

trade and the cost of keeping all of the information current. That cost is surely more than 5 minutes of a clerical worker's time. The Department gives no reason why it estimates that only 10 requests a year could be expected where some of our members have more than 2 million IRA clients. The actual cost and burden would be enormous and provide only the smallest imaginable benefit, if any, to retirement investors. This is unreasonable, and by itself is grounds to abandon this burdensome requirement.

Even for institutions already using the exemption, this requirement will necessitate a new separate mailing to every retirement investor, as well as the creation and maintenance of entirely new systems as described above. The Department's cost analysis suggests that the cost of the mailing would total about $2.6 million in the first year and about $1 million in subsequent years. We think these estimates widely miss the mark. We are certain that the industry will not be able to mail this disclosure (or any of the proposed disclosures) to millions of account holders in the 60 days following publication in the Federal Register.

Additional information for IRA-to-IRA transfers is not practical and would stifle delivery of retirement investor education

The requirement in the proposed amendments for advisors to provide enhanced rollover disclosure to a client when their advisor recommends moving an IRA account from one financial institution to the advisor's firm is unworkable and unnecessary.[83] We fail to see how these new requirements relate to the Department's often expressed concern about rollovers from an ERISA-covered plan. These kinds of transfers take place when entire retail relationships are changing, for example, when a client follows their financial professional. It is not a fiduciary problem within the Department's scope. It simply has nothing at all to do with employer sponsored plans.

While we appreciate the Department's suggestion that it would be reasonable to charge a fee for this new comparison that the Department is proposing, the comparison itself makes no sense. A retirement investor already knows what services they are receiving and the fees they are paying at their current financial institution. Under Reg BI, the advisor will use the SEC's Form CRS and Reg BI disclosure and other relevant documents to inform that client of the services and fees at the potential new financial institution. The Form CRS and the Reg BI disclosure will provide the retirement investor the information they need to compare their current financial institution to a potential new financial institution. Because the advisor is not aware of the specific services and fees at the client's current firm and public information is unlikely to provide a complete and accurate picture of these details, we doubt than any new financial institution would be better situated to compile any helpful information. Our members who rely

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[83] In addition, the proposal will require a rollover analysis to be provided to a retirement investor whenever a financial professional discusses how transferred assets might be invested, even if the financial professional does not recommend a rollover. For retirement investors who direct a firm to accept a rollover from an ERISA covered plan, the firm would not be providing the retirement investor an analysis because it had made no recommendation. But the proposed amendment suggests that if the financial professional and the client discuss what to do with the assets once transferred, a rollover analysis may still be required. The timing of this provision cannot be operationalized. Conversations are fluid; a financial professional can not say "I can't talk to you about our offerings until I give you a written analysis about the rollover you have already directed me to do." It is particularly difficult when the client can rollover or transfer assets into existing accounts and need not wait for approval of the institution.

on the current PTE 2020-02 have operationalized this comparison when the rollover is from a Title I covered plan to an IRA. However, they strongly believe that they will not be able to operationalize it for IRA-to-IRA transfers.[84] We urge the Department to eliminate this requirement or, if it is not eliminated, to use the Reg BI process as a safe harbor for any disclosure required in an IRA-to-IRA transfer.[85]

This Exemption, Like the BIC Exemption, Inappropriately Focuses on Differential Compensation at the Entity Level

It will come as no surprise to the Department that entity level pricing is not uniform across investment products. Neither is advisor compensation level across products. The proposed amendments require that the financial institution mitigate differential compensation both at the advisor level and at the institution level. Revenue sharing or other compensation from insurers and investment companies do not affect advisor compensation. These market and access payments cannot reasonably be levelled; the mitigation is ensuring that they do not influence advisor compensation. This exemption cannot be the vehicle through which the Department, acting alone as the supposed arbiter of the securities markets, levels out all variation in profit and compensation. The concept of level compensation at the institution level is not the industry norm or standard and was explicitly rejected by the SEC in promulgating Reg BI.[86] We urge the Department to delete the reference to differential compensation or "other similar actions or incentives." at the institution level.[87] We note that the exemption also precludes any quotas, appraisals, performance or personnel actions that would encourage "bad behavior". This language, reminiscent of the language in the BIC exemption, goes far beyond the current rule and far beyond Reg BI, which focuses on sales contests, sales quotas, bonuses, and non-cash compensation, that are based on the sales of specific securities within a limited period of time.

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[84] Changing the IRA custodian is merely a change in the advisor that a retirement investor wants to work with. It generally does not include selling of investments or other investment decisions. This is still another reason why the changes to the exemption on IRA-to-IRA rollovers should be abandoned.

[85] The proposed amendments appear to require substantial analysis and disclosure every time a retirement investor moves assets from one account to another. Requiring a cost comparison, etc. for moving money from an IRA to a checking account so that a client can pay for home repairs will grind business to a halt and result in very unhappy clients who will want to know why they can't have quicker access to their own money. Firms often have hundreds of thousands of this type of money movement every month, especially with respect to older IRA owners living on their retirement savings.

[86] The SEC, which is the primary regulator of broker-dealers, understood that eliminating all firm level incentives would be very burdensome, costly and for some firms, potentially impossible, and would likely lead to less investor choice among brokerage products and services. Thus, the SEC made clear that "[r]ather than requiring mitigation of all firm-level incentives, we have determined to refine our approach by generally *allowing firm-level conflicts to be generally addressed through disclosure*." 84 FR 33390 (emphasis added). Moreover, under Reg BI, disclosure of firm-level conflicts is not always sufficient. If, for example, a potential conflict of interest creates an incentive for the financial advisor to place their interest ahead of the retail customer, then Reg BI further requires the firm to mitigate the potential conflict of interest. Reg BI, 17 C.F.R. Sec. 240.15l-1(a)(2)(iii)(b).

[87] The economic impact analysis must account for the conflict between this exemption and the SEC's Reg BI. The costs of compliance with the SEC's Reg BI, a differing DOL approach, and potential state patchwork of judicial decisions has not been adequately addressed in the analysis.

To satisfy Section II(c), Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to encourage Investment Professionals to make recommendations that are not in Retirement Investors' Best Interest. 88 FR 75987

Our members cannot operationalize this requirement. It is speculative, subjective and capable of being violated in every single employee's compensation setting. Again, this provision punishes early adopters of this exemption, who, uniformly believe that they cannot comply with this requirement. We are particularly concerned about the Department's reference to educational conferences giving rise to incentives to violate the best interest standard. It is unclear what criteria the Department would use, but it ought not insert itself into the running of financial institutions to cast doubt on even the most routine employment decisions. It is just this kind of reference in the BIC exemption that caused financial institutions to decide the exemption was unworkable.

The Department Should Not Require Web Disclosure

The Department seeks comment on a contemplated web disclosure which would include a massive amount of information regarding products, compensation, and cost to the investor, among other things.

We strongly oppose the creation and maintenance of a comprehensive, continuously updated web disclosure that will be, at best, incomplete, and at worst, misleading. This newly proposed web disclosure requirement is no different than the invalidated BIC Exemption required web disclosure requirement.[88]

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[88] The BIC exemption required:

(b) Web Disclosure. For relief to be available under the exemption for any investment recommendation, the conditions of Section III(b) must be satisfied.

(1) The Financial Institution maintains a Web site, freely accessible to the public and updated no less than quarterly, which contains:

(i) A discussion of the Financial Institution's business model and the Material Conflicts of Interest associated with that business model;

(ii) A schedule of typical account or contract fees and service charges;

(iii) A model contract or other model notice of the contractual terms (if applicable) and required disclosures described in Section II(b)–(e), which are reviewed for accuracy no less frequently than quarterly and updated within 30 days if necessary;

(iv) A written description of the Financial Institution's policies and procedures that accurately describes or summarizes key components of the policies and procedures relating to conflict-mitigation and incentive practices in

The BIC Exemption required the financial institution to maintain a web page that lists all "direct or indirect material compensation" payable to the financial institution and its financial professionals for services in connection with each asset (or, if uniform across a class of assets, the class of assets) that an investor is able to purchase, hold or sell through the financial institution and that has been purchased, held or sold in the last 365 days, along with the source of the compensation and how it varies within and among assets. The information was also required to be accessible in a machine readable format. The disclosure requirement presumably required the detailing of every insurance company separate account, every collective trust by unit class, every mutual fund by share class, every annuity contract and every GIC.

SIFMA, then, as now, views the web page disclosure requirement as overly broad, impractical, and costly and cumbersome to build, administer and maintain. SIFMA's members have had the experience of modeling disclosure for plans and participants in the last five years. They do not believe that such an undertaking would achieve the Department's stated goal of providing "a broad base of information about the various pricing and compensation structures adopted by Financial Institutions and Advisors." In addition, although the Department states that a related goal is to provide information that enables "financial information companies" to analyze and compare fee and compensation practices of advisors and financial institutions, this is a massive undertaking, requiring daily review for product and fee changes, and would cost millions of dollars for every single financial institution. We simply do not see how establishing a publicly available web page

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a manner that permits Retirement Investors to make an informed judgment about the stringency of the Financial Institution's protections against conflicts of interest;

(v) To the extent applicable, a list of all product manufacturers and other parties with whom the Financial Institution maintains arrangements that provide Third Party Payments to either the Advisor or the Financial Institution with respect to specific investment products or classes of investments recommended to Retirement Investors; a description of the arrangements, including a statement on whether and how these arrangements impact Advisor compensation, and a statement on any benefits the Financial Institution provides to the product manufacturers or other parties in exchange for the Third Party Payments;

(vi) Disclosure of the Financial Institution's compensation and incentive arrangements with Advisors including, if applicable, any incentives (including both cash and non-cash compensation or awards) to Advisors for recommending particular product manufacturers, investments or categories of investments to Retirement Investors, or for Advisors to move to the Financial Institution from another firm or to stay at the Financial Institution, and a full and fair description of any payout or compensation grids, but not including information that is specific to any individual Advisor's compensation or compensation arrangement.

(vii) The Web site may describe the above arrangements with product manufacturers, Advisors, and others by reference to dollar amounts, percentages, formulas, or other means reasonably calculated to present a materially accurate description of the arrangements. Similarly, the Web site may group disclosures based on reasonably-defined categories of investment products or classes, product manufacturers, Advisors, and arrangements, and it may disclose reasonable ranges of values, rather than specific values, as appropriate. But, however constructed, the Web site must fairly disclose the scope, magnitude, and nature of the compensation arrangements and Material Conflicts of Interest in sufficient detail to permit visitors to the Web site to make an informed judgment about the significance of the compensation practices and Material Conflicts of Interest with respect to transactions recommended by the Financial Institution and its Advisors.

would serve the interests of the public and it certainly would not justify the cost. Even if the Department's goal is to condense information that would then be aggregated and disseminated by "financial information companies," the varying amounts of payments that could be attributed across the many types of institutions would be meaningless. In addition to these steep challenges, the information would not have any use for members of the public, even for participants of plans that invest in privately managed accounts.

We urge the Department to abandon the web page disclosure requirement as a condition of PTE 2020-02.

Access to the Retrospective Review and Union Access to Individual Employee Information is Unwarranted and the Costs and Burdens Have Not Been Properly Analyzed

The Department seeks comment on providing the records required to be kept under the exemption to participants, union representatives and others.[89] Since the Department bases its reasoning on the assumption that most people will not ask for these records, an assumption that we question, it seems curious that the Department is contemplating putting such a requirement in place. The records would be available to all of the following:

(A) Any authorized employee of the Department or the IRS or another state or Federal regulator;
(B) Any fiduciary of a Plan that engaged in a transaction pursuant to this exemption;
(C) Any contributing employer and any employee organization whose members are covered by a Plan that engaged in a transaction pursuant to this exemption; or
(D) Any participant or beneficiary of a Plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.
(3) None of the persons described in subsection (2)(B)–(D) above are authorized to examine records regarding a transaction involving another Retirement Investor, privileged trade secrets or privileged commercial or financial information of the Financial Institution, or information identifying other individuals.

As an initial matter, we question the inclusion of any authorized state regulator. We see no need to condition this exemption on compliance with the requests of any state regulator, allowing an institution's use of this exemption to become embroiled in any investigation of any state. Second, it is unclear under paragraph (3) whether the Department is purporting to give unions access to their members' information, which would be unlawful and likely preempted by the National Labor Relations Act. Finally, we strongly oppose giving the retrospective review to anyone other than the Department of Labor and the IRS. Like internal audits, this document is intended to help financial institutions judge their compliance with the law. If it can be seen by individual clients or their collective bargaining representatives, there will be a chilling effect on the candor with which one should expect the reviewer to approach their task. This expansion is

[89] In addition, the Department believes that most parties will likely not request records, and, when they do, the Department believes it is important that plans, unions and employee organizations, and participants and beneficiaries can access information they need to determine whether the exemption is satisfied and to understand how the Financial Institution and Investment Professional are acting in the Retirement Investor's Best Interest.

not explained, nor justified in terms of cost or adverse effect on compliance. We urge the Department not to change the current exemption in this respect.

Proof of Filing Form 5330 is Unnecessary and Outside the Department's Jurisdiction

We do not understand why the Department should, for the first time in 48 years, and only in the fiduciary investment advice area, decide that it must monitor advice providers' across-the-board compliance with IRS Form 5330 filing requirements. The exemption requires that the retrospective review cover the filing of excise tax returns for transactions **not** covered under the exemption.

This proposal would require Financial Institutions, as part of their retrospective review, to report any non-exempt prohibited transactions in connection with fiduciary investment advice by filing IRS Form 5330, correcting those transactions, and paying any resulting excise taxes. The proposed amendment would add failure to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay the resulting excise tax imposed under Code section 4975 to the list of behaviors that could make a Financial Institution ineligible to rely on PTE 2020–02 for ten years. The Department believes these proposed conditions would provide important protections to Retirement Investors by enhancing the existing protections of PTE 2020–02.

This is overreaching. The Department is requiring the reporting of excise tax filings by financial institutions not to enforce the law, but instead to have a basis to make the institutions ineligible to use the exemption (thus making them unable to provide fiduciary investment advice to retirement investors). Congress did not intend to give this kind of unconstrained authority to the Department when it gave the Department the authority to grant prohibited transaction exemptions.

By definition, only those that have engaged in transactions for which no exemption applies (including PTE 2020-02) file Form 5330. It makes no sense that a condition of PTE 2020-02 is reporting to the Department of Labor a failure to comply with PTE 2020-02 (or any other exemption). We further note that the Secretary of Labor has no enforcement authority over Code section 4975 - in the Reorganization Plan of 1978 - enforcement of the excise tax provisions of the Code was explicitly reserved to the Internal Revenue Service.[90] The

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[90] Reorganization Plan of 1978; Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, August 10, 1978, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code.

Section 105 - Enforcement by the Secretary of the Treasury

The transfers provided for in Section 102 of this Plan shall not affect the ability of the Secretary of the Treasury, subject to the provisions of Title III of ERISA relating to jurisdiction, administration, and enforcement, (a) to audit plans and employers and to enforce the excise tax provisions of subsections 4975(a) and 4975(b) of the Code, to exercise the authority set forth in subsections 502(b)(1) and 502(h) of ERISA, or to exercise the authority set forth in Title III of ERISA, including the ability to make interpretations necessary to audit, to enforce such taxes, and to exercise such authority; and (b) consistent

Department has no legitimate need for this information and no authority over the filing of a Form 5330, and should not seek to make institutions ineligible to use the only class exemption available for investment advice if they fail to file excise tax returns. If Congress intended to give the Department this authority, it would have done so directly, and if Congress intended that the penalty for failing to file a Form 5330 would be disqualification from providing investment advice to retirement investors, it would have written that penalty into the Internal Revenue Code.

The Effective Date Cannot Be Met

We have mentioned elsewhere two effective date issues: the first issue relates to convictions entered before the effective date (which the Department states is 60 days after publication of the final exemption in the Federal Register), and the second issue deals with the mailing to every single retirement investor of a notice of the availability of cost and compensation information. Further, while the Department suggests that the original exemption was effective 60 days after final publication (88 FR 75980), that statement is not accurate. The preamble to the original exemption provided:

> Further, the extension of the temporary enforcement policy in FAB 2018–02 until its expiration on December 20, 2021 will allow parties a transition period during which the Department will not pursue prohibited transaction claims against investment advice fiduciaries who work diligently and in good faith to comply with the Impartial Conduct Standards for rollover recommendations or treat such fiduciaries as violating the applicable prohibited transaction rules.

That "enforcement policy" was later extended by FAB 2021-02 until (i) January 31, 2022 for all of the PTE's conditions except the "specific reasons" requirement, which was (ii) extended to June 30, 2022.[91] So, the functional effective date of the original exemption was almost 18 months after the final exemption was published in the Federal Register. Since this exemption will be the only available class exemption, the industry needs at least that amount of time to comply.

Other Matters

We appreciate the Department's removal of the exclusion under the exemption's scope of relief of pooled employer plans and robo-advice. We think that change will make use of the

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with the coordination requirements under Section 103 of this Plan, to disqualify, under section 401 of the Code, a plan subject to Part 4 of Subtitle B of Title I of ERISA, including the ability to make the interpretations necessary to make such disqualification. However, in enforcing such excise taxes, and, to the extent applicable, in disqualifying such plans the Secretary of the Treasury shall be bound by the regulations, rulings, opinions, and exemptions issued by the Secretary of Labor pursuant to the authority transferred to the Secretary of Labor as provided in Section 102 of this Plan.

[91] In addition, from December 21, 2021 through June 30, 2022, the Department will not pursue prohibited transactions claims against investment advice fiduciaries who are otherwise in compliance with PTE 2020-02 based solely on their failure to comply with the disclosure and documentation requirements set forth in Sections II(b)(3) and (c)(3) of that exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules.

exemption by financial institutions more straightforward and will streamline training and policies and procedures.[92] We also appreciate the Department calling out the fact that the exemption does not require a fiduciary to identify the "single best" option. We also believe the good faith rule provides a common sense way to approach inadvertent errors.

We were surprised to see the Department's footnote that seemed to suggest that the Department is the final arbiter of best interest. While we do not quarrel with the proposition that the Department has enforcement authority over plans covered by Title I and can bring an enforcement action against an advice fiduciary alleging that a transaction fails to meet the best interest standard, the Department will have the same opportunity as the advisor to demonstrate its position to a court. The Department's view on the subject is not controlling. It also suggests that Reg BI's "best interest" standard might not actually be the same as the Department's, which undermines Department's claim to be seeking uniformity.

We were also surprised to see the Department propose to add to the operative language an example illustrating impermissible conduct. The example is obvious, and unnecessary. It does not need to be in the exemption.

The exemption needs clarification on referral programs. Our comment on the revision in the definition of the term "investment advice fiduciary" noted that lawyers and accountants often refer their clients to brokers, advisors or insurance agents. We said there that we do not believe that these referrals are investment advice for a fee. However, if the Department does not agree, we note that this exemption does not appear to be available for any fee or remuneration received by the lawyer or accountant. The two rulemakings should dovetail.

We strongly urge the Department to eliminate the requirement that the financial institution produce its policies and procedures in 10 business days. Most institutions have more than a hundred policies and procedures for different lines of business, different conduct, different systems and different investment advice laws. The Department can use its subpoena authority to seek those procedures; it should not use an exemption to commence an investigation, with the threat that if the Department does not believe that the information is provided quickly enough, the exemption will be unavailable for all transactions and all plans and retirement investors of the institution will suffer.

For all the substantive, due process, and cost reasons discussed herein, the proposed PTE 2020-02 changes should not be finalized.

Part 3: Proposed Amendments to PTE 77-4, PTE 80-83, PTE 83-1, PTE 84-24, PTE 86-128

SIFMA's members have used these exemptions, or their predecessors, since the 1970s. They are firmly imbedded in their policies and procedures, their training, their compliance

[92] We believe that all types of roboadvice – nondiscretionary and discretionary should be covered by the exemption because of the computer-generated nature of the advice or management.

routines and their internal audit reviews. The majority of the changes proposed by the Department will be disruptive and unhelpful, unnecessarily upending decades of consistency for rule compliance without substantial justification. They serve only to further the Department's intention to force all advisory services into a single class exemption. The costs to the industry of changing their reliance on all of these exemptions is high, and is entirely unanalyzed by the Department. Consents have been received, compliance routines built around, and policies, procedures and training have been based on these exemptions. There is no reason to abandon them in favor of a new PTE that has only been in existence for two years and has not been universally adopted by industry. We urge the Department to forego these wholesale changes and simply provide a method in PTE 84-24 for independent insurance agents to sell annuities as a fiduciary.

For nearly 50 years, exemptions were fashioned to reflect an industry or a practice, allowing a service provider or fiduciary to find the exemption that best reflected its business model. The Department appears to believe that all of those exemptions should no longer be available to an investment advice fiduciary. Instead, it proposes a one-size-fits-all model to avoid "regulatory arbitrage". While this approach may make the Department's oversight and enforcement easier, it certainly comes with a significant and totally unrecognized cost to the industry, and therefore to plans and other retirement investors. Financial institutions have set up their policies, procedures, compliance routines, risk assessments, training and supervision structures to accommodate the exemptions each has chosen to use. Requiring all of those institutions to revamp their systems and processes will be expensive and time consuming, none of which are reflected in the Department's cost assessment or effective date.

Thus, these proposed amendments are overly restrictive and unhelpful, made all the worse because they are unnecessary. To the extent these changes are invalidated under the reasoning of *Chamber of Commerce*,[93] the industry and the plans they serve will suffer unnecessary costs and investment in ultimately vacated rules. We urge the Department not to finalize these amendments.[94] Our members spent significant time and resources to make these exemptions work and we believe they have worked well for the last 48 years.

I. The Proposed Amendments to PTE 84-24 Have Greater Consequences Than the Department Acknowledges

The Department proposes to make PTE 84-24 unavailable to investment advice fiduciaries unless they are selling particular types of insurance products. While we understand that the Department believes that there are gaps in the regulatory regime for insurance agents, the proposed changes to PTE 84-24 have much more consequence. Since by its terms, it has always excluded trustees, plan administrators, employers and discretionary fiduciaries, it is neutered by these amendments. Its only purpose was to cover section 406(b) violations by advisors and the section 406(a)(1)(A) violation resulting from a sale of an insurance product between an

insurance company who is a party in interest and a plan. Sales of investment companies directly between a plan and an investment company is not a prohibited transaction because an investment company cannot be a party in interest to a plan.

Investment company shares sold between a plan and a principal underwriter are currently covered under PTE 75-1, Part II, PTE 84-24, and PTE 2020-02. Since virtually every financial institution had developed procedures for obtaining consent and providing disclosure under PTE 84-24, few if any, switched to PTE 2020-02 when that exemption became effective. On the effective date, there is no good option for these firms. It would be nearly impossible to redocument every plan client holder of investment company securities. There are probably tens of millions of retirement investors whose accounts would need to be instantly redocumented from the requirements of PTE 84-24 to the requirements of PTE 2020-02. Not a single word of the cost analysis is devoted to these costs. We note that the effective date provisions are drafted in a way that does not accommodate the use of the exemption from 1977 until the effective date of these proposals. Thus, to avoid fundamental due process problems, there needs to be two retroactive periods: one for pre-1977 transactions, one for 1977 – 2024 transactions, and a prospective section.

As noted in our comments on the fiduciary regulation and PTE 2020-02, PTE 84-24 has always permitted the purchase of closed-end funds in an initial public offering by fiduciaries. Without explanation or cost analysis the Department has removed this transaction from all relief under any exemption. Closed-end funds are one of three general types of investment companies identified in the Investment Company Act of 1940 ('40 Act); the other two are open-end funds (OEFs) and unit investment trusts. Exchange-traded funds are a newer investment company structure, and some describe them as a hybrid of an OEF and a closed-end fund. There are many similarities between these four investment companies. Each is a pooled investment vehicle that offers shares almost exclusively through a public offering registered under the Securities Act of 1933, with all applicable fees, expenses, and offering costs fully disclosed in an initial prospectus.

The primary exemption for initial offerings of closed-end funds is PTE 84-24. After shares are issued, they are traded on exchanges, and the only exemption required is section 408(b)(2). Closed-end funds differ from other investment companies in that they generally do not continuously offer shares. They typically have a fixed number of shares; this number is established during an initial public offering (IPO). Closed-end funds generally do not issue redeemable shares, but rather list shares on a national stock exchange for trading at prices determined by secondary market participants. Share prices for closed-end funds are transparent throughout the trading day, and liquidity is offered continuously through market trading.

As of the end of 2022, the closed-end fund universe included 441 funds with $252 billion in assets according to the Investment Company Institute (ICI). Of that amount, $153 billion are bond funds and $99 billion are equity funds. The ICI does not publish the proportion of these assets held in tax-deferred retirement savings plans, but estimates from financial intermediaries

that offer closed-end funds suggest IRAs or other tax-deferred retirement plans hold about 25% of these funds. [95]

Closed-end funds generally have one opportunity to raise capital through an IPO offering. Unlike open end funds, no new capital is added to the fund once offered. It is estimated that 25% of taxable fixed-income and equity closed-end funds are held in IRAs and tax-deferred accounts. Thus, to exclude potentially 25% of the current investor base from investing in closed-end funds when issued would materially and adversely reduce the scale of all future closed-end funds *for all investors*. Reduced scale means reduced expense economies, potentially reduced portfolio efficiencies, and lower secondary market volume, which generally translates into wider bid/ask spreads. These dis-economies of scale affect current and future shareholders, and ultimately provide reduced income and return potential to investors over time.

Despite such a substantial change, we did not see a cost analysis with respect to the costs to retirement investors, or a cost analysis with respect to the adverse effects of this rule on the markets. The industry raised this point in 2016 in connection with the BIC exemption, but since PTE 84-24 was still available, the funds were not adversely affected. The industry raised this point again in 2020, when PTE 2020-02 was proposed but again, the Department undertook no analysis. However, since PTE 84-24 could continue to be used, the funds were not adversely affected. This time, however, ***neither PTE 84-24, nor any other exemption***, will be available. We urge the Department to either permit these transactions under PTE 84-24 or PTE 2020-02.

The changes that the Department does fully explain are those changes that relate to independent insurance agents. The proposed amendments limit the insurance contracts that can be sold under the exemption to contracts that are not securities. While adopting many of the provisions in PTE 2020-02, the proposed amendments ignore all of the normal compensation associated with these products, all of which is fully disclosed under state law, and limit insurance producers to commissions, renewal fees and trailing fees. While others will focus their comments on this exemption with respect to insurance contracts, we point out that this solution to the independent agent problem seems punitive and unnecessary because state insurance laws have been modernized to harmonize with Reg BI.

In connection with PTE 84-24, and in response to DOL's request, we understand that some of our members do currently rely on the exemption in Section III(f), which provides relief in connection with the purchase of mutual fund shares with plan assets, when such principal underwriter acts as the sponsor of the "Pre-approved Plan" document utilized by the plan, or provides for nondiscretionary trustee services to the plan. We urge the Department to retain this provision.

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[95] https://www.ici.org/cef/background/bro_g2_ce#:~:text=share%20price%20volatility.-,Total%20Assets%20of%20Closed%2DEnd%20Funds,total%20assets%20of%20%24252%20billion

II. The Proposed Amendments to PTE 75-1 Will Create Confusion With Regard to the Provision of Research, Analysis and Reports to Issuers and Others

The Department proposes to revoke Part I(b) and (c) of PTE 75-1, which covers agency trading and the commissions in connection with those trades. The Department notes that the transactions and commissions are covered by ERISA section 408(b)(2). We agree, but have always relied on PTE 75-1 for a couple of useful clarifications. First, it covers the actual transaction, as well as clearance, settlement or custodial functions incidental thereto. Second, it provides the very useful clarification (and specific inclusion in the relief under PTE 75-1) regarding provision of research, analysis, availability of securities and reports concerning issuers, industries, securities or other property economic factors or trends, portfolio strategy and performance "under circumstances which do not make such party in interest or disqualified person a fiduciary with respect to such plan". We urge the Department not to revoke these sections of the exemption: they are not available to advice fiduciaries and they remain useful in the brokerage context. The Department has provided no evidence of a market failure to justify revocation, no cost analysis with respect to the revocation of this relief and offered no benefit to plans for proposing to do so.

The Department proposes to revoke Part II (2), which provides relief for the sale of mutual fund shares unaffiliated with the fiduciary and the receipt of compensation in connection with the purchase or sale. The preamble is somewhat confused on the reasons for the proposed revocation. It notes that the relief is covered by "newer, more protective exemptions" but then says that fiduciary providing investment management on the purchase or sale of a mutual fund security can receive non-commission compensation under PTE 77-4. PTE 77-4 only covers proprietary funds while PTE 75-1 only covers nonproprietary funds. We note that just because another exemption is more protective is not grounds to revoke this exemption. On that theory, the Department can never add a protective condition to any class or individual exemption without amending every other. This "catch-up" makes no sense, and this marks the first time in 48 years that the Department aims to standardize every exemption or force everyone into a single exemption. We oppose revocation here.

The Department asks for comment on the remaining parts of PTE 75-1, Part II. If the Department is referring to the principal transaction in securities exemption, which cannot be used by fiduciaries, we could not disagree more strongly. This exemption remains the bedrock of institutional dealer sales of securities, and the cost and disruption of revocation would be staggering. It is safe to say that every single U.S. securities firm uses this relief constantly, with respect to the overwhelming majority of its trading activities.

The Department proposes to require records to be kept by the financial professional, rather than by the plan. We believe that is an appropriate change.

The Department proposes to amend PTE 75-1, Part V in two ways. The first is to put the responsibility for recordkeeping on the financial firm. We believe this change is appropriate. The second change is to condition the relief on extensions of credit on the settlement failure not having been caused by the financial institution. We think this is a mistake. Generally, when

there is a fail in the market, it is extremely hard to tell the exact cause. Often it is a custodian failure; sometimes it is the custodian for the counterparty or it is the fault of a broker on the exchange. It makes no sense to try to resolve every factual disagreement of who is at fault. The system is working well and plans are not being harmed. The Department's insistence on conditioning relief on what will likely be a finger pointing exercise will grind the system to a halt. We urge the Department not to make this change.

The Department does not even mention its amendment of Parts III and IV in the preamble. We disagree with these proposed changes. The very thing covered by these parts is not permitted at all under PTE 2020-02. Plans and retirement investors will lose opportunities and trading efficiencies they currently enjoy with no alternative avenue open to them. Amazingly, the cost analysis does not mention the cost to plans or the market. Where the Department allows a transaction under another exemption, we may disagree with the approach but at least there is a path forward. With these two exemptions, plans are just excluded from the market, based on the Department's preferences and not their own.

III. The Proposed Amendments to PTE 77-4, PTE 80-83, and PTE 83-1 are Unnecessary and Unexplained

We urge the Department not to make the proposed changes in these exemptions to keep fiduciary advisors from using them. The Department has not analyzed the cost to change all existing accounts to a new exemption, nor has it given the industry any time to do so. The disruption to plans and the industry is enormous; all accounts will have to be redocumented. And these changes are effective in 60 days. These changes are not necessary; the Department does not even take the time to explain why they need amending, or the transactions they exempt, or where in PTE 2020-02 equivalent relief can be found. This kind of back-of-the-hand broad brush rulemaking buried in a 700 page package is unfair and unfortunate.

IV. The Proposed Amendments to PTE 86-128 are Not Tailored for Retail Clients and are Duplicative of Securities Law Disclosure

The Department proposes to exclude nondiscretionary advisors of IRAs from the relief under PTE 86-128. In contrast, the exemption appears to include discretionary fiduciary managers, regardless of whether they are advising plans or IRAs, so long as they meet all of the conditions of the exemption. We reiterate our comment that we disagree with the Department's limitations on available exemptions. We note that the relief for agency cross transactions is now not available in any exemption.

