STATE STREET GLOBAL ADVISORS

January 2, 2024

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Retirement Security Rule
Room N-5655

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712

U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Submitted via http://www.regulations.gov

Re: RIN 1210–AC02 – Retirement Security Rule: Definition of an Investment Advice Fiduciary; ZRIN: 1210-ZA32 – Proposed Amendments to Class Exemption 2020-02; ZRIN: 1210-ZA34 – Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83, 83-1 and 86-128

Ladies and Gentlemen:

State Street Global Advisors ("SSGA"), the investment management division of State Street Corporation,[1] appreciates the opportunity to provide comments on: (1) the proposed definition of an investment advice fiduciary (the "Proposed Regulation"); (2) the proposed amendments to prohibited transaction class exemption 2020-02; and (3) the proposed amendments to PTE 77-4, each issued by the Department of Labor (the "Department") on November 3, 2023. While SSGA fully supports the Department's goal of protecting and enhancing the quality of investment advice offered to retirement investors, SSGA does not believe the Proposed Regulation or the proposed amendments to the above prohibited transaction exemptions are appropriately tailored, and as such we urge the Department to withdraw its proposal.

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[1] Headquartered in Boston, Massachusetts, State Street Corporation is a bank holding company that through subsidiaries serves institutional investors through two core business lines, investor servicing (the provision of custody and related services) and asset management. . State Street Bank and Trust Company, State Street's principal banking subsidiary, had approximately $40.0 trillion in assets under custody and/or administration as of September 30, 2023. SSGA had $3.69 trillion in assets under management* as of September 30, 2023.

*AUM as of September 30, 2023, includes approximately $58 billion of assets with respect to SPDR® products for which State Street Global Advisors Funds Distributors, LLC ("SSGA FD") acts solely as the marketing agent. SSGA FD and State Street Global Advisors are affiliated.

SSGA is a global leader in asset management, managing more than $3.69 trillion in assets from corporations, endowments and foundations, third-party asset gatherers, pension funds, sovereign wealth funds and registered investment companies as of September 30, 2023. SSGA has been providing asset management services for over 40 years and began offering services to 401(k) clients in 1981. As of September 30, 2023, SSGA's assets under management for global defined contribution ("DC") and defined benefit plans totaled $1.35 trillion, of which $610 billion represents DC plan assets sourced in the United States.

At SSGA, a significant portion of our business is undertaken as an ERISA fiduciary and the fiduciary role is one that we not only accept, but we also embrace. As such, we have built our institutional investment management franchise, as well as our related infrastructure, processes and technology, in a way that is consistent with our prevailing status as an ERISA fiduciary. We believe that the key to successful retirement investing is high quality, low cost investment products and services combined with optimal plan design and communication.

Below, we provide a brief overview of the Proposed Regulation and a number of comments SSGA requests that the Department consider.

I. Overview of the Proposed Regulation

A person will be a fiduciary with respect to an ERISA plan to the extent that the person "renders investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of such plan or has any authority or responsibility to do so."[2] The Proposed Regulation would revise the Department's interpretation of this statutory provision to eliminate most of the components of the current regulation's five-part test and would assign fiduciary status to any person who, for a fee or other compensation:

- makes a "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other property" as further defined in the Proposed Regulation[3];
- to a "Retirement Investor," which term includes: an ERISA plan, a fiduciary, participant or beneficiary of an ERISA plan, a Code plan and an owner or a fiduciary of a Code plan (Code plans are referred to in the Proposed Regulation and herein as IRAs); and
- the Covered Recommendation is made in one of three identified "contexts."[4]

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[2] ERISA §3(21)(A)(ii). Section 4975(e)(3) of the Internal Revenue Code (the "Code") includes a parallel definition with respect to Code plans. Unless otherwise specified, in this letter references to ERISA are also intended to refer to parallel Code provisions, if any.
[3] 88 Fed Reg at 75978 (Nov. 3, 2023) (each such recommendation is referred to herein as a "Covered Recommendation").
[4] *Id*. at 75977.

The Proposed Regulation also includes a number of other defined or described terms, the large majority of which are virtually identical to the defined terms used in the Department's previous effort to revise its regulation defining an investment advice fiduciary (referred to herein as "the 2016 Rule").

