

THE WAGNER LAW GROUP

99 SUMMER STREET, 13TH FLOOR
BOSTON, MA 02110
Tel (617) 357-5200
Fax (617) 357-5250

www.wagnerlawgroup.com

7108 FAIRWAY DRIVE, SUITE 125
PALM BEACH GARDENS, FL 33418
Tel (561) 293-3590
Fax (561) 293-3591

315 MONTGOMERY STREET, SUITE 904
SAN FRANCISCO, CA 94104
Tel (415) 625-0002
Fax (415) 358-8300

101 E. KENNEDY BLVD., SUITE 2140
TAMPA, FL 33602
Tel (813) 603-2959

100 SOUTH 4TH STREET, SUITE 550
ST. LOUIS, MO 63102
Tel (314) 236-0065

July 21, 2016

By E-mail: manish@incomediscovery.com &
U.S. Mail

Manish Malhotra
President & CEO
Income Discovery
233 Mount Airy Road, Suite 100
Basking Ridge, NJ 07920

Re: ERISA Opinion for Income Discovery

Dear Mr. Malhotra:

Income Discovery (the “Company”) is an internet-based retirement planning software tool developed by Fiducioso Advisors (“Software”). The Software may be utilized by broker-dealers and their registered representatives, registered investment advisers (“RIAs”) and their individual adviser representatives (“IARs”), or insurance companies and their agents (collectively, “Firms” at the institutional level or “Reps” at the individual representative level). The Software is intended for Firms offering investment-related services through their Reps to retail investors. These retail investors (collectively, “Retirement Clients”) typically include individuals with one or more individual retirement accounts (“IRAs”) and other similar tax-advantaged accounts subject to Titles I or II of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

On April 8, 2016, the U.S. Department of Labor (the “DOL”) issued new regulatory guidance (the “New DOL Rule”) under ERISA with the goal of broadening the scope of advisors who will be deemed fiduciaries when advising Retirement Clients with respect to their retirement accounts. The New DOL Rule has a delayed applicability date and will go into effect on April 10, 2017. At this time, virtually all Firms offering investment-related services to Retirement Clients through their Reps will be deemed to be fiduciary advisors under the New DOL Rule. You have asked for our views on how Firms and their Reps may utilize the Software to help protect themselves against fiduciary risk and any related fiduciary liability arising as a result of the application of the New DOL Rule.

I. EXECUTIVE SUMMARY OF ANALYSIS AND CONCLUSIONS

- ***Impact of New DOL Rule on Brokers and RIAs.*** Virtually all Firms and their Reps who provide investment-related services to Retirement Clients will be deemed fiduciary advisors as a result of the application of the New DOL Rule, which goes into effect on April 10, 2017. As fiduciary advisors, Firms and their Reps will be prohibited from earning commissions or other forms of variable compensation, unless they qualify for a DOL exemption, such as the Best Interest Contract Exemption (“BICE”).
- ***BICE’s Best Interest Standard of Care.*** As required under the BICE, any fiduciary advice provided by a Firm’s Rep to a Retirement Client must meet the “Best Interest Standard of Care.” Thus, such advice must be provided: (i) with the care, skill, prudence and diligence that a prudent person who is familiar with such matters would use, (ii) based on the investment objectives, risk tolerance, financial circumstances and needs of the client, and (iii) without regard to the interests of the Firm or the Rep. Additionally, the Rep must give appropriate consideration to the client’s needs and objectives, and to whether or not the recommended investment is reasonably designed to meet these needs and objectives.
- ***Potential Inadequacy of Suitability Questionnaires.*** Many broker-dealer Firms routinely ask their prospective clients to complete an investor suitability questionnaire with the goal of satisfying their suitability obligations under the Financial Industry Regulatory Authority’s (“FINRA”) conduct rules. However, the BICE’s Best Interest Standard of Care requires a Rep to provide advice based on the investment objectives, risk tolerance, financial circumstances and needs of the client, and to obtain such information in the same manner that a prudent person would. The suitability questionnaires utilized by many broker-dealer Firms are typically limited in scope, and they may not meet the information-gathering requirements for a fiduciary advisor who is responsible for acting in accordance with the Best Interest Standard of Care. If a broker-dealer Firm’s Reps rely on a flawed suitability questionnaire, they may fail to give appropriate consideration to the client’s needs and objectives and to whether the recommended investment is reasonably designed to meet these needs and objectives which would be a breach of their fiduciary responsibilities.
- ***Using Income Discovery’s Software to Meet Best Interest Standard of Care.*** The New DOL Rule does not expressly approve of any particular type of questionnaire or interactive tool for client information-gathering purposes. **However, in our view, the consideration and implementation of the retirement income strategy(ies) generated by Income Discovery’s retirement planning Software, coupled with a Rep’s rigorous data collection process and the Software’s ability to compare investment or annuity products, would assist a fiduciary advisor in satisfying its duty to act with the care, skill, prudence and diligence of a prudent person under the BICE’s Best Interest Standard of Care.** By utilizing the Software to analyze the Retirement Client’s essential personal data gathered by a Rep, the Software would enable the Rep to give appropriate consideration to the client’s retirement needs and objectives. The objectively determined

