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Commentary

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The Cold Comfort of the Best Interest Contract Exemption

The BIC Exemption to the new DOL Fiduciary Rule offers some relief, but at a potentially prohibitive cost.

The US Department of Labor (the DOL) recently forced the most significant change to the investment community since the enactment of the Employee Retirement Income Security Act of 1974 (ERISA). The DOL has expanded the scope of ERISA's fiduciary duties and protections in final regulations (the Final Rule), defining a "fiduciary" under ERISA and the Internal Revenue Code of 1986 (the Code) (see our prior *Client Alert* for an overview of the Final Rule). However, in adopting the Final Rule, the DOL did make some concessions to industry practices of recommending proprietary products and other investments that generate third-party payments, by also adopting the Best Interest Contract Exemption (the BIC Exemption) to the prohibited transactions provisions of ERISA and the Code. Without the BIC Exemption, these practices otherwise would be prohibited as fiduciaries generally cannot receive compensation that varies based on their investment advice.

However, the BIC Exemption comes at a steep price, imposing extensive compliance costs in the form of new disclosure requirements, as well as new policies and procedures requirements, discussed in depth below. The exemption also substantially increases litigation risk by providing IRA and other retirement plan investors (Retirement Investors) a new private enforcement right against financial advisers.

Best Interest Contract Exemption – Key Takeaways

The BIC Exemption is not an exemption from the definition of a fiduciary under the Final Rule. Quite the opposite, it provides an exemption from the prohibited transaction rules of ERISA and the Code for those financial advisers who are fiduciaries under the Final Rule — provided the fiduciaries affirmatively acknowledge in writing that they act as fiduciaries to a Retirement Investor and comply with extensive other requirements. The BIC Exemption allows financial advisers to recommend proprietary products or investments that generate third-party payments (or to restrict the universe of recommended investments to such products).

At the heart of the BIC Exemption is the Best Interest Contract that financial advisers are required to execute with each Retirement Investor to whom they provide advice. The Final Rule is highly prescriptive with respect to the content of the Best Interest Contract, and compliance with it. Failure to comply with the BIC Exemption and the Best Interest Contract could result in prohibited transactions, triggering penalty taxes under the Code as well as exposure to other fiduciary liability claims.

The most important aspect of the Best Interest Contract is that the financial adviser must affirmatively state that it and its advisers are fiduciaries, and that the investment advice provided is, at the time of the recommendation, in the "best interest" of the Retirement Investor. Also, the advisor may not earn a fee in

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excess of “reasonable compensation.” By having to explicitly acknowledge fiduciary status, financial advisers will no longer be able to argue that they were simply acting in a sales capacity, or otherwise that their statements did not constitute advice provided on a regular basis.

The BIC Exemption brings significant compliance costs to financial advisers, as they will be required to develop and implement new policies and procedures that comply with the BIC Exemption. While certain existing compliance systems can be leveraged to comply with the BIC Exemption, there are significant practical nuances in developing and adhering to communication protocols under the new landscape — for example, how to deal with providing advice to clients that maintain both non-retirement accounts and IRA accounts. Additional steps will be required at the outset of each interaction to determine what type of client (or potential client) a financial advisor is dealing with, as advice to Retirement Investors will need to fit within the BIC Exemption while advice to other clients will not. In any event, all firms are advised to begin implementation sooner rather than later in order to meet the first phase of requirements that will become effective as of April 10, 2017.

The BIC Exemption allows investment advisers who charge a level fee (Level Fee Fiduciary) to comply with a reduced set of requirements, referred to by some as “BIC Light.” We expect that many industry participants (especially broker-dealers) will seek to restrict their offerings to fixed-fee arrangements such as the traditional advisory model (or the new robo-advisory model) in order to fit within the definition of a Level Fee Fiduciary.