We urge the Department to look carefully at the current disclosure requirements of the exemption and consider whether they are appropriate for retail investors. We question whether a retail investor would be interested in seeing the Federal Register copy of the exemption every year, and whether they would understand it. We question why a retail investor would need a quarterly report in light of the fact that they are receiving monthly statements and have online access to their accounts. We question whether the turnover analysis make sense to a retail

investor. We think these conditions were directed at institutional investors and consultants in defined benefit plans. Simply applying the disclosure and reporting conditions in PTE 86-128 in a retail context makes little sense. Moreover, the cost analysis fails to address the questions we pose here, leading to very significant additional paperwork burdens, when this rule could simply say that reporting that meets the requirements of the securities laws will meet the requirements of PTE 86-128.

Further, from a practical perspective, the proposed changes do not address situations where an advisor may have limited discretion over the purchase and sale of certain securities within an advisory account, such as mutual funds and ETFs, but acts on a non-discretionary basis with respect to other securities within that same account, such as fee-based variable annuities or private placements. Should these transactions be included in the turnover ratio for discretionary accounts? Or should they be excluded from the portfolio turnover analysis? We urge the Department to look more closely at these conditions in light of the fact that PTE 86-128 deals only agency transactions in securities, a field fully regulated by the SEC, requiring substantial transaction based reporting which, we believe, makes more sense than the reporting required in the proposed amendments to PTE 86-128.

We object to unions being allowed to have any record of the plan. We think this provision undermines the careful balance of labor relations in this country and is preempted by the National Labor Relations Act; merely because the union's members are covered by the plan that should not give the union any access to participant records.

Conclusion

As detailed in our comment letter, SIFMA has wide-ranging and severe concerns with the approach taken by the Department of Labor in this package of proposed rules. The proposal is overly broad, unnecessary and inconsistent with existing federal regulations such as the SEC's Regulation Best Interest. Most importantly, it would negatively impact Americans saving for retirement by limiting access to advice and education while also limiting investor choice in advisors. For all of these reasons and more, the Department should withdraw this rulemaking package.

Sincerely,

Lisa Bleier

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SIFMA

Appendix I - Cost Benefit Analysis Review

Analysis of the Department of Labor's Proposed "Definition of Fiduciary Advice" Rule and Related Exemptive Rules: White Paper Proposal

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Introduction

This White Paper discusses certain aspects of the Regulatory Impact Assessment ("RIA"), or "economic analysis" that is contained in the Department of Labor's ("DOL") recently proposed *Retirement Security Rule: Definition of an Investment Advice Fiduciary ("*2023 Proposal"*, November 2023).* At the same time, the DOL also proposed amendments to existing prohibited transaction class exemptions. These were the *Proposed Amendment to Prohibited Transaction Exemption 2020–02 (November 2023),* the *Proposed Amendment to Prohibited Transaction Exemption 84–24 (November 2023),* and the *Proposed Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128 (November 2023).* The net effect of these proposed amendments was to eliminate access to certain exemptions by investment advice fiduciaries and require most advisers to use PTE 2020-02.

The notion that retirement investors should have access to reliable investment advice is a socially desirable goal and legally-authorized regulation that requires investment advisors to consider the best interests of their customers is sensible. In 2016, the DOL finalized the rule, *Definition of the Term "Fiduciary": Conflict of Interest Rule – Retirement Investment Advice ("*2016 Final Rule"*).* The rule was vacated on appeal in the US Court of Appeals for the Fifth Circuit. The court stated that:

> "We conclude that DOL's interpretation of an "investment advice fiduciary" relies too narrowly on a purely semantic construction of one isolated provision and wrongly presupposes that the provision is inherently ambiguous. Properly construed, the statutory text is not ambiguous. Ambiguity, to the contrary, "is a creature not of definitional possibilities but of statutory context." Brown v. Gardner, 513 U.S. 115, 118 (1994). Moreover, all relevant sources indicate that Congress codified the touchstone of common law fiduciary status—the parties' underlying relationship of trust and confidence—and nothing in the statute "requires" departing from the touchstone."[1]

In November 2023, the DOL proposed a revised version of the vacated rule that addresses some of its shortcomings but retained much of its original content as it relates to the definition of a fiduciary. The current definition relies on a five-part test to determine the extent to which a person acts as a fiduciary. Under the five-part test, persons are considered to be fiduciaries only if they meet all of the following five elements: (1) they render advice for a fee as to the value of securities or other property or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property, (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan.

The 2023 Proposal would replace the five-part test with a set of three conditions that, if any are satisfied, a person would be deemed a fiduciary. They are as follows: The person makes a recommendation and

[1] Chamber of Commerce of the USA v. U.S. Dep't of Labor, 885 F. 3d 360, 369 (5th Cir. 2018).

1. The person either directly or indirectly has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for any assets of the retirement investor, including his personal assets and other non-retirement accounts;
2. The person either directly or indirectly makes investment recommendations to other investors on a regular basis as part of its business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or
3. The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.[2]

I. The Importance of Rigorous Economic Analysis

Once applicable legal prerequisites are satisfied, the precise form that any such regulation ultimately takes should reflect the costs and benefits of the final policy choice underlying the regulation and, importantly, those of reasonable alternatives that have been considered but not adopted. A rigorous economic analysis includes a description of the statutory baseline, the need for regulation, the proposed rule's costs and benefits, and a discussion of reasonable alternatives considered but not adopted. The primary goal of economic analysis is to objectively assess the rule's economic effects; presumably, a well-designed rule will contain a supportive economic analysis. However, the economic analysis should not ignore important economic considerations nor, if considered, present them in a biased manner. A fulsome economic analysis should identify all the relevant costs and benefits, quantify them when possible, and when quantification is not possible, explain why. When quantification is complicated by a paucity of relevant data because the regulatory landscape has recently changed significantly, a lack of data may indicate that—as a policy matter—further regulatory action is premature. This last observation is particularly relevant because the DOL does not quantify any of the proposed rule's benefits, which it largely attributes to the passage of the U.S. Securities and Exchange Commission's Regulation Best Interest (Reg BI). Nor does the DOL provide an analysis of the shortfalls of PTE 2020-02, which it is proposing to amend after only two years of experience.

II. The Need for Regulation

The DOL summarizes the need for a fiduciary standard in the Regulatory Impact Analysis (RIA) as follows:

> *"Employment-based retirement plans and IRAs are critical to the retirement security of millions of America's workers and their families. Because retirement investors often lack financial expertise, professional investment advice providers often play an important role in*

[2] It is noteworthy that the representation or acknowledgement does not have to be made directly to the retirement investor and apparently, need not have been made in the context of the recommendation that triggers the definition.

guiding their investment decisions. Prudent professional advice helps consumers set and achieve appropriate retirement savings and decumulation goals more effectively than consumers would on their own. For many years, the benefits of professional investment advice, however, have been persistently undermined by conflicts of interest that occur when financial services firms compensate individual investment advice providers in a manner that incentivizes them to steer consumers toward investments and transactions that yield higher profits for the firms. These practices can bias the investment advice that providers render to consumers and detrimentally impact their retirement savings by eroding plan and IRA investment results."

It then describes the primary benefits as:

"The most significant benefits of the proposal are expected to result from (1) changing the definition of a fiduciary by amending the five-part test, (2) requiring advice given to a broader range of advice recipients, including plan fiduciaries and non-retail investors, to meet fiduciary standards under ERISA, (3) extending the application of the fiduciary best interest standard in the market for non-security annuities, creating a uniform standard across different retirement products, and (4) requiring that more rollover recommendations be in the retirement investor's best interest"

III. Statutory Baseline

The baseline for assessing the proposed regulation on retirement investment advice should accurately reflect the current market dynamics. It serves as a foundational reference for evaluating the economic impacts of the proposed rule and any viable alternatives considered but not adopted. A comprehensive baseline should:

1. Clearly identify and describe markets directly affected by the rule.
2. Explain how overlapping regulatory regimes, like those of the SEC and state insurance laws, interact with DOL rules and assess if they can act as effective substitutes. This aspect is crucial because the SEC regulates most investment products available to retirement investors and has a strong investor protection focus. By comparison, insurance products and annuity contracts are regulated at the state level.[3] State insurance regulators are supported by the NAIC, which helps to shape the regulatory landscape of the U.S. insurance industry by fostering consistent regulation across state lines.

The baseline must thoroughly characterize the market for retirement advice. This includes detailing the number of investors, types of available investment products, total investments by product category, and the existing state of DOL and overlapping regulations from bodies like the SEC, state authorities, FINRA, and the NAIC.

A detailed breakdown by product category is essential. The DOL's justification for new rulemaking largely hinges on regulatory gaps compared to the SEC's scope. These gaps cover non-security investments like fixed annuities, bank deposits, certificates of deposit, and non-security real estate investments. The baseline should quantify the size of these markets and compare them

[3] Variable annuity contracts are considered securities and are regulated by the SEC. Fixed and indexed annuities are not considered securities and fall under state regulation.

with the size of mutual funds and equities held by retirement investors to gauge the significance of potential market failures.

In the 2023 Proposal, the discussion on the existing regulatory landscape, including overlaps with the SEC, FINRA, NAIC, and state legislation, is somewhat fragmented. This approach makes it challenging to form a cohesive understanding of the economic characteristics of various asset classes. For instance, while the Proposal reports significant growth of fixed index annuities in 2022, it doesn't provide a comprehensive comparison with the market size of SEC-regulated variable annuities or the overall annuity market relative to mutual funds held by retirement investors.

Moreover, the focus is often on flow statistics like annual product sales rather than providing a clear picture of the overall market size. A more organized and holistic presentation of these statistics is necessary for a full understanding of the market and effective evaluation of the proposed regulation's impact. DOL has failed to provide this.

A. Limitations Associated with the Proposed Rule's Baseline and Need for Regulation

The baseline analysis of the 2023 Proposal has three major shortcomings:

1. It does not provide essential summary statistics about the extent of investor participation. The baseline should also include data about the frequency with which retirement investors invest in asset classes that are no longer permitted, such as equity IPOs and closed-end funds.
2. The analysis lacks a detailed, data-driven examination of market sizes, including a breakdown by product category.
3. There is an absence of an analysis of the size of different asset classes under the jurisdiction of relevant regulatory bodies.

A key focus of the 2023 Proposal is conflicted products (where a conflict of interest exists between the recommender and the investor). To effectively address this issue, it is crucial to precisely define and quantify the scope of these conflicted products and to what extent they are already governed by fiduciary or best interest standards. This analysis would significantly aid in understanding the potential scale of benefits from the proposed regulation.

The discussion should also highlight the sizes of markets for conflicted products compared to non-conflicted asset classes. This comparison is necessary to gauge the extent of regulatory gaps, which is vital for estimating the potential benefits. Since these statistics should be available to the DOL, the resultant baseline discussion is incomplete. If the DOL is unable to collect this data, it needs to acknowledge this and explain why. I discuss possible benefit and cost quantification in more detail below.

Furthermore, the DOL should present a thorough data-driven analysis to substantiate the perceived regulatory gaps and clarify why existing regulations are inadequate for addressing concerns about conflicted advice. For instance, the 2023 Proposal points to potential underperformance in mutual funds with load fees, suggesting significant losses for retirement investors. The Proposal estimates

these losses to be between $202 billion and $404 billion over 20 years, leading to a significant reduction in retirement savings.

However, this estimate is not reliable since the academic research it is based on predates the enactment of Reg BI. Reg BI was expected to mitigate such conflicts. If the DOL finds that Reg BI's protections are not enough and wants to enforce stricter standards, it should clearly explain its reasons and provide a justification for imposing additional regulations.

Given the significant overlap in regulatory scope between the DOL's 2023 Proposal and the responsibilities of the SEC, the baseline for the Proposed Rule should include data on the proportion of Individual Retirement Accounts (IRAs) and retirement plans invested in SEC-regulated securities. This is important because the SEC already has established investor protection standards and an effective enforcement mechanism. Understanding this overlap is crucial for assessing the necessity and potential impact of the new DOL regulations.

A.1 Relevance of Academic Literature in 2023 Proposal

The 2023 Proposal references 36 academic papers, encompassing a variety of studies on investor and advisor behaviors. These references are tabulated in Table 1. These references include:

- Eight discussion papers primarily focus on theoretical or conceptual aspects without presenting new data analyses.
- Nineteen papers feature empirical analyses, which involve original data research.
- One paper explores outcomes from two distinct field experiments.
- Eight papers are based on survey research.

Out of these 36 papers, 28 are categorized as empirical analyses, surveys, or field experiments. However, most of these studies rely on data collected before significant regulatory changes:

- 22 of these papers use data samples that predate the implementation of the 2016 Final Rule.
- 25 papers are based on samples collected before the enactment of Reg BI in 2019.

Sethi, Spiegel, and Szapiro's 2019 study stands out as the only one that analyzes mutual fund underperformance using data from the post-2016 period—and even then, only covering a short period of time after the 2016 Final Rule. The study demonstrates that the association between excess loads and underperformance ends in 2007, well before the passage of Final Rule 2016 and remains insignificant for the remainder of the sample period, including 2017. As explained below, SSS does not support the DOL's analysis.

A.2 Relevance of Academic Literature in the 2015 Regulatory Impact Analysis

The 2023 Proposal refers to the 2015 Regulatory Impact Analysis (2015 RIA) that accompanied the 2016 Final Rule. The DOL indirectly incorporates this analysis through citation, discussing several of the 2015 RIA's primary conclusions as if they are established fact.

For example, the 2015 RIA cites an extensive literature that examines the performance of broker-sold and direct-sold mutual funds (see Table 3.2.24-1 of the 2015 RIA). The cited literature finds that load funds tend to underperform relative to several different benchmarks and are the basis for the quantification of potential gains.

Since Reg BI had not been proposed when the 2015 RIA was published, the DOL's baseline analysis appropriately considered these papers, and their attempts at quantification, if performed correctly, would have been appropriate.[4] However, Reg BI is now established law rendering such an analysis inappropriate because it fails to consider the mitigating effects of Reg BI. The DOL, therefore, may not properly rely on the 2015 RIA.

IV. Assessments of Costs and Benefits

The 2023 Proposal articulates the following set of benefits (see Table 2 of the Proposal):

1. Increase uniformity in the regulation of financial advice for retirement investors, across different market segments and market participants.
2. Protect consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility).
3. Facilitate retirement investors' trust in advisers.
4. Facilitate more efficient capital allocation.

Additionally, it identifies transfer benefits mainly arising from shifting retirement investments away from what it considers conflicted products:

1. Reduced fees and expenses for participants paid to financial institutions.
2. Redistribution of investment capital to different asset types, share classes, or investment products.
3. Changes in asset distributions in plans and IRAs.

The above-listed benefits are highly qualitative. Consequently, the cost-benefit analysis in the 2023 Proposal is markedly different from the 2016 Final Rule. First, unlike its predecessor, it makes no effort to quantify any of the benefits. Instead, it implicitly relies on quantifications in the 2015 RIA and 2016 by referring to them throughout the 2023 Proposal.

The absence of an analysis of quantified benefits is likely attributable to their vaguely defined nature and their attendant lack of specificity. As discussed below, the lack of quantification extends to areas where quantification should be possible, such as the description of the baseline and the amounts of retirement capital invested in so-called conflicted products.

One significant problem with continued reliance on attempts at quantification in the 2015 RIA and the 2016 Final Rule is that both are based on fund underperformance – an analysis that would only be relevant to SEC-regulated products. The DOL argues that conflicted brokers place retirement

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[4] A discussion of reasonable alternatives should have included the impact of a future version of Reg BI because the SEC was working on its version of a best interest standard for broker-dealers and was actively consulting with the DOL at the time the rule was proposed and finalized.

investors in underperforming funds because they tend to pay higher commissions. To the extent that a fiduciary standard can ameliorate broker self-dealing, the DOL expects underperformance to be eliminated. This argument is based on the premise that a fiduciary standard will increase competition among mutual funds for investor assets. If weak funds cannot attract assets due to poor relative performance, they will eventually be forced out of the market.[5]

However, there is ample evidence of increased competition for retirement assets. For example, Hung, Clancy, Dominitz, Talley, Berrebi, and Suvankulov (2008) document a shift from broker-dealer to investment advisory models in retail investing.[6] When combined with declining commission rates and competition from discount brokerage firms, traditional transaction-based services have become less attractive because fee-based activities provide a more consistent revenue stream than commission-based accounts. Peirce (2017) comments on the steady decline in the number of registered broker-dealers from 2002 through 2017.[7] She observes that:

> "*The decline in the number of BDs is complicated by the wide variety of firms that are registered as BDs. One area in which there is substantial change is the retail BD landscape. More firms are moving away from commissions to an account-based fee model and many registered-representatives are dually registering as investment advisers. The Department of Labor's fiduciary rule has not taken effect and is currently under review by the new administration, but it has already caused BDs to rethink their fee structures and business models.*"

Consistent with this observation, the SEC's discussion of the baseline in Reg BI documents that this decline has been accompanied by a marked increase in the number of investment advisors.[8]

When the SEC released Reg BI on June 9, 2019, it established standards that were designed to "enhance the quality and transparency of retail investors' relationships with investment advisers and broker-dealers, bringing the legal requirements and mandated disclosures in line with reasonable investor expectations, while preserving access (in terms of choice and cost) to a variety of investment services and products."[9] Reg BI's extension of the SEC's investor protection mandates to the area of investment guidance should mitigate conflicts of interest with SEC-regulated investment products. Once again, a significant problem with the 2023 Proposal is it references quantified benefits from the 2015 RIA and 2016 Final Rule, both of which did not –

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[5] The quantifications in the 2016 Final Rule estimated that conflicts of interest related to underperformance in load funds could be as high as $404 billion over the next twenty years and additional underperformance associated with load funds that charged excess load fees could be as high a $36 billion over the next twenty years.

[6] See Angela A. Hung, Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi, and Farrukh Suvankulov, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, RAND Institute for Civil Justice Technical Report (2008), available at https://www.rand.org/content/dam/rand/pubs/technical_reports/2008/RAND_TR556.pdf. This report was prepared by RAND and sponsored by the SEC.

[7] *See* Hester Peirce, *Dwindling Numbers in the Financial Industry*, Brookings Center on Markets and Regulation Report (May 15, 2017), *available at* https://www.brookings.edu/research/dwindling-numbers-in-the-financial-industry/

[8] See https://www.sec.gov/regulation-best-interest, pages 417-422.

[9] Regulation Best Interest, Form CRS and Related Interpretations, https://www.sec.gov/regulation-best-interest

indeed, could not have -- considered the impact of Reg BI. Since the SEC finalized Reg BI, referring to quantified benefits from the 2016 Final Rule is inappropriate.

Additionally, the DOL's 2015 RIA, which the 2016 Final Rule relied upon, contains significant methodological flaws. As discussed below, the benefit quantifications associated with fund underperformance are incorrect and cannot be relied upon.

If the DOL still perceives issues with fund underperformance, it implicitly suggests that the SEC's best interest standard is unable to fully protect retirement investors. If true, the DOL needs to recognize the extent of this regulatory gap and estimate the remaining level of underperformance. This would require the DOL to quantify the residual benefit. It could use a methodology similar to the one used to quantify benefits in the 2015 RIA and similar to the quantification made by the SEC in Reg BI, which would require calculating the costs associated with underperformance after Reg BI was finalized. Such an effort would require the DOL to estimate the marginal benefits relative to Reg BI. Even though such a calculation should be possible, no such estimation is made.

Another issue related to the DOL's dependence on the 2015 RIA and 2016 Final Rule is the notable reduction in fund underperformance that occurred before the implementation of the 2016 Final Rule and Reg BI. The DOL's initial attempt at benefit quantification in the 2015 RIA assumed that the elimination of conflicted advice will reduce underperformance by approximately 1% per annum. At the time, commenters argued that this estimate was too high based on several factors that the DOL failed to consider. Based on commenter input, most notably an updated analysis by Reuter (2015), the DOL reduced its estimate of underperformance in the 2016 RIA to between 0.50% and 1.00%.[10] This reduction was primarily based on the observation that the market for mutual funds had become more competitive and that the level of underperformance had been significantly reduced.

Reuter (2015) reexamines performance differences between broker-sold and direct sold funds over 2003-2014. In this literature, the standard performance measure is "net return" (the fund's after-fee monthly return) plus any 12b-1 fees that broker-sold funds pay for distribution. As Reuter notes "This is reasonable except to the extent that conflicts of interest lead brokers to recommend funds that charge higher 12b-1 fees that broker-sold funds use to pay for distribution." He finds that the degree of underperformance across all actively managed fund classes is 0.18% for value weighted returns and 0.22% for equal-weighted returns.[11] Critically, Reuter (2015) also finds that the difference in performance between broker-sold and direct-sold funds is statistically insignificant based on weighted least squares estimations of net returns plus 12b-1 fees.[12]

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[10] Reuter, Jonathan, Revisiting the Performance of Broker-Sold Mutual Funds (November 2, 2015). Available at SSRN: https://ssrn.com/abstract=2685375 or http://dx.doi.org/10.2139/ssrn.2685375.

[11] If one only considers "net returns", actively managed fund classes experience underperformance of 0.40% and 0.45% for value-weighted and equal-weighted return, respectively.

[12] Table 6 of Reuter (2015) tests whether there is a performance difference between direct-sold and broker–sold funds. The results are statistically insignificant based on a weighted least squares regression of net return plus 12b-1 fees. Since weighted least squares regression controls for fund size when calculating standard errors, it implicitly provides a test of whether the aggregate economic effect is statistically different between broker-sold and direct sold funds (*See* Written testimony submitted by Jonathan Reuter to Department of Labor's Conflict of Interest Public Hearing (Aug. 11, 2015), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-WrittenTestimony10.pdf.)

The ICI (2017) also looks at underperformance over 2008-2016 by comparing front-end load funds to retail no-load funds.[13] This approach implicitly assumes that all funds that pay a load to brokers have some potential to attract conflicted brokers and that no-load funds are conflict-free. Using net return plus 12b-1 fees to measure performance, it finds that front-end load funds only underperformed no-load retail funds by 0.10% to 0.11%.

In conclusion, the results in the Reuter (2015) and ICI (2017) analyses indicate that the level of underperformance in "conflicted funds" is economically small relative to prior estimates used in DOL analyses. This indicates that the possible economic harm associated with underperformance is economically insignificant.[14] Moreover, the 2015 RIA and 2016 Final Rule fail to take into account the value of guidance apart from underperformance. A thorough evaluation of the benefits and costs should also take into account the potential loss of valuable services that brokers offer, like personalized, face-to-face guidance. This aspect is particularly significant for retirement investors who might prefer direct interaction with their account representatives rather than online platforms that offer automated, robo-advice.

One of the key points that a robust risk impact assessment must make as it relates to fund underperformance is threefold:

1. The DOL must explain why Reg BI is insufficient to mitigate retirement investor protection concerns associated with mutual funds.
2. Load fees have declined sharply in the recent past and estimates of underperformance based on older time periods will overstate the expected benefits.
3. There has been an increase in competition from lower cost substitutes such as exchange traded products and more no-load funds.

By comparison, the DOL is correct to rely upon Reg BI to lower its cost estimates to some extent. It argues that many of the compliance costs associated with a DOL fiduciary standard already have been incurred as firms change systems to comply with Reg BI. This is not to suggest, however, that the cost savings DOL attributes to Reg BI are correctly estimated, and of course, even though they are not quantified, Reg BI also reduces the benefits attributable of the DOL Proposal.

A. Inappropriate Reliance on Academic Literature to Motivate Benefits

Almost all of the academic literature cited in the 2023 Proposal predates the implementation of Reg BI in 2019. Of the 36 academic papers referenced in the 2023 Proposal, only three -- Honigsberg, Hu, and Jackson (2022); Liu, Yang, and We (2023); and Sethi, Spiegel, and Szapiro (SSS, 2019) -- specifically include data from after Reg BI's adoption.[15]Although the 36 studies

[13] Letter from Brian Reid, Chief Economist, ICI, & David Blass, General Counsel, ICI, to Office of Regulations and Interpretations, U.S. Dep't of Labor (March 17, 2017), *available at* https://www.ici.org/pdf/17_ici_dol_fiduciary_applicability_ltr.pdf.

[14] In any case, , the 2015 RIA fails to take into account the value of advice apart from underperformance. A robust regulatory impact analysis needs to describe the additional beneficial services brokers provide to clients.

[15] Honigsberg, Hu, and Jackson (2022) show that financial advisers that have been disciplined operate in areas with lighter regulation, Liu, Yang, and We (2023) find that investors that relied on robo-advisers performed better in Taiwan during the COVID-19 pandemic. SSS examined, among other issues, fund underperformance.

cover various topics like regulatory deterrence and investor behavior, including the rise of robo-advisors, most did not account for Reg BI's potential impact.

In addition to a lack of discussion about reductions in the level of fund underperformance, the 2023 Proposal selectively references SSS's work, emphasizing their finding that the 2016 Final Rule led to a decrease in investments in funds with excess loads. This selective citation overlooks SSS's crucial finding that there was no significant relation between excess loads and future returns after 2008. This omission is significant as it fails to acknowledge the changed regulatory and market landscape post-2016, especially considering the influence of the SEC following the adoption of Reg BI. A more balanced assessment of the SSS paper would have also recognized the absence of a statistical link between excess loads and future returns in the period following 2016, a perceived link that was central to the 2015 RIA and 2016 Rule but no longer discussed in the 2023 Proposal.[16]

B. Inappropriate Discussion of Quantified Benefits for 2016 Rule

The discussion above leads one to conclude that there is no empirical basis to support a quantified estimate of the benefits associated with fund underperformance. And yet, the DOL still reports that "*underperformance associated with conflicts of interest in the mutual funds segment alone could have cost IRA investors between $95 billion and $189 billion over the following 10 years and between $202 billion and $404 billion over the following 20 years."* In effect, the DOL continues to assert that the benefit calculations from the 2016 Final Rule are still applicable despite evidence to the contrary. By citing the 2016 Final Rule, the DOL implicitly attempts to use these estimates to help justify a market failure, despite being unable to quantify any incremental benefits to the proposed rule.

C. Failure to Consider Costs

The RIA in the 2023 Proposal fails to consider several additional, possibly unintended, costs associated with the proposed rule.

C.1 Competition for Broker-dealer and Investment Adviser Services

The 2023 Proposal cites to work by Bhattacharya, Illanes, and Padi (BIP, 2019) who find that counties in states with fiduciary standards have 15.8% fewer broker-dealers than adjacent counties with fiduciary standards. Similarly, counties with fiduciary standards also have 20.9% fewer investment advisers relative to adjacent counties without fiduciary standards. BIP conclude:

> "*These results suggest that concerns about fiduciary duty inducing exit of BDs have merit. While the effect on the absolute number of firms is small, there nevertheless seems to be a trade-off between advice provision and the number of firms in the market*."

[16] Given that SSS's study is the only empirical analysis covering the post-2016 period, it suggests that there is no current empirical support for a negative association between future returns and excess loads in this timeframe. Accordingly, a principal justification for the 2016 Rule is no longer supportable.

The DOL refers to this result as "potentially small," but such a conclusion is hard to motivate with the empirical facts. Drops of 15.8% and 20.9% are large and would alter the level of competition for retirement investment advice.

The DOL uses the BIP analysis to note that "there was no change in total annuity sales." Based on this observation, it then concludes that "the reduction in broker-dealers did not result in poor quality products being sold."

The first finding is hardly surprising. The number of retirement investors requiring investment guidance is exogenous relative to whether they reside in a county that provides fiduciary status.

The Department of Labor's assertion that decreasing the number of broker-dealers doesn't necessarily affect product quality is just one way to look at it. Another valid viewpoint suggests that broker-dealers likely to exit the market under a fiduciary standard may actually provide investment guidance similar to those that remain, implying that these firms weren't necessarily conflicted in the first place. This, in turn, suggests that fiduciary standards may not be very effective in eliminating conflicted firms. On the other hand, if conflicted firms did indeed exit the market due to the fiduciary standard, it could have a positive impact on competition. However, firms providing similar advice might exit the market, potentially harming competition in retirement advice. The DOL should consider the possibility that fewer broker-dealers and investment advisers might decrease competition in providing retirement investment advice and restrict investors' access to financial products.

C.2 Unrecognized Costs Associated with Disclosures under PTE 2020-02

The DOL has not adequately addressed the costs associated with the new disclosure requirements that financial professionals who are currently using or will need to use Prohibited Transaction Exemption (PTE) 2020-02 must bear. This is relevant because the range of available prohibited transaction exemptions has been narrowed, leading more retirement advisors to depend on PTE 2020-02, which has expanded disclosure requirements. These costs will arise in situations such as when a broker-dealer advises retirement investors on rolling over assets from a company pension plan into an IRA. For many advisors, this will necessitate the development of costly systems to ensure they meet these compliance obligations.

Additionally, the expanded criminal disqualification provision that now scopes in all affiliates rather than the business unit providing retirement guidance puts broker-dealers at greater risk of losing access to PTE 2020-02. Of particular concern is the possibility that a broker-dealer may become ineligible for an exemption because an affiliate unrelated to the business unit providing advice is convicted of committing a crime, such as an affiliate that commits crimes in a foreign country.

When a firm loses its eligibility, it can have a substantial impact on the retirement advice market. Brokers at ineligible firms may be incentivized to join a firm that is still eligible. Some investors may choose to follow their broker to the new firm, while others may seek out a new broker altogether. Regardless of the reasons behind these relocations, it is crucial to take into account and address the costs associated with these disruptions. This includes considering the effects on

competition in the market for retirement investment guidance and the consequences of increased client concentration at the remaining eligible firms.

The proposal mandates that retirement investors receive detailed cost and compensation information from financial entities before engaging in transactions under the exemption. However, it fails to consider the substantial costs associated with providing this information for every transaction. The Department estimates only 10 annual requests for this disclosure, which seems implausibly low given the size of many financial institutions. Even if this estimate were accurate, the costs involved in developing systems, allocating costs to each trade, and maintaining up-to-date information far exceed the minimal benefit to retirement investors. Given the lack of a comprehensive cost-benefit analysis and the unrealistic assumption of only 10 requests, this requirement should be eliminated.

C.3 *Unrecognized Costs Associated with Changes in the Market for Retirement Advice*

The introduction of the DOL's 2016 Final Rule and the SEC's Reg BI were pivotal factors that caused a shift from traditional broker-dealer models, primarily transaction-based, to an investment advisory model. This shift was necessitated by the emphasis on acting in the best interests of clients. These regulatory changes, even though the 2016 Final Rule was ultimately vacated, also led to a significant redistribution of assets from broker-dealers to investment advisers, robo-advisors, and self-directed accounts. Many broker-dealers offered clients a choice to either place their retirement assets in a self-directed account, an advisory account, or to close their accounts. Some broker-dealers terminated IRA accounts if account holder balances fell below specific levels (e.g., $100,000).

Evidence that the transition to a fiduciary standard will result in significant compliance costs is provided in an Investment News survey of 57 independent broker-dealers which found "firms posting a 17.1% year-over-year increase [in operating costs] as a result of increased costs related to technology, compliance and training in preparation for the Labor Department's now in-flux fiduciary rule."[17]

Concurrently, the broker-dealer industry faced declining transaction-based revenue due to decreasing commission rates, partly fueled by heightened competition from discount brokerage firms. These firms, which generally provide execution-only services at lower costs, exerted downward pressure on commission rates throughout the industry. This environment forced traditional broker-dealers to reconsider their pricing structures and led to a notable shift towards fee-based models.[18] Fee-based services, which are less dependent on customer trading activity and offer more predictable revenue streams, became more attractive compared to the traditional commission-based models.

[17] Matt Sirinides, "Independent Broker-Dealer Revenue on the Decline: Firms Participating in the Investment News", 2017, Annual IBD survey, Investment News, http://www.investmentnews.com/article/20170422/BLOG18/170429968/independent-broker-dealer-revenue-on-the-decline.

[18] *See* Crystal Kim, "BofA, JPMorgan, and the Fiduciary Rule: Will They or Won't They," BARRON'S, Mar. 15, 2017, https://www.barrons.com/articles/bofa-jpmorgan-and-the-fiduciary-rule-will-they-or-wont-they-1489588442.