retirement income strategy generated by the Software would also enable the Rep to give appropriate consideration to whether any resulting investment recommendations are reasonably designed to meet the client's retirement needs and objectives.

- ***Requiring Use of Income Discovery's Software as BICE Compliance Policy.*** Under the BICE, Firms must adopt and comply with written compliance policies and procedures that are reasonably and prudently designed to prevent conflicts from causing any violations of the relevant fiduciary standards under the BICE. Firms have a great deal of flexibility in establishing and designing their compliance policies and procedures for BICE purposes. **In our view, when adopted as part of a complete set of compliance policies and procedures, the adoption of a written policy that requires Reps to utilize high quality retirement planning software, such as the Software offered by Income Discovery, when advising Retirement Clients, would be consistent with the BICE's requirement that Firms adopt compliance policies and procedures reasonably and prudently designed to prevent conflicts.**
- ***Using Income Discovery's Software to Meet RIA's Prudent Man Standard of Care.*** Many RIAs do not earn any variable compensation in connection with the investment advisory services they furnish to Retirement Clients. Accordingly, they will not need to comply with the BICE or the BICE's Best Interest Standard of Care (although those that engage in rollover business would be subject to elements of BICE). However, any fiduciary advice provided by RIAs to any Retirement Clients subject to Title I of ERISA would generally need to comply with the "Prudent Man Standard of Care" under ERISA. The Prudent Man Standard of Care and the Best Interest Standard of Care are substantially similar standards of care for fiduciary advisors. **Based on the foregoing analysis, in our view, the use of Income Discovery's retirement planning Software, coupled with a Rep's rigorous data collection process and the Software's ability to compare investment or annuity products, would assist a RIA in satisfying its duty to act with the care, skill, prudence and diligence of a prudent person under ERISA's Prudent Man Standard of Care.**

II. FACTUAL OVERVIEW OF INCOME DISCOVERY SOFTWARE AND METHODOLOGY

The Software, unlike financial planning, is only focused on retirement. The Software is designed to give a Firm's Reps the ability to develop a customized, high quality retirement income strategy for each of their individual Retirement Clients based on the key information elicited from the applicable client. Each Firm and their Reps will have their own process for client data collection. We assume the Firm's Reps will engage in a comprehensive "input" process that invites the client (or the Rep acting on behalf of the client) to provide data points relating to the client's personal situation, retirement needs and priorities. The Rep is assumed to request detailed client information in a wide array of areas, including but not limited to the following:

- Personal information such as marital status, dependents, employment income, other income, state of residence, life expectancy, personal health and smoking preference.
- Priorities and goals such as general concerns and expectations about retirement, desired retirement age, basic living expenses, health care costs, family care as well as other goals relating to home ownership, cars, education, travel and charitable giving.
- Financial resources such as investments held in taxable and tax-advantaged accounts, pension benefits, deferred compensation, Social Security, real property, illiquid assets and other investments.
- Liabilities such as home mortgage and equity loans, business debt, school loans, credit card debt, vehicle loans, alimony and other financial obligations.
- Risk tolerance and preferences relating to market risk, longevity risk, inflationary risk as well as life, disability, long-term care, property/casualty and other insurance needs.

This process is intended to enable Retirement Clients to identify their retirement goals and help their advisers develop a personalized retirement income strategy for accomplishing these goals. The Software may be utilized to create an individualized retirement income strategy that includes the following three elements. The first relates to *income withdrawal rules*, and provides a schedule of constant real income or real income adjusted over time based on predetermined phases.