The reduced requirements applicable to Level Fee Fiduciaries under BIC Light are intended to allow advisers to recommend rollover transactions, and otherwise transition their clients away from commission-based brokerage relationships to fee-based advisory relationships, without having to execute Best Interest Contracts. The recommendations still create fiduciary liability, and must be in the investor’s “best interest.” These transitions remain challenging under BIC Light, since firms are required to document the specific reasons why recommendations to rollover and/or switch account types are in the Retirement Investor’s best interest. Such documentation could be particularly difficult with clients who have utilized a “buy and hold” investment strategy, where firms will need to ensure they are covered against claims of “reverse churning.” Transitioning these “buy and hold” investors to level fee accounts may prove difficult to justify, unless the level fee is a minimal percentage of account assets and the account receives highly tailored investment advice (as would be the case with sophisticated robo-advice arrangements). Brokerage firms especially may want to consider forcing the transition to level fee arrangements before the relevant provisions of the Final Rule become applicable on January 1, 2018, to avoid this pitfall.

Also, because concepts such as “best interest” and “reasonable compensation” are not defined in the BIC Exemption, legal proceedings will likely flesh these terms out over time — a process that is necessarily reactive, thereby adding to the uncertainty and costs financial advisers face. Notably, a Best Interest Contract cannot include provisions that purport to waive a Retirement Investor’s right to bring or participate in class actions, nor can a Best Interest Contract include provisions disclaiming liability, limiting compensatory remedies (including via a liquidated damages clause) or waiving or qualifying Retirement Investors’ right to pursue a class action. However, a Best Interest Contract can include provisions in which Retirement Investors agree to arbitrate individual disputes, as well as provisions waiving Retirement Investors’ rights to punitive damages or rescission as contract remedies, in each case, to the extent permitted by applicable law. As a result of these requirements, financial advisors cannot rely on much of the language now found in standard disclaimer clauses. The end result is that financial advisors will likely see an increase in class actions as the plaintiffs’ bar looks to take advantage of a new avenue for litigation incentivized based on a belief — whether right or wrong — that they can formulate a facially sufficient complaint that then requires the parties to proceed to discovery.

The bottom line is, financial advisers with Retirement Investor accounts that want to recommend proprietary products or products that generate third-party payments (or that restrict available investments to these products, in whole or in part) will need to comply with the BIC Exemption to some extent, to obtain exemption from the prohibited transaction rules. This will result in significant compliance costs and increased litigation risks.

Best Interest Contract Exemption – Overview

The BIC Exemption provides a counterweight to the Final Rule — a framework within which registered investment advisers, broker-dealers, insurance companies and their respective agents and representatives, can continue to receive certain fees and compensation that otherwise would be prohibited in connection with advising plan participants, beneficiaries, IRAs, IRA owners and certain plan fiduciaries (including small plan sponsors).

Scope

The BIC Exemption is only available to the following:

- **Advisers**: an individual who is (1) an ERISA or Code fiduciary solely by reason of the provision of investment advice with respect to the assets of the plan or IRA involved in the recommended transaction, or (2) an employee, independent contractor, agent or registered representative of a Financial Institution.

- **Financial Institutions**: an entity that employs or otherwise retains the Adviser and is also (1) an SEC- or state-registered investment adviser, (2) a bank or similar financial institution, (3) a state-qualified insurance company, or (4) an SEC-registered broker-dealer.[1]

- **Affiliates**: persons directly or indirectly controlling, controlled by, or under common control with the Adviser or Financial Institution, where "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual; officers, directors, partners, employees, or relatives of the Adviser or Financial Institution; and corporations or partnerships of which the Adviser or Financial Institution is an officer, director or partner.

- **Related Entities**: any entity other than an Affiliate in which the Adviser or Financial Institution has an interest that may affect the exercise of its best judgment as a fiduciary.

Additionally, the BIC Exemption only applies in the context of investment advice given to a **Retirement Investor**, which is defined as: (1) a participant or beneficiary of a plan with authority to direct the investment of assets in his or her plan account or to take a distribution; (2) the beneficial owner of an IRA acting on behalf of the IRA; or (3) a "retail fiduciary" of a plan or IRA (*i.e.,* a fiduciary other than a bank, insurance company, registered investment adviser, registered broker-dealer or a fiduciary responsible for the management of at least US$50 million in assets).

Contract Requirement

For a particular investment recommendation to qualify for the BIC Exemption, the advice must be provided pursuant to a written contract executed between the Financial Institution and the Retirement Investor (and enforceable against the Financial Institution), which must include specific language and disclosures (the Contract).