II. The Department Should Withdraw the Proposals

SSGA fully supports a regulatory approach that will enhance the quality of investment advice offered to retirement savers. However, if finalized in its current form, the Proposed Regulation would result in inefficiencies and increased costs and would decrease the quality of services and communications available in the retirement marketplace. SSGA also believes that the Proposed Regulation suffers from many of the same defects that led to the vacatur of the 2016 Rule. The proposed amendments to PTE 2020-02, PTE 77-4 and to several other long-standing exemptions will also add significant additional and unjustified compliance burdens. For these reasons, SSGA's primary comment is that the Department should withdraw all of the proposals.

We do not make this comment lightly, as we understand that the Department strongly believes that changes to the current investment advice fiduciary definition are necessary to protect individual retirement savers from what the Department perceives as gaps in the current regulatory framework. Importantly, as an institutional asset manager SSGA generally does not provide securities brokerage or advisory services to IRAs or to individual participants or beneficiaries in ERISA-covered plans and does not offer or market insurance products, which are the areas where the Department has articulated its belief that the current regulation poses particular risks to individual Retirement Investors.[5] However, the impact of the proposals on institutional asset managers and those providing similar services is far greater than the Department seems to realize.

Despite the significant impact the proposals would have, the Department provided only a 60-day comment period, which included several holidays. Unlike the Department's other significant regulatory proposals in this area, public hearings on the proposals were held during, rather than after, the comment period. In addition, the unofficial hearing transcripts were made available at 4:00 pm on Friday, December 22, 2023, which meant that commenters had only four business days to review and consider over 600 pages of transcripts before the January 2, 2024 comment deadline. SSGA requests that the Department reopen the comment period immediately to allow commenters to provide additional input to the Department on these proposals.

To the extent the Department feels compelled to finalize the proposals, SSGA believes that significant changes will need to be made. Below, we provide comments describing changes that are necessary to bring a revised fiduciary advice definition in line with ERISA and to reflect the scale and practical realities of a multi-trillion-dollar marketplace for retirement plan products and services.

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[5] *Id*. at 75899 (describing the purpose of the Proposed Rule exclusively in terms of marketplace changes affecting individual investors).

III. Comments on the Proposed Regulation

a. The Terms Defined or Used in the Proposed Regulation are Substantively Identical to those in the 2016 Rule, Overly Broad and Unworkable

Below we discuss SSGA's concerns regarding three of the terms that are defined or used in the Proposed Regulation. Each of these terms is broad in its own right, and when considered together with the dismantling of the current regulation's five-part test, the cumulative effect would be a regulation that reaches far beyond the statutory investment advice definition, which applies to a person who "renders investment advice for a fee or other compensation, direct or indirect, with respect to" plan assets.[6]

i. Definition of Fee or Other Compensation

The Proposed Regulation broadly captures receipt by a person or its affiliate of a fee explicitly for investment advice and any fee or compensation "in connection with or as a result of" the advice or consummation of a recommended transaction. Similar to the 2016 Rule, the Proposed Regulation treats compensation as "in connection with or as a result of" a transaction, service or advice if eligibility for or the amount of compensation is based (in whole or in part) on the transaction, service or advice or if it would not have been paid "but for" the transaction, service or advice.[7]

In the preamble to the Proposed Regulation, the Department argues that this definition is appropriate because it is consistent with that used under the current regulation and other long-standing related guidance.[8] This argument misses the point, however. A broad definition of compensation might be reasonable when used with the current regulation's five-part test that by its terms is limited to individualized recommendations made to a plan on a regular basis, under a mutual agreement that the advice will serve as a primary basis for an investment decision with respect to the plan's assets. However, the same broad definition will have a completely different impact as part of the Proposed Regulation, which would include as fiduciary investment advice a one-time suggestion by an asset manager to an ERISA plan regarding an investment strategy the manager thinks might be a good fit for the plan.[9]

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[6] ERISA §3(21)(A)(ii).
[7] 88 Fed Reg at 75978.
[8] *Id*. at 75910 fn.139 (citing DOL Advisory Op. 83-60A (Nov. 21, 1983)).
[9] Advisory opinion 83-60A - the very same letter cited in the proposal as evidence of the Department's consistent approach to defining compensation - describes ERISA section 3(21)(A)(ii) as a "two-part test requiring both the provision of 'investment advice' and the receipt of a 'fee or other compensation' for such advice" and notes that compensation is only relevant if the services provided include the provision of investment advice under the applicable regulation.