The second element involves *portfolio configuration* into multiple buckets such as one total-return-based systemic withdrawal portfolio (SWP) or an SWP with a ladder of bonds held to maturity and/or immediate, fixed and variable life annuities. In the Software's "advanced" mode, a tax sensitive analysis is performed for determining the purchase accounts for the annuities and the bond ladder and the portfolio glide path. The glide path defines asset allocations for each account, which may remain constant or change, over the course of the strategy.

The third element is *withdrawal order rules* recommending the source for withdrawals of income from multiple accounts of different tax classifications.

The Software includes an analytical engine robust enough to give the Rep the ability to run alternative "what if" scenarios, giving the Retirement Client's advisor flexibility to explore combinations of annuities, investments, and Social Security claiming strategies for each client's unique situation. For example, with respect to annuities, the Software can illustrate how one or more annuities can help improve the outcome for clients in retirement. The Retirement Client can be shown alternative plans containing no annuities, followed by illustrations comparing different combinations of annuities (using either general annuity calculations or the Firm's specific annuity product) to demonstrate how adding annuities to the retirement income strategy changes various risk-reward metrics for retirement. The Software can also explore alternative

assumptions about future events, such as tax changes or increased longevity. These features may also be used for "stress testing" purposes, giving the client the ability to investigate how their financial situation might change across a range of real world uncertainties, such as down markets, premature death or the need for long-term care.

The investment methodology utilized by the Software for purposes of developing goal funding and asset allocation strategies is based on optimization inputs, which include the following: (i) the expected returns of asset classes, (ii) the standard deviation of asset class returns, and (iii) the correlation between asset class returns.¹ Using this underlying investment methodology, the Software performs Monte Carlo simulations to illustrate how variations in projected rates of return each year may affect a client's potential future outcomes. The Monte Carlo simulation calculates the results of a client's financial plan by running it many times, each time using a different sequence of returns. These multiple trials provide a range of possible projected outcomes, some of which may be successful (projecting the client's attainment of all financial goals) while others may be unsuccessful. The percentage of trials that are successful is the probability that a client's financial plan is projected as being successful. Of course, these projections are based on a stochastic or probabilistic analysis, which in turn relies on historical data and certain underlying assumptions, and they do not guarantee any future results.

A Rep may use the Software to generate a customized retirement income strategy(ies) that is tailored to an individual Retirement Client's particular circumstances, as described above. The Software also has the capacity to evaluate and compare specific investment or annuity products or generic investment products with payouts derived from averaging the payouts by multiple actual products. However, the Software's output does not include recommendations for any specific investment product or advisory service.

III. LEGAL ANALYSIS AND CONCLUSIONS

A. IMPACT OF NEW DOL RULE ON FIRMS AND REPS

Title I of ERISA requires fiduciaries of employer-sponsored retirement plans ("ERISA Plans") to act in accordance with a "Prudent Man Standard of Care."² Title I also includes a related set of "Prohibited Transaction Rules" that prohibit ERISA Plan fiduciaries from engaging in certain types of activities. Among other restrictions, the Prohibited Transaction Rules generally prohibit a fiduciary from engaging in any fiduciary self-dealing or other transactions that involve conflicts of interest. A fiduciary violation of Title of ERISA may result in personal liability for the breaching fiduciary, giving the client the right of rescission, restitution for any losses and disgorgement of profits.³ In addition, the DOL may impose punitive civil penalties as well as other equitable remedies.⁴

¹ With regard to expected asset class returns, Income Discovery's Software utilizes capital market assumptions, a standard industry approach.

² ERISA Section 404.

³ ERISA Section 409.

⁴ ERISA Section 502(l).

Title II of ERISA includes a set of punitive excise tax rules that mirror the Prohibited Transaction Rules under Title I. These excise tax provisions are reflected in Section 4975 of the Internal Revenue Code of 1986, as amended (the “Code”), which was added to the Code by Title II of ERISA. ERISA plan fiduciaries are subject to the restrictions under both Titles I and II of ERISA. Conversely, fiduciaries to Retirement Clients that are not subject to Title I of ERISA are subject to the requirements of Title II of ERISA only (*i.e.*, the excise tax rules under Code Section 4975). Retirement Clients that are not subject to Title I of ERISA generally include IRAs and sole proprietor plans such as solo 401(k) plans.