The Contract may be a master contract that covers multiple recommendations, and may be a standalone document or incorporated into an investment advisory agreement; investment program agreement;

account opening agreement; insurance or annuity contract or application; similar document; or amendment thereto. The Contract does not need to be executed at the moment a Retirement Investor walks through the door, but instead must be executed prior to or at the same time as the execution of the recommended transaction.

As part of the phase-in for compliance with the Final Rule, existing contracts with Retirement Investors (defined as contracts executed before January 1, 2018) may be amended to include the language required by the BIC Exemption. The notice of amendment can be delivered by mail or electronically, and a Retirement Investor's failure to terminate the contract within 30 days may be considered assent to the terms of the amended contract (*i.e.,* the amendment may be effected by negative consent). This negative consent prong comes in response to industry concern, that obtaining affirmative consent from each individual existing client would be impracticable. Note, however, that the amendment may not impose any new contractual obligations, restrictions or liabilities on the Retirement Investor by negative consent. A copy of the amended contract must be made accessible to the Retirement Investor on the Financial Institution's website going forward.

Required and Prohibited Contractual Provisions

The BIC Exemption requires that the Contract include certain provisions, warranties and disclosures, and that the Contract refrain from including certain other provisions.

Notably, the BIC Exemption prohibits certain disclaimers and limitations of liability that are common in current brokerage account and investment advisory documentation. Accordingly, firms must carefully consider the effect of these prohibitions when incorporating the required BIC Exemption provisions into existing account documents (or, in some cases, when deciding whether to continue to operate under a business model that requires reliance on the BIC Exemption). While certain investment advisory agreements may need to be substantially revised, the revisions required for brokerage account agreements should be less sweeping (for example, the typical FINRA arbitration provisions that exist in brokerage account agreements would remain valid).

The following tables summarize the required and prohibited contractual provisions under the BIC Exemption. The disclosures and descriptions of Material Conflicts of Interest[2] and Third Party Payments[3] (described below) may instead be included outside of the Contract, in a separate written disclosure document provided to the Retirement Investor, so long as such disclosure is clear and prominent.

Required Contractual Provisions
Acknowledgement of fiduciary status
○ The Financial Institution must affirmatively state that it and its Advisers act as fiduciaries under ERISA and/or the Code with respect to any investment advice that is covered by the Contract
Acknowledgement of impartial conduct standards
○ The Financial Institution must affirmatively state that it and its Advisers will adhere to (and must in fact comply with) the following Impartial Conduct Standards:
○ The Financial Institution and Adviser will provide investment advice that is, at the time of the recommendation, in the Best Interest[4] of the Retirement Investor
○ The recommended transaction(s) must not cause the Financial Institution, Adviser or their Affiliates or Related Entities to receive, directly or indirectly, compensation that is in excess of reasonable compensation as defined by ERISA and the Code
○ Statements made by the Financial Institution and its Advisers to the Retirement Investor about the recommended transaction(s), fees and compensation, Material Conflicts of Interest, and any other matters relevant to a Retirement Investor's investment decisions, must not be materially misleading at the time they are made