Read together, the compensation and advice definitions in the Proposed Regulation would appear to cover a situation in which SSGA provides information regarding SSGA's services as an ERISA section 3(38) investment manager to a plan's investment consultant (who has agreed to act as a plan fiduciary). SSGA is then selected by the plan to provide investment management services, executes a management agreement with the plan and, pursuant to the terms of the agreement, is paid an asset-based management fee.

The reality is that SSGA does not receive an asset management fee for the information it provides to the plan's consultant in the scenario above as required under the statutory investment advice definition. Rather, the fee received by SSGA is for the expertise it applies on the plan's behalf in the management of the plan's assets. SSGA requests that the Department revise the definition of "fee or other compensation, direct or indirect" to align it with the statutory requirements and to account for the other changes included in any final investment advice regulation. At a minimum, any final compensation definition should not reach compensation that merely has a "connection with" incidental recommendations of financial products or services provided to an ERISA plan fiduciary or another financial institution or financial professional acting on behalf of an ERISA plan.

ii. Definition of Recommendation

While not defined in the text of the Proposed Regulation, the preamble describes the term "recommendation" essentially identically to the definition used in the 2016 Rule: "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the Retirement Investor engage in or refrain from taking a particular course of action."[10] As in 2016, SSGA continues to view this formulation as overly broad. The implications of ERISA fiduciary status are significant – requiring adherence to strict standards of care and loyalty. Further, both ERISA and the Code require fiduciaries to avoid certain transactions or to comply with the detailed conditions of one or more prohibited transaction exemptions.[11] Firms should not be expected to undertake these significant compliance burdens based on a mere suggestion.

Further, SSGA is concerned that the Department could determine that it would be reasonable to view almost any communication from a person deemed to have special expertise related to investments (such as an asset manager) to a person who may (or may not) have less expertise (such as a Retirement Investor) as involving a "suggestion" and therefore a recommendation. The Department should establish a new definition that makes clear that a mere endorsement of or expression of opinion about a product or service (including one's own products or services) is not the same as a "recommendation" for purposes of determining whether the person is an investment advice fiduciary. While an endorsement denotes approval or support, and an opinion can be expressed as positive or

[10] 88 Fed Reg at 75904.

[11] The Department's recently finalized regulations governing the procedures for obtaining an individual exemption strongly indicate that going forward the Department is inclined to impose more numerous and onerous conditions on individual exemptions and that such exemptions will be more difficult to obtain than in the past.

negative, neither necessarily indicates that a particular course of action is superior to other courses of action, and neither is necessarily a "call to action."

SSGA also strongly urges the Department to make clear in the final rule that a person may offer a fulsome description and endorsement of the investment-related products and services it offers without making a recommendation. This approach would be consistent with the Department's existing guidance under ERISA section 408(b)(2), in which the Department has made clear that: (1) a fiduciary to a plan is not acting in a fiduciary capacity when proposing to perform additional services to a plan; and (2) a person does not act in a fiduciary capacity when working to persuade a fiduciary to hire the person to perform services for the plan (including investment advisory services).[12] In each example, the Department explains that the actors in question have not used any fiduciary authority to cause an act that benefits them (*i.e.*, their own hiring).[13]

iii. Definition of Covered Recommendation

The Proposed Regulation captures an overly broad number of activities within the definition of "any securities transaction or other investment transaction or any investment strategy involving securities or other investment property" (*e.g.*, a Covered Recommendation). While the current investment advice regulation applies to recommendations as to "the advisability of investing in, purchasing or selling securities or other property" the Proposed Regulation would also apply to recommendations regarding:

- any investment strategy;
- investment policies;
- portfolio composition;
- the management of securities or other investment property by another person;
- the provision of investment advice services by another person;
- the selection of account arrangements; and
- voting of proxies associated with securities.