Many Firms offering investment-related services to Retirement Clients currently take the position that neither the Firm nor their Reps are acting in a fiduciary capacity. In other words, they typically assert that the investment recommendations made by their Reps to Retirement Account clients are non-fiduciary in nature, and do not include any fiduciary “investment advice” within the meaning of Title I or Title II of ERISA. However, virtually all Firms and their Reps providing investment-related services to Retirement Clients will be deemed fiduciary advisors as a result of the application of the New DOL Rule, which goes into effect on April 10, 2017. The New DOL Rule is specifically designed to broaden the scope of advisors who will be deemed to be fiduciaries with respect to any Retirement Clients, and many Firms and their Reps will be deemed to be offering fiduciary advice for the first time on April 10, 2017 as a result of the New DOL Rule.

B. “BEST INTEREST STANDARD OF CARE” UNDER BICE

Under the Prohibited Transaction Rules,⁵ fiduciary advisors generally cannot earn any “variable compensation” that varies with the particular investment(s) that are selected in connection with the investment advice furnished to a Retirement Client.⁶ An impermissible conflict of interest arises to the extent that a fiduciary advisor has a financial incentive to recommend a particular investment that results in a higher level of compensation for such advisor. Accordingly, when Firms and their Reps are deemed to be fiduciary advisors as a result of the application of the New DOL Rule, they will be prohibited from earning commissions, revenue sharing, 12b-1 fees, third party payments or other forms of variable compensation in connection with the investment advice they provide to their Retirement Clients, unless they qualify for an exemption from the Prohibited Transaction Rules. As part of the New DOL Rule, the DOL has also issued a new prohibited transaction class exemption that is entitled the “Best Interest Contract Exemption” (the “BICE”). In sum, the BICE would give Firms and their Reps the ability to earn variable compensation, such as the commission-based compensation described above, as long as the numerous conditions imposed under the BICE are satisfied.

⁵ For purposes of this letter, all references to the Prohibited Transaction Rules under ERISA Title I should be interpreted as also referencing the mirror excise tax provisions under ERISA Title II, except as the context otherwise clearly requires.

⁶ Variable compensation is generally prohibited under the Prohibited Transaction Rules and the mirror excise tax rules. See ERISA Section 406(b) and Code Section 4975, respectively. See, also, the DOL preamble to the BICE (April 8, 2016).

Among the BICE's conditions, any fiduciary advice provided by a Firm's Rep to a Retirement Client must meet the new "Best Interest Standard of Care".⁷ Accordingly, the advice must be provided (i) with the care, skill, prudence and diligence that a prudent person who is familiar with such matters would use, (ii) based on the investment objectives, risk tolerance, financial circumstances and needs of the client, and (iii) without regard to the interests of the Firm or the Rep. The exemptive relief under the BICE is potentially available with respect to all types of Retirement Clients advised by the fiduciary advisor. Thus, the BICE's Best Interest Standard of Care may apply to an individual client with an ERISA plan account (such as a 401(k) plan participant), an IRA account owner or a sole proprietor with a non-ERISA plan account (such as a solo 401(k) account). It should also be noted that in the case of an individual client with an ERISA plan account, the fiduciary advice provided by the Firm through its Rep would also be subject to the Prudent Man Standard of Care under Title I of ERISA, which is generally imposed under the ERISA statute in addition to the Best Interest Standard of Care imposed under the BICE.

As noted by the DOL, the Best Interest Standard of Care is intended to be given the same meaning as the Prudent Man Standard of Care. Both fiduciary standards reflect a duty of prudence, which is generally viewed as incorporating objective standards of care, as well as a duty of undivided loyalty to the client. In support of the foregoing, the DOL noted the following in its preamble to the BICE:

The Best Interest standard, as set forth in the exemption, is intended to effectively incorporate **the objective standards of care and undivided loyalty that have been applied under ERISA for more than forty years**. Under these objective standards, the Adviser must adhere to a professional standard of care in making investment recommendations that are in the Retirement Investor's Best Interest. **The Adviser may not base his or her recommendations on the Adviser's own financial interest in the transaction**. Nor may the Adviser recommend the investment, unless it meets the objective prudent person standard of care. Additionally, the duties of loyalty and prudence embodied in ERISA are objective obligations that do not require proof of fraud or misrepresentation, and full disclosure is not a defense to making an imprudent recommendation or favoring one's own interests at the Retirement Investor's expense. **(Emphasis added.)**