In response to the 2016 Final Rule, some broker-dealers began modifying the compensation structures for their registered representatives, which included equalizing commissions across similar securities and, in some instances, banning sales quotas and certain types of bonuses. However, following the Fifth Circuit's decision to vacate the 2016 Final Rule, there were instances where firms reinstated practices previously discontinued, like back-end recruiting bonuses.[19] Moreover, broker-dealers also adjusted their business practices by, in some cases, reinstating brokerage IRA accounts in response to the vacating of the 2016 Final Rule. Changes to incentive-based compensation and principal trading restrictions were also observed.

In summary, the emphasis on fiduciary responsibility, combined with competitive pressures, is changing the way financial advice and services are structured and provided. A comprehensive regulatory impact should – but does not do so in the 2023 Proposal -- take into account the costs linked to this shift, not just in relation to competition but also how it is likely to impact efficiency and the ability to raise capital.

V. Discussion of Reasonable Alternatives

Executive Order 12866 instructs agencies to "assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. . . [and] select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impact; and equity)." In compliance with the Order, the DOL has considered alternatives from "public comments, hearing testimony, meetings with stakeholders, consultations with other financial regulators, and suggestions from Congress."

To its credit, the DOL discusses a number of feasible alternatives. However, similar to the 2016 Final Rule, the DOL dismisses many of them without providing adequate justification or posits them to serve as a straw man.

A. Platform Providers and Pooled Employer Plans.

One regulatory alternative that could have been considered relates to platform providers and pooled employer plans. Under the 2023 Proposal, platform providers offer investment alternatives for participant-directed individual account plans, where fiduciaries choose investments for participants. These providers might give investment advice or provide general financial information, like historical performance data.

The key focus of the proposed regulation on platform providers centers on whether their communications qualify as a "recommendation." This determination hinges on how "individually tailored" the communication is to the retirement investor. For example, presenting a selective list of securities as suitable for a specific investor would be considered a recommendation, even if no particular security is recommended.

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[19] See Jed Horowitz, JPMorgan to Remove Some Fiduciary Rule Handcuffs, Others May Follow, ADVISORHUB, May 4, 2018, https://advisorhub.com/jpmorgan-to-remove-some-fiduciary-rule-handcuffs-others-may-follow/; Imani Moise, Merrill Lynch Does about Face on Fiduciary-Era Policy, REUTERS, Aug. 30, 2018, https://www.reuters.com/article/us-bank-of-america-fiducuary/merrill-lynch-does-about-face-on-fiduciary-era-policy-idUSKCN1LF1R9.

If platform providers only use objective third-party criteria (like expense ratios or fund size) to help in selecting and monitoring investments, without further screening or recommendations based on the plan or IRA investors' interests, they would not be deemed as making a recommendation under the proposal.

This analysis also extends to pooled employer plans (PEPs), as authorized in the SECURE Act. PEPs involve pooled plan providers (PPPs) who have full discretion in managing the plan and its features. Whether a PPP or another service provider is making a recommendation when discussing investment options with an employer depends on whether they present the investments as specifically selected for and suitable for the plan, its participants, or beneficiaries.

When a PPP engages with a sophisticated pooled employer plan (PEP), extending fiduciary protections to the PEP may be redundant. Extending fiduciary status may be more compelling for smaller companies that lack financial expertise, as long as there is relevant legal authority to support such an extension. A potential solution is to establish a sophistication threshold for PEPs, beyond which fiduciary protection is not justified. This threshold could be determined using metrics like the PEP's size or the number of employees covered. Such criteria would help differentiate between PEPs that arguably benefit from fiduciary oversight and those with sufficient sophistication to operate without it.

Table 1. Academic Citation Analysis

Author(s)	Title	Journal	Publication Year	Primary Regulator	Topic	Period Covered	Discussion/Essay (D), Empirical Analysis (EA), Fied Experiment (FE), Survey (S)	Pre 2016 Final Rule	Pre Reg BI	Rule Text	Footnote #
Panel A. Advisory Behavior - Investment Advice											
Ashley C. Vicere	The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest	101(3) American Economic Review 423–28, (May 2011)	2011	General	Advisory Behavior - Investment Advice	n.a.	D	Y	Y	(569) Advisers may inflate the bias in their advice to counteract any discounting that might occur because of the disclosure of conflicts.	569
Alec Smith	The Cost of Chasing Returns	18 Economic Synopses (2014), https://doi.org/10.20955/es.2014.18	2014	SEC	Advisory Behavior - Investment Advice	1994-2012	EA	Y	Y	(409) Good advice can help investors avoid timing errors when trading by reducing panic-selling during large and abrupt downturns. However, conflicted advice providers may profit by encouraging investors' natural inclination to trade more and ''chase returns,'' an activity that tends to produce harmful timing errors.	409
Jill E. Fisch, Marion Laboure, & John A. Turner	The Value of Financial Advice	16(1) Annalsof Economics and Finance 69–94 (2015), http://aeconf.com/articles/may2015/aef160104.pdf	2015	Canada	Advisory Behavior - Investment Advice	2010, 2011	S	Y	Y	(398) Montmarquette and Viennot-Briot (2015) provided evidence that ''having a financial advisor for at least four years has a positive and significant impact on financial assets'' and that ''the positive effect of advice on wealth creation cannot be explained by asset performance alone: the greater savings discipline acquired through advice plays the major role.''	398
Facundo Abraham, Sergio L. Schmukler, & Jose Tessada,	The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors	66(3) Duke Law Journal (2016), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3875&context=dlj	2016	Not Specific	Advisory Behavior - Investment Advice	2015	S	Y	Y	(399) Fisch et al. (2016) also provided evidence that ''highlight[s] the potential value of professional advice in mitigating the effects of financial illiteracy in retirement planning.''	399
Panel B. Advisory Behavior - Investment Advice											
George Loewenstein, Daylian M. Cain & Sunita Sah	Retirement Savings Flows and Financial Advice: Should You Roll Over Your 401(k) Plan?	30(4) Benefits Quarterly 42–54 (2014), https://www.iscebs.org/ Documents/PDF/bqpublic/bq414f.pdf.	2014	Not Specific	Advisory Behavior - Product Choice	n.a.	D	Y	Y	(356) Turner and Klein (2014) suggested that the services and investment *performance associated with higher fees paid in an IRA are not necessarily justified,* meaning a plan participant would be able to obtain similar investment performance and services in a lower cost 401(k) plan.	366
John Turner & Bruce W. Klein	Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market	99(1) The Review of Economics and Statistics 1–15, (2015), https://doi.org/10.1162/ REST_a_00625.	2015	India	Advisory Behavior - Product Choice	2010, 2014	FE	Y	Y	(361) Research suggests that the problems resulting from differing regulatory regimes are not unique to the United States. For instance, Anagol et al. (2017) found that when agents selling life insurance in India were required to disclose commissions for one particular product, they were much less likely to recommend it to clients. Instead, the agents recommended products that did not have this requirement, but which had higher and opaque commissions.	361
Jonathan W. Lam	Defining Fiduciary: Aligning Obligations with Expectations	82(4) Brooklyn Law Review 1783 (2016), https://brooklynworks.brooklaw.edu/blr/ vol82/iss4/8/.	2016	Not Specific	Advisory Behavior - Product Choice	n.a.	D	N	Y	(389) Other commenters observed that even if the 2016 Final Rule could have reduced investors' access to certain services or products, the impact would have been on services and products that were not in the investors' best interest	389
Augustin Landier & David Thesmar	It Pays to Set the Menu: Mutual Fund Investment Options in 401(k) Plans	71(4) Journal of Finance 1779–1812, (2016).	2016	SEC	Advisory Behavior - Product Choice	1998-2009	EA	Y	Y	(213) Pool et al. (2016) found that while mutual fund companies involved in plan management for 401(k) plans included both funds from their own family as well as unaffiliated funds in the menu of investment options, poor performing funds were less likely to be removed and more likely to be added to the menu if they were affiliated with the plan trustee. (393) Pool et al. (2022) demonstrated that funds who offer defined contribution plan recordkeepers revenue-sharing payments are more likely to be added as investment options on plan menus and are also more likely to be retained. Additionally, plans whose menus include funds that share revenue had higher expense ratios resulting in significantly higher fees	213, 393
Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr.	Financial Illiteracy Meets Conflicted Advice: The Case of Thrift Savings Plan Rollovers	3(4) The Journal of Retirement 47–65 (2015), https://doi.org/ 10.3905/jor.2016.3.4.047.	2016	SEC, FINRA	Advisory Behavior - Product	2015	S	Y	Y	(367) For instance, Turner, Klein, and Stein (2015) found that most financial advisers told federal workers about the benefits of rolling over into an IRA, such as having a larger number of investment options and more lenient withdrawal options, without mentioning the higher costs that would be incurred relative to keeping their savings in the Thrift Savings Plan, which has extremely low fees.	367
Mark Egan, Shan Ge, & Johnny Tang	Mutual Fund Revenue Sharing in 401(k) Plans	Vanderbilt Owen Graduate School of Management Research Paper (November 8, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=3752296.	2022	Not Specific	Advisory Behavior - Product Choice	2009-2013	EA	Y	Y	(392 and 393) Pool et al. (2022) demonstrated that funds who offer defined contribution plan recordkeepers revenue-sharing payments are more likely to be added as investment options on plan menus and are also more likely to be retained. Additionally, plans whose menus include funds that share revenue had higher expense ratios resulting in significantly higher fees.392 Pool states that this is ''consistent with the notion that . . . less transparent indirect payments allow record keepers to extract additional rents from plan participants.''	393, 393
Panel C. Advisory Behavior - Regulatory Deterrence											
Che-Wei Liu, Mochen Yang, & Ming-Hui Wen	Advisers, Brokers, and Online Platforms: How a Uniform Fiduciary Duty Will Better Serve Investors	2017(3) Colum. Bus. L. Rev. 1200–1243 (2017), https://doi.org/10.7916/ cblr.v2017i3.1730.	2017	SEC	Advisory Behavior - Regulatory Deterrence	n.a.	D	N	Y	(359) When contemplating a potential ''Financial Adviser Reform Act'' that would ''be uniform in its application of the fiduciary duties of loyalty and care across all financial advisers,'' Smith (2017) noted that, ''this uniformity would eliminate the 'false distinction' between investment service providers by recognizing the overlapping services they offer.''	359
Jasmin Sethi, Jake Spiegel, & Aron Szapiro	Does Regulatory Jurisdiction Affect the Quality of Investment-Adviser Regulation	109(10) American Economic Review (October 2019), https:// www.aeaweb.org/articles?id=10.1257/aer.20180412.	2019	SEC and State	Advisory Behavior - Regulatory Deterrence	2009-2014	EA	Y	Y	(198) Charoenwong et al. (2019) found that under lighter regulation, advisers were more likely to receive complaints, particularly advisers with past complaints or with conflicts of interest. (401) Charoenwong et al. (2019) showed that regulatory oversight has an important impact on investment advice.	198, 401
James Choi, David Laibson, Brigette Madrian, & Andrew Metrick	Regulatory Arbitrage and the Persistence of Financial Misconduct	Stanford Law Review 797, (2022).	2022	SEC to Other	Advisory Behavior - Regulatory Deterrence	6/2010-6/2020	EA	N	N	(197) Honigsberg et al. (2022) showed that variation in regulatory oversight regimes leads to a situation where the worst financial advisers are operating in the most lightly regulated regimes. (225) associated persons of broker-dealers who had been registered with FINRA between 2010 and 2020 but were no longer registered with the regulatory authority. Of those that exited, roughly a third continued providing financial advice under a different regulatory regime, of which eight percent had a history of serious misconduct while registered with FINRA. This share increased to 12 percent when you looked at those that were still providing financial advice as an insurance producer registered with the NAIC and 13 percent when you looked at the National Futures Association members. The authors argued that the existing framework for regulating adviser misconduct creates incentives for the worst advisers to migrate to more poorly regulated state regimes. (289) While some reforms and improvements in the delivery of advice have endured despite the vacatur, without new regulatory action, gains made to some products and markets that are not covered by recent regulatory actions by the Department, SEC, or states, could be derailed. Other regulatory agencies have worked to reduce conflicts of interest, but this has resulted in a ''patchwork'' approach to regulating advice arrangements of retirement investments, which has already resulted in the most conflicted advisers moving to markets with the least oversight. Note 1. Sample is based on individuals exiting FINRA database but still active elsewhere, e.g., state insurance and Nationa Futures Asssociation databases.	197, 225, 289
YiLi Chien	Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities	35(12) Review of Financial Studies 5334–5386 (December 2022).	2022	SEC	Advisory Behavior - Regulatory Deterrence	2005Q1–2020Q2	EA	N	N	(238) Research suggests that the Department's prior efforts produced positive changes in advice markets, even without fully taking effect, which were reinforced by the SEC's actions. For instance, several studies found that the Department's 2016 Final Rule had a positive effect on conflicts of interest and that some categories of conflicts, such as bundled share classes of mutual funds and high expense variable annuities, were reduced even after the DOL rule was struck down. (284) The commission paid varies significantly, from as little as 0 percent to as much as 10 percent of the investment with the most common amount being 7 percent. (388) Good regulation may also improve the overall investment advice market. According to Egan, Ge, and Tang (2022), after the Department issued its 2016 Final Rule, total variable annuity sales fell significantly—primarily driven by a 52 percent decrease in annuities with expenses in the highest quartile, suggesting that broker-dealers responded to the 2016 Final Rule by placing greater weight on investor interests. These impacts persisted even after the rule was vacated by the Fifth Circuit. Critics of the Department's 2016 Final Rule often refer to a decline in variable annuity sales as evidence of the 2016 Final Rule having negative effects. Egan, Ge, and Tang (2002) conclude, however, that investors on average experienced a net benefit from the Rule, even taking into account the fact that some investors were no longer participating in the annuity market, (416) Egan, Ge, and Tang (2022) showed that variable annuity sales were four times more sensitive to brokers' financial interests than to investors' financial interests. (417) After the Department published its 2015 proposal, sales of high-expense variable annuities fell by 52 percent, which Egan, Ge, and Tang (2022) attributed to sales becoming more sensitive to expenses and insurers increasing the availability of lowexpense products. In fact, the authors stated that the ''regulatory change improved the distribution of products available to investors along the extensive margin, in terms of the annuities available for sale, as well as thethe intensive margin, in terms of the actual annuities sold by brokers.'' Thus, the authors concluded, the 2016 Final Rule resulted in improved investor welfare, increasing risk-adjusted returns of investors by up to 30 basis points per year, with two-thirds of the effect associated with investors moving into lower-expense products and the remainder from sales of annuities with more desirable investment options and characteristics. (418) The long-run impact of such a regulation can be estimated by applying the 30 basis point figure to the assets held in variable annuities in 2018, which was $2.2 trillion, yielding a total annual increase in risk-adjusted returns of approximately $6.6 billion. This estimate is based on variable annuity assets in 2018 of $2.2 trillion, as reported in the referenced study. (445) Egan, Ge, and Tang (2022) found that while variable annuity sales had decreased, there is no evidence that the change affected investors with less wealth more than others. They concluded that variable annuity sales had become more sensitive to expenses and that insurers had increased the relative availability of low-expense products. Even if there is reporting error in the maximum upfront commission rates data, it would tend to understate the effect of brokerage commissions on investment transactions. Therefore, the study concluded that investor welfare had improved because of the 2016 Rulemaking, despite the fact that it was vacated.	238, 284, 388, 416, 417, 418, 445
Veronika K. Pool, Clemens Sialm, & Irina Stefanescu	Fiduciary Duty and the Market for Financial Advice,	Working Paper 25861 National Bureau of Economic Research, https://www.nber.org/ papers/w25861.	2020, rev 2023	SEC and State	Advisory Behavior - Regulatory Deterrence	2013-2015	EA	Y	Y	(196) Bhattacharya et al. (2020) found that higher fiduciary standards are associated with the sale of higher quality annuity products. (384) Research shows that fiduciary protections in the annuity markets lead to better outcomes for investors. By analyzing deferred annuity sales at a large financial services provider during 2013 to 2015, Bhattacharya et al. (2020) found that fiduciary duty increases riskadjusted returns by 25 basis points. /// Note 1. This paper examines Fixed Index Annuities (not an SEC product) and Variable Annuities (an SEC product). Note 2. 79% of annuites sold by BDs are VA; 90% of annuities sold by dualy registered brokers are VA.	196, 384

Table 1. Academic Citation Analysis(continued)

Author(s)	Title	Journal	Publication Year	Primary Regulator	Topic	Period Covered	Discussion/Essay (D), Empirical Analysis (EA), Fied Experiment (FE), Survey (S)	Pre 2016 Final Rule	Pre Reg BI	Rule Text	Footnote #
Panel D. Advisory Behavior - Robo Investment Advice											
Veronika K. Pool, Clemens Sialm, & Irina Stefanescu	Robo-Advisors: A PortfolioManagement Perspective	(April 2016). https://economics.yale.edu/sites/default/files/2023-01/Jonathan_Lam_Senior%20Essay%20Revised.pdf.	2016	SEC	Advisory Behavior - Robo Investment Advice	n.a.	D	Y	Y	(335) The most basic models use computer algorithms to offer investments deemed appropriate in terms of asset allocation and diversification based on the information supplied by the client on opening an account. These investments typically include low-cost mutual funds and exchange traded funds (ETFs), and automatically invest and rebalance funds based on a specified objective or risk tolerance. Most robo-advisers offer advice concerning taxable accounts and IRA accounts. The nature of robo-advice appeals to different investors than traditional investment advice does. While traditional advisers often target older investors with high net worth, robo-advice providers or other low-cost investment firms tend to attract young, technology-savvy investors with low balances.	335
Ben Charoenwong, Alan Kwan, & Tarik Umar	The Emergence of the Robo-advisor	Wharton Pension Research Council Working Papers	2018	SEC	Advisory Behavior - Robo Investment Advice	n.a.	D	N	Y	(330) The proposed changes to PTE 2020– 02 would make investment advice providers providing pure robo-advice eligible for relief under the exemption. While there has been a significant increase in robo-advice in recent years, the market for robo-advice has shifted away from pure robo-advice to a hybrid approach which combines features of robo-advisers and traditional human advisers. (332) Another driver is larger financial institutions entering the market with hybrid robo-advice. While the first robo-advisers were standalone firms, many existing financial firms, including banks, broker-dealers, technology firms, and asset managers, have entered the market,332 many by acquiring existing pure robo-advice platforms	330, 332
Vivek Bhattacharya, Gaston Illanes, & Manisha Padi	Robo-advisors: Investing Through Machines	World Bank Research and Policy Briefs 134881 (2019).	2019	SEC	Advisory Behavior - Robo Investment Advice	n.a.	D	N	Y	(336) According to one source, there were 200 robo-advisers in the United States in 2017.	336
Mark Carhart, Ron Kaniel & Adam Reed	Judge Me on My Losers: Does Adaptive Robo-Advisors Outperform Human Investors During the COVID–19 Financial Market Crash?	Production and Operations Management Forthcoming, (Accessed Aug. 31, 2023), https://doi.org/10.1111/poms.14029.	2023	Taiwan	Advisory Behavior - Robo Investment Advice	2020	EA	N	N	(459) a recent study by Liu et al. (2021) looked specifically at the impact of using roboadvisers on investment performance during the 2020 financial crisis caused by the COVID–19 global pandemic. Using portfolio and transaction data from investors at a Taiwanese mutual fund online investment platform, Liu et al. (.2021) found that robo-advice significantly reduced the losses experienced by investors during the crisis and that investors using roboadvice adjusted risk levels and trading to adapt to changes in the market while other investors did not. Younger users and those with less investment experience benefited the most from robo-advice. /// The comparison appears to be between robo-advisers and self directed accounts. NIr ure this is a relevant comparion in the context of fiduciary standards.	459
Panel E. Fund Behavior and Performance											
Mercer Bullard, Geoffrey C. Friesen, & Travis Sapp,	Leaning for the Tape: Evidence of Gaming Behavior in Equity Mutual Funds	57(2) Journal of Finance 661–693 (2002)	2002	SEC	Fund Behavior and Performance	1992-2000	EA	Y	Y	(571) A wide range of literature suggest that when financial data are available to researchers, these researchers uncover problematic behaviors and draw attention to the behaviors, which has the effect of curbing the practices in the future.	571
Susan Christoffersen, Richard Evans & David Musto	Investor Timing and Fund Distribution Channels	Social Science Research Network	2008	SEC	Fund Behavior and Performance	1991-2004	EA	Y	Y	(411) Bullard, Friesen, and Sapp (2008) found that the difference in performance between load and no-load funds has two components: the difference in prospectus returns across share classes and the difference in investor returns resulting from differences in investor timing.	411
Truong X.Duong & Felix Meschke	What Do Consumers' Fund Flows Maximize? Evidence from Their Broker's Incentives	68(1) Journal of Finance 201–235 (February 2013), https://doi.org/10.1111/j.1540-6261.2012.01798.x.	2013	SEC	Fund Behavior and Performance	1993-2009	EA	Y	Y	(373) As discussed in the Baseline section discussion on market developments in the insurance market, research has found load fees create a conflict of interest in investment advice, leading to decreased returns. (412) Additionally, Christoffersen, Evans, and Musto (2013) found that as the size of the load-share increased, mutual fund returns decreased. This suggests that the greater the adviser's conflict of interest, the worse off the IRA investor can expect to be	373. incorrect, (412) correct
Geoffrey Friesen & Travis Sapp	Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?	6(3) The Journal of Retirement 46–59, (2019);	2019	SEC	Fund Behavior and Performance	1993-2017	EA	N	Y	This study updated the analysis performed by Christoffersen, Evans, and Musto (2013) and examined the period from 1993 to 2017 in order to look at the impact of the Department's Final Rule, taking into consideration preexisting marketplace trends, anticipatory effects, the April 2015 Proposal, and the April 2016 Final Rule. The study calculates the excess load as ''the difference between loads predicted by a regression and actual load, given a number of other control variables. (238) Research suggests that the Department's prior efforts produced positive changes in advice markets, even without fully taking effect, which were reinforced by the SEC's actions. For instance, several studies found that the Department's 2016 Final Rule had a positive effect on conflicts of interest and that some categories of conflicts, such as bundled share classes of mutual funds and highexpense variable annuities, were reduced even after the DOL rule was struck down. (272) Sethi, Spiegel, and Szapiro (2019) found that the Department's 2016 Final Rule reduced flows into funds with excess loads or loads that were higher than would otherwise be expected based on the fund's characteristics.	238, 272
Mark Egan, Gregor Matvos, & Amit Seru	The Rise and Fall of Portfolio Pumping Among U.S. Mutual Funds	60 Journal of Corporate Finance (February 2020)	2020	SEC	Fund Behavior and Performance	1993-2011	EA	Y	Y	(571) A wide range of literature suggest that when financial data are available to researchers, these researchers uncover problematic behaviors and draw attention to the behaviors, which has the effect of curbing the practices in the future.	571
Panel F. Investor Behavior											
Mark Egan	Mutual Fund Flows and Investor Returns: An Empirical Examination of Fund Investor Timing Ability	31(9) Journal of Banking and Finance 2796–2816 (2007), https://www.sciencedirect.com/science/article/abs/pii/S0378426607001422.	2007	SEC	Investor Behavior	1991-2004	EA	Y	Y	(410) Friesen and Sapp (2007) found that equity mutual fund investors made timing decisions that reduced fund investor average returns by 1.56 percent annually	410
Randall A. Heron & Erik Lie	Financial Literacy and Financial Sophistication in the Older Population	13(4) Journal of Pension Economics and Finance 347– 366, (October 2014).	2014	Not specific	Investor Behavior	2008	S	Y	Y	(177) Researchers have consistently found that many Americans demonstrate low levels of financial knowledge and lack basic understanding of investment strategies. In particular, households age 50 and older and nearing retirement, ''fail to grasp essential aspects of risk diversification, asset valuation, portfolio choice, and investment fees.''	177
Randall A. Heron & Erik Lie	Individual Judgment and Trust Formation: An Experimental Investigation of Online Financial Advice	Australian School of Business Research Paper No. 2013 ACTL21	2014	Not specific	Investor Behavior	2011	S	Y	Y	(191) Research also suggests that investors' opinions of adviser quality can be manipulated. For instance, Agnew et al. (2014) found that if an adviser first provides good advice on a financial decision that is easy to understand, the client will subsequently trust bad advice on a more difficult or complicated topic. (423) However, advisory conflicts have historically distorted the market in ways that have prevented consumers from accessing less conflicted investment alternatives. Less sophisticated investors frequently do not know how much they are paying for advice and are not equipped to effectively monitor the quality of the advice they receive. Indeed, Agnewet al. (2021) found in an experimental setting that younger, less financially literate, and less numerate participants were more likely to hire a low-quality adviser	191, 423
Santosh Anagol, Shawn Cole & Shayak Sarkar	Financial Adviser Anxiety, Financial Literacy, and Financial Advice Seeking	51(1) Journal of Consumer Affairs 54–90 (2017), https://www.jstor.org/stable/44154765.	2017	Australia	Investor Behavior	2011	S	Y	Y	(395) The market for financial advice generally works best when investors trust investment advice providers and their trust is well-placed. Both conditions are necessary for optimal results. If investors distrust investment advice providers, they will incur higher costs to select a provider and monitor their conduct. Their provider may also incur higher costs to counter prospective and existing customers' distrust. Distrustful investors may be less likely to obtain beneficial advice and more likely not to follow beneficial advice.	395
Jill E. Fisch, Andrea Hasler, Annamaria Lusardi, & Gary Mottolo	Trust Reduces Costs Associated with Consumer-Financial Planner Relationship	71(4) Journal of Financial Service Professionals 80–91 (2017), https://web.p.ebscohost.com/ehost/pdfviewer/pdfviewer?vid= 0&sid=1ca603cd-53ca-4cbb-99b1-5fd43782b0 c4%40redis	2017	Not specific	Investor Behavior	not specifiied but prior to July 2016	S	Y	Y	(396) Likewise, if investors trust investment advice providers more than is warranted, they may reduce their monitoring of the advisor's actions and accept less transparency in policies, procedures and fees, making them more vulnerable to harm from advice that is biased by advisory conflicts.	396
Claude Montmarquette & Nathalie Viennot-Briot	For Better or For Worse: Default Effects and 401(k) Savings Behavior	In Wise DA (ed.), Perspectives on the Economics of Aging. Chicago: University of Chicago Press, pp.81–121. https://spinup-000dla-wp-offloadmedia.s3.amazonaws.com/faculty/wp-content/uploads/sites/27/2019/06/betterorworse.pdf.	2019	Not specific	Investor Behavior	1997, 1998	EA	N	Y	(428) Research shows that low-income participants tend to be influenced by default options more than high income participants	428
Jill E. Fisch, Tess Wilkinson-Ryan, & Kristin Firth	The Market for Financial Adviser Misconduct	127(1) Journal of Political Economy, (2019).	2019	SEC, FINRA	Investor Behavior	2005-2015	EA	Y	Y	(178) Such customers appear to be particularly vulnerable to receiving harmful advice. Egan et al. (2019) found that misconduct among investment advice professionals was higher in counties with populations that were less financially sophisticated, including those who are less educated and older. (383) Supporting this call for caution, Egan et al. (2019) found substantial amounts of misconduct disputes in the sales of annuities between 2005 and 2015.	178, 383
John A. Turner, Bruce W. Klein & Norman P. Stein	Brokers vs. Retail Investors: Conflicting Interests and Dominated Products	74(3) Journal of Finance 1217–1260, (June 2019).	2019	SEC	Investor Behavior	2008-2012	EA	Y	Y	(179) Retirement investors are in a poor position to assess the quality of the advice they receive, and the advisers' incentives are often misaligned with the investors' interests. //Paper abstract: Using g a novel convertible bond data set, I find that consumers often purchase dominated bonds - cheap and expensive otherwise-identical bonds coexist in the market. Brokers are incentivized to sell the dominated bonds, typically earning two times greater fees for selling them. I develop and estimate a broker-intermediated search model that rationalizes this behavior. The estimates indicate that costly search is a key friction in financial markets, but the effects of search costs are compounded when brokers are incentivized to direct the search of consumers toward high-fee inferior products.	179
Annamaria Lusardi, Olivia Mitchell, & Vilsa Curto	New Evidence on the Financial Knowledge and Characteristics of Investors	https://gflec.org/wpcontent/uploads/2019/10/FINRA_GFLEC_Investor_FinancialIlliteracy_Report_FINAL.pdf?x20348.	2019	Not specific	Investor Behavior	2018	S	N	Y	(182) A subsequent 2018 FINRA study of non-retired individuals age 25–65 found that those investors that only had retirement accounts through their employers routinely scored lower on financial literacy questions than active investors and that these workplace-only investors scored only two percentage points higher than the general population (32 percent versus 30 percent) on a composite question regarding interest, inflation and risk diversification.	182
Julie Agnew, Hazel Bateman, Christine Eckert, Fedor Iskhakov, Jordan Louviere, & Susan Thorp	Does Backdating Explain the Stock Price Pattern Around Executive Stock Option Grants?	83(2) Journal of Financial Economics 271–295 (2007).	2007	Unregulated Product	Issuer Behavior	2002-2004	EA	Y	Y	(571) A wide range of literature suggest that when financial data are available to researchers, these researchers uncover problematic behaviors and draw attention to the behaviors, which has the effect of curbing the practices in the future.	571
Paul Gerrans & Douglas A. Hershey	What Fraction of Stock Option Grants to Top Executives Have Been Backdated or Manipulated?	55(4) Management Science 513–525.`	2009	Unregulated Product	Issuer Behavior	1996-2005	EA	Y	Y	(57) A wide range of literature suggest that when financial data are available to researchers, these researchers uncover problematic behaviors and draw attention to the behaviors, which has the effect of curbing the practices in the future.	57
Panel G. Disclosure											
Winchester, Danielle & Sandra Huston	Regulating Systemic Risk Through Transparency:Tradeoffs in Making Data Public	Working Paper National Bureau of Economic Research (December 2011), 320, https://www.nber.org/system/files/working_papers/w17664/w17664.pdf.	2011	Not specific	Disclosure	n.a.	D	Y	Y	(570) Requiring public disclosure of conflicted compensation practices would allow investment professionals, experts, and consultants, as well as academic researchers, to draw attention to the concerning aspects of the conflicts and even rate firms based on the scope of their conflicts. As noted by Landier and Thesmar (2011), data availability feeds research intensity	570

CHAMBER OF COMMERCE OF the UNITED STATES OF AMERICA; Financial Services Institute, Incorporated; Financial Services Roundtable; Greater Irving-Las Colinas Chamber of Commerce; Humble Area Chamber of Commerce, doing business as Lake Houston Chamber of Commerce; Insured Retirement Institute; Lubbock Chamber of Commerce; Securities Industry and Financial Markets Association; Texas Association of Business, Plaintiffs–Appellants

v.

UNITED STATES DEPARTMENT OF LABOR; R. Alexander Acosta, Secretary, U.S. Department of Labor, Defendants–Appellees

American Council of Life Insurers; National Association of Insurance and Financial Advisors; National Association of Insurance and Financial Advisors—Texas; National Association of Insurance and Financial Advisors—Amarillo; National Association of Insurance and Financial Advisors—Dallas; National Association of Insurance and Financial Advisors—Fort Worth; National Association of Insurance and Financial Advisors—Great Southwest; National Association of Insurance and Financial Advisors—Wichita Falls; Plaintiffs–Appellants

v.

United States Department of Labor; R. Alexander Acosta, Secretary, U.S. Department of Labor, Defendants–Appellees

Indexed Annuity Leadership Council; Life Insurance Company of the Southwest; American Equity Investment Life Insurance Company; Midland National Life Insurance Company; North American Company for Life and Health Insurance, Plaintiffs–Appellants

v.

R. Alexander Acosta, Secretary, U.S. Department of Labor; United States Department of Labor, Defendants–Appellees

No. 17-10238

United States Court of Appeals,
Fifth Circuit.