Importantly, the Proposed Regulation could capture as Covered Recommendations numerous communications that financial institutions routinely have with plan fiduciaries, including the following:

- Any Investment Strategy: A plan fiduciary informs an asset manager that it intends to replace the manager as of June 30, 2024. The asset manager asks if the plan intends to utilize a transition manager and notes that the plan already has a standing agreement for transition management services in place with the manager's affiliate. The plan fiduciary informs the manager that the plan has in place several such

[12] *See* 29 C.F.R. 2550.408b-2(c)(3)(f) Examples 1 and 4.
[13] In 2012, the Department updated the 408(b)(2) regulations and did not elect to make any changes to the examples cited above. We presume the reason for this is that the Department continues to view these examples as correctly describing the contours of fiduciary status and responsibilities.

standing agreements, but agrees to consider the manager's affiliate as a transition manager – either for this transition or for a future transition.

- Portfolio Composition: An asset manager leverages its internal portfolio construction expertise to create asset allocation models and markets those models to unaffiliated investment advisers who may utilize the model to service the advisers' Retirement Investor clients.
- Management or Advisory Services of Another Person: A plan fiduciary contacts a financial professional working for an asset management firm to inquire whether the manager offers a particular type of investment-related product or service. The professional responds that the asset management firm does not have a service offering that would meet the plan's needs and provides the name of another asset management firm with the expertise the plan is seeking.
- Account Type Arrangement: A plan fiduciary asks an asset manager to create a separately managed account for a particular investment mandate. After learning more about the plan and the fiduciary's goals for the investment mandate, the manager suggests that a CIT structure could provide cost savings to the plan.
- Proxy Voting: An asset manager markets proxy voting capabilities that would allow a plan fiduciary to elect from a slate of proxy voting policies based on the plan's needs, as determined by the plan fiduciary.

These examples also illustrate the cumulative effect of the Department's choice to define broadly the term "recommendation" and to expand significantly the subjects about which a recommendation can give rise to fiduciary status – while still retaining a broad definition of what constitutes a "fee or other compensation." We ask that the Department reconsider each of the elements discussed above, particularly in light of their cumulative effect.

b. Certain Communications Should be Excepted from the Investment Advice Definition

In order for any investment advice fiduciary definition to comply with ERISA and the Code, the Department must recognize the distinction between sales and advice.[14] This does not mean, in SSGA's view, that a person can never be an investment advice fiduciary while they are selling an investment product or service to a Retirement Investor. However, SSGA does not believe the Proposed Regulation strikes an appropriate balance on this point. In fact, rather than recognizing and working with this distinction, the Department goes as far as possible in the other direction. In the preamble to the proposal, the Department clearly and forcefully states 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."[15] While this preamble statement is limited to

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[14] *See Chamber of Commerce v. U.S. Department of Labor*, 885 F.3d 360, 373 (5th Cir. 2018) ("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").

[15] 88 Fed Reg at 75907.

retail investors, the Proposed Regulation does not treat sophisticated institutional Retirement Investors any differently from the way it treats individuals in this respect.

Recognizing the Department's reluctance to treat all sales-related interactions as non-fiduciary, SSGA asks the Department to recognize that sophisticated Retirement Investors have very different expectations regarding investment-related information than individual Retirement Investors have. Examples illustrating this are discussed, below.

SSGA is routinely asked by ERISA plan fiduciaries to describe the specific products and services the firm has to offer, to discuss the types of investment strategies that other plans use to achieve certain goals and to answer in-depth questions about the firm's investment philosophy, expertise and personnel. For example, SSGA regularly responds to RFPs and other solicitations to compete for business, including to provide asset management services for a specific mandate that has been pre-determined by an ERISA plan's named investment fiduciary, often working with the plan's paid independent investment adviser or consultant. SSGA also meets with plan fiduciaries and advisors who may prefer to gather information about investment products and services without conducting a formal RFP process. In addition, SSGA markets its services, products and capabilities to other financial institutions and their representatives who are considering whether SSGA's expertise could add value to products and services the financial institution may provide to its own clients. In some cases, the financial institution may be acting in a fiduciary capacity when considering this information.