Longstanding DOL regulations provide that a fiduciary is deemed to comply with the duty of prudence if the fiduciary gives "appropriate consideration" to the facts and circumstances that the fiduciary knows or should know are relevant with respect to an investment action.⁸ Therefore, it is generally understood that a fiduciary advisor must give appropriate consideration to the needs and objectives of the Retirement Client prior to making any investment recommendations. The DOL regulations further provide that giving "appropriate consideration"

⁷ Section VIII(d) of the BICE.

⁸ Section 2550.404a-1(b) of DOL Regulations.

includes making a determination that the investment action is reasonably designed to further the purposes of the Retirement Client. Accordingly, in addition to giving appropriate consideration to the client's needs and objectives, the fiduciary advisor must also give appropriate consideration to whether the recommended investment is reasonably designed to meet these needs and objectives.

In addition to the Best Interest Standard of Care, the BICE also imposes a number of other operational conditions on Firms. For instance, the Firm must adopt written compliance policies and procedures that are reasonably and prudently designed to prevent conflicts from causing any violations of the relevant fiduciary standards under the BICE.⁹ Of course, in addition to adopting these compliance policies and procedures, a Firm must also comply with their provisions in operation in order to qualify for the exemptive relief available under the BICE.

C. FINRA "SUITABILITY" OBLIGATIONS FOR BROKERS

FINRA currently imposes "suitability" obligations on broker-dealer Firms and their Reps when providing investment-related services to their clients. FINRA Rule 2111 generally requires that they "have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile." The rule further explains that a "customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation." There are three main suitability obligations under FINRA Rule 2111 as follows:

- Reasonable-basis suitability requires a Rep to have a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least some investors.
- Customer-specific suitability requires a Rep to have a reasonable basis to believe that the recommendation is suitable for a particular customer based on that customer's investment profile. As noted above, the rule requires a broker to attempt to obtain and analyze a broad array of customer-specific factors.
- Quantitative suitability requires a Rep who has actual or effective control over a customer account to have a reasonable basis for believing that a series of recommended transactions, even if suitable when viewed in isolation, are not excessive and unsuitable for the customer when taken together in light of the customer's investment profile.¹⁰

⁹ Sections II(d)(1) and II(g)(3) of the BICE.

¹⁰ FINRA Rule 2111 and Regulatory Notices 11-02, 11-25 and 12-25.

In addition to these suitability obligations, there are related “know your customer” obligations under FINRA Rule 2090, which requires broker-dealer Firms to use reasonable diligence in regard to the opening and maintenance of client accounts.¹¹ They must know the “essential facts” concerning every customer as required to (i) effectively service the customer’s account, (ii) act in accordance with any special handling instructions for the account, (iii) understand the authority of each person acting on behalf of the customer, and (iv) comply with applicable laws and rules. The know-your-customer obligations arise at the beginning of the customer-broker relationship and, unlike the suitability obligations, do not depend on whether the broker has made a recommendation. Furthermore, Rule 17a-3 under the Securities Exchange Act of 1934 generally requires broker-dealer Firms to attempt to update certain client account information at least every 36 months regarding accounts for which they are required to make suitability determinations.

D. POTENTIAL INADEQUACY OF SUITABILITY QUESTIONNAIRES

With regard to broker-dealer Firms and their Reps that are subject to the requirements of the BICE, the Best Interest Standard of Care under the BICE is significantly more rigorous than the suitability obligations under the FINRA conduct rules. In its preamble to the BICE, the DOL specifically observes that the text of FINRA’s suitability rule does not do any of the following:

Reference a best interest standard, clearly require brokers to put their client's interests ahead of their own, **expressly prohibit the selection of the least suitable (but more remunerative) of available investments**, or require them to take the kind of measures to avoid or mitigate conflicts of interests (**Emphasis added.**)

Many broker-dealer Firms routinely ask their prospective clients to complete an investor suitability questionnaire with the goal of satisfying their suitability obligations under the FINRA conduct rules. As discussed above, FINRA Rule 2111 requires the broker-dealer Firm and its Rep to request relevant investment profile information from the Retirement Client. For example, a typical questionnaire may request one or more of the following informational items:

- Date of birth;
- Employer name and occupation;
- Education and degree(s);
- Annual income and sources of income;
- Net worth and liquid assets;
- Liquidity needs;
- Level of experience with various investment types (*e.g.*, mutual funds, stocks, bonds); and
- Investment objective and time horizon.