FILED March 15, 2018

Background: Business groups brought action against United States Department of Labor (DOL) challenging the "fiduciary rule" that broadly reinterpreted the term "investment advice fiduciary." The United States District Court for the Northern District of Texas, Barbara M.G. Lynn, Chief Judge, 231 F.Supp.3d 152, granted summary judgment for DOL. Business groups appealed.

Holding: The Court of Appeals, Edith H. Jones, Circuit Judge, held that DOL's expansion of the scope of its "fiduciary rule" to include a broker-dealer and insurance agents conflicted with plain text of ERISA.

Judgment reversed and rule vacated.

Carl E. Stewart, Chief Judge, wrote dissenting opinion.

1. Labor and Employment ⚷467

ERISA definition of "investment advice fiduciary" was unambiguously limited to the common law definition of fiduciary, which required an underlying relationship of trust and confidence between the fiduciary and client such that it only applied to one who rendered advice regularly and as the primary basis for clients' investment decisions, and thus Department of Labor's expansion of the scope of its "fiduciary rule" to include a broker-dealer and insurance agents, who simply sold products to clients, conflicted with plain text of ERISA. 26 U.S.C.A. § 4975(e)(3)(B); Employee Retirement Income Security Act of 1974 § 3, 29 U.S.C.A. § 1002(21)(A)(ii).

See publication Words and Phrases for other judicial constructions and definitions.

2. Administrative Law and Procedure ⚷305

A regulator's authority is constrained by the authority that Congress delegated it by statute.

3. Administrative Law and Procedure ⚷432

Where the text and structure of a statute unambiguously foreclose an agency's statutory interpretation, the intent of Congress is clear, and that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

4. Statutes ⚷1079, 1152, 1212

The text, structure, and the overall statutory scheme are among the pertinent traditional tools of statutory construction.

5. Statutes ⚷1102, 1153

Ambiguity in a statute is a creature not of definitional possibilities but of statutory context.

6. Statutes ⚷1384

In interpreting a statute, absent other indication, it is assumed that Congress intended to incorporate the well-settled meaning of the common-law terms it uses.

7. Statutes ⚷1125, 1205

Generally, in interpreting a statute, a common-law term of art should be given its established common-law meaning, except where that meaning does not fit.

8. Statutes ⚷1153, 1212

Statutory language cannot be construed in a vacuum; it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

9. Statutes ⚷1367

Congress is presumed to have acted against a background of shared understanding of the terms it uses in statutes.

10. Administrative Law and Procedure ⚷432, 433

Under the second step of *Chevron*, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

11. Labor and Employment ⚷467

Even assuming ERISA's definition of "investment advice fiduciary" was ambiguous, Department of Labor's (DOL) expansion of its "fiduciary rule" to include a broker-dealer and insurance salespeople, was not a reasonable interpretation of ERISA under *Chevron* step two and the Administrative Procedure Act (APA); DOL had interpreted "fiduciary" in line

with the common law definition for 40 years before expanding its rule, expanded definition treated individual retirement account (IRA) financial service providers in tandem with ERISA employer-sponsored plan fiduciaries, even though ERISA treated them differently, DOL conceded its new definition encompassed actors and transactions that it did not believe Congress intended to cover, ERISA generally prohibited fiduciaries from selling financial products to clients, rendering DOL's treatment of salespeople as fiduciaries illogical, and rule permitted private rights of action by IRA owners that Congress refused to authorize in ERISA. 5 U.S.C.A. § 706(2)(A); 26 U.S.C.A. §§ 4975(c)(1), 4975(c)(2), 4975(e)(3)(B); Employee Retirement Income Security Act of 1974 §§ 3, 406, 408, 29 U.S.C.A. §§ 1002(21)(A)(ii), 1106(b), 1108(a).

12. Statutes ⚷1151, 1367, 1371

Canons of statutory construction require that every word in a statute be interpreted to have meaning, and Congress's use and withholding of terms within a statute is taken to be intentional.

13. Action ⚷3

Administrative Law and Procedure ⚷305

Only Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates.

14. Administrative Law and Procedure ⚷433

The guiding inquiry under *Chevron* step two is whether Congress intended to delegate interpretive authority over a question to the agency asserting deference.

Appeals from the United States District Court for the Northern District of Texas

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Andrew B. Kay, Cozen O'Connor, P.C., Washington, DC, for Amicus Curiae Thrivent Financial for Lutherans.

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Scott Lawrence Nelson, Allison M. Zieve, Public Citizen Litigation Group, Washington, DC, for Amicus Curiae Public Citizen, Incorporated.

Deepak Gupta, Gupta Wessler, P.L.L.C., Washington, DC, for Amicus Curiae American Association for Justice.

Before STEWART, Chief Judge, and JONES and CLEMENT, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Three business groups[1] filed suits challenging the "Fiduciary Rule" promulgated by the Department of Labor (DOL) in April 2016. The Fiduciary Rule is a package of seven different rules that broadly reinterpret the term "investment advice fiduciary" and redefine exemptions to provisions concerning fiduciaries that appear in the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (ERISA), codified as amended at 29 U.S.C. § 1001 et seq, and the Internal Revenue Code, 26 U.S.C. § 4975. The stated purpose of the new rules is to regulate in an entirely new way hundreds of thousands of financial service providers and insurance companies in the trillion dollar markets for ERISA plans and individual retirement accounts (IRAs). The business groups' challenge proceeds on multiple grounds, including (a) the Rule's inconsistency with the governing statutes, (b) DOL's overreaching to regulate services and providers beyond its authority, (c) DOL's imposition of legally unauthorized contract terms to enforce the new regulations, (d) First Amendment violations, and (e) the Rule's arbitrary and capricious treatment of variable and fixed indexed annuities.

The district court rejected all of these challenges. Finding merit in several of these objections, we VACATE the Rule.

I. BACKGROUND

As might be expected by a Rule that fundamentally transforms over fifty years of settled and hitherto legal practices in a large swath of the financial services and insurance industries, a full explanation of the relevant background is required to focus the legal issues raised here.

Congress passed ERISA in 1974 as a "comprehensive statute designed to pro-

1. Suits were separately filed by groups headed by the U.S. Chamber of Commerce, the American Council of Life Insurers, and the Indexed Annuity Leadership Council. The suits were consolidated and jointly decided by the district court in the Northern District of Texas.

mote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Title I of ERISA confers on the DOL far-reaching regulatory authority over employer- or union-sponsored retirement and welfare benefit plans. 29 U.S.C. §§ 1108(a)-(b), 1135. A "fiduciary" to a Title I plan is subject to duties of loyalty and prudence. 29 U.S.C. § 1104(a)(1)(A)-(B). Fiduciaries may not engage in several "prohibited transactions," including transactions in which the fiduciary receives a commission paid by a third party or compensation that varies based on the advice provided. 29 U.S.C. § 1106(b)(3). ERISA authorizes lawsuits by the DOL, plan participants or beneficiaries against fiduciaries to enforce these duties. 29 U.S.C. § 1132(a).

ERISA Title II created tax-deferred personal IRAs and similar accounts within the Internal Revenue Code. 26 U.S.C. § 4975(e)(1)(B).[2] Title II did not authorize DOL to supervise financial service providers to IRAs in parallel with its power over ERISA plans. Moreover, fiduciaries to IRAs are not, unlike ERISA plan fiduciaries, subject to statutory duties of loyalty and prudence. Instead, Title II authorized the Treasury Department, through the IRS, to impose an excise tax on "prohibited [*i.e.* conflicted] transactions" involving fiduciaries of both ERISA retirement plans and IRAs. 26 U.S.C. § 4975 (a), (b), (f)(8)(E). DOL was authorized only to grant exemptions from the prohibited transactions provision, 29 U.S.C. § 1108(a), 26 U.S.C. § 4975(c)(2), and to "define accounting, technical and trade terms" that appear in both laws, 29 U.S.C. § 1135. Title II did not create a federal right of action for IRA owners, but state law and other remedies remain available to those investors.

The critical term "fiduciary" is defined alike in both Title I, 29 U.S.C. § 1002(21)(A), and Title II, 26 U.S.C. § 4975(e)(3). In Title I, fiduciaries are subject to comprehensive DOL regulation, while in Title II individual plans, they are subject to the prohibited transactions provisions. The provision states that "a person is a fiduciary with respect to a plan to the extent he

- exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets," 29 U.S.C. § 1002(21)(A)(i);
- "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so," 29 U.S.C. § 1002(21)(A)(ii); or
- "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A)(iii).

Subsection ii of the "fiduciary" definition is in issue here.

In 1975, DOL promulgated a five-part conjunctive test for determining who is a fiduciary under the investment-advice subsection. Under that test, an investment-advice fiduciary is a person who (1) "renders advice . . . or makes recommendation[s] as to the advisability of investing in, purchasing, or selling securities or other property;" (2) "on a regular basis;" (3) "pursuant to a mutual agreement . . . between such person and the plan;" and the

2. Title II also covers individual retirement annuities, health savings accounts, and certain other tax-favored trusts and plans. *See* 26 U.S.C. § 4975(e)(1)(C)-(F). For convenience, all such plans are designated "IRAs" in this opinion.

advice (4) "serve[s] as a primary basis for investment decisions with respect to plan assets;" and (5) is "individualized ... based on the particular needs of the plan." 29 C.F.R. § 2510.3-21(c)(1) (2015).

The 1975 regulation captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client. *See*, *e.g.*, George Taylor Bogert, et al., Trusts & Trustees § 481 (2016 update). The regulation also echoed the then thirty-five-year old distinction drawn between an "investment adviser," who is a fiduciary regulated under the Investment Advisers Act, and a "broker or dealer" whose advice is "solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." 15 U.S.C. § 80b-2(a)(11)(C). Thus, the DOL's original regulation specified that a fiduciary relationship would exist only if, *inter alia*, the adviser's services were furnished "regularly" and were the "primary basis" for the client's investment decisions. 29 C.F.R. § 2510.3-21(c)(1) (2015).

In the decades following the passage of ERISA, the use of participant-directed IRA plans has mushroomed as a vehicle for retirement savings. Additionally, as members of the baby-boom generation retire, their ERISA plan accounts will roll over into IRAs. Yet individual investors, according to DOL, lack the sophistication and understanding of the financial marketplace possessed by investment professionals who manage ERISA employer-sponsored plans. Further, individuals may be persuaded to engage in transactions not in their best interests because advisers like brokers and dealers and insurance professionals, who sell products to them, have "conflicts of interest." DOL concluded that the regulation of those providing investment options and services to IRA holders is insufficient. One reason for this deficiency is the governing statutory architecture:

> Although ERISA's statutory fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs and other plans not covered by ERISA, these fiduciaries are subject to prohibited transaction rules under the [Internal Revenue] Code. The statutory exemptions in the Code apply and the [DOL] has been given the statutory authority to grant administrative exemptions under the Code. [footnote omitted] In this context, however, the sole statutory sanction for engaging in the illegal transactions is the assessment of an excise tax enforced by the [IRS].

Definition of Fiduciary, 81 Fed. Reg. at 20946, 20953 (Apr. 8, 2015) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550).

A second reason for the gap lies in the terms of the 1975 regulation's definition of an investment advice fiduciary. In particular, by requiring that the advice be given to the customer on a "regular basis" and that it must also be the "primary basis" for investment decisions, the definition excluded one-time transactions like IRA rollovers. As DOL saw it, the term "adviser" should extend well beyond investment advisers registered under the Investment Advisers Act of 1940 or under state law. Semantically, the term "investment advice fiduciary" can include "an individual or entity who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer." 81 Fed. Reg. at 20946 n.1. Further, "[u]nless they are fiduciaries, ... these consultants and advisers are free under ERISA and the Code, not only to receive such conflicted compensation, but also to act on their conflicts of interest to the detriment of their customers." 81 Fed. Reg. at 20956.

Beginning in 2010, DOL set out to fill the perceived gap. The result, announced in April 2016, was an overhaul of the investment advice fiduciary definition, together with amendments to six existing exemptions and two new exemptions to the prohibited transaction provision in both ERISA and the Code (collectively, as previously noted, the Fiduciary Rule). The Fiduciary Rule is of monumental significance to the financial services and insurance sectors of the economy. The package of regulations and accompanying explanations, although full of repetition, runs 275 pages in the Federal Register. DOL estimates that compliance costs imposed on the regulated parties might amount to $31.5 billion over ten years with a "primary estimate" of $16.1 billion. 81 Fed. Reg. at 20951. In a novel assertion of DOL's power, the Fiduciary Rule directly disadvantages the market for fixed indexed annuities in comparison with competing annuity products. Finally, with unintentional irony, DOL pledged to alleviate the regulated parties' concerns about "compliance and interpretive issues" following this "issuance of highly technical or significant guidance" by drawing attention to its "broad assistance for regulated parties on the Affordable Care Act regulations . . . ." 81 Fed. Reg. at 20947.

II. THE FIDUCIARY RULE

Now to the relevant highlights of the Fiduciary Rule.[3] In lieu of the 1975 definition of an investment advice fiduciary, the Fiduciary Rule provides that an individual "renders investment advice for a fee" whenever he is compensated in connection with a "recommendation as to the advisability of" buying, selling, or managing "investment property." 29 C.F.R. § 2510.3-21(a)(1) (2017). A fiduciary duty arises, moreover, when the "investment advice" is directed "to a specific advice recipient . . . regarding the advisability of a particular investment or management decision with respect to" the recipient's investment property. 29 C.F.R. § 2510.3-21(a)(2)(iii) (2017).

To be sure, the new rule purports to withdraw from fiduciary status communications that are not "recommendations," *i.e.*, those in which the "content, context, and presentation" would not objectively be viewed as "a suggestion that the advice recipient engage in or refrain from taking a particular course of action." 29 C.F.R. § 2510.3-21(b)(1) (2017). But the more individually tailored the recommendation is, the more likely it will render the "adviser" a fiduciary. *Id.*

Critically, the new definition dispenses with the "regular basis" and "primary basis" criteria used in the regulation for the past forty years. Consequently, it encompasses virtually all financial and insurance professionals who do business with ERISA plans and IRA holders. Stockbrokers and insurance salespeople, for instance, are exposed to regulations including the prohibited transaction rules. The newcomers are thus barred, without an exemption, from being paid whatever transaction-based commissions and brokerage fees have been standard in their industry segments because those types of compensation are now deemed a conflict of interest.

The second novel component of the Fiduciary Rule is a "Best Interest Contract Exemption," (BICE) which, if adopted by

3. The original definition of an investment advice fiduciary occupied one page in the Federal Register. Definition of the Term "Fiduciary," 40 Fed. Reg. 50842, 50842-43 (Oct. 31, 1975). The revised definition is over five pages long, and the associated exemption rules are complex. The issues raised here can, however, be addressed by paraphrasing the critical language of the regulations, as all parties have done.

"investment advice fiduciaries," allows them to avoid prohibited transactions penalties. 81 Fed. Reg. 21002 (Apr. 8, 2016), *corrected at* 81 Fed. Reg. 44773 (July 11, 2016), *and amended by* 82 Fed. Reg. 16902 (Apr. 7, 2017). The BICE and related exemptions were promulgated pursuant to DOL's authority to approve prohibited transaction exemptions (PTE's) for certain classes of fiduciaries or transactions. 29 U.S.C. § 1108(a), 26 U.S.C. § 4975(c)(2).[4] The BICE was intended to afford such relief because, as DOL candidly acknowledged, the new standard could "sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships." 81 Fed. Reg. at 20948.

The BICE supplants former exemptions with a web of duties and legal vulnerabilities. To qualify for a BIC Exemption, providers of financial and insurance services must enter into contracts with clients that, *inter alia*, affirm their fiduciary status; incorporate "Impartial Conduct Standards" that include the duties of loyalty and prudence; "avoid[ ] misleading statements;" and charge no more than "reasonable compensation." As noted above, Title II service providers to IRA clients are not statutorily required to abide by duties of loyalty and prudence. Yet, to qualify as *not* being "investment advice fiduciaries" per the new definition, the financial service providers must deem themselves fiduciaries to their clients. In addition, the contracts may not include exculpatory clauses such as a liquidated damages provision nor may they require class action waivers. DOL contends that the enforceability of the BICE-created contract, "and the potential for liability" it offers, were "central goals of this regulatory project." 81 Fed. Reg. at 21021, 21033. In these respects, a BIC Exemption comes at a high price.[5]

The third relevant element of the Fiduciary Rule is the amended Prohibited Transaction Exemption 84-24. Since 1977, that exemption had covered transactions involving insurance and annuity contracts and permitted customary sales commissions where the terms were at least as favorable as those at arm's-length, provided for "reasonable" compensation, and included certain disclosures. 49 Fed. Reg. 13208, 13211 (Apr. 3, 1984); *see* 42 Fed. Reg. 32395, (June 24, 1977) (precursor to PTE 84-24). As amended in the Fiduciary Rule package, PTE 84-24 now subjects these transactions to the same Impartial Conduct Standards as in the BICE exemption. 81 Fed. Reg. 21147 (Apr. 8, 2016), *corrected at* 81 Fed. Reg. 44786 (July 11, 2015), *and amended by* 82 Fed. Reg. 16902 (Apr. 7, 2017). But DOL removed fixed indexed annuities from the more latitudinarian PTE 84-24, leaving only fixed-rate annuities within its scope. In practice, this action places a disproportionate burden on the market for fixed indexed annuities, as opposed to competing annuity products.

4. Exemptions can be "conditional" or "unconditional," but they must be "(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan." 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2).

5. DOL also created a new Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs that is "functionally identical" to the BICE and allows financial institutions to engage in otherwise-prohibited transactions while receiving compensation. 81 Fed. Reg. 21089 (Apr. 8, 2016), *corrected at* 81 Fed. Reg. 44784 (July 11, 2016), *and amended by* 82 Fed. Reg. 16902 (Apr. 7, 2017). As the parties recommended, our discussion treats these provisions alike by referencing BICE alone for convenience.

The President has directed DOL to reexamine the Fiduciary Rule and "prepare an updated economic and legal analysis" of its provisions, 82 Fed. Reg. 9675 (Feb. 3, 2017), and the effective date of some provisions has been extended to July 1, 2019. The case, however, is not moot. The Fiduciary Rule has already spawned significant market consequences, including the withdrawal of several major companies, including Metlife, AIG and Merrill Lynch from some segments of the brokerage and retirement investor market. Companies like Edward Jones and State Farm have limited the investment products that can be sold to retirement investors. Confusion abounds—how, for instance, does a company wishing to comply with the BICE exemption document and prove that its salesman fostered the "best interests" of the individual retirement investor client? The technological costs and difficulty of compliance compound the inherent complexity of the new regulations. Throughout the financial services industry, thousands of brokers and insurance agents who deal with IRA investors must either forgo commission-based transactions and move to fees for account management or accept the burdensome regulations and heightened lawsuit exposure required by the BICE contract provisions. It is likely that many financial service providers will exit the market for retirement investors rather than accept the new regulatory regime.

Further, as DOL itself recognized, millions of IRA investors with small accounts prefer commission-based fees because they engage in few annual trading transactions. Yet these are the investors potentially deprived of all investment advice as a result of the Fiduciary Rule, because they cannot afford to pay account management fees, or brokerage and insurance firms cannot afford to service small accounts, given the regulatory burdens, for management fees alone.

The district court rejected all of the appellants' challenges to the Fiduciary Rule. Timely appeals were filed.

III. DISCUSSION

Appellants pose a series of legal issues, all of which are reviewed de novo on appeal, *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 601 (5th Cir. 2000), and nearly all of which we must address. The principal question is whether the new definition of an investment advice fiduciary comports with ERISA Titles I and II. Alternatively, is the new definition "reasonable" under *Chevron, U.S.A., Inc. v. N.R.D.C., Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) and not violative of the Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A) (2016)?

Beyond that threshold are the questions whether the BICE exemption, including its impact on fixed indexed annuities, asserts affirmative regulatory power inconsistent with the bifurcated structure of Titles I and II and is invalid under the APA. Further, are the required BICE contractual provisions consistent with federal law in creating implied private rights of action and prohibiting certain waivers of arbitration rights? [6]

A. The Fiduciary Rule Conflicts with the Text of 29 U.S.C. Sec. 1002(21)(A)(ii); 26 U.S.C. Sec. 4975(e)(3)(B).

[1] DOL expanded the statutory term "fiduciary" by redefining one out of three provisions explaining the scope of fiduciary

6. Given these other grounds for rejecting the Fiduciary Rule, and consistent with principle of constitutional avoidance, we need not address the First Amendment issue raised by one of the appellants.

responsibility under ERISA and the Internal Revenue Code. The second of these three provisions states that

> a person is a fiduciary with respect to a plan to the extent ... he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so[.]

29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3)(B). For the past forty years, DOL has considered the hallmarks of an "investment advice" fiduciary's business to be its "regular" work on behalf of a client and the client's reliance on that advice as the "primary basis" for her investment decisions. 29 C.F.R. § 2510.3-21(c)(1) (2015). The Fiduciary Rule's expanded coverage is best explained by variations of the following hypothetical advanced by the Chamber of Commerce: a broker-dealer otherwise unrelated to an IRA owner tells the IRA owner, "You'll love the return on X stock in your retirement plan, let me tell you about it" (the "investment advice"); the IRA owner purchases X stock; and the broker-dealer is paid a commission (the "fee or other compensation"). Based on this single sales transaction, as DOL agrees, the broker-dealer has now been brought within the Fiduciary Rule. The same consequence follows for insurance agents who promote annuity products.

[2–4] Expanding the scope of DOL regulation in vast and novel ways is valid only if it is authorized by ERISA Titles I and II. A regulator's authority is constrained by the authority that Congress delegated it by statute. Where the text and structure of a statute unambiguously foreclose an agency's statutory interpretation, the intent of Congress is clear, and "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778. To decide whether the statute is sufficiently capacious to include the Fiduciary Rule, we rely on the conventional standards of statutory interpretation and authoritative Supreme Court decisions. *City of Arlington v. F.C.C.*, 569 U.S. 290, 133 S.Ct. 1863, 1868, 185 L.Ed.2d 941 (2013) (quoting *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778). The text, structure, and the overall statutory scheme are among the pertinent "traditional tools of statutory construction." *See Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778.

[5] We conclude that DOL's interpretation of an "investment advice fiduciary" relies too narrowly on a purely semantic construction of one isolated provision and wrongly presupposes that the provision is inherently ambiguous. Properly construed, the statutory text is not ambiguous. Ambiguity, to the contrary, "is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994). Moreover, all relevant sources indicate that Congress codified the touchstone of common law fiduciary status—the parties' underlying relationship of trust and confidence—and nothing in the statute "requires" departing from the touchstone. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992) (where a term in ERISA has a "settled meaning under ... the common law, a court *must* infer, unless the statute otherwise *dictates*, that Congress mean[t] to incorporate the established meaning") (internal quotation omitted) (emphasis added).

1. The Common Law Presumptively Applies

[6, 7] Congress's use of the word "fiduciary" triggers the "settled principle of interpretation that, absent other indica-

tion, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.' " *United States v. Castleman*, ––– U.S. ––––, 134 S.Ct. 1405, 1410, 188 L.Ed.2d 426 (2014) (quoting *Sekhar v. United States*, 570 U.S. 729, 133 S.Ct. 2720, 2724, 186 L.Ed.2d 794 (2013)). Indeed, it is "the general rule that 'a common-law term of art should be given its established common-law meaning,' except 'where that meaning does not fit.' " *Id.* (quoting *Johnson v. United States*, 559 U.S. 133, 139, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010)). This general presumption is particularly salient in analyses of ERISA, which has its roots in the common law. *See, e.g.*, *Tibble v. Edison Int'l*, ––– U.S. ––––, 135 S.Ct. 1823, 1828, 191 L.Ed.2d 795 (2015) ("In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts."); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 294–96, 129 S.Ct. 865, 172 L.Ed.2d 662 (2009); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 218–19, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004); *Pegram v. Herdrich*, 530 U.S. 211, 223–24, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

The common law term "fiduciary" falls within the scope of this presumption. In *Firestone Tire & Rubber Co. v. Bruch*, the Supreme Court cited Congress's use of "fiduciary" as one example of "ERISA abound[ing] with the language and terminology of trust law." 489 U.S. at 110, 109 S.Ct. 948 (citing 29 U.S.C. § 1002(21)(A)). More importantly for present purposes, the Court rejected dictionary definitions in favor of the common law when analyzing the statutory definition of "fiduciary" in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). There, the Court was tasked with determining the meaning of the word "administration," which appears in another of the tripartite examples of a "fiduciary," 29 U.S.C. § 1002(21)(A)(iii). *See Varity Corp.*, 516 U.S. at 502, 116 S.Ct. 1065. The Court noted that "[t]he dissent look[ed] to the dictionary for interpretive assistance," but the Court expressly declined to follow that route: "Though dictionaries sometimes help in such matters, we believe it more important here to look to the common law, which, over the years, has given to terms such as 'fiduciary' and trust 'administration' a legal meaning to which, we normally presume, Congress meant to refer." *Id.* The Court then considered the "ordinary trust law understanding of fiduciary 'administration' " to determine that an entity "was acting as a fiduciary." *Id.* at 502–03, 116 S.Ct. 1065.

The common law understanding of fiduciary status is not only the proper starting point in this analysis, but is as specific as it is venerable. Fiduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and client. "The concept of fiduciary responsibility dates back to fiducia of Roman law," and "[t]he entire concept was founded on concepts of sanctity, trust, confidence, honesty, fidelity, and integrity." George M. Turner, *Revocable Trusts* § 3:2 (Sept. 2016 Update). Indeed, "[t]he development of the term in legal history under the Common Law suggested a situation wherein a person assumed the character of a trustee, or an analogous relationship, where there was an underlying confidence involved that required scrupulous fidelity and honesty." *Id.* Another treatise addresses relationships "which require trust and confidence," and explains that "[e]quity has always taken an active interest in fostering and protecting these intimate relationships which it calls 'fiduciary.' " George G. Bogert, et al., Trusts & Trustees § 481 (2017 Update). Yet another treatise describes fiduciaries as "individuals or corporations who

appear to accept, expressly or impliedly, an obligation to act in a position of trust or confidence for the benefit of another or who have accepted a status or relationship understood to entail such an obligation, generating the beneficiary's justifiable expectations of loyalty." 3 DAN B. DOBBS, ET AL., THE LAW OF TORTS § 697 (2d ed. June 2017 Update). Notably, DOL does not dispute that a relationship of trust and confidence is the *sine qua non* of fiduciary status.

Congress did not expressly state the common law understanding of "fiduciary," but it provided a good indicator of its intention. In § 1002, ERISA's definitional section, 41 of 42 provisions begin by stating, "[t]he term ["X"] means ...." 29 U.S.C. § 1002(1)–(20), (22)–(42). For example, § 1002(6) begins, "[t]he term 'employee' means any individual employed by an employer." [7] Similarly, § 1002(8) begins, "[t]he term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." In each case, Congress placed a word or phrase in quotation marks before defining the word or phrase.

The unique provision in which Congress did not take that route delineates the term "fiduciary." Instead, Congress stated that "a person is a fiduciary with respect to a plan to the extent" he performs any of the enumerated functions. *Id.* § 1002(21)(A). That Congress did not place "fiduciary" in quotation marks indicates Congress's decision that the common law meaning was self-explanatory, and it accordingly addressed fiduciary status for ERISA purposes in terms of enumerated functions. *See John Hancock Mut. Life Ins. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 96–97, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993) (the words "to the extent" in ERISA are "words of limitation").

In any event, "absent other indication, 'Congress intend[ed] to incorporate the well-settled meaning' " of "fiduciary"—the very essence of which is a relationship of trust and confidence. *See Castleman*, 134 S.Ct. at 1410 (quoting *Sekhar*, 133 S.Ct. at 2724).

2. Displacement of the Presumption?

DOL concedes the relevance of the common-law presumption and the common-law trust-and-confidence standard but then places all its eggs in one basket: displacement of the presumption. Invoking its favorite phrases from *Varity Corp.*, DOL argues that the common law is only "a starting point" and the presumption "is displaced if inconsistent with 'the language of the statute, its structure, or its purposes.' " (quoting *Varity Corp.*, 516 U.S. at 497, 116 S.Ct. 1065) (emphasis removed). Displacement should occur here, DOL continues, because "DOL reasonably interpreted ERISA's language, structure, and purpose to go beyond the trust-and-confidence standard."

As a preliminary matter, DOL neglects to mention two aspects of *Varity Corp.* that cut against its position. First, the phrase quoted above is significantly less absolute than DOL lets on: "In *some instances*, trust law will offer only a starting point, after which courts must go on to ask *whether*, or *to what extent*, the language of the statute, its structure, or its purposes *require* departing from common-law trust requirements." *Varity Corp.*, 516 U.S. at 497, 116 S.Ct. 1065 (emphases added). Thus, it is not the case, as DOL suggests, that any perceived inconsistency automatically requires jettisoning the common-law

7. In *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 322-23, 112 S.Ct. 1344, the Supreme Court invoked the common law to interpret ERISA's definition of "employee."

understanding of "fiduciary." Second, although the Court suggested that in some instances the common law will be "only a starting point," the Court went on specifically to reject reliance on dictionary definitions when interpreting the statutory definition of "fiduciary" and reverted to the common law. *See id.* at 502–03, 116 S.Ct. 1065. Thus, *Varity Corp.* reinforces rather than rejects the common law when interpreting ERISA.

Even more important, DOL acknowledges appellants' argument "that there is nothing inherently inconsistent between the trust-and-confidence standard and ERISA's definition" of "fiduciary." The DOL's only response is that it "is not required to adopt semantically possible interpretations merely because they would comport with common-law standards." But this proves appellants' point: adopting "semantically possible" interpretations that *do not* "comport with common law standards" is contrary to *Varity Corp.* because the statute does not "require departing from [the] common-law" trust-and-confidence standard. *Id.* at 497, 116 S.Ct. 1065. DOL's concession should end any debate about the viability and vitality of the common law presumption.

3. Statutory Text—"investment advice fiduciary"

Even if the common law presumption did not apply, the Fiduciary Rule contradicts the text of the "investment advice fiduciary" provision and contemporary understandings of its language. To restate, a person is a fiduciary with respect to a plan to the extent "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so[.]" 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3)(B). Focusing on the words "investment" and "advice," DOL cites dictionary definitions to explain the breadth of the terms, the reasonableness of the Fiduciary Rule's construction of those terms, and the permissibility of its departure from the common law trust and confidence standard.

[8] Going straight to dictionary definitions not only conflicts with *Varity Corp.*, but it also fails to take into account whether the words that Congress used were terms of art within the financial services industry. *See, e.g.*, *Corning Glass Works v. Brennan*, 417 U.S. 188, 201–02, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974) (rejecting an ordinary understanding of "working conditions" because "the term has a different and much more specific meaning in the language of industrial relations"). Moreover, the technique of defining individual words in a vacuum fails to view the entire provision in context. "[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989).

Properly considered, the statutory text equating the "rendering" of "investment advice for a fee" with fiduciary status comports with common law and the structure of the financial services industry. When enacting ERISA, Congress was well aware of the distinction, explained further below, between investment advisers, who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients. The Fiduciary Rule improperly dispenses with this distinction. Had Congress intended to include as a fiduciary any financial services provider to investment plans, it could have written ERISA

to cover any person who renders "*any* investment advice for a fee...." The word "any" would have embodied DOL's expansive interpretation, and it is a word used five times in ERISA's tripartite fiduciary definition, *e.g.* "*any* authority or responsibility." *See generally* 29 U.S.C. § 1002(21)(A). That Congress did not say "*any* investment advice" signals the intentional omission of this adjective. *See Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another..., it is presumed that Congress acts intentionally and purposely. ..."). Further, DOL's interpretation conjoins "advice" with a "fee or other compensation, direct or indirect," but it ignores the preposition "for," which indicates that the purpose of the fee is not "sales" but "advice." Therefore, taken at face value, the provision rejects "*any* advice" in favor of the activity of "render[ing] investment advice for a fee." Stockbrokers and insurance agents are compensated only for completed sales ("directly or indirectly"), not on the basis of their pitch to the client. Investment advisers, on the other hand, are paid fees because they "render advice." The statutory language preserves this important distinction.