SSGA also maintains a line of business where it provides to unaffiliated investment advisors limited, non-exclusive, non-transferable licenses to use investment management models for the purpose of providing asset allocation services to such advisors' clients, some of which are plans, plan fiduciaries, participants or beneficiaries, IRAs or IRA holders. Under these arrangements, the advisors generally agree that they will obtain information about each of their client's financial situations and investment objectives (including any reasonable restrictions) at the time the client's account is opened with the advisor, and will make recommendations on the basis of such information. SSGA does not engage with the advisor's clients directly, collect any identifying information about the clients or enter into agreements with the clients. In fact, SSGA generally has no control over, or knowledge of, whether the models or strategies, or allocation of assets to particular investment vehicles pursuant to those models or strategies, that are generated by its services are in fact implemented by the unaffiliated advisor. SSGA's interactions with these advisors are limited to discussions about the models and related investment matters. The advisors conduct their own due diligence on the models and are responsible for fulfilling any legal obligations attendant to their use of the models for any purpose.

The examples discussed above describe interactions between SSGA and a financial institution, a named fiduciary with respect to an ERISA plan or an authorized representative of such financial institution or named fiduciary. In each case, the information provided by SSGA should not be viewed as investment advice under any test that remains faithful to ERISA's statutory language and the Fifth Circuit opinion vacating the 2016 Rule. Further,

none of these entities receiving the information provided by SSGA in these examples would reasonably view the information provided as fiduciary investment advice. SSGA believes that plan fiduciaries selecting service providers and financial institutions seeking to maximize returns for plan clients value the information they receive in these interactions and do not see any benefit in those communications being curtailed by an overly broad fiduciary advice definition.[16]

SSGA asks that the Department include in the text of any final rule specific factors that would indicate certain circumstances do not involve the provision of information individualized to the needs of the Retirement Investor, or that such information may not reasonably be relied upon as a basis for investment decisions that are in the Retirement Investor's best interest, or both. These factors are needed to provide certainty to financial institutions, plan fiduciaries and their advisors and representatives.

We propose that information provided to a Retirement Investor who is a financial institution, a named fiduciary with respect to an ERISA plan or an authorized representative of such financial institution or named fiduciary (each a "Recipient") will not involve a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property if one or more of the following factors are present:

- The Recipient solicits the information from more than one provider pursuant to a request for proposals or similar competitive process;
- The provider acknowledges that, if selected, it will agree to act as a discretionary trustee, an "investment manager" under ERISA section 3(38) or in a similar capacity with respect to the assets of one or more ERISA plans or pooled investment vehicles;
- The provider and the Recipient mutually acknowledge that the information is based on stated assumptions that could reasonably apply to a large number of ERISA plans or pooled investment vehicles;
- The Recipient informs the provider that it does not expect to rely on information from the provider as a basis for any investment or to engage the provider without undertaking steps independently to evaluate the provider's expertise, qualifications and capabilities;
- The Recipient is a representative of the plan's named fiduciary for investments, is independent of the provider and is compensated by the plan or plan sponsor in connection with evaluating or recommending plan investments;
- The Recipient acknowledges that it is receiving the information from the provider to assist the Recipient in providing services to the Recipient's own clients, that the

[16] This view is supported by the 2015 public comment letter from the Committee on Investment of Employee Benefit Assets, which specifically requested that in finalizing what became the 2016 Rule the Department clarify that, "Recommendations made in the context of responding to an RFP issued by or on behalf of, a plan sponsor should not be considered fiduciary advice." (https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00726.pdf)

information is not individualized to the needs of any such clients and that to the extent the Recipient uses the information in connection with services it provides to other Retirement Investors, the Recipient will acknowledge that it is acting as a fiduciary when making investment recommendations to such clients; or
- The Recipient represents in writing that it represents a qualified institutional buyer as that term is defined in Rule 144A under the Securities Act of 1933.

Legitimate conversations about investment products and services between sophisticated parties benefit all parties involved and do not raise the same concerns that the Department has expressed regarding individual Retirement Investors. Thus, the Department should preserve the ability of sophisticated Retirement Investors to receive useful information.

c. Affiliates of Investment Managers Should Not Automatically be Investment Advice Fiduciaries

Subsection (c)(1)(i) of the Proposed Regulation provides that a person will be an investment advice fiduciary if that person makes a Covered Recommendation to a Retirement Investor and they or an affiliate have discretionary control with respect to purchasing or selling securities or other investment property for the Retirement Investor. As drafted, this subsection is incredibly broad, inconsistent with ERISA, impossible to comply with and captures numerous situations that in no way involve a "trust and confidence" relationship.