Required Contractual Provisions
Warranties as to policies and procedures
○ The Financial Institution must affirmatively warrant (and must in fact comply with) the following:
○ The Financial Institution has adopted and will comply with written policies and procedures reasonably and prudently designed to ensure adherence to the Impartial Conduct Standards
○ In formulating its policies and procedures, the Financial Institution has (1) specifically identified and documented its Material Conflicts of Interest; (2) adopted measures reasonably designed to prevent Material Conflicts of Interest from causing violations of the Impartial Conduct Standards; and (3) designated a person responsible for addressing Material Conflicts of Interest and monitoring the Advisers' adherence to the Impartial Conduct Standards
○ The Financial Institution's policies and procedures require that neither the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity use or rely upon quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions that are intended or would reasonably be expected to cause Advisers to make recommendations that are not in the Best Interest of the Retirement Investor
Disclosures and descriptions of Material Conflicts of Interest and Third Party Payments
○ In the Contract or in a separate written disclosure document provided to the Retirement Investor, the Financial Institution must clearly and prominently:
○ State the Best Interest standard of care owed by the Financial Institution and the Adviser to the Retirement Investor and describe how the Retirement Investor will pay for services
○ Describe Material Conflicts of Interest, disclose any fees or charges the Financial Institution, its Affiliates or the Adviser imposes upon the Retirement Investor or the Retirement Investor's account, and state the types of compensation that the Financial Institution, its Affiliates and the Adviser expect to receive from third parties in connection with investments recommended to Retirement Investors
○ Inform the Retirement Investor that it has the right to obtain copies, free of charge, of the Financial Institution's written description of its policies and procedures, as well as the specific disclosure of costs, fees and compensation, including Third Party Payments, related to recommended transactions
○ Include a link to the Financial Institution's website and inform the Retirement Investor that model contract disclosures and the Financial Institution's written description of its policies and procedures are available free of charge on the website
○ Disclose to the Retirement Investor whether the Financial Institution offers Proprietary Products[5] or receives Third Party Payments with respect to any recommended investments
○ Notify the Retirement Investor of any limitations placed on the universe of investments that the Adviser may offer for purchase, sale, exchange or holding, to the extent that the Financial Institution or Adviser limits investment recommendations, in part or in whole, to Proprietary Products or investments that generate Third Party Payments (*note that the notice is insufficient if it merely states that investment recommendations "may" be limited based on whether the investments are Proprietary Products or generate Third Party Payments without specific disclosure of the extent to which recommendations are, in fact, limited on that basis*)
○ Describe whether or not the Financial Institution will monitor the Retirement Investor's investments and alert the Retirement Investor to any recommended change to those investments, and, if so, the Financial Institution must provide the frequency with which the monitoring will occur and the reasons for which the Retirement Investor will be alerted

Prohibited Contractual Provisions
Exculpatory provisions
○ Provisions that disclaim or otherwise limit liability of the Adviser or Financial Institution for a violation of the Contract's terms
Waiver of class action or liquidated damages provisions
○ Provisions whereby the Retirement Investor waives or qualifies its right to bring or participate in a class action, or agrees to an amount representing liquidated damages for breach of the Contract (*however, a waiver of a right to obtain punitive damages or rescission of recommended transactions is permitted*)
Certain arbitration/mediation provisions
○ Agreements to arbitrate or mediate disputes in venues that are distant or otherwise unreasonably limit the ability of the Retirement Investor to assert claims

Disclosure Requirements

In addition to the disclosures that must be included in the Contract, the Financial Institution must provide additional (1) transaction-based disclosures, and (2) web-based disclosures to Retirement Investors. The general requirements for the additional disclosures required by the BIC Exemption are described in the following table.

Transaction-Based Disclosure	Web-Based Disclosure
Timing	
○ Does not need to be repeated for subsequent recommendations of the same investment product made within one year of a previous disclosure (unless there are material changes to the subject to the disclosure)	○ Must be updated no less than quarterly (or, in the case of changes to the model Contract or other model notice of contractual terms, within 30 days of the change)
Form	
○ Single written document	○ Financial Institution's website
○ Clear and prominent disclosure	○ To the extent that the information required is provided in other disclosure documents that are made public (such as a Form ADV, Part II), the web-based disclosure requirement may be satisfied by posting those documents to the website, explaining that the required disclosures can be found in those documents, and providing a link to where the disclosures can be found
Content	
○ State the Best Interest standard of care owed to the Retirement Investor and describe any Material Conflicts of Interest	○ Discuss the Financial Institution's business model and the Material Conflicts of Interest associated with that business model
○ State that the Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the purchase, sale, exchange or holding of recommended investments	○ Provide schedule of Financial Institution's typical account or contract fees and service charges
○ State the limitations placed on the universe of investments that the Adviser may recommend to the Retirement Investor (*note that this notice is insufficient if it only states that investment recommendations "may" be limited based on whether the investments are Proprietary Products or generate Third Party Payments, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis)*	○ List all investment product manufacturers and other parties with whom the Financial Institution maintains arrangements that provide Third Party Payments to either the Adviser or the Financial Institution, a description of any such arrangements, including a statement of whether and how the arrangements impact Adviser compensation, and a statement of any benefits the Financial Institution provides to the investment product manufacturers or other parties in exchange for the Third Party Payments
○ Inform the Retirement Investor of his or her right to obtain copies of the Financial Institution's written description of its policies and procedures, as well as other specific disclosures of costs, fees and other compensation, including Third Party Payments in relation to recommended transactions	○ Disclose of the Financial Institution's compensation and incentive arrangements including, if applicable, any incentives (cash or non-cash) for recommending particular products, investments or actions, including a full and fair description of any pay-out or compensation grids, but not including information that is specific to any individual Adviser's compensation
○ Include a link to the Financial Institution's website and state that model contract disclosures and the written description of its policies and procedures are available on the website, free of charge	○ Provide model Contract or other model notice of the contractual terms
	○ Provide written description of policies and procedures