Put otherwise, DOL's defense of the Fiduciary Rule contemplates a hypothetical law that states, "a person is a fiduciary with respect to a plan to the extent...he receives a fee, in whole or in part, in connection with any investment advice...." This language could have embraced individual sales transactions as well as the stand-alone furnishing of investment advice. But this iteration does not square with the last clause of the actual law, which includes a person who "has any authority or responsibility to [render investment advice]." Only in DOL's semantically created world do salespeople and insurance brokers have "authority" or "responsibility" to "render investment advice." The DOL interpretation, in sum, attempts to rewrite the law that is the sole source of its authority. This it cannot do.

[9] Further, in law and the financial services industry, rendering "investment advice for a fee" customarily distinguished salespeople from investment advisers during the period leading up to ERISA's 1974 passage. Congress is presumed to have acted against a background of shared understanding of the terms it uses in statutes. *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) ("We assume that Congress is aware of existing law when it passes legislation."). And the phrase "investment advice for a fee" and similar phrases generally referenced a fiduciary relationship of trust and confidence between the adviser and client.

To begin with, DOL itself reflected this understanding in its 1975 definition of an "investment advice fiduciary." There, DOL there explained that a "fee or other compensation" for the rendering of investment advice under ERISA "should be deemed to include all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered." Definition of the Term "Fiduciary," 40 Fed. Reg. 50842, 50842-43 (Oct. 31, 1975). DOL went on to say that this "may include" brokerage commissions, but only if the broker-dealer who earned the commission otherwise satisfied the regulation's requirements that the broker-dealer provide individualized advice on a regular basis pursuant to a mutual agreement with his client. *See id.* Later, DOL reiterated that "the receipt of commissions by a broker-dealer which per-

forms services in addition to that of effecting or executing securities transactions for a plan is not necessarily dispositive of whether the broker-dealer received a portion of such compensation for the rendering of 'investment advice.' " DOL Advisory Opinion 83-60A (Nov. 21, 1983), *in* ERISA for Money Managers and Advisers § 2:51 (Sept. 2016 Update). Instead, "if, under the particular facts and circumstances, the services provided by the broker-dealer include the provision of 'investment advice' " as defined by the regulation—i.e. on a regular basis pursuant to a mutual agreement to provide individualized advice—only then "may [it] be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice." *Id.*

DOL's 1975 regulation flowed directly from contemporary understanding of "investment advice for a fee," which contemplated an intimate relationship between adviser and client beyond ordinary buyer-seller interactions. The Fiduciary Rule is at odds with that understanding.

Substantial case law has followed and adopted DOL's original dichotomy between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does. In the Fifth Circuit, this court held that "[s]imply urging the purchase of its products does not make an insurance company an ERISA fiduciary with respect to those products." *Am. Fed'n of Unions v. Equitable Life Assurance Soc'y,* 841 F.2d 658, 664 (5th Cir. 1988). Applying the DOL's 1975 regulation of an "investment advice fiduciary," the Seventh Circuit refused to hold a brokerage firm liable for the failure of investments it sold to an ERISA plan, but the court emphasized that there was

> nothing in the record to indicate that Jones or its employees had agreed to render individualized investment advice to the Plan. . . . The only 'agreement' between the parties was that the trustees would listen to Jones' sales pitch and if the trustees liked the pitch, the Plan would purchase from among the suggested investments, *the very cornerstone of a typical broker-client relationship.*

Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d 288, 293 (7th Cir. 1989) (emphasis added). The Eleventh Circuit, relying upon "numerous" cases, dismissed a claim that an insurance company's selling of life policies to an ERISA plan, without more, sufficed to give rise to fiduciary duties to the plan. *Cotton v. Mass. Mut. Life Ins. Co.,* 402 F.3d 1267, 1278-79 (11th Cir. 2005).

The SEC has also repeatedly held that "[t]he very function of furnishing [investment advice for compensation]—learning the personal and intimate details of the financial affairs of clients and making recommendations as to purchases and sales of securities—cultivates a confidential and intimate relationship"—rendering a broker-dealer who does so "a fiduciary." Hughes, Exchange Act Release No. 4048, 1948 WL 29537, at *4, *7 (Feb. 18, 1948), *aff'd sub nom., Hughes v. S.E.C.*, 174 F.2d 969 (D.C. Cir. 1949); *see also* Mason, Moran & Co., Exchange Act Release No. 4832, 1953 WL 44092, at *4 (Apr. 23, 1953). The SEC cautioned that fiduciary status does not follow "merely from the fact that [the broker-dealer] renders investment advice." *Hughes*, 1948 WL 29537, at *7. Indeed, broker-dealers "who render investment advice merely as an incident to their broker-dealer activities" are not fiduciaries "unless they have by a course of conduct placed themselves in a position of trust and confidence as to their customers." *Id.*

The SEC's industry-based distinction thus long predated the passage of ERISA.[8]

Significant federal and state legislation also used the term "investment adviser" to exclude broker-dealers when their investment advice was "solely incidental" to traditional broker-dealer activities and for which they received no "special compensation." The Investment Advisers Act of 1940, for example, defines "investment adviser" as "any person who, for compensation, engages in the business of advising others ... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities[.]" 15 U.S.C. § 80b-2(a)(11). But the Act excludes "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." *Id.*[9] Later interpreting the Act, the Supreme Court highlighted legislative history in which "leading investment advisers emphasized their relationship of 'trust and confidence' with their clients," and the Court stated that the Act reflected Congress's recognition of "the delicate fiduciary nature of an investment advisory relationship." *S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 190–91, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963) (quotation marks and citation omitted). Numerous contemporary state statutes also excluded broker-dealers from investment-adviser fiduciary status either completely or to the extent that the advice was incidental to their traditional activities and they did not receive special compensation for the advice.[10]

The contemporary case law similarly demonstrates that when investment advice was procured "on a fee basis," it entailed a substantial, ongoing relationship between adviser and client. *See, e.g.*, *S.E.C. v. Ins. Sec., Inc.*, 254 F.2d 642, 645 (9th Cir. 1958) (company receives a "management and investment supervisory fee for investment advice" on annual bases); *Kukman v. Baum*, 346 F.Supp. 55, 56 (N.D. Ill. 1972) ("Supervisor[ ] furnishes investment advice" and "receives a monthly fee calculated on the net value of the fund's assets."); *Norman v. McKee*, 290 F.Supp. 29, 34 (N.D. Cal. 1968) ("For its services, including administration, management and investment advice, ISI charges a so-called 'Management Fee' of 1 1/2% Per year of the face amount of each outstanding in-

8. Worth noting is that if the Fiduciary Rule is upheld, it places broker-dealers who work with clients about *both* individual retirement plans and ordinary brokerage accounts in an untenable position; they will be covered by two separate, complex regulatory regimes depending on the client's account or accounts they are discussing.

9. Contrary to the dissent's implication that the Investment Advisers Act ought to be semantically identical to ERISA before any comparison may be drawn, we reference that statute as background authority, which demonstrates Congressional awareness, when ERISA was enacted, of the difference between a fiduciary's offering regular investment advice for a fee and ordinary brokerage transactions. There is nothing illogical in reading ERISA's 1974 definition of "fiduciary" to embody a well-accepted distinction. *See Sekhar v. U.S.*, 570 U.S. 729, 133 S.Ct. 2720, at 2724, 186 L.Ed.2d 794 (2013)(observing, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."(internal quotation marks and citation omitted)).

10. *See, e.g.*, Cal. Corp. Code § 25009 (1968); Del. Code tit. 6, § 7302(1)(f)3 (1973); Ky. Rev. Stat. 292.310(7)(c) (1972); Mont. Code § 30-10-103(5)(c) (1961); N.Y. Gen. Bus. Law § 359-eee(1)(a)3 (1960); N.D. Cent. Code § 10-04-02(10) (1951); 70 Pa. Stat. and Cons. Stat. § 1-102(j)(iii) (1972); Utah Code § 61-1-13(6)(c) (1963); Wash. Rev. Code § 21.20.005(6)(c) (1967); W. Va. Code § 32-4-401(f)(3) (1974).

vestment certificate."); *Acampora v. Birkland*, 220 F.Supp. 527, 533 (D. Colo. 1963) (entity "undertook to employ independent investment counsel" "for the purpose of the rendition of investment advice," and in return the entity received a fee equal to 0.5% of the advice recipient's yearly net asset value); *Glicken v. Bradford*, 204 F.Supp. 300, 302 (S.D.N.Y. 1962) (company "is engaged in furnishing investment advice on a fee basis to its clients"); *S.E.C. v. Fiscal Fund*, 48 F.Supp. 712, 713 & n.7 (D. Del. 1943) ("for a stated fee" of "approximately $3,000 per annum," company agreed to "furnish all services, including management, investment advice and clerical assistance").

In short, whether one looks at DOL's original regulation, the SEC, federal and state legislation governing investment adviser fiduciary status vis-à-vis broker-dealers, or case law tying investment advice for a fee to ongoing relationships between adviser and client, the answer is the same: "investment advice for a fee" was widely interpreted hand in hand with the relationship of trust and confidence that characterizes fiduciary status.

DOL's invocation of two dictionary definitions of "investment" and "advice" pales in comparison to this historical evidence. That DOL contradicts its own longstanding, contemporary interpretation of an "investment advice fiduciary" and cannot point to a single contemporary source that interprets the term to include stockbrokers and insurance agents indicates that the Rule is far afield from its enabling legislation. DOL admits as much in conceding that the new Rule would "sweep in some relationships" that "the Department does not believe Congress intended to cover as fiduciary."

Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so. This is particularly true where such abrogation portends consequences that "are undeniably significant." Accordingly, the Fiduciary Rule's interpretation of "investment advice fiduciary" fatally conflicts with the statutory text and contemporary understandings.

4. Consistency with other prongs of ERISA's "fiduciary" definition

In addition to the preceding flaws, the Fiduciary Rule renders the second prong of ERISA's fiduciary status definition in tension with its companion subsections. The Rule thus poses a serious harmonious-reading problem. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."). The investment-advice prong of the statutory application of "fiduciary" is bookended by one subsection that defines individuals as fiduciaries with respect to a plan to the extent they exercise "any discretionary authority or . . . control" over the management of a retirement plan or "any authority or control" over its assets. 29 U.S.C. § 1001(21)(A)(i); 26 U.S.C. § 4975(e)(3)(A). The following prong identifies as fiduciaries those individuals to the extent they possess "any discretionary authority or . . . responsibility" in a plan's administration. 29 U.S.C. § 1001(21)(A)(iii); 26 U.S.C. § 4975(e)(3)(C). In *Mertens*, the Supreme Court was emphatic that these prongs defined "fiduciary" in "functional terms of

control and authority." *See Mertens v. Hewitt Assocs.,* 508 U.S. 248, 262, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). The phrase "control and authority" necessarily implies a special relationship beyond that of an ordinary buyer and seller.

Sandwiched between the two "control and authority" prongs, the interpretation of an "investment advice fiduciary" should gauge that subdivision by the company it keeps and should uniformly apply the trust and confidence standard in all three provisions. *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101, 132 S.Ct. 1350, 182 L.Ed.2d 341 (2012) ("the words of a statute must be read in their context" (quotation omitted)). The inference of textual consistency is reinforced by the similar phrasing in the last clause of the investment advice fiduciary prong, which refers to a person "with any authority or responsibility" to render investment advice for a fee. Salespeople in ordinary buyer-seller transactions have no such authority or responsibility.[11]

Countertextually, the Fiduciary Rule's interpretation of an "investment advice fiduciary" lacks any requirement of a special relationship. DOL thus asks us to differentiate within the definition of "fiduciary"—rendering the definition a moving target depending on which of the three prongs is at issue. Standard textual interpretation disavows that disharmony.

There is also no merit in DOL's reliance on *Mertens* for the broader proposition that ERISA departed from the common law definition of "fiduciary." DOL emphasizes the Court's statement that, by defining fiduciary in "functional" terms, Congress "expand[ed] the universe of persons subject to fiduciary duties." *Mertens*, 508 U.S. at 262, 113 S.Ct. 2063.

DOL's quotation is correct but beside the point. The question in *Mertens* was whether individuals who were not subject to fiduciary duties at common law could be sued under ERISA. *See id.* at 261–62, 113 S.Ct. 2063. This question arose because under the common law, not only the named trustee, but also individuals who "knowingly participated" in a named trustee's breach of his fiduciary duties, could be held liable. *Id.* at 256, 113 S.Ct. 2063. The Court held that this was no longer the case under ERISA. Although Congress "expand[ed] the universe of persons subject to fiduciary duties" by defining "fiduciary" "not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan," Congress actually limited the number of persons that could be sued. *Id.* at 262, 113 S.Ct. 2063. ERISA differed from common law by excluding "persons who [despite participation in the trustee's breach] had no real power to control what the plan did." *Id.*

Under *Mertens*, ERISA eliminated the "formal trusteeship" requirement and applied fiduciary status to all individuals who have "control and authority over the plan." *Id.* The reason for this is clear: "Professional service providers such as actuaries become liable for damages when they *cross the line from adviser to fiduciary*." *Id.* (emphasis added). Thus, the Court understood ERISA to apply to those who act as fiduciaries, regardless whether they are named fiduciaries. That understanding is

11. The dissent appears to contend that the "investment advice fiduciary" prong of ERISA's definition would be "stripped of meaning" by the other two prongs of that definition were it required to incorporate traditional fiduciary standards. On the contrary, each provision covers a distinct aspect of ERISA plan governance: control over the management or assets of the plan (i); rendering investment advice for a fee to the plan (ii); and discretionary authority in plan administration (iii). Although potentially somewhat overlapping, these activities are conceptually and practically distinguishable.

consistent, not *inconsistent*, with the common law trust and confidence standard.

Moreover, although ERISA "abrogate[d] the common law in certain respects" concerning "formal trusteeship," "we presume that Congress retained all other elements of common-law [fiduciary status] that are consistent with the statutory text because there are no textual indicia to the contrary." *Universal Health Servs., Inc. v. United States*, ––– U.S. ––––, 136 S.Ct. 1989, 1999 n.2, 195 L.Ed.2d 348 (2016).[12] There is no inconsistency between the statutory structure and the common law trust and confidence standard that "require[s] departing from common-law trust requirements." *Varity Corp.*, 516 U.S. at 497, 116 S.Ct. 1065.

5. Purposes

DOL ultimately falls back on statutory purposes. DOL points to the alleged negative repercussions of appellants' position, namely that "many investment advisers would be able to 'play a central role in shaping' retirement investments without the fiduciary safeguards 'for persons having such influence and responsibility.' " (quoting 81 Fed. Reg. 20955). DOL also says that appellants "cannot show that DOL acted unreasonably in determining that their proposed trust-and-confidence requirement would 'undermine[ ] rather than promote[ ]' ERISA's goals." (quoting 81 Fed. Reg. 20955). Finally, citing *United States v. Guidry*, 456 F.3d 493, 510–11 (5th Cir. 2006), DOL concludes that "[s]uch inconsistency with statutory purposes is alone sufficient to displace the common law, as *Varity* reflects and this Court has held in other contexts."

None of these arguments holds water. DOL's invocation of ERISA's purposes is unpersuasive in light of *Mertens*. There, the petitioners asked for a particular interpretation of ERISA "in order to achieve the 'purpose of ERISA to protect plan participants and beneficiaries.' " 508 U.S. at 261, 113 S.Ct. 2063. The petitioners complained that a different interpretation would "leave[ ] beneficiaries like petitioners with *less* protection than existed before ERISA, contradicting ERISA's basic goal of 'promot[ing] the interests of employees and their beneficiaries in employee benefit plans.' " *Id.* (quoting *Shaw*, 463 U.S. at 90, 103 S.Ct. 2890). *Mertens* rejected these complaints because "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Id.* Indeed, the Court said that "[t]his is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Id.* at 262, 113 S.Ct. 2063; *see also Darden*, 503 U.S. at 324-25, 112 S.Ct. 1344 (rejecting broader definition of employee based solely on the "goals" of ERISA). DOL's complaints here about "undermining ERISA's goals" are no less vague than the notions rejected in *Mertens* and *Darden*.

Moreover, DOL's principal policy concern about the lack of fiduciary safeguards

12. For the same reason, DOL's reliance on *Varity Corp.* and *Pegram v. Herdrich*, 530 U.S. 211, 120 S.Ct. 2143 (2000) as "cases [that] endors[e] other departures from the common law concerning fiduciaries," does not advance the ball. Those cases stand for the unremarkable proposition that, although an individual may hold both fiduciary and non-fiduciary positions, the individual must be acting as a fiduciary to be subject to ERISA fiduciary duties. *See Pegram*, 530 U.S. at 224–26, 120 S.Ct. 2143, *Varity Corp.*, 516 U.S. at 498, 116 S.Ct. 1065. Again, the trust-and-confidence standard is consistent, not inconsistent, with those holdings.

in Title II was present when the statute was enacted, but Congress chose not to require advisers to individual retirement plans to bear the duties of loyalty and prudence required of Title I ERISA plan fiduciaries. That times have changed, the financial market has become more complex, and IRA accounts have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority. A perceived "need" does not empower DOL to craft *de facto* statutory amendments or to act beyond its expressly defined authority.

Finally, DOL's reliance on *Guidry* is misleading and misplaced. *Guidry* was a criminal kidnapping-enhancement case in which this court was required to define the term "kidnap." 456 F.3d at 509–11. This court noted that "[w]e do not use the common law definition of any term where it would be inconsistent with the statute's purpose, notably where the term's definition has evolved." *Id.* at 509. This court applied the modern definition because the term "kidnap" had evolved so far from the antiquated common law that the common-law definition "would come close to nullifying the term's effect in the statute." *Id.* at 510-11 (quoting *Taylor v. United States*, 495 U.S. 575, 594, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). Unlike the term "kidnap," the term "fiduciary" has not "evolved" over time.

In sum, using the "regular interpretive method leaves no serious question, not even about purely textual ambiguity" in ERISA. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004). DOL cannot displace the presumption of common-law meaning because there is no inconsistency between the common-law trust-and-confidence standard and the statutory definition of "fiduciary." The Fiduciary Rule conflicts with the plain text of the "investment advice fiduciary" provision as interpreted in light of contemporary understandings, and it is inconsistent with the entirety of ERISA's "fiduciary" definition. DOL therefore lacked statutory authority to promulgate the Rule with its overreaching definition of "investment advice fiduciary." [13]

B. The Fiduciary Rule fails the "reasonableness" test of *Chevron* step 2 and the APA.

[10, 11] Under Step 2 of *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. Notwithstanding the preceding discussion, we assume *arguendo* that there is some ambiguity in the phrase "investment advice for a fee." In that case, the *Chevron* doctrine requires that DOL's regulatory interpretation be upheld if it is "reasonable." *Id.* at 845, 104 S.Ct. 2778.[14]

13. As noted at the beginning of this analysis, the Fiduciary Rule's overbreadth flows from DOL's concession that any financial services or insurance salesman who lacks a relationship of trust and confidence with his client can nonetheless be deemed a fiduciary. This conclusion, however, does not mean that any regulation of such transactions, or of IRA plans, is proscribed. ("To the extent ... that some brokers and agents hold themselves out as advisors to induce a fiduciary-like trust and confidence, the solution is for an appropriately authorized agency to craft a rule addressing *that* circumstance, not to adopt an interpretation that deems the speech of a salesperson to be that of a fiduciary, and that concededly is so overbroad that ... it must be accompanied by a raft of corrections.").

14. This court is bound by the Supreme Court's decisions to defer to an agency's "reasonable" construction of an ambiguous stat-

In addition, the regulation must withstand APA review, ensuring it is not arbitrary, capricious, contrary to law or in excess of statutory authority. 5 U.S.C. § 706(2)(A). Although DOL is empowered to enact regulations enforcing the fiduciary provisions of ERISA Title I, including the definition of "fiduciary" in Titles I and II, the Rule fails to pass the tests of reasonableness or the APA.

Bear in mind that DOL's 1975 regulations only covered "investment advice fiduciaries" who rendered advice regularly and as the primary basis for clients' investment decisions. The Fiduciary Rule extends regulation to any financial transaction involving an ERISA or IRA plan in which "advice" plays a part, and a fee, "direct or indirect," is received. The Rule expressly includes one-time IRA rollover or annuity transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers. Through the BIC Exemption, the Rule undertakes to regulate these and myriad other transactions as if there were little difference between them and the activities of ERISA employer-sponsored plan fiduciaries. Finally, in failing to grant certain annuities the long-established protection of PTE 84-24, the Rule competitively disadvantages their market because DOL believes these annuities are unsuitable for IRA investors.

Not only does the Rule disregard the essential common law trust and confidence standard, but it does not holistically account for the language of the "investment advice fiduciary" provision or for the additional prongs of ERISA's fiduciary definition. The Supreme Court has warned that "there may be a question about whether [an agency's] departure from the common law. . . with respect to particular questions and in a particular statutory context[ ] renders its interpretation unreasonable." *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 94, 116 S.Ct. 450, 133 L.Ed.2d 371 (1995). Given that the text here does not compel departing from the common law (but actually embraces it), and given that the Fiduciary Rule suffers from its own conflicts with the statutory text, the Rule is unreasonable.

Moreover, that it took DOL forty years to "discover" its novel interpretation further highlights the Rule's unreasonableness. *See Util. Air Regulatory Grp. v. EPA*, —— U.S. ——, 134 S.Ct. 2427, 2444, 189 L.Ed.2d 372 (2014) (hereinafter,

ute within its realm of enforcement responsibility. Nevertheless, the *Chevron* doctrine has been questioned on substantial grounds, including that it represents an abdication of the judiciary's duty under Article III "to say what the law is," and thus turns over judicial power to politically unaccountable employees of the Executive Department. *See, e.g., Michigan v. E.P.A.*, —— U.S. ——, 135 S.Ct. 2699, 2712, 192 L.Ed.2d 674 (2015) (Thomas, J., concurring) ("*Chevron* deference precludes judges from exercising [independent] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction.") (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027-32 (6th Cir. 2016), *rev'd on other grounds*, —— U.S. ——, 137 S.Ct. 1562, 198 L.Ed.2d 22 (2017) (Sutton, J., concurring in part and dissenting in part) (arguing the rule of lenity should trump *Chevron* deference when the Immigration and Nationality Act's civil provisions have the possibility of entailing criminal consequences); Philip Hamburger, Is Administrative Law Unlawful? 316 (2014). Although the status of *Chevron* may be uncertain, the parties vigorously disputed the applicability of *Chevron* and we must respond to their arguments.

"*UARG*") ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.") (citation and quotation marks omitted). DOL's turnaround from its previous regulation that upheld the common law understanding of fiduciary relationships alone gives us reason to withhold approval or at least deference for the Rule. *See Gen. Elec. Co. v. Gilbert,* 429 U.S. 125, 142, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976) (overturning an agency guideline that was "not a contemporaneous interpretation of Title VII," and "flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute"); *see also Watt v. Alaska,* 451 U.S. 259, 272-73, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981) ("[P]ersuasive weight" is due to an agency's contemporaneous construction of applicable law and subsequent consistent interpretation, whereas a "current interpretation, being in conflict with its initial position, is entitled to considerably less deference.").

The following problems highlight the unreasonableness of the Rule and its incompatibility with APA standards.

[12] First, the Rule ignores that ERISA Titles I and II distinguish between DOL's authority over ERISA employer-sponsored plans and individual IRA accounts. By statute, ERISA plan fiduciaries must adhere to the traditional common law duties of loyalty and prudence in fulfilling their functions, and it is up to DOL to craft regulations enforcing that provision. 29 U.S.C. §§ 1001(b), 1104. IRA plan "fiduciaries," though defined statutorily in the same way as ERISA plan fiduciaries, are not saddled with these duties, and DOL is given no direct statutory authority to regulate them. As to IRA plans, DOL is limited to defining technical and accounting terms, 11 U.S.C. § 1135, and it may grant exemptions from the prohibited transactions provisions. 26 U.S.C. § 4975(c)(2), 29 U.S.C. § 1108(a). Hornbook canons of statutory construction require that every word in a statute be interpreted to have meaning, and Congress's use and withholding of terms within a statute is taken to be intentional. It follows that these ERISA provisions must have different ranges; they cannot mean that DOL may comparably regulate fiduciaries to ERISA plans and IRAs. *Loughrin v. United States*, ––– U.S. ––––, 134 S.Ct. 2384, 2390, 189 L.Ed.2d 411 (2014). Despite the differences between ERISA Title I and II, DOL is treating IRA financial services providers in tandem with ERISA employer-sponsored plan fiduciaries. The Fiduciary Rule impermissibly conflates the basic division drawn by ERISA.

DOL's response to the statutory distinction is that it has broad power to exempt "prohibited transactions." *See* 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2). It has abused that power. The test is whether an exemption is administratively feasible; in the interests of the plan, its participants and beneficiaries; and protective of participants' and beneficiaries' rights. *Id.* DOL adopted the BICE provisions after redefining "investment advice fiduciary" for two essential reasons. To begin with, DOL knew, and continues to concede, its new definition encompassed actors and transactions that the Department "does not believe Congress intended to cover as fiduciary." DOL had to create exemptions not exclusively for the statutory purposes, but to blunt the overinclusiveness of the new definition. Were it not for DOL's ahistorical and strained interpretation of "fiduciary," there would be no rationale for the BICE exemptions. Thus, when DOL argues that any exemptions would be more lenient on IRA financial services providers

than deeming their ordinary activities to fall within the ERISA Title II prohibited transactions provision, DOL proves too much.

Additionally, the "exemptions" actually subject most of these newly regulated actors and transactions to a raft of affirmative obligations. Among the new requirements, brokers and insurance salespeople assume obligations of loyalty and prudence only statutorily required of ERISA plan fiduciaries. Further, when brokers and insurance representatives use the BICE exemptions (as they must in order to preserve their commissions), they are required to expose themselves to potential liability *beyond* the tax penalties provided for in ERISA Title II. *See* 26 U.S.C. § 4975(a). ERISA employer-sponsored plan fiduciaries may be sued under Title I, 29 U.S.C. § 1132(a), but federal law did not expose brokers and insurance salespeople to private claims of IRA investors until the Fiduciary Rule was promulgated. On this basic level, DOL unreasonably failed to follow its statutory guidance and the clear distinction in the scope of its authority under ERISA Titles I and II.

Second, insofar as the Fiduciary Rule defines "investment advice fiduciary" to include anyone who makes a suggestion "to a specific advice recipient ... regarding the advisability of a particular investment ... decision," it comprises nearly any broker or insurance salesperson who deals with IRA clients. Under ERISA, however, fiduciaries are generally prohibited from selling financial products to plans. 26 U.S.C. § 4975(c)(1), 29 U.S.C. § 1106(b). As the Chamber of Commerce puts it, the Rule "treats the fact that a person has done something that a fiduciary generally may *not* [do], as dispositive evidence that the person is a fiduciary." Transforming sales pitches into the recommendations of a trusted adviser mixes apples and oranges.[15] But the Rule is not even consistently transformative: it acknowledges the distinction between sales and fiduciary advice by what it frankly called a "seller's carve-out" for certain transactions involving ERISA Title I plans with more than $50 million in assets. *See* 29 C.F.R. § 2510-3.21(c)(1) (2016). DOL explained that the purpose of the carve-out was "to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial or trusted adviser." 81 Fed. Reg. at 20980. Only DOL's fiat supports treating smaller-scale sales pitches, those not carved out, as if the counterparty is acting as an impartial or trusted adviser. Illogic and internal inconsistency are characteristic of arbitrary and unreasonable agency action.

Another such marker is the overbreadth of the BIC Exemption when compared with an exception that Congress enacted to the prohibited transactions provisions. 26 U.S.C. § 4975(d)(17) exempts from "prohibition" transactions involving certain "eligible investment advice arrangements" for individually directed accounts. 26 U.S.C.

15. *See, e.g., Burton v. R. J. Reynolds Tobacco Co.,* 397 F.3d 906, 911-913 (10th Cir. 2005) (noting "the weight of core authority holding that the relationship between a product buyer and seller is not fiduciary in nature"); *Farm King Supply*, 884 F.2d at 294 ("Jones offered the plan individualized solicitations much the same way a car dealer solicits particularized interest in its inventory."); *Schlumberger Tech. v. Swanson,* 959 S.W.2d 171, 177 (Tex. 1997) ("while a fiduciary or confidential relationship may arise from the circumstances of a particular case, to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit;" and "mere subjective trust does not, as a matter of law, transform arm's-length dealing into a fiduciary relationship").

§ 4975(e)(3)(B); 26 U.S.C. § 4975(f)(8)(A), (B). Moreover, in describing the transactions not prohibited by Section 4975(d)(17), Congress distinguished two activities: "the provision of investment advice" and "the ... sale of a security ...." 26 U.S.C. § 4975(d)(17)(A)(i), (ii). Congress further distinguished the "direct or indirect receipt of fees" "in connection with the ... advice" from fees "in connection with the ... sale of a security ...." 20 U.S.C. § 4975(d)(17)(A)(iii). That Congress distinguished sales from the provision of investment advice is consistent with this opinion's interpretation of the statutory term, "render[ing] investment advice for a fee," 29 U.S.C. § 1002(21)(A)(ii), and inconsistent with DOL's conflating sales pitches and investment advice.

Even more remarkable, DOL had to exclude Congress's nuanced § 4975(d)(17) exemption from the BICE exemption's onerous provisions. 81 Fed. Reg. 20982 n.33. But for this exclusion, the BIC Exemption would have brazenly overruled Congress's careful striking of a balance in the regulation of "prohibited transactions" concerning certain self-directed IRA plans. DOL candidly summarizes the intersection of its far broader Rule with Congress's exclusion contained in the Pension Protection Act of 2006 (PPA):

> [T]he PPA created a new statutory exemption that allows fiduciaries giving investment advice to individuals ... to receive compensation from investment vehicles that they recommend in certain circumstances. 29 U.S.C. 1108(b)(14); 29 U.S.C. 4975(d)(17). Recognizing the risks presented when advisers receive fees from the investments they recommend to individuals, Congress placed important constraints on such advice arrangements that are calculated to limit the potential for abuse and self-dealing ... .Thus, the PPA statutory exemption remains available to parties that would become investment advice fiduciaries [under the Fiduciary Rule] *because of the broader definition in this final rule* ....

Id. (emphasis added).

Unlike the BIC Exemption regulations, Congress's exemption did not require detailed contractual provisions or subject "fiduciaries" involved in Section 4975(d)(17) transactions to the possibility of class actions suits without damage limitations. When Congress has acted with a scalpel, it is not for the agency to wield a cudgel. *See Fin. Planning Ass'n. v. S.E.C.*, 482 F.3d 481 (D.C. Cir. 2007) (overturning SEC's broad regulatory exemption contrary to Congress's narrower exemption).

Third, the Rule's status is not salvaged by the BICE, which as noted was designed to narrow the Rule's overbreadth. The Supreme Court addressed such a tactic when it held that agencies "are not free to adopt unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness." *See U.A.R.G.*, 134 S.Ct. at 2446 (internal quotations and alterations omitted). This is the vice in BICE, which exploits DOL's narrow exemptive power in order to "cure" the Rule's overbroad interpretation of the "investment advice fiduciary" provision. DOL admitted that without the BIC Exemptions, the Rule's overbreadth could have "serious adverse unintended consequences." 81 Fed. Reg. at 21062. That a cure was needed "should have alerted [the agency] that it had taken a wrong interpretive turn." *U.A.R.G.*, 134 S.Ct. at 2446. The BIC Exemption is integral to retaining the Rule. Because it is independently indefensible, this alone dooms the entire Rule.