The definition of "affiliate" and the attribution rules used in the proposal reach much more broadly than is reasonable in that they would cover, among others, any controlling parent, commonly controlled sibling or controlled subsidiary company of a provider and every employee, officer, director and representative of the provider along with their spouses, parents, children, and siblings. Thus, if any one of SSGA's "affiliates" exercises discretion with respect to the assets of an ERISA plan and SSGA makes a Covered Recommendation to a Retirement Investor (including in responding to an RFP) and wins the business, SSGA would automatically be deemed to be an investment advice fiduciary. This would be the case even where SSGA is not aware of the identity of the ERISA plan or fiduciary in question, where the plan's fiduciary is unaware that a State Street affiliate has a discretionary role for the plan or where that role is limited and completely unrelated to the Covered Recommendation.

For example, SSGA's affiliate may act as a custodian or directed trustee for a plan. In this role, the affiliate would not exercise any discretion over the plan's purchase or sale of securities. However, the affiliate may also provide related services such as, for instance, as a securities lending agent for the plan. Another example could involve a different affiliate of SSGA that does not provide services to the plan on a regular basis, but that could nevertheless be engaged occasionally to provide transition management services to the plan, which services would involve discretion over certain securities transactions.

The reach of subsection (c)(1)(i) also goes well beyond the statutory language in ERISA section 3(21)(A)(ii)[17] that specifically limits the reach of fiduciary status to those who provide advice "with respect to any moneys or other property of" a plan. Given this language, the statute is explicitly limited to advice with respect to "plan assets". In contrast, subsection (c)(1)(i), by its terms and as emphasized by the Department in the preamble to the proposal, is not limited to persons that exercise discretion over plan assets.[18] When a Retirement Investor invests in any vehicle, including registered investment companies, non-plan assets private funds and foreign funds, the person or entity managing the vehicle decides what securities to sell or buy "for" the investors in the vehicle.[19] As the Department is well aware, ERISA itself excludes registered investment companies from plan assets status.[20] Thus, the Department cannot, consistent with ERISA, impose fiduciary status onto an entity merely because it or its affiliate manages a non-plan assets vehicle.[21]

As a practical matter, it would be impossible for SSGA to be able to track Retirement Investors on the scale required by this subsection of the proposal. SSGA and its affiliates manage assets in registered investment companies and other pooled vehicles, such as collective investment trusts, that on any given day may be held in the portfolios of literally millions of individual retail investors, IRAs, plans, participants and beneficiaries. There would simply be no way for SSGA (or any financial institution) to know if it or its affiliates exercise discretion as described in the subsection "for" a Retirement Investor.

The discussion above demonstrates why the Department should not include subsection (c)(1)(i) in any final rule. It is not appropriate to assume that an affiliate of a person or entity who exercises discretionary authority over securities transactions with respect to one portion of a Retirement Investor's portfolio will, in every instance, be reasonably viewed as in a position of trust and confidence with respect to the Retirement Investor's entire portfolio.

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[17] ERISA's fiduciary definition includes any "person 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."

[18] 88 Fed Reg at 75901 (Noting that subsection (c)(1)(i) of the Proposed Regulation would not be limited to affiliates exercising discretion over plan or IRA assets, but would cover *any* assets of the Retirement Investor).

[19] If the Department were to take the view that the manager of a pooled investment vehicle is exercising discretion "for" the vehicle itself and not "for" its investors, then the subsection would be meaningless except as it relates to separately managed accounts, where a Retirement Investor doesn't own an interest in a vehicle, but rather owns the managed securities directly. Presumably, if this were the Department's intent, it would have communicated that intent in the proposal. Since it did not, we conclude the Department intended to cover management of pooled vehicles.

[20] *See* DOL Adv. Op. 2009-04A (Dec. 4, 2009) (Noting that section 3(21)(B) explicitly excludes from fiduciary status an investment company, its adviser and principal underwriter from status as an ERISA fiduciary as a result of its role with respect to an investment company in which a plan invests and that section 401(b)(1) of ERISA excludes from "plan assets" status the assets of an investment company).