¹¹ All remaining references to the suitability obligations in this letter should be interpreted as also referencing the related know-your-customer obligations, except as the context otherwise clearly requires.

However, these questionnaires are typically designed to meet FINRA's suitability obligations, rather than the duty of prudence and duty of loyalty under the Best Interest Standard of Care under the New DOL Rule and the BICE. As discussed above, when a fiduciary advisor is making investment recommendations to a client, the investment advice must be provided with the care, skill, prudence and diligence that a prudent person who is familiar with such matters would use, based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Client, without regard to the interests of the broker-dealer Firm or the Rep. Additionally, the advisor is generally obligated to obtain the necessary information in the same manner that a prudent person would. As required under longstanding DOL regulations, in addition to giving appropriate consideration to the Retirement Client's needs and objectives, the fiduciary advisor must also give appropriate consideration to whether the recommended investment is reasonably designed to meet these needs and objectives.

E. USING INCOME DISCOVERY SOFTWARE TO MEET THE BEST INTEREST STANDARD OF CARE

Virtually all Firms and their Reps will be deemed to be fiduciary advisors when advising Retirement Clients as a result of the application of the New DOL Rule. Once the New DOL Rule goes into effect, hypothetically speaking, if a broker-dealer Rep were to continue to use a suitability questionnaire that was originally designed to meet the minimum information-gathering requirements under FINRA's suitability rules, the resulting advice provided by the Rep in reliance on such questionnaire could fall significantly short of the Best Interest Standard of Care under the New DOL Rule and the BICE.

The duty of prudence requires a Rep to provide advice based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Client, which in turn requires the Rep to obtain this information before providing such investment advice. Additionally, the duty of prudence requires the Rep to obtain such information in the same manner that a prudent person would. Therefore, a suitability questionnaire which has not been designed with this standard in mind, may not be comprehensive and detailed enough to elicit all necessary information. In fact, the suitability questionnaires utilized by many Firms are typically limited in scope, and they may not meet the information-gathering requirements for a fiduciary advisor who is responsible for acting with the care, skill, prudence and diligence of a prudent expert in accordance with the Best Interest Standard of Care (*i.e.*, duty of prudence). If a Firm's Reps rely on a flawed suitability questionnaire, they may fail to give appropriate consideration to the Retirement Client's needs and objectives and to whether the recommended investment is reasonably designed to meet these needs and objectives in breach of their fiduciary responsibilities.

This opinion assumes that, in comparison to a suitability questionnaire that was originally designed to meet the minimum information-gathering requirements under FINRA's suitability rules, the Rep's data collection process covers a comprehensive range of topics that is designed to build a complete financial picture of the Retirement Client's needs and objectives. The New DOL Rule does not expressly approve of any particular type of questionnaire or interactive tool

for client information-gathering purposes. **However, in our view, the consideration and implementation of the retirement income strategy(ies) generated by Income Discovery’s retirement planning Software, coupled with a Rep’s comprehensive data collection process and the Software’s ability to compare investment or annuity products, would assist a fiduciary advisor in satisfying its duty to act with the care, skill, prudence and diligence of a prudent expert under the BICE’s Best Interest Standard of Care.** By utilizing the Income Discovery Software and a Rep’s comprehensive input process, the Software would help Reps elicit key information from the Retirement Client in accordance with their fiduciary duty of prudence, enabling the Rep to give appropriate consideration to the Retirement Client’s needs and objectives.

The objectively determined retirement income strategy created by the Software would also enable the Rep to give appropriate consideration to whether any resulting investment recommendations are reasonably designed to meet the Retirement Client’s needs and objectives. As discussed above, the Software’s output includes goal funding strategies as well as asset allocation strategies and other related guidance that is shared with the Retirement Client. This output is based on an objective financial analysis that considers all relevant information provided by the Retirement Client, and it can guide the Rep’s recommendations and confirm for the Retirement Client that these recommendations are in the “Best Interest” of the Retirement Client.