Fourth, BICE extends far beyond creating "conditional" "exemptions" to ERISA's prohibited transactions provisions. Rather

than ameliorate overbreadth, it deliberately extends ERISA Title I statutory duties of prudence and loyalty to brokers and insurance representatives who sell to IRA plans, although Title II has no such requirements. The BIC Exemption creates these duties and burdensome warranty and disclosure requirements by writing provisions for the regulated parties' contracts with IRA owners. The contractual mandates fulfilled a "critical" and "central goal" of BICE, ensuring IRA owners' ability to enforce them with lawsuits, 81 Fed. Reg. 21020, 21021, 21033. Incentives to private lawsuits include the BICE's additional provisions that reject damage limitations and class action waivers. In stark contrast to these entangling regulations, ERISA Title II only punishes violations of the "prohibited transactions" provision by means of IRS audits and excise taxes. And unlike § 1132 of ERISA Title I, Title II contains no private lawsuit provision. Together, the Fiduciary Rule and the BIC Exemption circumvent Congress's withholding from DOL of regulatory authority over IRA plans. The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties is unreasonable and arbitrary and capricious.

[13] Fifth, the BICE provisions regarding lawsuits also violate the separation of powers, as reflected in *Alexander v. Sandoval* and its progeny. *Armstrong v. Exceptional Child Ctr., Inc.*, ––– U.S. ––––, 135 S.Ct. 1378, 1387-88, 191 L.Ed.2d 471 (2015) ("a private right of action under federal law is not created by mere implication, but must be 'unambiguously conferred' ") (quoting *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002)); *Alexander v. Sandoval,* 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) ("private rights of action to enforce federal law must be created by Congress"). Only Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates. *See Alexander,* 532 U.S. at 291, 121 S.Ct. 1511. In ERISA, Congress authorized private rights of action for participants and beneficiaries of employer sponsored plans, 29 U.S.C. § 1132(a), but it did not so privilege IRA owners under Title II. DOL may not create vehicles for private lawsuits indirectly through BICE contract provisions where it could not do so directly. *Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110, 117-19, 131 S.Ct. 1342, 179 L.Ed.2d 457 (2011). Yet DOL did not apply the BIC Exemption enforceability provisions to ERISA employer-sponsored plan fiduciaries precisely because ERISA already subjects those entities to suits by private plaintiffs. 81 Fed. Reg. 21022. This action admits DOL's purpose to go beyond Congressionally prescribed limits in creating private rights of action.

Further, whether federal or state law may be the vehicle for DOL's BICE-enabled lawsuits is immaterial in the absence of statutory authorization. If the IRA owners' lawsuits are intended to be cognizable under federal law, the absence of statutory basis is obvious. If the BICE-mandated provisions are intended to authorize new claims under the fifty states' different laws, they are no more than an end run around Congress's refusal to authorize private rights of action enforcing Title II fiduciary duties. Paraphrasing the Supreme Court, "[t]he absence of a private right to enforce [Title II fiduciary duties] would be rendered meaningless if [IRA owners] could overcome that obstacle by suing to enforce [DOL-imposed contractual] obligations instead. The statutory and contractual obligations, in short, are one and the same." *Astra USA, Inc.,* 563 U.S. at 117, 131 S.Ct. 1342; *see also Umland v. PLANCO Fin. Serv., Inc.*, 542 F.3d 59, 67

(3d Cir. 2008)(reading FICA's provisions into every employment contract would contradict Congress's decision not to expressly include a private right of action). DOL's assumption of non-existent authority to create private rights of action was unreasonable and arbitrary and capricious.

Although it is now disavowed by DOL, another unsustainable feature of the BIC Exemption is the forced rejection, in transactions involving transaction-based compensation, of contractual provisions that would have allowed arbitration of class action claims. This contractual condition violates the Federal Arbitration Act. The Supreme Court has broadly applied the Federal Arbitration Act's promotion of voluntary arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). State law provisions that have attempted to condition or limit the availability of an arbitral forum have been consistently struck down. *See, e.g., AT&T Mobility, Inc. v. Concepcion,* 563 U.S. 333, 336, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (conditions on class-wide arbitration struck down); *OPE Int'l LP v. Chet Morrison Contractors, Inc.,* 258 F.3d 443, 447 (5th Cir. 2001) (state may not condition enforcement of an arbitration agreement on absence of a forum selection clause). That DOL has retreated from its overreach (although not yet by formal rule amendment) does not detract from the impermissible nature of the provisions in the first place. *See also Thrivent Fin. for Lutherans v. Acosta*, No. 16-cv-03289, 2017 WL 5135552 (D. Minn. Nov. 3, 2017) (granting injunction against enforcement of the BICE exemption anti-arbitration condition).

The sixth "unreasonable" feature of the Fiduciary Rule lies in DOL's decision to outflank two Congressional initiatives to secure further oversight of broker/dealers handling IRA investments and the sale of fixed-indexed annuities. The 2010 Dodd Frank Act amended both the Securities Exchange Act and the Investment Advisers Act of 1940, empowering the SEC to promulgate enhanced, uniform standards of conduct for broker-dealers and investment advisers who render "personalized investment advice about securities to a retail customer. . . ." Dodd-Frank Act Sec. 913(g)(1), 124 Stat. 1827-28 (2010). Significantly, Dodd-Frank prohibits SEC from eliminating broker-dealers' "commission[s] or other standard compensation." Dodd-Frank Act Sec. 913(g)(2), 124 Stat. at 1828 (2010).

Another provision of Dodd-Frank was spawned by a federal court's rejection of an SEC initiative to regulate fixed indexed annuities as securities. *See Am. Equity Inv. Life Ins. v. S.E.C.,* 613 F.3d 166, 179 (D.C. Cir. 2010). In Dodd-Frank, Congress opted to defer such regulation to the states, which have traditionally and under federal law borne responsibility for thoroughgoing supervision of the insurance business. Section 989J accordingly provides that "fixed indexed annuities sold in states that adopted the National Association of Insurance Commissioners' enhanced model suitability regulations, or companies following such regulations, shall be treated as exempt securities not subject to federal regulation." Dodd-Frank Sec. 989J, 124 Stat. 1376, 1949-50 (2010).

The Fiduciary Rule conflicts with both of these efforts. The SEC has the expertise and authority to regulate brokers and dealers uniformly. DOL has no such statutory warrant, but far from confining the Fiduciary Rule to IRA investors' transactions, DOL's regulations effect dramatic industry-wide changes because it is impractical to separate IRA transactions from non-IRA securities advice and brokerage. Rather than infringing on SEC

turf, DOL ought to have deferred to Congress's very specific Dodd-Frank delegations and conferred with and supported SEC practices to assist IRA and all other individual investors. By presumptively outlawing transaction-based compensation as "conflicted," the Fiduciary Rule also undercuts the Dodd-Frank provision that instructed SEC not to prohibit such standard forms of broker-dealers' compensation. And in direct conflict with Congress's approach to fixed indexed annuities, DOL's regulatory strategy not only deprives sellers of those products of the enhanced PTE 84-24 exemption but it also subjects them to the stark alternatives of using the BIC Exemption, creating entirely new compensation schemes, or withdrawing from the market. While Congress exhibited confidence in the states' insurance regulation, DOL criticizes the Dodd-Frank provisions as "insufficient" to protect the "subset" of retirement-related fixed-indexed annuities transactions within DOL's purview. Certainly, however, most such products are sold to retirement investors, so DOL is occupying the Dodd-Frank turf.

DOL contends that legislation pertaining to the SEC does not detract from its authority to regulate "fiduciaries" to IRA investors, but we are unconvinced. Congress does not ordinarily specifically delegate power to one agency while knowing that another federal agency stands poised to assert the very same power. DOL's direct imposition on the delegation to SEC is made plain by the text of Dodd-Frank Section 913(g)(2), which states:

> The Commission may promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice. In accordance with such rules, any material conflicts of interest shall be disclosed and may be consented to by the customer. Such rules shall provide that such standard of conduct shall be no less stringent than the standard applicable to investment adviser[s] under sections 206(1) and (2) of this Act when providing personalized investment advice about securities, except the Commission shall not ascribe a meaning to the term *customer* that would include an investor in a private fund managed by an investment adviser, where such private fund has entered into an advisory contract with such adviser. The receipt of compensation based on commission or fees shall not, in and of itself, be considered a violation of such standard applied to a broker, dealer or investment adviser. (emphasis added)

As a major securities law treatise explains, the genesis of this provision was an SEC initiative commencing in 2006 to address "Trends Blurring the Distinction Between Broker-Dealers and Investment Advisers." *See* Louis Loss, et al., 2 Fundamental of Securities Regulation 1090–94 (2011). Congress was concerned to protect all retail investment clients, and there is no evidence that Congress expected DOL to more restrictively regulate a trillion dollar portion of the market when it delegated the general question to the SEC (for broker-dealers and registered investment advisers) and conditionally deferred to state insurance practices.[16]

16. DOL contends that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313, 80 S.Ct.

Seventh, regardless of the precise status of a "major questions" exception to *Chevron* analysis, *see generally* Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 261 (2016), there is no doubt that the Supreme Court has been skeptical of federal regulations crafted from long-extant statutes that exert novel and extensive power over the American economy. *See, e.g., King v. Burwell,* ––– U.S. ––––, 135 S.Ct. 2480, 2488-89, 192 L.Ed.2d 483 (2015) (exhibiting no deference to certain Affordable Care Act regulations, because if Congress had wished to delegate to the IRS "a question of deep 'economic and political significance[,]' ... central to th[e] statutory scheme, ... it surely would have done so expressly"). The Court rejected a *Chevron* Step Two "reasonableness" justification for EPA regulations that "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *U.A.R.G.,* 134 S.Ct. at 2444. The Court further stated, "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.* (internal quotation omitted); *see also FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 160, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (rejecting FDA bid to regulate the tobacco industry); *MCI Telecomms. Corp. v. AT&T Co.,* 512 U.S. 218, 234, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) (rejecting use of term "modify" in enabling statute to "effectively...introduc[e]...a whole new regime of regulation").

[14] These decisions are not, as DOL contends, distinguishable. They restate fundamental principles deriving from the Constitution's separation of powers within the federal government. Congress enacts laws that define and, equally important, circumscribe the power of the Executive to control the lives of the citizens. When agencies within the Executive Branch defy Congressional limits, they lord it over the people without proper authority. Most instances of regulatory activity, no doubt, are underpinned by direct or necessary consequences of enabling statutes. But the guiding inquiry under *Chevron* Step Two is whether Congress intended to delegate interpretive authority over a question to the agency asserting deference. *City of Arlington,* 133 S.Ct. at 1868. It is not hard to spot regulatory abuse of power when "an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy...." *U.A.R.G.,* 134 S.Ct. at 2444 (internal quotation omitted).

DOL has made no secret of its intent to transform the trillion-dollar market for IRA investments, annuities and insurance products, and to regulate in a new way the thousands of people and organizations working in that market. Large portions of the financial services and insurance industries have been "woke" by the Fiduciary Rule and BIC Exemption. DOL utilized two transformative devices: it reinterpreted the forty-year old term "investment advice fiduciary" and exploited an exemption provision into a comprehensive regulatory framework. As in the *U.A.R.G.* case, DOL found "in a long-extant statute an unheralded power to regulate a significant portion of the American economy." And,

326, 4 L.Ed.2d 334 (1960). In this case, however, Congress made plain the comprehensive scope of its intent. Congress had to be aware of the enormous impact of IRA investments on the overall market for personalized investment advice to retail customers. It is unreasonable to presume Congress would not have referred to—or carved out—DOL's claimed broad power over ERISA Title II transactions. Instead, the lack of any reference or carve-out in Dodd-Frank strongly suggests Congress, like DOL itself (until after 2010), did not suppose such DOL power was hidden in the interstices of ERISA.

although lacking direct regulatory authority over IRA "fiduciaries," DOL impermissibly bootstrapped what should have been safe harbor criteria into "backdoor regulation." *Hearth, Patio & Barbecue Ass'n. v. U.S. Dep't of Energy,* 706 F.3d 499, 507-08 (D.C. Cir. 2013). The Fiduciary Rule thus bears hallmarks of "unreasonableness" under *Chevron* Step Two and arbitrary and capricious exercises of administrative power.

CONCLUSION

The APA states that a "reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, . . . not in accordance with law" or "in excess of statutory . . . authority[ ] or limitations." 5 U.S.C. § 706(2)(A), (C). DOL makes no argument concerning severability of the provisions making up the Fiduciary Rule and BICE exemption apart from the illegal arbitration waiver. In any event, this comprehensive regulatory package is plainly not amenable to severance. Based on the foregoing discussion, we **REVERSE** the judgment of the district court and **VACATE** the Fiduciary Rule *in toto.*

JUDGMENT REVERSED; FIDUCIARY RULE VACATE

CARL E. STEWART, Chief Judge, dissenting:

Over the last forty years, the retirement-investment market has experienced a dramatic shift toward individually controlled retirement plans and accounts. Whereas retirement assets were previously held primarily in pension plans controlled by large employers and professional money managers, today, individual retirement accounts ("IRAs") and participant-directed plans, such as 401(k)s, have supplemented pensions as the retirement vehicles of choice, resulting in individual investors having greater responsibility for their own retirement savings. This sea change within the retirement-investment market also created monetary incentives for investment advisers to offer conflicted advice, a potentiality the controlling regulatory framework was not enacted to address. In response to these changes, and pursuant to its statutory mandate to establish nationwide "standards . . . assuring the equitable character" and "financial soundness" of retirement-benefit plans, 29 U.S.C. § 1001, the Department of Labor ("DOL") recalibrated and replaced its previous regulatory framework. To better regulate conflicted transactions as concerns IRAs and participant-directed retirement plans, the DOL promulgated a broader, more inclusive regulatory definition of investment-advice fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("the Code").

Despite the relevant context of time and evolving marketplace events, Appellants and the panel majority skew valid agency action that demonstrates an expansive-but-permissible shift in DOL policy as falling outside the statutory bounds of regulatory authority set by Congress in ERISA and the Code. Notwithstanding their qualms with these regulatory changes and the effect the DOL's exercise of its regulatory authority might have on certain sectors of the financial services industry, the DOL's exercise was nonetheless lawful and consistent with the Congressional directive to "prescribe such regulations as [the DOL] finds necessary or appropriate to carry out [ERISA's provisions]." 29 U.S.C. § 1135. Because I do not share the panel majority's concerns about the DOL's amended regulatory framework, I respectfully dissent.

I.

A comprehensive recitation of the relevant regulatory and statutory background

can be found in the district court's opinion. *See Chamber of Commerce of the United States of America, et al. v. Hugler, et al.*, 231 F.Supp.3d 152 (N.D. Tex. 2017). This appeal primarily turns on the DOL's interpretation of the parallel definitions of "investment-advice fiduciary" in ERISA and the Code. *See* 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3). Those provisions define an investment-advice fiduciary as one who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so." *Id.* This statutory definition deliberately casts a wide net in assigning fiduciary responsibility with respect to plan assets. *See* Fiduciary Rule, 81 Fed. Reg. 20,954. Thus, any person who "renders investment advice for a fee or other compensation, direct or indirect," is an investment-advice fiduciary, "regardless of whether they have direct control over the plan's assets, and regardless of their status as an investment adviser or broker under federal securities laws." *Id.*

For 41 years, the DOL employed a five-part test to determine whether a person is an investment-advice fiduciary under ERISA and the Code, and that test limited the reach of the statutes' prohibited transaction rules to those who rendered advice "on a regular basis," and to instances where such advice "serve[d] as a primary basis for investment decisions with respect to plan assets." *See* 29 C.F.R. § 2510.3–21(c)(1) (2015). This regulation "was adopted prior to the existence of participant-directed 401(k) plans, the widespread use of IRAs, and the now commonplace rollover of plan assets" from Title I plans to IRAs, thus leaving out of ERISA's regulatory reach many investment professionals, consultants, and advisers who play a critical role in guiding plans and IRA investments. Fiduciary Rule, 81 Fed. Reg. 20,946.

The rule challenged on appeal addresses these and other changes in the retirement investment advice market by, *inter alia*, abandoning the five-part test in favor of a definition of fiduciary that includes "recommendation[s] as to the advisability of acquiring . . . investment property that is rendered pursuant to [an] . . . understanding that the advice is based on the particular investment needs of the advice recipient." 29 C.F.R. § 2510.3–21(a) (2016). A "recommendation," in turn, includes 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." *Id.* § 2510.3–21(b)(1) (emphasis added). Importantly, the regulatory definition of "investment-advice fiduciary" thoroughly and specifically describes communications that would otherwise be covered "recommendations," and gives examples of interactions and relationships that, under the broad regulatory definition of fiduciary, would qualify as "recommendations" but which are not "appropriately regarded as fiduciary in nature" under ERISA and are therefore circumscribed from the regulation's definition. *See* 29 C.F.R. § 2510.3–21(b)-(c) (2016); Fiduciary Rule, 81 Fed. Reg. 20,971.[1]

1. This is an important point. The DOL has noted that the "proposed general definition of investment advice was intentionally broad to avoid weaknesses of the 1975 regulation and to reflect the broad sweep of the statutory text." Fiduciary Rule, 81 Fed. Reg. 20,971. Realizing that "standing alone" the new definition "could sweep in some relationships that are not appropriately regarded as fiduciary in nature" and that the DOL did "not believe Congress intended to cover as fiduciary relationships," the DOL created "carve-outs" to exclude specific activities and communications from the definition of fiduciary

Appellants, organizations and associations representing businesses and financial service providers who previously fell outside the DOL's definition of fiduciary but who are now governed by certain of the rule's new regulatory requirements, challenge the expansion. The panel majority finds many of Appellants' arguments persuasive and vacates the DOL's rule as unreasonable under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984), and as arbitrary and capricious agency action under the Administrative Procedure Act, 5 U.S.C. § 706 ("APA").[2] Because I believe the DOL's new regulations are a statutorily permissible and reasonable exercise of its regulatory authority, I would affirm the district court's judgment.

II.

As the panel majority acknowledges, the DOL's authority to implement a new definition of investment-advice fiduciary implicates the two-step analytical framework established in *Chevron*. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute." *Id.* at 843, 104 S.Ct. 2778 (emphasis added). The agency's view "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009) (emphasis in original). Importantly, a court may not substitute its own construction of a statutory provision of a reasonable interpretation made by the administrator of an agency. *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778.

The *Chevron* inquiry necessarily begins with the text of the statutory definition of investment-advice fiduciary. *See* 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3). Contrary to the panel majority's protestation, nothing in the statutory text forecloses the DOL's current interpretation. The statute does not define the pertinent phrase "renders investment advice," and ERISA expressly authorizes the DOL to adopt regulations defining "technical and trade terms used" in the statute. 29 U.S.C. § 1135. As a matter of ordinary usage, there can be no "serious dispute" that someone who provides "[a] recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property," 29 C.F.R. 2510.3–21(a), is "render[ing] investment advice." *See Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F.Supp.3d 1, 23

investment advice. Fiduciary Rule, 81 Fed. Reg. 20,948–49. After receiving comments on that proposal, the DOL eliminated the term "carve-out" from the final regulation and articulated with greater specificity the nature of communications and activities that would be regarded as fiduciary-creating "recommendations" while expressly proscribing conduct and relationships that ERISA was not enacted to prevent. *See* Fiduciary Rule, 81 Fed. Reg. 20,949; 29 C.F.R. § 2510.3–21(b)–(c).

2. Given the primary basis of the panel majority's holding, their opinion does not address Appellants' First Amendment claims. Because I would uphold the DOL's regulations, I would also reject Appellants' First Amendment claims as either waived or otherwise without merit.

(D.D.C. Nov. 4, 2016). Additionally, although the panel majority dismisses the use of dictionary definitions as an aid in interpreting the statutory text, plain language definitions highlight the uniformity between the statutory text and the DOL's regulations.[3] The dictionary defines "advice" as an "opinion or recommendation offered as a guide to action [or] conduct," and it defines "investment" as "the investing of money or capital in order to gain profitable returns." *See Random House Dictionary of the English Language* (2d ed. 1987). The DOL's interpretation of "investment advice" all but replicates those definitions by classifying as fiduciaries only those who provide "recommendations" to investors who reasonably rely on their advice and expertise. *See* 29 C.F.R. § 2510.3–21(a)–(c). Nothing in the phrase "renders investment advice for a fee or other compensation" suggests that the statute applies only in the limited context accepted by the panel majority.

That the text of ERISA does not unambiguously foreclose the DOL's regulatory interpretation of fiduciary satisfies step one of *Chevron*. Nonetheless, the panel majority reaches additional erroneous conclusions to make a case for a contrary holding. The panel majority primarily contends that the DOL's new interpretation is inconsistent with common law fiduciary standards that Congress contemplated and retained in enacting ERISA. Under those common law standards, fiduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and the client, a relationship that the panel majority maintains never materializes when a financial services professional does not engage in the type of ongoing transactional relationships that plan managers and administrators traditionally do.

No one seriously challenges that the courts have, at times, looked to the common law of trusts in interpreting the nature and scope of fiduciary duties under ERISA. The Supreme Court has "recognize[d] that the [ ] fiduciary duties [found in ERISA] draw much of their content from the common law of trusts," which "governed most benefit plans before ERISA's enactment." *Varity Corp. v. Howe*, 516 U.S. 489, 496, 116 S.Ct. 1065 (1996). But the Court has "also recognize[d] . . . that trust law does not tell the entire story," and that "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trust did not offer completely satisfactory protection." *Id.* at 497, 116 S.Ct. 1065. Accordingly, the Court concluded that "[i]n some instances, trust law . . . offer[s] only a starting point, after which courts must go on to ask whether, or to what extent, *the language of the statute, its structure, or its purposes* require departure from common-law trust requirements." *Id.* (emphasis added).

3. The panel majority repudiates the use of dictionary definitions based on the Supreme Court's preference for common law understandings under ERISA in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065 (1996). There, the Supreme Court was analyzing whether an employer's actions fell within the statutory definition of fiduciary, and specifically whether the employer was acting as a plan "administrator" at the time it rendered fraudulent advice related to its employees' retirement plans. *Varity Corp.*, 516 U.S. at 492–95, 116 S.Ct. 1065. Because the terms "fiduciary" and specifically trust "administration" were given a legal meaning under the common law, the Court proceeded to assess the employer's actions using standards set under common law trust principles related to plan administration. *Id.* at 502, 116 S.Ct. 1065. Here, because the common law does not directly inform what constitutes an "investment-advice fiduciary" under ERISA, the DOL's reliance on dictionary definitions to interpret the term is not inconsistent with or contrary to *Varity Corp*.

One area in which Congress has departed from the common law of trusts is with the statutory definition of "fiduciary." ERISA does not define "fiduciary" "in terms of formal trusteeship, but in *functional* terms of *control and authority over the plan*, ... thus expanding the universe of persons subject to fiduciary duties ..." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262, 113 S.Ct. 2063 (1993) (emphasis added). That is, contrary to the panel majority's interpretation, *Mertens* recognizes that although Congress intended to incorporate the core principles of fiduciary conduct that were developed in the common law of trusts, Congress modified this approach where appropriate for employee benefit plans, including in defining who qualifies as a fiduciary under ERISA. Indeed, ten years before *Mertens*, a panel of this court recognized that ERISA imposes a duty on a broader class of fiduciaries than did trust law. *See Donovan v. Cunningham*, 716 F.2d 1455, 1464 n.15 (5th Cir. 1983) (noting that "ERISA's modifications of exiting trust law include imposition of duties upon a broader class of fiduciaries") (citing 29 U.S.C. § 1002(21) (1976)). The panel majority now interprets *Mertens* very narrowly, effectively limiting its interpretation of the statutory definition of "fiduciary" to reach only plan managers, administrators, and other comparable roles. Such a holding, however, runs counter to the very clear language in *Mertens*, which interpreted ERISA to define fiduciaries as "not only the persons named as fiduciaries by a benefit plan ... but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets." *Mertens*, 508 U.S. at 262, 113 S.Ct. 2063. Under the current regime, investment advisers of the sort covered by the new regulatory definition of "investment-advice fiduciary" exercise such control. Because the text of ERISA goes beyond the common law, and because the purpose of the statute does not compel a different result, the textual rendering of "fiduciary" controls and, as explained, does not unambiguously foreclose the DOL's interpretation of "investment-advice fiduciary." *See Varity Corp.*, 516 U.S. at 496–97, 116 S.Ct. 1065.[4]

It is only after invoking common law trust principles that the panel majority turns to the statutory text. Instead of assessing the DOL's regulations based on the plain language of the statute, the panel majority relies on several extra-statutory sources which purportedly shed light on how an investment-advice fiduciary should be defined. In so doing, the panel majority maintains that the relevant provisions in ERISA and the Code contemplated a hard distinction between investment advisers

4. Accepting as true that the statutory definition of "investment-advice fiduciary" continues to be informed by the common law, I am not persuaded that the DOL's interpretation conflicts with common law trust principles. Throughout the new regulation, the DOL emphasizes that "ERISA safeguards plan participants by imposing trust law standards of care and undivided loyalty on plan fiduciaries," Fiduciary Rule, 81 Fed. Reg. 20946, and proscribed certain communications from the new definition of investment-advice fiduciary to "avoid[ ] burdening activities that do not implicate relationships of trust." Fiduciary Rule, 81 Fed. Reg. 20,950. Additionally, the DOL found that "[i]n the retail IRA marketplace, growing consumer demand for personalized advice ... has pushed brokers to offer *comprehensive guidance services* rather than just transactional support." Fiduciary Rule, 81 Fed. Reg. at 20,949 (emphasis added). These references to common law trust principles indicate the DOL's intention to regulate only those relationships in which investors rely on the advice and recommendation of financial professionals when making decisions concerning their retirement plans. Nothing in the regulations explicitly conflict with that standard.

and those who merely sell retirement products, and that the DOL dispensed with this distinction in the new rule by conferring fiduciary status on one-time sellers of products.

As an initial matter, the new rule does not make one a fiduciary for selling a product *without a recommendation* upon which an investor might reasonably rely. *See* Fiduciary Rule, 81 Fed. Reg. 20,984; *see also* 29 C.F.R. § 2510.3–21(b). Thus, "if a retirement investor asked a broker to purchase a . . . security, the broker would not become a fiduciary investment adviser *merely because the broker . . . executed the securities transaction*. Such 'purchase and sales' transactions do not include any investment advice component." *Id.* (emphasis added). That the panel majority's primary concern is expressly addressed by the plain language of the new rule is alone enough to render unavailing any reliance on extra-statutory contemporary understandings of the term "investment advice" as inherently and necessarily distinctive from pure sales activity (which, again, the new rule does not purport to regulate). In any event, the sources cited by the panel majority independently undermine its ultimate conclusion.

The panel majority first highlights the Investment Advisers Act of 1940 ("the IAA"), which precedes the disputed regulations by some 76 years and which informed Congress's use of the phrase "renders investment advice for a fee or other compensation" in ERISA and the Code. The IAA defines an "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities," 15 U.S.C. § 80b–2(a)(11), and specifically excludes from that definition "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no compensation therefor." *Id.* From this, the panel majority gleans that the distinction in the IAA between "investment advisers compensated for rendering advisory services" and "salespersons compensated only for their sales" was incorporated by Congress into the concepts of ERISA. This logic is misplaced. "The distinction between advisers and brokers contained in the [IAA] was created when Congress define[d] 'investment adviser' broadly and then create[d] . . . a precise exemption for broker-dealers." *Perez*, 217 F.Supp.3d at 26 (quoting *Fin. Planning Ass'n v. S.E.C.*, 482 F.3d 481, 489 (D.C. Cir. 2007)) (internal quotations omitted). In ERISA and the Code, however, Congress omitted such an exclusion from the definition of "fiduciary." *See* 29 U.S.C. § 1002(21)(A); 26 U.S.C. § 4975(e)(3)(B). Thus, to the extent Congress had the IAA in mind as a model when it enacted the statutory definition of "fiduciary" found in ERISA, that the definitions do not exactly align, and specifically that ERISA's definition mysteriously omits any statutory exclusion of broker-dealers, counsels against construing ERISA's definition of "fiduciary" in the way advanced by the panel majority. *See Perez*, 217 F.Supp.3d at 26.

Additionally, the panel majority's reliance on the DOL's *original* regulation, SEC interpretations of "investment advice for a fee," and case law tying investment advice for a fee to "ongoing relationships between adviser and client" are similarly unavailing. First, because the DOL limited the scope of its original regulation such that it did not touch the breadth of the statutory definition of fiduciary, all interpretations rendered pursuant to that regulation will necessarily be limited in a way that the new regulation seeks to remedy. Further, that the SEC and case law have

interpreted investment advice *for a fee* as implicating ongoing relationships between an adviser and his client does not take the entire statutory provision into consideration. ERISA defines "investment-advice fiduciary" as one who renders investment advice "for a fee *or other compensation*, direct or indirect." 29 U.S.C. § 1002(21)(A)(ii) (emphasis added). This phrase contemplates compensation structures other than those incorporating fees, *i.e.* commissions, and which are built on relationships that are more than mere buyer-seller interactions, but which do not require ongoing intimate relationships.

The panel majority also emphasizes that the investment-advice provision is "bookended" by two separate definitions of fiduciary which purportedly incorporate common law trust principles and apply to individuals vested with responsibilities to manage and control the plan. From this, the panel majority extrapolates that the investment advice prong requires the existence of a "special" relationship so as to harmonize with the statutory definitions of fiduciary that come before and after it. However, that the other two prongs of the statutory definition of "fiduciary" describe those involved in managing or administering a plan provides support for the opposite conclusion. Because the other disjunctive prongs of the statutory definition already address "the ongoing management [and administration] of an ERISA plan," the panel majority's reading of the "investment advice" prong would strip that prong of independent meaning and render it superfluous. *See, e.g.*, *U.S. v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (citation and internal quotation marks omitted).

In sum, the statutory definition of "fiduciary" does not unambiguously foreclose the DOL's updated regulatory definition of "investment-advice fiduciary." The text and structure of the statute support this conclusion, and the panel majority's reliance on common law presumptions and extra-statutory interpretations of "renders investment advice for a fee" do not upset this conclusion. Accordingly, I conclude that the DOL acted well within the confines set by Congress in implementing the challenged regulatory package, and said package should be maintained so long as the agency's interpretation is reasonable.

III.

In applying *Chevron* step two to cases where an agency has changed its existing policy, the court defers to the agency's permissible interpretation, but only if the agency has offered a reasoned explanation for why it chose that interpretation. *See Encino Motorcars, LLC v. Navarro*, ––– U.S. ––––, 136 S.Ct. 2117, 2125, 195 L.Ed.2d 382 (2016). Analysis at this step is analogous to the "arbitrary or capricious" standard under the APA. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7, 132 S.Ct. 476, 181 L.Ed.2d 449 (2011).

The DOL's interpretation of "renders investment advice" is reasonably and thoroughly explained. The new interpretation fits comfortably with the purpose of ERISA, which was enacted with "broadly protective purposes" and which "commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits retirement plan participants will receive." *Perez*, 217 F.Supp.3d at 28 (quoting *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 96, 114 S.Ct. 517 (1993)). In light of changes in the retirement investment advice market since 1975, mentioned above, the DOL reasonably concluded that limiting fiducia-

ry status to those who render investment advice to a plan or IRA "on a regular basis" risked leaving retirement investors inadequately protected. This is especially so given that "one-time transactions like rollovers will involve trillions of dollars over the next five years and can be among the most significant financial decisions investors will ever make." *Perez*, 217 F.Supp.3d at 28 (citing Fiduciary Rule, 81 Fed. Reg. at 20,954–55). Given DOL's reasoned explanation for choosing its most recent interpretation, I would hold that the agency's action passes muster under step two of *Chevron*.

Notwithstanding the DOL's reasoned explanation for the new regulations, the panel majority maintains that the DOL acted unreasonably and arbitrarily when it promulgated the new fiduciary rule and, in a strained attempt to justify this conclusion, the panel majority disregards the requirement of showing judicial deference under *Chevron* by highlighting purported issues with other provisions of the regulation. Each of the panel majority's positions fails for reasons more fully explained below.