[21] *Id*. at n.2 (Recognizing that Congress was aware of "funds of funds" when enacting ERISA).

Rather than try to address the myriad issues raised by this subsection, SSGA requests that the Department simply eliminate subsection (c)(1)(i) of the Proposed Regulation.

IV. Comments on the Proposed PTE 2020-02 Amendments

a. No Changes to PTE 2020-02 Should be Made Now

SSGA does not support the Department's proposed amendments to PTE 2020-02. The exemption has only been fully effective for just over two years, which is simply not enough time for Financial Institutions or the Department to know whether and how the exemption can be improved. The Department has not provided compelling evidence of any systemic issues with the current exemption.

However, to the extent that the Department determines that it should amend PTE 2020-02, SSGA believes that the following revisions to the proposed amendments should be made.

b. PTE 2020-02 Should Include a Streamlined Exemption for Incidental Advice to an ERISA Plan or Plan Fiduciary

Because of the nature of its business, SSGA does not rely on PTE 2020-02 and would not expect to do so in the future unless the Proposed Regulation would cause SSGA to be viewed as an investment advice fiduciary when interacting with potential clients. Thus, our concerns about the proposed PTE 2020-02 amendments are primarily that the burdens of complying with the exemption are disproportionate in light of the transitional nature of any sales-related conflict SSGA might be viewed as having under the Proposed Regulation.

As noted in the proposal, ERISA prohibits fiduciaries "from receiving compensation that varies based on their investment advice."[22] We agree that where SSGA, *acting as a fiduciary,* has the ability to affect the amount and timing of its fee, it has an impermissible conflict under ERISA. SSGA's business is structured to avoid such conflicts or to comply with the conditions of one or more prohibited transaction exemptions.[23]

The Best Interest Contract exemption, as finalized by the Department in 2016, provided a streamlined exemption for investment advice fiduciaries who receive a level fee for the ongoing provision of investment management or advisory services. As explained by the Department, this type of fee does not raise on-going prohibited transaction concerns and aligns the manager's own financial interests with that of its clients.[24]

[22] 88 Fed Reg at 75999.
[23] Including, *e.g.*, PTE 77-4, discussed further, below.
[24] 81 Fed Reg 21002, 21011 (Apr. 8, 2016) (In connection with providing a streamlined exemption for "Level Fee" fiduciaries, the Department noted that such arrangements the "[i]nterests of the Adviser in making prudent investment recommendations, which could have an effect on compensation received, are aligned with the Retirement Investor's interests in increasing and protecting account investments.")

SSGA requests that PTE 2020-02 include a streamlined set of conditions to provide certainty to the regulated community and sophisticated Retirement Investors that the parties' expectations when entering into or renewing a relationship involving investment services can be honored. In order to be effective, any such exemption should have limited conditions. While the BIC's "Level Fee" conditions could be a starting point, SSGA notes that because the 2016 Rule included a sophisticated investor carve-out, the Level Fee exemption in the BIC was intended to be used with retail investors.

SSGA suggests that the Department add to PTE 2020-02 an exemption specifically covering the receipt of reasonable compensation by a Financial Institution for incidental investment advice to a Retirement Investor who is a financial institution, an ERISA plan, an ERISA plan fiduciary or a representative thereof regarding any securities transaction or other investment transaction or any investment strategy involving securities or other investment property.[25] Because the exemption would be limited to incidental investment advice to sophisticated parties, its conditions should be primarily disclosure-based. SSGA believes that it would be appropriate to require a written acknowledgement by the Financial Institution that: (1) any investment advice provided is incidental to the parties' arm's length discussions regarding the Financial Institution's product or service offerings; and (2) the Financial Institution will act as a fiduciary to the extent it is selected to provide investment management or advisory services to the Plan. It would also be appropriate for the Retirement Investor to acknowledge in writing that it does not intend to rely on any incidental investment advice as a basis for an investment decision without first undertaking steps to independently evaluate the Financial Institution's expertise, qualifications and capabilities. As the streamlined exemption would be available only for the Financial Institution's receipt of reasonable compensation if retained, SSGA does not believe any other conditions should be included.

c. The Department Should Not Expand the Disqualification Provisions of PTE 2020-02