F. REQUIRING USE OF INCOME DISCOVERY SOFTWARE AS BICE COMPLIANCE POLICY

As discussed above, under the BICE, Firms must adopt and comply with written compliance policies and procedures that are reasonably and prudently designed to prevent conflicts from causing any violations of the relevant fiduciary standards under the BICE. Although the DOL’s BICE includes high level guidance for Firms on how they may establish and design their required policies and procedures, the BICE does not expressly require any particular measure to be included in such policies and procedures. Instead, Firms have a great deal of flexibility in establishing and designing their compliance policies and procedures for BICE purposes.

For example, a Firm would be permitted to require their Reps to utilize high quality software, such as Income Discovery’s Software, to provide retirement planning services when advising Retirement Clients. As noted above, the “output” that is generated by the Software includes goal funding strategies as well as asset allocation strategies and other related guidance that is shared with the client. Thus, this Software’s output can help guide the Rep when making his or her investment recommendations. This Software output can also confirm for the client that the Rep’s recommendations are consistent with the “Best Interest” standard. **In our view, when adopted as part of a complete set of compliance policies and procedures, the adoption of a written policy that requires Reps to utilize high quality financial planning software, such as Income Discovery Software, when advising Retirement Clients, would be consistent with the BICE’s requirement for Firms to adopt compliance measures that are reasonably and prudently designed to prevent conflicts.**

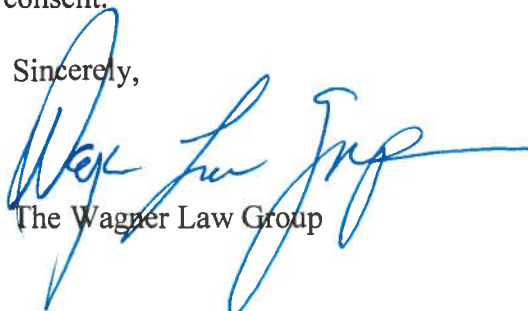
G. USING INCOME DISCOVERY SOFTWARE TO MEET RIA'S PRUDENT MAN STANDARD OF CARE

Many registered investment advisers ("RIAs") do not earn any variable compensation in connection with the investment advisory services they furnish to Retirement Clients. Accordingly, under the Prohibited Transaction Rules, many RIAs will not need to comply with the BICE or the BICE's Best Interest Standard of Care (although those that engage in rollover business would be subject to elements of BICE, as discussed above). However, even though the Best Interest Standard of Care would not apply, any fiduciary advice provided by RIAs to any Retirement Clients that are subject to Title I of ERISA would generally need to comply with ERISA's traditional Prudent Man Standard of Care. And as discussed above, the Prudent Man Standard of Care and the Best Interest Standard of Care are substantially similar standards of care for fiduciary advisors. Thus, our legal analysis in section III.E above concerning the use of Income Discovery Software and the Best Interest Standard of Care would be equally relevant for purposes of addressing the Prudent Man Standard of Care.

Based on the foregoing analysis, in our view, the use of Income Discovery's retirement planning Software, coupled with a Rep's comprehensive data collection process and the Software's ability to compare investment or annuity products, would assist a RIA in satisfying its duty to act with the care, skill, prudence and diligence of a prudent person under ERISA's Prudent Man Standard of Care. For this reason, even if a RIA is not subject to the BICE or the BICE's Best Interest Standard of Care, the RIA may wish to consider utilizing the Income Discovery retirement planning Software when advising any Retirement Clients that are subject to Title I of ERISA.

The opinions and views included in this letter represent our view of the outcome in a court of law if a challenge were to be made to the conclusions set out above and do not represent a guarantee as to the outcome. The legal analysis included herein is based on the facts presented and the existing laws and regulations in effect as of the date of this letter. The addition of facts other than those described above and any material changes in the law or regulatory guidance may affect the legal analysis and conclusions set forth herein. Our opinions and views expressed in this letter are furnished to you solely for your benefit. Although we understand that you may wish to provide copies of this letter to third parties for their information only, to which we provide our consent, the opinions and views expressed in this letter may not be relied upon by any person other than you without our prior consent.

Sincerely,



The Wagner Law Group