A. *PTE 84–24, the BIC Exemption, and the DOL's Exemption Authority*

Beyond its qualms with the new regulatory delineations on who qualifies as an investment-advice fiduciary, the panel majority takes substantial issue with the DOL's exercise of its exemption authority to amend PTE 84–24 and create the new BIC Exemption. The DOL may supplement statutorily created exemptions by implementing new exemptions under the prohibited transaction rules, which apply to retirement investment instruments under Titles I and II and "supplement[ ] the fiduciary's general duty of loyalty to the plan's beneficiaries . . . by . . . barring certain transactions deemed 'likely to injure the pension plan.' " *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241–42, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000). ERISA and the Code authorize the DOL to adopt "*conditional or unconditional* exemption[s]" for otherwise prohibited transactions, the only limitation on this expansive authority being that the exemption must be "administratively feasible," "in the interest of the plan and its participants and beneficiaries," and "protective of the rights of [plan] participants and beneficiaries." 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2). Consistent with this broad authority, the DOL granted exemptions for otherwise prohibited transactions in the new regulatory package, but conditioned those exemptions on, among other things, a requirement that the fiduciary take on the same duties of "prudence" and "loyalty" that bind Title I fiduciaries. *See* Fiduciary Rule, 81 Fed. Reg. 21,077, 21,176. This condition is only truly meaningful as applied to advisers under Title II, which must, under the new rule, satisfy new requirements to engage in transactions that would otherwise be prohibited.

The panel majority concludes that because the DOL is given no direct statutory authority to regulate IRA plan fiduciaries under Title II, and because the DOL has used its exemption authority to "subject most of these newly regulated actors and transactions to a raft of affirmative obligations," the agency necessarily abused its exemption authority. However, the panel majority's interpretation of the DOL's use of its exemption authority all but ignores the statutory directive given to the DOL to create "conditional or unconditional" exemptions from otherwise prohibited transactions. ERISA and the Code do not qualify the form conditions must take or limit the scope of the DOL's exemption authority to mirror specific exemptions created by

Congress, leaving it up to the agency to decide whether to impose affirmative or negative conditions (or none at all) on exemptions from prohibited transactions. And Congress's imposition of broad regulatory power over Title I plans is not dispositive of whether Congress intended to foreclose the DOL from requiring adherence to those duties as a condition of granting an exemption.[5]

Further, the panel majority accepts Appellants' contention that the BIC Exemption creates a private right of action in contravention of *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) by requiring the inclusion of specific contractual terms as a condition of qualifying for and receiving the prohibited transaction exemption. However, the BIC Exemption does not create a private right of action. "[I]t merely dictates terms that otherwise-conflicted financial institutions must include in written contracts with IRA and other [Title II] owners in order to qualify for the exemption." *Perez*, 217 F.Supp.3d at 36. Any action brought to enforce the terms of the written contract created pursuant to the BIC Exemption would be brought under state law, and state law would ultimately control the enforceability of any of the required contractual terms.

The panel majority also urges that in moving fixed indexed annuities from PTE 84–24 to the BIC Exemption, the DOL failed to account for state regulation of sales of annuities. *See* Maj. Opn. at 385 (citing *American Equity Inv. Life Ins. Co. v. S.E.C.*, 613 F.3d 166 (D.C. Cir. 2010)). However, ERISA contains no statutory requirement that the DOL check for efficiency when changing which annuities qualify for a specific exemption, as was the case in *American Equity*. Further, before making the relevant amendments to the exemptions, the DOL comprehensively assessed existing securities regulation for variable annuities, state insurance regulation of all annuities, and consulted with numerous government and industry officials, including the SEC, the Department of the Treasury, and the Consumer Financial Protection Bureau, among others. The DOL found the protections prior to the current rulemaking insufficient to protect investors and acted within its prerogative to modify the regulatory regime as it deemed necessary.

Similarly, the panel majority observes that because § 913(g) of the Dodd-Frank

5. Throughout its opinion, the panel majority represents that the BIC Exemption was created to draw back an otherwise "overinclusive" regulatory definition of investment-advice fiduciary, and that without the BIC Exemption, the new definition could "sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships." *See* Maj. Opn. at p. 367 (quoting Fiduciary Rule, 81 Fed. Reg. 20,948); *see also* Maj. Opn. at 381–82. However, the quoted language upon which the panel majority's opinion relies does not cite the BIC Exemption as the regulatory provision intended to keep the new definition of investment-advice fiduciary in line with the statutory definition of the same, but to certain *exclusions* of communications between advisers and plan beneficiaries within the new regulatory definition of investment-advice fiduciary. Note 1, *supra*, describes how the regulatory definition of investment-advice fiduciary explicitly circumscribes those "relationships that are not appropriately regarded as fiduciary in nature." The BIC Exemption is not the source of this exclusion (which serves to specify who is and who is not an investment-advice fiduciary), but it is the new definition of investment-advice fiduciary itself that limits its own reach. Relatedly, it is illogical to cite the BIC Exemption as creating an external limit on the new definition of fiduciary, as the entire purpose of the exemption is to impose requirements on parties who fall within the new definition of fiduciary (and consequently fall outside the group of advisers who are excluded from the new definition).

Wall Street Reform and Consumer Protection Act, Pub. Law. No. 111–203, 124 Stat. 1376 (2010) ("Dodd-Frank Act") prohibits the SEC from adopting a standard of conduct that disallows commissions for broker-dealers, it is implausible that Congress intended to allow the DOL, through ERISA, to promulgate a regulation that would do just that. As an initial matter, the DOL's final rules do not *prohibit* commissions for broker-dealers. The rules only modify already-existing exemptions from prohibited transactions. As has been the case, if a person or entity qualifies for an exemption, the applicant can still receive commissions and other forms of third party compensation. Further, "[n]othing in the Dodd-Frank Act indicates that Congress intended to preclude the DOL's regulation of fiduciary investment advice under ERISA or its application of such a regulation to securities brokers or dealers." Fiduciary Rule, 81 Fed. Reg. 20,990. In fact, "[the] Dodd-Frank Act specifically directed the SEC to study the effectiveness of existing ... regulatory standards of care under other federal and state authorities," § 913(b)(1), (c)(1), and "[t]he SEC has ... consistently recognized ERISA as an applicable authority in this area, noting that advisers entering into performance fee arrangements with employee benefit plans covered by [ERISA] are subject to the fiduciary responsibility and prohibited transaction provisions of ERISA." *Id.* (internal quotation marks omitted).

B. Questions of Deep "Economic and Political Importance"

Finally, the panel majority's contention that the DOL is using a "long-extant" statute to implement an "enormous and transformative expansion in regulatory authority without clear congressional authorization" is misplaced. Maj. Opn. at 387. The panel majority relies on several Supreme Court cases in support of this position but fails to recognize a meaningful distinction between those opinions and the case *sub judice*: in each of these cases, the relevant agency clearly exceeded the scope of delegation created by the enabling statute. *See Util. Air Regulatory Grp. v. EPA*, ––– U.S. ––––, 134 S.Ct. 2427, 2444, 189 L.Ed.2d 372 (2014) (holding that "it would be patently unreasonable—not to say outrageous—for [the] EPA to insist on seizing expansive power that *it admits the statute is not designed to grant*," and finding that a "long-extant statute [did not give EPA] an unheralded power to regulate a significant portion of the American economy") (emphasis added); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (rendering as invalid regulations in which the FDA departed from statements it had made to Congress for over ninety years that it did not have jurisdiction over the tobacco industry, and ignoring that Congress had created a distinct regulatory scheme over the tobacco industry and expressly rejected proposals to give the FDA such jurisdiction). Here, in contrast, the DOL has acted within its delegated authority to regulate financial service providers in the retirement investment industry—which it has done since ERISA was enacted—and has utilized its broad exemption authority to create conditional exemptions on new investment-advice fiduciaries. That the DOL has extended its regulatory reach to cover more investment-advice fiduciaries and to impose additional conditions on conflicted transactions neither requires nor lends to the panel majority's conclusion that it has acted contrary to Congress's directive.

IV.

The panel majority's conclusion that the DOL exceeded its regulatory authority by

implementing the regulatory package that included a new definition of investment-advice fiduciary and both modified and created new exemptions to prohibited transactions is premised on an erroneous interpretation of the grant of authority given by Congress under ERISA and the Code. I would hold that the DOL acted well within its regulatory authority—as outlined by ERISA and the Code—in expanding the regulatory definition of investment-advice fiduciary to the limits contemplated by the statute, and would uphold the DOL's implementation of the new rules.

Stephen R. LEGENDRE; Paul L. Legendre, also known as Leroy Paul Legendre; Ragus J. Legendre; Percy J. Legendre, Jr., Plaintiffs-Appellees

v.

HUNTINGTON INGALLS, INCORPORATED, formerly known as Northrop Grumman Shipbuilding, Incorporated, formerly known as Northrop Grumman Ship Systems, Incorporated, formerly known as Avondale Industries, Incorporated, formerly known as Avondale Shipyards, Incorporated, formerly known as Avondale Marine Ways, Incorporated, Defendant-Appellant

No. 17-30371

United States Court of Appeals, Fifth Circuit.

Filed March 16, 2018

Background: Surviving children of shipyard worker brought negligence action in state court against shipyard, alleging shipyard failed to warn employees of risks of asbestos exposure, and failed to implement proper safety procedures for handling asbestos, and thus their sister was exposed to asbestos fibers that clung to their father's work clothing and body, which later caused her to death from mesothelioma. Shipyard removed to federal court. The United States District Court for the Eastern District of Louisiana, Lance M. Africk, J., 2017 WL 1458209, granted plaintiffs' motion to remand to state court. Shipyard appealed.

Holding: The Court of Appeals, Stephen A. Higginson, Circuit Judge, held that negligence claim against shipyard owner did not challenge actions taken under color of federal authority, and thus lacked causal nexus required for federal officer removal.

Affirmed.

Higginbotham, Circuit Judge, filed concurring opinion.

1. Removal of Cases ⚷21

Federal officer removal is unlike other removal doctrines: it is not narrow or limited. 28 U.S.C.A. § 1442.

2. Removal of Cases ⚷107(9)

Court of Appeals reviews the district court's remand order de novo, without a thumb on the remand side of the scale.

3. Removal of Cases ⚷21

To be entitled to federal officer removal, a defendant must show: (1) that it is a person within the meaning of the statute, (2) that it has a colorable federal defense, (3) that it acted pursuant to a federal officer's directions, and (4) that a causal nexus exists between its actions under color of federal office and the plaintiff's claims. 28 U.S.C.A. § 1442.

Appendix III - E-mail Exchange with Department of Labor on Foreign Crime Provision Effective Date

From: Hauser, Timothy - EBSA
Sent: Sunday, November 12, 2023 11:01 AM
To: Nussdorf, Melanie
Cc: Gomez, Lisa M - EBSA ; Khawar, Ali - EBSA; Cosby, Chris - EBSA; McMennamin, Lynne - EBSA; Bloom, Tom - EBSA
Subject: [EXTERNAL] Issue

Melanie,

This is to confirm that the Department's intention with respect to the proposed amendments to PTE 2020-02 and PTE 84-24 is that only a conviction entered after the effective date of the final amendments would cause an advisor to be ineligible to use the exemption. Thank you for alerting us to the concern that the provisions could be read differently than intended.

Tim

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Dear Tim:

In the Department's proposed amendments to PTE 2020-02, significant changes were made to the ineligibility provisions. Instead of ineligibility being triggered by convictions of the advisor entity for asset management related conduct, which is current law, the proposal would make ineligible any advisor if it or its affiliates were convicted of a list of specified crimes not limited to asset management conduct. The provision has a lookback period of 10 years. [1]

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[1] Section III (a) General
Subject to the timing and scope provisions set forth in subsection (b) and the opportunity to be heard as set forth in subsection (c), an Investment Professional or Financial Institution will be ineligible to rely on the exemption with respect to any transaction, if the Financial Institution, its Affiliate, or Investment Professional is described in (1) or (2):
(1) The Investment Professional or Financial Institution has been convicted either:
(A) by a U.S. Federal or state court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

As we have discussed, we believe your proposed changes to this provision will deprive retirement investors of advice despite the fact that the advisor entity is separate from and uninvolved in the conduct. But for purposes of drafting public comments, our immediate concern is that this provision, read literally, would make ineligible *on the effective date,* more than a dozen large financial institutions whose affiliates have been convicted over the past 10 years.
You have orally indicated that this is not your intended result, and that your intention with respect to the proposed amendments is that only a conviction entered after the effective date of the final class exemption would cause an advisor to be ineligible to use the exemption.

We would appreciate it if you could confirm that the intention of your proposal is for the class exemption to trigger ineligibility only for convictions for the enumerated crimes entered after the effective date of the final exemption.

(B) by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A).

* * *

(b) Timing and Scope of Ineligibility.
(1) Ineligibility shall begin six months after:
(A) the conviction date defined in Section (a)(1);
(B) the date of the Department's written determination under Section (c)(1)(C) for a petition regarding a foreign conviction; or
(C) the date of the written ineligibility notice described in subsection (a)(2).
(2) A person shall become eligible to rely on this exemption again only upon the earliest of the following:
(A) the date of a subsequent judgment reversing such person's conviction described in (a)(1);
(B) 10 years after the person became ineligible under Section III(b)(1) or 10 years after the person was released from imprisonment as a result of a crime described in (a)(1), if later; or
(C) the date, if any, the Department grants an individual exemption (which may impose additional conditions) to the person permitting its continued reliance on this exemption notwithstanding the conviction

December 18, 2018

The Honorable Preston Rutledge
Assistant Secretary of Labor
The Honorable Jeanne Klinefelter Wilson
Deputy Assistant Secretary
The Honorable Timothy D. Hauser
Deputy Assistant Secretary for Program Operations
Lyssa Hall
Director, Exemptions Branch
The Employee Benefits Security Administration
U. S. Department of Labor
200 Constitution Avenue NW
Room S-2524
Washington, DC 20210

Dear Mr. Rutledge, Ms. Wilson, Mr. Hauser, and Ms. Hall:

On behalf of the members of the Securities Industry and Financial Markets Association ("SIFMA")[1], we respectfully request that the Department of Labor (the "Department") issue an advisory opinion confirming that foreign convictions are not disabling under section I(g) of PTE 84-14, the prohibited transaction exemption for qualified professional asset managers (herein, "PTE 84-14", or the "QPAM Exemption" or the "Exemption"). There are three principal arguments that support the conclusion that section I(g) does not apply to foreign convictions.

First, nothing about the regulatory proposals underlying the QPAM Exemption itself suggests that the Department intended to reach foreign convictions. Second, even if that was the Department's intent, the Supreme Court has cautioned that statutes should not be applied extraterritorially unless they plainly on their face provide for such application[2] and the Employee Retirement Income Security Act of 1974 ("ERISA") does not so provide. Third, all of the policy

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).
[2] *See Small v. United States,* 544 U.S. 385, 388-89 (2005).

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reasons undergirding a prohibition against extraterritorial application are present here and therefore militate against extraterritorial application of ERISA.

That administrative exemptions covering foreign convictions have been sought and granted in the past should not deter the Department from excluding foreign convictions from section I(g) going forward. It is clear from our discussions with various applicants that they sought these individual exemptions because they assumed that the Department would be able to grant an individual exemption in a more timely fashion than would be the case for a formal advisory opinion process seeking confirmation that foreign crimes are not implicated. In each of these exemption applications, with the threat of a foreign conviction imminent and the lack of certainty in the market, the application seemed prudent at the time. Once the application was granted, few applicants wanted to expend additional resources to obtain an opinion from the Department. While most practitioners believed that foreign crimes were not disabling, the stakes of being wrong, especially in the context of huge derivative transactions, which generally rely on this exemption, were simply too high to take any risk.[3]

The Department's general practice is to grant individual exemptions in response to requests when the applicable conditions for granting individual exemptions are met, and the Department does not generally opine on the need for an exemption in any particular circumstance unless asked to do so. Since 1984, we do not know of a formal request for the Department to opine in this area, and in reviewing the applications for exemption, we saw no significant mention of this question. Accordingly, for the reasons described in more detail below, and to clarify this issue for the markets in general, we urge the Department to look at this issue anew and, consistent with the President's directive to all Cabinet members to eliminate unnecessary regulatory costs and burdens, issue an advisory opinion clarifying that section I(g) applies only to U.S. federal and state convictions.[4]

Historical Background

In 1982, the Department proposed a class exemption providing relief from ERISA section 406 to "qualified professional asset managers" ("QPAMs"), in order to "improve the administration of the prohibited transaction rules of ERISA."[5] The proposed exemption, which was adopted as PTE 84-14, enabled regulated institutions that meet specified qualifications to

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[3] ERISA's prohibited transaction scheme broadly prohibits, among other things, any sale, exchange, extension of credit or service between a plan and a party in interest and the Internal Revenue Code imposes an excise tax on the counterparty to such a transaction. That jeopardy for trading partners has resulted in requests for relief where relief may not be necessary, so as to avoid any uncertainty in the markets and any diminution in trading partners for a plan.

[4] It is the practice of the Department to answer inquiries of individuals or organizations affected, directly or indirectly, by ERISA as to their status under it and as to the effect of certain acts and transactions. *See* ERISA Advisory Opinion Procedure 76-1 (FR Doc. 76-25168).

[5] 47 Fed. Reg. 56945, 56946 (Dec. 21, 1982).

enter into a wide range of beneficial transactions with "parties in interest" that would otherwise be prohibited by ERISA's prohibited transaction rules, unless another exemption applies.

In part, the exemption was modelled on PTE 80-51 (now PTE 91-38), which provides broad party-in-interest relief for bank collective trusts, and PTE 78-19 (now PTE 90-1), which provides broad party-in-interest relief for insurance company pooled separate accounts. Although neither of those exemption models included a provision making the relief inapplicable to any investment manager whose affiliate is convicted of a crime, the Department included such a provision in section I(g). "Neither the QPAM nor any affiliate . . . is a person who within the 10 years immediately preceding . . . has been . . . convicted . . . of . . . any . . . crime described in section 411 of ERISA", or another specifically identified crime.[6] This provision was included because: "[a] QPAM, and those who may be in a position to influence its policies, are expected to maintain a high standard of integrity."[7] Section I(g) remains unchanged today except for scriveners' corrections.[8]

No foreign convictions are contemplated by this very analogous provision of ERISA. Indeed, the language of the section refers only to two possibilities: conviction by a federal court or conviction by a state or local court. Neither section 411, nor PTE 84-14, section I(g), contain any mention of foreign crimes.[9]

Section 411 of ERISA, which I(g) incorporates by reference, expressly contemplates conviction by a federal court, state, or local court only—not by a foreign court. Thus, for example, a provision of section 411 identifying circumstances where the section's 13-year prohibition may be shortened, refers to cases in which" . . . prior to the end of such period, in the case of a person so convicted or imprisoned (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) if the offense is a *Federal offense*, the sentencing judge or, if the offense is a *State or local offense*, the United States district court for the district in which the offense was committed, pursuant to sentencing guidelines and policy statements under section 994(a) of title 28, determines that such person's service in any capacity referred to in paragraphs (1) through (3) would not be contrary to the purposes of this subchapter. Prior to making any such determination the court shall hold a hearing and shall give notice to such proceeding by certified mail to the Secretary of Labor *and to State, county, and Federal prosecuting officials* in the jurisdiction or jurisdictions in which

[6] *Id.* at 56950.
[7] *Id.* at 56947.
[8] 75 Fed. Reg. 38837, 38842 (July 6, 2010).
[9] In full, section 411 identifies the following crimes: "robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 80a–9(a)(1) of title 15, a violation of any provision of this chapter, a violation of section 186 of this title, a violation of chapter 63 of title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), any felony involving abuse or misuse of such person's position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element." 29 U.S.C. § 1111(a).

such person was convicted. The court's determination in any such proceeding shall be final." (Emphases added).[10] And this is so despite the fact that section 411's enumeration of crimes, like section I(g)'s enumeration of crimes, includes some "common name" crimes, untethered to a federal or state statutory cite.

Thus, we are confident a court would hold that section 411 has no extraterritorial effect and that foreign crimes are not therefore disabling thereunder. The question then becomes whether a nearly identical list in section I(g) includes foreign convictions. We think it does not and was never intended to do so. Nothing in the language of section I(g) or in any of the preambles accompanying the QPAM Exemption speaks to a conviction under foreign law. Had the Department intended section I(g) to vastly expand upon section 411's disqualifications, by extending section I(g) to convictions in every other country in the world, one would expect a very specific reference to and explanation for such a significant departure from ERISA, and from the very provision of ERISA being incorporated by reference. The complete absence of such a statement or explanation is further, powerful evidence that section I(g) is limited to domestic convictions.

Indeed, the language generally used in other statutes when referring to foreign law is entirely absent here. See section 9(b) of the Investment Company Act[11] which, in an analogous setting, specifically permits the Securities and Exchange Commission ("SEC") to make an investment adviser or related person ineligible to manage, among other things, a registered investment company, due to a conviction in a foreign court, upon notice and hearing. We note that even this authority is absent from ERISA.

Nothing in the Proposal or Grant of the Exemption Suggests the Coverage of Foreign Crimes

In proposing PTE 84-14, the Department created a new class of manager, the QPAM, to provide relief from ERISA in order to "improve the administration of the prohibited transaction rules of ERISA" for asset managers that meet certain criteria. Section I(g) provides that a QPAM cannot be, or be affiliated with, an entity that has been convicted of certain crimes for a period of ten year. As discussed above, section I(g) is based on section 411 of ERISA where foreign convictions are not contemplated; we believe this is instructive and in fact makes it even clearer that Congress did not intend foreign crimes to be covered by ERISA at all.[12] This is so

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[10] *Id.*

[11] *See* 15 U.S.C. 80a-9(b): "(b) Certain persons serving investment companies; administrative action of Commission The Commission may, after notice and opportunity for hearing, by order prohibit, conditionally or unconditionally, either permanently or for such period of time as it in its discretion shall deem appropriate in the public interest, any person from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, if such person . . . (5) within 10 years has been convicted by a foreign court of competent jurisdiction of a crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense set forth in paragraph (1) of subsection (a); or . . . ").

[12] *Id.* (" . . . or unless prior to the end of such period, in the case of a person so convicted or imprisoned (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) if the offense

despite the fact that section 411's enumeration of crimes, like section I(g)'s enumeration of crimes, sets forth "common name" crimes untethered to a statutory cite, as well as specific federal statutes. There is no reference to foreign crimes in the proposal or the grant of the final exemption. The fact that the Department has issued individual exemptions covering foreign crimes is irrelevant; for an applicant, the stakes of not applying and obtaining relief in the absence of the Department's confirmation that foreign crimes are not covered by section I(g) are simply too high. Moreover, given that the Department does not generally opine on the need for an exemption supports the point that the Department has never "spoken" on this issue. We are not aware of any formal request prior to today for the Department to opine on this issue.

The Supreme Court Has Cautioned Against Extraterritorial Application of Federal Statutes

Application of the rules of statutory construction bolsters the conclusion that section I(g) of the QPAM Exemption does not encompass foreign convictions. First, nothing in the plain language of either section 411 of ERISA, which is cross referenced in section I(g) of the QPAM Exemption, or section I(g) itself, suggests that either provision encompasses foreign convictions. As described in detail below, Congress, when extending a law extraterritorially, generally uses words that plainly evoke its meaning: e.g., from the Investment Company Act, "within 10 years has been convicted by a *foreign court of competent jurisdiction* of a crime, *however denominated by the laws of the relevant foreign government*, that is *substantially equivalent* to an offense set forth in paragraph (1) of subsection (a)." [13] No such language appears in ERISA itself or in the QPAM Exemption or its regulatory history.[14] As we note above, section 411 *explicitly* contemplates application to US proceedings only. It contains explicit reference to federal, state, and local convictions, but no reference to foreign proceedings, and certain important procedural protections it provides would not be administrable in a non-US court. *Moreover,* when a statute or regulation incorporates another statutory provision by reference, it incorporates the restrictions and limitations of that provision. Here, section I(g) expressly incorporates "any . . . crime described in section 411 of ERISA"; that section, in turn, plainly covers only US convictions.

Second, the Supreme Court has spoken definitively on this issue. In *Small v. United States*,[15] the petitioner had been convicted in Japan of gun-running or arms trafficking.[16] After

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is a Federal offense, the sentencing judge or, if the offense is a State or local offense, the United States district court for the district in which the offense was committed, pursuant to sentencing guidelines and policy statements under section 994(a) of title 28, determines that such person's service in any capacity referred to in paragraphs (1) through (3) would not be contrary to the purposes of this subchapter. Prior to making any such determination the court shall hold a hearing and shall give notice to such proceeding by certified mail to the Secretary of Labor and to State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The court's determination in any such proceeding shall be final.

[13] 15 U.S.C. § 80a-9(b)(5).

[14] We do not believe it is relevant that individual companies have sought individual exemptive relief. Asset managers cannot take the risk that counterparties will be uncertain on whether the manager is a QPAM, and have likely pursued exemptions for certainty and to put counterparty's concerns to rest.

[15] 544 U.S. 385 (2005)

[16] *Id.* at 387.

release from Japanese prison, he returned to the United States, where he bought a gun.[17] Sometime later, the gun was discovered, and Small was prosecuted under the statute that made it "unlawful for any person . . . who has been *convicted in any court* of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm."[18] The Supreme Court overturned Small's conviction, concluding that no crime had been committed under the statute, because "convicted in any court" "refers only to domestic courts, not to foreign courts."[19] In considering the appropriate standard, the Court noted:

> And, although the presumption against extraterritorial application does not apply directly to this case, we believe a similar assumption is appropriate when we consider the scope of the phrase "convicted in any court" here.
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> For one thing, the phrase describes one necessary portion of the "gun possession" activity that is prohibited as a matter of domestic law. For another, considered as a group, foreign convictions differ from domestic convictions in important ways. Past foreign convictions for crimes punishable by more than one year's imprisonment may include a conviction for conduct that domestic laws would permit, for example, for engaging in economic conduct that our society might encourage. See, *e.g.*, Art. 153 of the Criminal Code of the Russian Soviet Federated Socialist Republic, in Soviet Criminal Law and Procedure 171 (H. Berman & J. Spindler transls. 2d ed. 1972) (criminalizing "Private Entrepreneurial Activity"); Art. 153, *id.*, at 172 (criminalizing "Speculation," which is defined as "the buying up and reselling of goods or any other articles for the purpose of making a profit"); cf., *e.g.*, Gaceta Oficial de la Republica de Cuba, ch. II, Art. 103, p. 68 (Dec. 30, 1987) (forbidding propaganda that incites against the social order, international solidarity, or the Communist state). They would include a conviction from a legal system that is inconsistent with an American understanding of fairness. See, *e.g.*, U.S. Dept. of State, Country Reports on Human Rights Practices for 2003, Submitted to the House Committee on International Relations and the Senate Committee on Foreign Relations, 108th Cong., 2d Sess., 702-705, 390*390 1853, 2023 (Joint Comm. Print 2004) (describing failures of "due process" and citing examples in which "the testimony of one man equals that of two women"). And they would include a conviction for conduct that domestic law punishes far less severely. See, *e.g.*, Singapore Vandalism Act, ch. 108, §§ 2, 3, III Statutes of Republic of Singapore, pp. 257-258 (imprisonment for up to three years for an act of vandalism). Thus, the key statutory phrase "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" somewhat less reliably identifies dangerous individuals for the purposes of U.S. law where foreign convictions, rather than domestic convictions, are at issue.

[17] *Id.*
[18] *Id.*
[19] *Id.* at 394.

> In addition, it is difficult to read the statute as asking judges or prosecutors to refine its definitional distinctions where foreign convictions are at issue. To somehow weed out inappropriate foreign convictions that meet the statutory definition is not consistent with the statute's language; it is not easy for those not versed in foreign laws to accomplish; and it would leave those previously convicted in a foreign court (say, of economic crimes) uncertain about their legal obligations. Cf. 1 United States Sentencing Commission, Guidelines Manual § 4A1.2(h) (Nov. 2004) ("[S]entences resulting from foreign convictions are not counted" as a "prior sentence" for criminal history purposes).[20]

In concluding, the Supreme Court noted that Congressional silence on the point is compelling:

> The statute itself and its history offer only congressional silence. Given the reasons for disfavoring an inference of extraterritorial coverage from a statute's total silence and our initial assumption against such coverage, see supra, at 1756, we conclude that the phrase "convicted in any court" refers only to domestic courts, not to foreign courts. Congress, of course, remains free to change this conclusion through statutory amendment.[21]

See also, *Equal Employment Opportunity Commission v. Arabian American Oil Co.* ("*EEOC v. Aramco*"), a case involving a statute prohibiting employment discrimination by businesses "engaged in . . . any activity, business, or industry . . . affecting commerce . . . between a State and any place outside thereof".[22] The Court held that "any place" did not mean world-wide, reasoning that "even statutes that . . . expressly refer to 'foreign commerce' do not apply abroad" if there is not "any specific language . . . reflecting . . . intent to do so."[23]

Moreover, in *Morrison v. National Australia Bank Ltd.*, the Supreme Court reviewed section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), which provides that it shall be unlawful to use or employ, in connection with the purchase or sale of any security, any manipulative or deceptive device.[24] In considering whether this language applied extraterritorially, the Court rejected a long string of Second Circuit cases based on facts and circumstances, including: (i) the fact that "although the transactions . . . took place in Canada, they affected the value of the common shares publicly traded in the United States"; (ii) the "necess[ity] to protect American investors"; (iii) whether "the United States would . . . have . . .

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[20] *Id.* at 389-90.
[21] *Id.* at 393.
[22] 499 U.S. 244, 249 (1991) (Rehnquist, C.J.).
[23] *Id.* at 249, 251-52.
[24] 561 U.S. 247, 283 (2010)

jurisdiction"; (iv) what Congress "would have wanted" "if [it] had thought about the point"; (v) what "would be reasonable"; and (vi) "the effect on American . . . investors".[25]

The Supreme Court rejected all of these factors.

> It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (Aramco) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate, see *Blackmer v. United States*, 284 U.S. 421, 437 (1932). It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters. *Smith v. United States*, 507 U.S. 197, 204, n. 5 (1993). Thus, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." *Aramco, supra*, at 248 (internal quotation marks omitted). The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law, see *Sale v. Haitian Centers Council, Inc.*, 509 U. S. 155, 173–174 (1993). When a statute gives no clear indication of an extraterritorial application, it has none.[26]

The Court also criticized the court below for substituting its own judgment for that of Congress:

> Despite this principle of interpretation, long and often recited in our opinions, the Second Circuit believed that, because the Exchange Act is silent as to the extraterritorial application of §10(b), it was left to the court to "discern" whether Congress would have wanted the statute to apply. See 547 F. 3d, at 170 (internal quotation marks omitted).

The Court then reviewed all of the Courts of Appeals' decisions in which the various courts attempted to divine what Congress really meant, and thereafter concluded:

> The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.[27]

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[25] *Id.* at 256-57.
[26] *Id.* at 255.
[27] *Id*. at 261 (footnote omitted)

We believe that the Supreme Court' decision in *Small* and the line of cases on the presumption against extraterritoriality since *Small* provide ample authority to conclude that given the lack of clear Congressional intent to the contrary, neither section 411 nor section I(g) applies to foreign crimes.[28] This interpretation is also consistent with, and supported by, the conclusion that neither federal labor laws generally, nor ERISA specifically,[29] apply extraterritorially.

Policy Reasons for Excluding Foreign Convictions from Section I(g)

In addition to the compelling legal basis for concluding that foreign crimes are not disabling under section I(g) of the QPAM Exemption, there are several public policy reasons for excluding foreign convictions. These reasons are consistent with the case law discussed above.