Documentation and Internal Policies and Procedures

The BIC Exemption also requires certain documentation and internal policies and procedures of Financial Institutions and Advisers, as follows:

- The Financial Institution must document in writing (1) its limitations on the universe of recommended investments; (2) the Material Conflicts of Interest associated with any contract, agreement, or arrangement providing for its receipt of Third Party Payments or associated with the sale or promotion of Proprietary Products; and (3) any services it will provide to Retirement Investors in exchange for Third Party Payments, as well as any services or consideration it will furnish to any other party, including the payor, in exchange for the Third Party Payments.

- The Financial Institution must reasonably determine (and document in writing the basis for its determinations), after consideration of the policies and procedures established pursuant to the BIC Exemption, that the limitations and Material Conflicts of Interest will not cause the Financial Institution or its Advisers to recommend imprudent investments.

- The Financial Institution must adopt, monitor, implement, and adhere to policies and procedures and incentive practices that meet the terms required to be disclosed to Retirement Investors in the Contract.

- Neither the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity may use or rely upon quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives that are intended or would reasonably be expected to cause the Adviser to make imprudent investment recommendations, to subordinate the interests of the Retirement Investor to the Adviser's own interests, or to make recommendations based on the Adviser's considerations of factors or interests other than the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor.

Substantive Requirements of Recommendations

The BIC Exemption also requires certain facts to be true with respect to each recommendation made:

- At the time of any recommendation, the amount of compensation and other consideration reasonably anticipated to be paid, directly or indirectly, to the Adviser, Financial Institution, or their Affiliates or Related Entities for their services in connection with the recommended transaction may not be in excess of reasonable compensation.

- The Adviser's recommendation reflects the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor.

- The Adviser's recommendation is not based on the financial or other interests of the Adviser or on the Adviser's consideration of any factors or interests other than the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor.

Recordkeeping and Notification Requirements

Financial Institutions must notify the DOL by email of their intention to rely on the BIC Exemption prior to receiving compensation in reliance on the BIC Exemption. Additionally, Financial Institutions must retain for a period of six years, in a manner that is reasonably accessible for examination by the DOL, IRS,

Retirement Investor and certain others, the records necessary to determine whether the conditions of the BIC Exemption were met with respect to any particular transaction.

A failure to maintain the necessary records will result in the loss of the BIC Exemption with respect to the transaction or transactions for which the records are missing or have not been maintained (but the exemption remains applicable to other transactions that are supported by the proper records).

"BIC Light" for ERISA Plans, Level Fee Fiduciaries and Bank Networking Arrangements

ERISA Plans

Under the BIC Exemption, Financial Institutions and Advisers can adhere to slightly reduced requirements and still comply with the BIC Exemption when providing advice to Retirement Investors regarding investments in plans covered by ERISA. Specifically, Financial Institutions are not required to execute written contracts with Retirement Investors, and instead may merely acknowledge the Financial Institution's fiduciary status. However, Financial Institutions and Advisers must still comply with the substance of what would have been included in the written contract, including adhering to the Impartial Conduct Standards and adopting and complying with adequate written policies and procedures. Additionally, Financial Institutions and Advisers are still required to (1) disclose and describe any Material Conflicts of Interest and Third Party Payments they receive; (2) comply with the transaction-based and web-based disclosure requirements; and (3) comply with the recordkeeping requirements.

Level Fee Fiduciaries

The BIC Exemption provides for even further reduced requirements for Level Fee Fiduciaries — Financial Institutions and Advisers that only receive "Level Fees" that are disclosed in advance to Retirement Investors, such as a fixed percentage fee based on assets under management, or a fixed fee that otherwise does not vary according to the particular investment recommended.