In general, SSGA believes that a Financial Institution should not be disqualified from relying on PTE 2020-02 for foreign activities unless such activities are convictions for disqualifying crimes under ERISA section 411. As the Department is aware, Financial Institutions often have a vast network of foreign branches and affiliates that are independently managed and provide services wholly unrelated to those provided to ERISA plans in the U.S. While plan fiduciaries can choose to consider any behavior – foreign or domestic – of a Financial Institution or its affiliates when deciding to hire the Financial Institution, it is not appropriate for a Financial Institution to be automatically disqualified from relying on PTE 2020-02 solely on the basis of a foreign conviction. Given the global scale of the financial services business, it is simply not the case that the asset management arm of a Financial Institution can control the behavior of the entire institution. Further, automatic disqualification for foreign crimes gives outsized weight to foreign judicial

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[25] SSGA has phrased its request regarding activity covered by a streamlined exemption using the same language included in subsection (f)(10) of the Proposed Regulation in order to illustrate that the exemption's coverage should mirror the activities described in any final regulation.

systems that often do not reflect the same fundamental principles of due process or adherence to the rule of law as the U.S. system.

V. Comments on the Proposed Amendments to PTE 77-4

The Department has proposed to amend PTE 77-4 to make it no longer available to investment advice fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and the regulations promulgated thereunder. SSGA's concerns with this proposal are described below.

a. The Proposed Amendment to PTE 77-4 Would Require Costly Evaluation of Current Uses and Alternatives

The proposal to amend PTE 77-4 does not account for or justify the disruption caused by the change. Specifically, for 45 years Financial Institutions have relied on PTE 77-4 for both investment advice and discretionary programs. Legal and compliance strategies are created as a firm brings each new product type or service type to market. The proposed amendment would require firms to fully inventory every product and service to identify every use of PTE 77-4 and determine whether the exemption can continue to be used and, if not, whether there are any viable alternatives. It does not appear that the Department's regulatory impact analysis accounted for the costs entailed in undertaking this analysis anew and making the appropriate follow-on determinations. SSGA requests that the Department reconsider whether this amendment is necessary in light of these costs.

b. PTE 2020-02 may not be a Viable Alternative to PTE 77-4

Unlike PTE 2020-02, PTE 77-4 is designed for a specific situation – where a fiduciary with respect to a plan, or its affiliate, acts as an investment adviser or principal underwriter for a mutual fund. As such, the exemption's conflict mitigation measures, which prohibit the receipt of sales commissions, redemption fees and fees at both the plan and the mutual fund level, are specifically designed for this use case. PTE 2020-02 is intended as a broadly applicable exemption, and therefore is not designed specifically for a plan's investment in a mutual fund advised by a fiduciary or its affiliate. As a result, the outsized burden of complying with the disclosure, documentation, reporting, and recordkeeping requirements of PTE 2020-02 may be too great for it to be viewed as a viable alternative to PTE 77-4 in many cases. The unfortunate potential result of this is that financial firms are likely to no longer offer certain services to plans if doing so would require them to rely on PTE 2020-02. For example, consider a case where a 401(k) plan fiduciary responsible for selecting and monitoring the plan's investment options wishes to obtain fiduciary investment advice related to a glidepath to construct a target date fund for plan participants. As the Department has advised plan fiduciaries, this type of custom target date fund may offer various advantages to plans, including the ability to incorporate the options from the plan's core

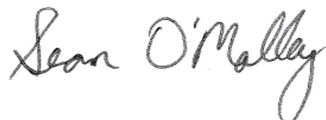
line-up, lower costs and more diversified investments.[26] However, in a case where a financial firm has no role in selecting a plan's core line-up, it may decline to offer glidepath services to any plan that happens to include (or even could include in the future) a mutual fund advised by the firm's affiliate if the only exemption available is PTE 2020-02.

VI. Conclusion

SSGA appreciates this opportunity to provide comments to the Department on these proposals. We urge the Department to carefully consider our significant concerns with the proposals discussed herein.

Please feel free to contact me at sean_o'malley@ssga.com should you wish to discuss our submission in further detail.

Sincerely,



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State Street Global Advisors

[26] *See Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* (February 2013) (https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/target-date-retirement-funds.pdf)