First, section I(g)'s disqualification provision refers to felonies, but many foreign crimes are not clearly denominated as felonies or misdemeanors. For example, civil law countries and non-English-speaking countries may not use the "felony" terminology, and the United Kingdom, Canada,[30] Ireland,[31] Australia,[32] and New Zealand[33] have all abolished the common law's felony

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[28] The burden of overcoming the above presumption lies with the party asserting application of U.S. law to events that occurred abroad. *Labor Union of Pico Korea, Ltd. v. Pico Prods.,* Inc., 968 F.2d 191, 194 (2d Cir.), *cert. denied*, 506 U.S. 985 (1992). The presumption against extraterritoriality can be overcome only by a clear expression of Congress's intention to extend the reach of federal law beyond those places where the United States has sovereignty or has some measure of legislative control. *U.S. v. Gatlin*, 216 F.3d 207, 211-12 (2d Cir. 2000). In determining whether "clear evidence" exists, the Courts are permitted to consider "all available evidence" about Congress's intent, including the text of the relevant statute; the structure of the statute; and the legislative history of the statute. *Id.*

[29] For example, in *Maurais v. Snyder*, No. C.A. 00-2133, 2000 WL 1368024 (E.D. Pa. Sept. 14, 2000), a Canadian citizen brought claims for unpaid medical services provided to the defendant, an American citizen, in Canada. The defendant's insurer argued that the plaintiff's claims were preempted by ERISA. The court rejected the preemption argument and held that the preemption provisions of ERISA did not have an extraterritorial reach and thus, did not apply to abrogate the claims. Quoting the Supreme Court, the district court noted that "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Id.* at 2. The court held that ERISA did not evidence such "affirmative intent," as the broad jurisdictional language was not sufficient to overcome the presumption against extraterritorial application. *Id.*

[30] *See* Criminal Code of 1892 (Canada) § 535 ("After the commencement of this Act the distinction between felony and misdemeanour shall be abolished, and proceedings in respect of all indictable offences (except so far as they are herein varied) shall be conducted in the same manner."); *accord* Criminal Code (Canada) (silent in the current version).

[31] *See* Criminal Law Act of 1997 (Ireland) § 3 ("(1) All distinctions between felony and misdemeanour are hereby abolished. (2) Subject to the provisions of this Act, on all matters on which a distinction has previously been made between felony and misdemeanour, including mode of trial, the law and practice in relation to all offences (including piracy) shall be the law and practice applicable at the commencement of this Act in relation to misdemeanour.").

[32] *See* Crimes Act of 1900 (New South Wales, Australia) § 580E ("(1) All distinctions between felony and misdemeanour are abolished. (2) In all matters in which a distinction has previously been made between felony and misdemeanour, the law and practice in regard to indictable offences is to be the law and practice applicable, immediately before the commencement of this section, to misdemeanours."); Crimes Act of 1958 (Victoria, Australia) § 322B ("(1) All distinctions between felony and misdemeanor are hereby abolished. (2) Subject to section 322D, in all matters in which before the commencement of this Part a distinction has been made between felony and misdemeanour (including mode of trial), the law and practice in relation to all indictable offences

versus misdemeanor distinction, in some cases long before the QPAM Exemption was promulgated.

Second, standards differ from country to country. Convictions for a felony in one country may be a misdemeanor in another (or in the United States). Other countries impose criminal penalties where there is no criminal intent required and in still others, so-called dual penalty laws, the conviction of an institution is automatic if an institution's employees are convicted, regardless of whether they are officers, highly compensated employees or are in a position of authority and control with respect to plan assets. This type of conviction is particularly troubling given the lack of due process accorded to the corporate defendant (i.e., effectively none). Countries also differ in their substantive law. See *Small,* giving examples of what would be considered "unjust laws", such as those of the former Soviet Russia or Cuba.[34] *Small* also notes that countries differ in their criminal procedure and principles of due process, and that foreign convictions can include "failures of due process".[35] Furthermore, there are significant differences in statutes of limitations between the United States and foreign countries, where some minor infractions may have a 15 year statute of limitations, a period that would be considered fundamentally unfair in the United States for a crime of that magnitude. See Wilson v. Garcia, 471 U.S. 261, 273 (1985) (a cause of action " 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.' Adams v. Woods, 2 Cranch 336, 342 (1805). Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten." If such prosecutions would be fundamentally unfair in the United States, prosecutions brought after unreasonably long periods of time in foreign countries should not be taken into account in the United States. Moreover, certain crimes are categorized only by their place in the foreign criminal code, regardless of whether they would be felonies under foreign law.

Third, the Department would be forced to interpret foreign statutes with which it is unfamiliar. See Citibank and the Belgian prosecution for misleading sales practices (PTE 2012-08). See also the failure to supervise cases (Prudential PTE 2004-13, Deutsche Bank PTE 2015-

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cognizable under the law of Victoria (including piracy and offences deemed to be piracy) shall be the law and practice applicable immediately before the commencement of this Part in relation to misdemeanour.").

[33] *Cf.* Crimes Act of 1961 (New Zealand) § 9 ("No one shall be convicted of any offence at common law, or of any offence against any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom . . . .").

[34] Id. ("Past foreign convictions for crimes punishable by more than one year's imprisonment may include a conviction for conduct that domestic laws would permit, for example, for engaging in economic conduct that our society might encourage.").

[35] Id. at 389-90 ("They would include a conviction from a legal system that is inconsistent with an American understanding of fairness."). *Small* asks and answers whether the U.S. government should: (1) take foreign convictions at face value, (2) use discretion in sifting through them, or (3) read them out of the statute. The Supreme Court came down firmly for option (3).

15). Under settled Supreme Court precedent, if Congress has not plainly indicated extraterritorial application, a federal agency may not attempt to weigh foreign convictions based on U.S. principles. Such a discretionary procedure (a) is not justified by the text of the law, and (b) is administratively infeasible and beyond the expertise of regulators not trained in the applicable foreign criminal law.

Finally, section I(g) already is broader than what Congress enacted in section 411 (in that section I(g)'s disqualification extends to convictions of a broadly-defined universe of "affiliates"), and provides fewer procedural protections. Applying section I(g) to foreign convictions would further deprive affected entities of the protections and limitations that Congress deemed appropriate. Unlike section I(g), the debarment imposed by section 411 applies only to the individual or entity convicted, and not to the employer of a convicted employer or an entity's affiliates. In addition, with respect to corporations or partnerships, section 411(a) provides as follows:

> Notwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan or as a consultant to any employee benefit plan without a notice, hearing, and determination by such court that such service would be inconsistent with the intention of this section.[36]

Thus, in connection with the conviction of a partnership or corporation, the Department must take affirmative steps to request a court to impose debarment and that debarment may not be imposed without a notice, hearing and determination by such court. These protections do not exist in section I(g) of the QPAM Exemption.

<u>Administrative Exemptions</u>

We have considered whether, despite the fact that ERISA does not have extraterritorial reach, the Department could require an entity convicted of a foreign crime to seek an administrative exemption as a condition of granting relief at all. We believe a court would hold that if a foreign crime cannot be taken into account under the law, it cannot be used to condition an administrative exemption. *See* Financial Planning Association v. SEC, 482 F. 3d 481 (D.C. Cir. 2007); *See also* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2446 (2014). Indeed, the Fifth Circuit came to precisely this conclusion in Chamber of Congress, et al v. U.S. Department of Labor, 885 F.3d 360, 388 (5th Cir. 2018) (where Congress has not specified a standard of care in the statute, the Agency cannot impose such a standard in an administrative exemption).

* * *

[36] 29 U.S.C. § 1111(a).

For the reasons set forth above, we believe the Department has ample reason to issue a clear and unequivocal advisory opinion concluding that section I(g) of the QPAM Exemption does not encompass foreign convictions. Leaving this issue in doubt will continue to lead to uncertainty in the markets, expense to plans, and the use of already limited Department resources to process time consuming and costly applications for individual exemptions that are not legally required. We would appreciate the opportunity to meet with you to discuss these issues in more detail.

Sincerely,

Lisa Bleier

Managing Director & Associate General Counsel

U.S. Department of Labor

Office of the Solicitor of Labor
Washington, D.C. 20210

November 3, 2020

By email: lbleier@sifma.org

Lisa Bleier
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Dear Ms. Bleier,

This letter responds to your request of December 18, 2018 on behalf of your members for the Department of Labor's (the Department's) view of whether section I(g) of Prohibited Transaction Exemption 84-14 (PTE 84-14) applies to convictions under foreign law.[1] Given that this is a purely legal question, Deputy Secretary Patrick Pizzella asked that I respond on behalf of the Department.[2] The opinion that follows reflects the Department's official legal position on this matter pursuant to Secretary Perkins' Order of June 6, 1940, as recently reaffirmed by Acting Secretary Pizzella's Memorandum of July 22, 2019.[3] This document is intended to provide clarity to the public regarding existing requirements under the law and agency policies.

In your letter, you stated that nothing in the regulatory proposals underlying PTE 84-14 suggests that the Department intended to reach foreign convictions. You note that section I(g) incorporates by reference section 411 of the Employee Retirement Income Security Act of 1974 (ERISA) (section 411)[4], and state that this demonstrates that section I(g) of PTE 84-14 does not apply to foreign criminal convictions.

ERISA section 406 prohibits fiduciaries from engaging in various transactions with "parties in interest."[5] Since 1984, the Department has offered an exemption for qualified professional asset managers, or "QPAMs," known as PTE 84-14.[6] PTE 84-14 is relied upon by a large number of

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[1] Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 49 Fed. Reg. 9494 (March 13, 1984), as corrected at 50 Fed. Reg. 41430 (Oct. 10, 1985), and as amended at 70 Fed. Reg. 49305 (Aug. 23, 2005) and at 75 Fed. Reg. 38837 (July 6, 2010).
[2] Direction was given by Deputy Secretary Pizzella because Secretary Eugene Scalia is recused.
[3] *See* Administrative Order Placing All Personnel in the Department of Labor Employed in the Capacity of Attorneys or Engaged in Legal Work Under the Solicitor of Labor (June 6, 1940); Memorandum from Acting Secretary of Labor Patrick Pizzella to Agency Heads on the Role of the Office of the Solicitor in Litigation (July 22, 2019).
[4] 29 U.S.C. § 1111.
[5] *Id.* § 1106.
[6] *See* 49 Fed. Reg. at 9506. PTE 84-14 also provides an exemption from parallel prohibited transaction provisions in Internal Revenue Code section 4975. Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Internal Revenue Code Section 4975 to the Secretary of Labor.

banks, investment advisers, and insurance companies when managing plans subject to ERISA.[7] It permits "transactions between a party in interest . . . and an investment fund" that would otherwise be prohibited by ERISA section 406.[8] The Department's authority to grant that exemption is rooted in ERISA section 408(a), which authorizes the Department to "grant a conditional or unconditional exemption of any . . . class of fiduciaries . . . from all or part of the restrictions imposed by" section 406.[9] In order to grant such an exemption, the Department must "find[] that such an exemption is—(1) administratively feasible, (2) in the interests of the plan and its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan."[10] Section I(g) is one of several conditions that PTE 84-14 imposes to satisfy those statutory requirements. It bars QPAMs from relying on PTE 84-14 for a period of 10 years if the QPAM, a five percent or more owner, or an affiliate is "convicted of various crimes . . . that involve abuse or misuse of a position of trust, or felonies generally described in ERISA section 411."[11] The exemption excludes QPAMs from relief under these circumstances because "[a] QPAM, and those who may be in a position to influence its policies, are expected to maintain a high standard of integrity."[12] The Department occasionally grants individual exemptions to QPAMs who fail to satisfy that condition.[13] Prior to 2004, every individual exemption granted by the Department related to a domestic conviction.

In light of section I(g)'s plain reference to section 411, when interpreting the scope of PTE 84-14 section I(g), we must consider the reach of section 411. While no federal court has analyzed section 411's application to foreign convictions, the text of section 411 extends only to domestic convictions.[14] Section 411's procedural mechanisms reference exclusively "Federal" and "State or local" offenses, reference the jurisdiction of the U.S. district court "in which the offense was committed," and reference "State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted."[15] Nothing in the text of section 411 indicates that its listed crimes include foreign equivalents. Some of the listed federal crimes, such as wire

[7] *See* PTE 84-14, section V(a), 49 Fed. Reg. at 9506 (defining a QPAM).
[8] 49 Fed. Reg. at 9504.
[9] 29 U.S.C. § 1108(a).
[10] *Id.*
[11] Proposed Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 47 Fed. Reg. 56945, 56947 (Dec. 21, 1982).
[12] *Id.*
[13] *See, e.g.*, PTE 2005-06, Riggs Bank N.A., 70 Fed. Reg. 25614 (May 13, 2005).
[14] ERISA section 411 identifies the following crimes:

> [R]obbery, bribery extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 80a–9(a)(1) of title 15, a violation of any provision of this chapter, a violation of section 186 of this title, a violation of chapter 63 of title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), any felony involving abuse or misuse of such person's position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element.

[15] 29 U.S.C. § 1111. ERISA section 411 also includes additional procedural protections for corporations: "[n]otwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as [a] . . . fiduciary . . . of any employee benefit plan . . . without a notice, hearing, and determination by such [federal] court that such service would be inconsistent with the intention of this section."

fraud, arguably may be applied to conduct that occurs outside the U.S. but has sufficient domestic nexus.[16] However, that does not mean that section 411 incorporates, for example, other countries' wire-fraud statutes in the absence of explicit language to that effect.[17] Moreover, despite section 411's inclusion of the phrase "any felony," the U.S. Supreme Court noted in an analogous context that "the word 'any' considered alone cannot answer [the] question" of whether "the statutory reference 'convicted in *any* court' includes a conviction entered in a *foreign* court."[18] This express domestic focus differs from statutes where Congress has regulated participants in the financial system on the basis of foreign convictions.[19]

Section 411's domestic language also differs from the language Congress has used when addressing extraterritoriality elsewhere in ERISA. For example, ERISA section 4 provides that "this subchapter shall not apply to any employee benefit plan if . . . such plan is maintained *outside of the United States* primarily for the benefit of persons substantially all of whom are nonresident aliens"[20] and ERISA section 408 exempts "[a]ny transaction involving the purchase or sale of securities, or other property . . . between a plan and a party in interest if . . . the transaction is executed through an electronic communication network . . . subject to regulation and oversight by . . . such *foreign regulatory entity* as the Secretary may determine by regulation . . . " (emphasis added). In addition, courts have recognized that ERISA does not have extraterritorial effect in other contexts.[21]

For the most part, section I(g) adopts the same crimes as section 411.[22] The language of PTE 84-14 generally, and section I(g) specifically, does not indicate that the scope of ERISA section 411 crimes was expanded for purposes of the exemption, nor are there special indicia suggesting that the other enumerated crimes included in PTE 84-14 were intended to include foreign equivalents.[23]

[16] *See Pasquantino v. United States,* 544 U.S. 349, 371–72 (2005) (dicta); *see also, e.g., United States v. Hussain,* 972 F.3d 1138, 1143-45 (9th Cir. 2020) (wire fraud); *United States v. Allen,* 864 F.3d 63 (2d Cir. 2017) (wire fraud); *United States v. Georgiou,* 777 F.3d 125, 136 (3d Cir. 2015) (Exchange Act); *S.E.C. v. Straub,* 921 F. Supp. 2d 244 (S.D.N.Y. 2013) (FCPA).

[17] *See, e.g., United States v. Hoskins,* 902 F.3d 69, 95–97 (2d Cir. 2018) (FCPA does not apply to conduct committed abroad except as expressly provided for in the statute).

[18] *Small v. United States,* 544 U.S. 385, 388 (2005).

[19] For example, section 203(e) of the Investment Advisers Act of 1940 permits the U.S. Securities and Exchange Commission to regulate investment advisers convicted "of any felony or misdemeanor or of a substantially equivalent crime by a foreign court . . . ." 15 U.S.C. § 80b-3(e)(2). This provision repeatedly uses phrases like "substantially equivalent foreign statute or regulation" and "foreign entity substantially equivalent to any of the above." *See id.* § 80b-3(e) *passim.*

[20] 29 U.S.C. § 1003.

[21] *See In re Reliance Standard Life Ins. Co.,* 386 F. Supp. 3d 505 (E.D. Pa. 2019) (ERISA's jurisdictional grant does not extend to suits by foreign nationals working outside the U.S.); *Chong v. InFocus Corp.,* No. CV-08-500-ST, 2008 WL 5205968 (D. Or. Oct. 24, 2008) (same); *Maurais v. Snyder,* No. C.A. 00-2133, 2000 WL 1368024 (E.D. Pa. Sept. 14, 2000) (same).

[22] 29 U.S.C. § 1111 PTE 84-14 § I(g) covers:

> [A]ny felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasions any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or any other crime described in section 411 of ERISA.

[23] Other regulators have similarly limited regulatory disqualifications to domestic violations unless explicitly required under the related statute. *See, e.g.,* Securities and Exchange Commission Compliance and Disclosure Interpretations,

Furthermore, section 411's text evinces Congress's intent to establish a bright-line rule barring those convicted of certain crimes from serving as fiduciaries, but Congress declined to explicitly include foreign convictions in that bar. The text also evinces Congress's intent that corporations with foreign convictions should not be precluded, as a class, from serving as fiduciaries.[24] These textual and contextual considerations persuade the Department that section 411's limitation to domestic contexts indicates that section I(g) is similarly limited.

In addition, your letter discussed the Supreme Court's decision in *Small v. United States*.[25] There, the Court considered whether 18 U.S.C. § 922(g)(1)'s ban on possession of a firearm by any individual "convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" was triggered by a foreign conviction.[26] The Court answered in the negative, explaining that it was inappropriate to read the statute to include foreign convictions since "foreign convictions differ from domestic convictions in important ways" and there was "no convincing indication" that Congress intended the statute to apply to foreign convictions, particularly since doing so would lead to "anomalies."[27] You stated that *Small* resolves any doubt as to whether section I(g) applies to convictions for foreign offenses.

Your letter also pointed to the Supreme Court's decisions in *Equal Employment Opportunity Commission v. Arabian American Oil Co.* (*Aramco*)[28] and *Morrison v. National Australia Bank Ltd.*[29] In *Aramco*, the Court considered whether Title VII's bar on discrimination in businesses "engaged in . . . any activity, business, or industry . . . affecting commerce . . . between a State and any place outside thereof" applied to discrimination that took place in Saudi Arabia.[30] Applying the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'" the Court held that Title VII did not apply abroad.[31] It did so despite the undoubted importance of eliminating employment discrimination by American employers. Similarly, in *Morrison* the Supreme Court applied the same presumption to hold that 15 U.S.C. § 78j's ban on the "use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance" did not support a suit against a bank whose shares were listed in Australia.[32] In reaching that conclusion, the Supreme Court observed that "[t]he probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended

https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm, Question 260.20 (foreign convictions, orders, regulatory orders do not trigger "bad actor" disqualification under Rule 506(d)); *cf.* Question 203.03 (Rule 405 definition of "ineligible issuer" extends to conviction by a foreign court due to statutory inclusion of "a substantially equivalent foreign statute" (Securities Exchange Act § 15(b)(4)(ii), (iv)).

[24] *See supra* note 15.

[25] 544 U.S. 385 (2005).

[26] *Id.* at 387.

[27] *Id.* at 389, 391.

[28] 499 U.S. 244 (1991).

[29] 561 U.S. 247 (2010).

[30] *Aramco*, 499 U.S. at 249.

[31] *Aramco*, 499 U.S. at 249, 251–52.

[32] *Morrison*, 561 U.S. at 261.

such foreign application it would have addressed the subject of conflicts with foreign laws and procedures."[33]

The cited Supreme Court precedent is persuasive support for the conclusion that section I(g) of PTE 84-14 does not extend to foreign convictions. These cases declined to interpret statutes to reach beyond a domestic context absent some explicit indication, and nothing in the text or context of PTE 84-14 provides a "convincing indication" that the exemption was intended to apply to foreign convictions.[34] The extraterritorial reach of some criminal statutes does not provide such a contrary indication. It is true that various U.S. laws, such as counterfeiting[35] and income-tax evasion,[36] prohibit such conduct abroad. It is also true that various other U.S. crimes are expressly territorial,[37] and that the United States has begun using existing statutes to regulate foreign financial crime.[38] PTE 84-14 thus may recognize U.S. convictions predicated on foreign misconduct as disqualifying events, to the extent the statute violated permits such extraterritorial application.[39] It does not follow, however, that PTE 84-14 also recognizes foreign nations' criminal laws. That would involve recognizing foreign convictions themselves as legally operative acts under U.S. law, not just applying U.S. law to foreign conduct.

Moreover, section I(g) uses the terms "felony," "judgment of the trial court," and a "judgment" that "remains on appeal." These are particular terms applicable in the context of the U.S. state and federal court systems. It is problematic to apply these terms in the same context to legal proceedings outside of the United States. For example, as you point out, many jurisdictions, including the United Kingdom, Canada, Ireland, Australia, and New Zealand, do not rely on a legal category of "felony." That is similar to the anomalies the Supreme Court referenced in *Small*, and the "probability of incompatibility with the applicable laws of other countries" that the Court noted as problematic in *Morrison*.[40]

Finally, you state that the fact "[t]hat administrative exemptions covering foreign convictions have been sought and granted in the past should not deter the Department from excluding foreign convictions from section I(g) going forward." The Department has previously granted several individual exemptions as requested by applicants that were premised on foreign convictions. In one instance, the Department observed that "PTE 84-14 is not limited to crimes committed in the United States" and stated further that it had "construed Section I(g) as extending to foreign convictions."[41] The Department relied for those assertions on the previous exemptions it had granted and a statement in the preamble of the proposed PTE 84-14 that section I(g)'s purpose was

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[33] *Morrison*, 561 U.S. at 269 (internal quotation marks omitted).
[34] *See Small*, 544 U.S. at 391.
[35] *See* 18 U.S.C. § 470.
[36] *See, e.g.*, Jonathan Pickworth et al., "Tax Evasion Knows No Borders," WHITE & CASE CLIENT ALERT (Oct. 1, 2018), https://www.whitecase.com/publications/alert/tax-evasion-knows-no-borders.
[37] *See* CONGR'L RES. SERV., EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 42–52 (Oct. 31, 2016).
[38] *See* cases cited, *supra* note 16; *see also* Pierre-Hugues Verdier, "The New Financial Extraterritoriality," 87 GEO. WASH. L. REV. 239 (2019).
[39] *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101–03 (2016).
[40] *See Small*, 544 U.S. at 391; *Morrison*, 561 U.S. at 269.
[41] PTE 2019-01, Exemption Involving UBS Assets Management (Americas) Inc.; UBS Realty Investors LLC; UBS Hedge Fund Solutions LLC; UBS O'Connor LLC; and Certain Future Affiliates in UBS's Asset Management and Global Wealth Management U.S. Divisions, 84 Fed. Reg. 6163, 6164, 6165 (Feb. 26, 2019). The Department had previously issued several exemptions that assumed, without deciding, that section I(g) applied to foreign convictions. *See, e.g.*, PTE 2016-10, Royal Bank of Canada, 81 Fed. Reg. 75147 (Oct. 28, 2016).

to ensure that "[a] QPAM, and those who may be in a position to influence its policies, are . . . maintain[ing] a high standard of integrity."[42] It is well settled that an agency's statement in the preamble of a rule is not law nor does it overcome regulatory text to the contrary. *See Wy. Outdoor Council v. U.S. Forest Srvc.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("[L]anguage in the preamble of a regulation is not controlling over the language in the regulation itself."). Furthermore, the Department believes that the purposes set out in the preamble to the proposed PTE 84-14 do not provide evidence of extraterritorial intent, much less the "convincing indication" needed to overcome the "commonsense notion" that agencies adopt legal rules with domestic concerns in mind.[43] Congress or the Department may revisit PTE 84-14 on a future occasion, but for now the Department must abide by the plain text of the regulation as it exists.

Accordingly, in the future, the Department will not view a conviction under foreign law as a disqualifying event under PTE 84-14 section I(g). Note, however, that a fiduciary's duties of prudence and loyalty apply in the context of hiring, monitoring, evaluating, and retaining an asset manager, regardless of whether the PTE 84-14 exemption formally depends on disqualifying a QPAM based on a foreign conviction against the QPAM, its affiliate, or owner, as defined. Moreover, other statutes that expressly condition participation in U.S. financial markets on the absence of a foreign conviction, such as 15 U.S.C. § 80b-3(e), continue to apply. This letter will not impact any exemptions that the Department has previously granted. Further, pursuant to Executive Order 13891, this document does not have the force and effect of law and is not meant to bind the public in any way.[44]

I trust that this opinion letter addresses the issues raised in your December 18, 2018 correspondence. Going forward, the Office of the Solicitor will advise the Department consistent with our legal conclusions expressed herein.

Sincerely,

Kate O'Scannlain
Solicitor, United States Department of Labor

cc: William J. Kilberg
Gibson, Dunn & Crutcher LLP

Patrick Pizzella
Deputy Secretary of Labor

[42] 47 Fed. Reg. at 56947.

[43] *See Small*, 544 U.S. at 388, 391; *see also Ashtabula Cty. Med. Ctr. v. Thompson*, 352 F.3d 1090, 1094 (6th Cir. 2003) ("Deference to the Secretary's interpretation of the regulation only comes into play if its plain language is ambiguous."); *United States v. Boynton*, 63 F.3d 337, 342 (4th Cir. 1995) ("Although an agency's interpretation of its own regulations is entitled to deference from the courts, the interpretation will not be enforced if it is plainly erroneous or inconsistent with the regulation's language or the intent of the regulation as manifest by the agency at the time of the regulation's promulgation.").

[44] Executive Order 13891, 84 Fed. Reg. 55238 (Oct. 9, 2019).

U.S. Department of Labor

Office of the Solicitor
Washington, DC 20210

March 23, 2021

By email: lbleier@sifma.org

Lisa Bleier
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Dear Ms. Bleier,

On November 3, 2020, the Solicitor of Labor issued a letter to you (the 2020 SOL Letter) regarding Section I(g) of Prohibited Transaction Exemption 84-14 (the QPAM Exemption).[1] Under Section I(g) of the QPAM Exemption, a qualified professional asset manager (QPAM) is disqualified from relying on the exemption for a period of 10 years following the conviction of the QPAM, or certain affiliated entities, of specified crimes. The 2020 SOL Letter opined on the question of whether Section I(g) is triggered by a conviction under foreign law.

The 2020 SOL Letter responded to your request, dated December 18, 2018, for an advisory opinion from the Employee Benefits Security Administration (EBSA).[2] The 2020 SOL Letter was not an advisory opinion issued by EBSA under the applicable procedure for advisory opinions,[3] but rather was a legal opinion issued by the Office of the Solicitor at the request of Deputy Secretary Patrick Pizzella, and over the objection of EBSA's leadership.[4] The letter stated that going forward, the Office of the Solicitor would advise the Department that a conviction under foreign law does not cause a QPAM

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[1] Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 49 Fed. Reg. 9494 (Mar. 13, 1984), as corrected at 50 Fed. Reg. 41430 (Oct. 10, 1985), and as amended at 70 Fed. Reg. 49305 (Aug. 23, 2005) and at 75 Fed. Reg. 38837 (July 6, 2010).

[2] Your letter was addressed to the following officials of the Employee Benefits Security Administration: The Honorable Preston Rutledge, Assistant Secretary of Labor; The Honorable Jeanne Klinefelter Wilson, Deputy Assistant Secretary; The Honorable Timothy D. Hauser, Deputy Assistant Secretary for Program Operations; Lyssa Hall, Director, Exemptions Branch.

[3] *See* Filing Requests for ERISA Advisory Opinions: ERISA Procedure 76-1, available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/filing-requests-for-erisa-aos.

[4] The 2020 SOL Letter noted that Secretary of Labor Eugene Scalia was recused.

to become disqualified pursuant to Section I(g).[5] The 2020 SOL Letter reversed the longstanding treatment by EBSA and QPAMs of Section I(g)'s scope in the specific context of non-U.S. convictions.[6]

The 2020 SOL Letter clearly stated that it "does not have the force and effect of law and is not meant to bind the public in any way." This office has determined that the letter was issued through a flawed process and was based on a legal analysis that was inadequate to support abandoning the Department's long standing position. Accordingly, the 2020 SOL Letter is withdrawn while the Department considers additional guidance.

In issuing a legal opinion letter directly to SIFMA, the Solicitor bypassed the applicable EBSA advisory opinion process.[7] The 2020 SOL Letter's legal conclusions were based on an inadequate analysis of the relevant issues and legal authorities as they pertain to prohibited transaction exemptions. For example, the 2020 SOL Letter focused heavily on an analysis of the reach of ERISA § 411, which is incorporated by reference in Section I(g), without acknowledging the important differences between the two provisions and

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[5] The 2020 SOL Letter cited as authority "Secretary Perkins' Order of June 6, 1940, as reaffirmed by Acting Secretary Pizzella's Memorandum of July 22, 2019."

[6] *See, e.g*., Prohibited Transaction Exemption (PTE) 2020-01, 85 Fed. Reg. 8020 (Feb. 12, 2020); PTE 2019-01, 84 Fed. Reg. 6163 (Feb. 26, 2019); PTE 2016-11, 81 Fed. Reg. 75150 (Oct. 28, 2016); PTE 2016-10, 81 Fed. Reg. 75147 (Oct. 28, 2016); PTE 2012-08, 77 Fed. Reg. 19344 (March 30, 2012); PTE 2004-13, 69 Fed. Reg. 54812 (Sept. 10, 2004); and PTE 96-62 ("EXPRO") Final Authorization Numbers 2003-10E, 2001-02E, and 2000-30E, available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/expro-exemptions-under-pte-96-62.

[7] The Solicitor also bypassed several of the Trump Administration's own requirements governing the issuance of generally applicable guidance. The 2020 SOL Letter was not posted to the Department's guidance website until January 19, 2021; *see* https://www.dol.gov/guidance?combine=&field_agency_target_id=53&field_form_of_guidance_target_id=All&year_issued=&field_date_posted_website=&field_significant_value=All&sort_by=field_date_issued_updated_value&items_per_page=10. Under the Department of Labor's Pro Good Guidance Rule, 29 C.F.R. section 89.5, guidance not posted on the Department's website was deemed no longer in effect. *See also* Executive Order 13891, section 3(b)("No agency shall retain in effect any guidance document without including it in the relevant database referred to in subsection (a) of this section, nor shall any agency, in the future, issue a guidance document without including it in the relevant database.") Further, the letter failed to comply with additional requirements in the Pro Good Guidance Rule, section 89.4(g), including "[p]rominently" displaying the term "guidance" and providing a short summary at the top of the document of the subject matter covered in the guidance. Note that although both Executive Order 13891 and the Department's Pro Good Guidance Rule were in effect at the time of the issuance of the 2020 SOL Letter, they have both since been rescinded. 86 Fed. Reg. 7049 (Jan. 25, 2021); 86 Fed. Reg. 7237 (Jan. 27, 2021).

their contexts. Similarly, the letter's application of case law cited by SIFMA, including *Small v. United States*,[8] failed to grapple with the significant differences between a criminal statute and an agency's interpretation of its own administrative exemption. Further, even assuming *Small* is applicable to administrative interpretations, the 2020 SOL Letter's analysis of the text of Section I(g) failed to consider whether the "context, history, or purpose" of the section would support application to foreign crimes.[9] The 2020 SOL Letter glossed over issues of substantial concern and improperly disregarded EBSA's role and expertise in administering the exemption program and its established procedure.

Accordingly, the 2020 SOL Letter is hereby withdrawn while the Department reviews the class exemption and engages in a thorough analysis of the relevant issues. The Department understands SIFMA's members' interest in receiving guidance on this issue, and intends to conduct a review of the important issues raised by the scope of Section I(g) in the context of the QPAM Exemption. During this interim period, and until EBSA provides guidance on the scope of Section I(g), the Department will continue its long-standing practice of considering individual exemption applications from QPAMs in connection with relevant convictions under domestic as well as foreign law. Parties may contact EBSA's Office of Exemption Determinations at 202-693-8540 if they experienced a foreign conviction during the period from November 3, 2020, through the date of this letter and are concerned about their status as QPAMs, or if they have other questions about the QPAM Exemption.

Sincerely,

Elena S. Goldstein
Deputy Solicitor

cc: William J. Kilberg
Gibson, Dunn & Crutcher LLP

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[8] 544 U.S. 385 (2002).

[9] *Id*. at 391.