Level Fee Fiduciaries are required to acknowledge their fiduciary status to Retirement Investors and to comply with the Impartial Conduct Standards. Additionally, if Level Fee Fiduciaries recommend that a Retirement Investor (1) roll over from an ERISA plan to an IRA, or from another IRA to an IRA, or (2) move from a commission-based account to a level fee arrangement, then the Level Fee Fiduciary must document the specific reason or reasons why the recommendation was considered to be in the Retirement Investor's best interest.

Level Fee Fiduciaries also must comply with the requirements applicable to Proprietary Products and Third Party Payments discussed above.

However, Level Fee Fiduciaries are otherwise free from the remaining BIC Exemption requirements discussed above. Specifically, they do not need to provide any of the contract disclosures, transaction-based disclosures or web-based disclosures described above, and they do not need to adhere to the recordkeeping and notification requirements that are generally applicable under the BIC Exemption.

We expect that the Level Fee Fiduciary designation will be advantageous to Financial Institutions seeking to transition away from commission-based accounts in order to avoid the more burdensome requirements imposed upon fiduciaries under the BIC Exemption. However, as noted above, transitioning investors from commission-based accounts to fee-based accounts in order to attain Level Fee Fiduciary status could be challenging given the requirement for Level Fee Fiduciaries to document the specific reason or reasons why moving to a level fee arrangement is in the Retirement Investor's best interest.

Bank Networking Arrangements

Advisers who are bank employees (in the case of individual Advisers) or banks (in the case of Financial Institutions) may receive compensation under a Bank Networking Arrangement[6] in connection with their provision of investment advice to a Retirement Investor, provided that the investment advice adheres to the Impartial Conduct Standards. The BIC Exemption's remaining conditions and requirements do not apply.

Congressional Backlash; Industry Challenges

Both industry groups and House and Senate Republicans have vocally opposed the Final Rule since before its adoption.

On May 24, 2016, the Senate voted 56-41 in favor of a joint resolution, previously approved by the House of Representatives, that would block implementation of the Final Rule pursuant to the Congressional Review Act.[7] On June 8, 2016, President Obama vetoed the legislation. With a two-thirds majority in both chambers necessary to override the veto, this legislation is effectively symbolic.

Lawsuits challenging the Final Rule that industry groups filed this month may have a more meaningful impact. As of June 20, 2016, five lawsuits challenging the Final Rule have been filed (though the Secretary of Labor filed an unopposed motion on June 17, 2016, to consolidate three of the suits filed in Texas federal court). The first was filed by the US Chamber of Commerce, along with eight other industry groups, in Texas federal court on June 1, 2016, alleging, among other things, that the Final Rule oversteps the DOL's authority, creates unwarranted burdens and liabilities for financial advisers, and undermines the interests of small business and individual savers by limiting consumer choice. Since the first suit was filed, the National Association of Fixed Annuities, the American Council of Life Insurers, the Indexed Annuity Leadership Council and Market Synergy Group, Inc. have joined with other plaintiffs in challenging the Final Rule.

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Endnotes

1 For purposes of this *Client Alert*, unless otherwise specified, the term "Adviser" will be used to refer to both an individual Adviser and a Financial Institution.

2 A "*Material Conflict of Interest*" exists when an Adviser or Financial Institution has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor.

3 "*Third-Party Payments*" include sales charges when not paid directly by the Plan, participant or beneficiary account, or IRA; gross dealer concessions; revenue sharing payments; 12b-1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration or financial benefit provided to the Financial Institution or an Affiliate or Related Entity by a third party as a result of a transaction involving a Plan, participant or beneficiary account, or IRA.

4 "*Best Interest*" is defined as acting with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity or other party.

5 "*Proprietary Product*" means a product that is managed, issued or sponsored by the Financial Institution or any of its Affiliates.

6 A "*Bank Networking Arrangement*" is an arrangement for the referral of retail non-deposit investment products that satisfies applicable federal banking, securities and insurance regulations, under which employees of a bank refer bank customers to an unaffiliated investment adviser registered under the Investment Advisers Act of 1940 or under the laws of the state in which the adviser maintains its principal office and place of business, insurance company qualified to do business under the laws of a state, or broker or dealer registered under the Securities Exchange Act of 1934, as amended. For purposes of this definition, a "bank" is a bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)).

7 H.J. Res. 88, *Disapproving the rule submitted by the Department of Labor relating to the definition of the term "Fiduciary."*