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August 16, 2017

The Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11933
Suite 400
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Submitted Electronically—EBSA.FiduciaryRuleExamination@dol.gov

Re: RIN 1210-AB82–Response to the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

To Whom It May Concern:

The U.S. Chamber of Commerce ("the Chamber") is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. As nearly all of our members are sponsors of employee benefit plans, our members are directly affected by the Department of Labor's ("Department") rule redefining fiduciary investment advice and its associated new and amended prohibited transaction class exemptions (collectively the "Fiduciary Rule" or "Rule").[1] The Chamber also represents a number of financial services providers who assist retail investors with retirement and other types of financial planning. We appreciate the opportunity to respond to this Request for Information ("RFI") to provide new information regarding the effects of the Rule, and to highlight essential changes in the Rule necessary to protect the best interest of retirement investors.[2]

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[1] 81 Fed. Reg. 20,945 – 21,221 (Apr. 8, 2016).

[2] 82 Fed. Reg. 31,278 (Jul. 6, 2017).

We are encouraged by indications that the Department will be proposing an 18 month extension of the Transition Period.[3] As we explained in more detail in our previous comment letter responding to Question 1 of the RFI, such an extension is essential to allow the Department time to complete its review of the Rule; to coordinate with the Securities and Exchange Commission ("SEC"), the Financial Regulatory Authority ("FINRA"), state insurance commissioners, and other state and Federal regulators; and to avoid the serious costs and confusion that would otherwise harm retirement savers if the deferred provisions of the remaining exemptions became applicable.

Executive Summary

The Department's review of the Fiduciary Rule must be based on good data and solid analysis. When the Department promulgated the final Rule in April 2016, it had to guess about the Rule's effects. Today, instead of guesses, we have actual facts—significant portions of the Rule have been implemented, and market participants have had to respond to the new regulatory environment. Based on those facts, and on the unintended consequences of the Rule, including reduced access to investment advice and the full range of investment products for too many retirement savers, the Chamber recommends important modifications of the Rule.

To inform the Department's review of the Rule and our recommended changes with actual information rather than academic speculation, the Chamber has begun an ongoing effort to monitor the impact of the rule and the implementation of compliance systems by companies. These efforts will focus primarily on the effects these changes will have on retirement savers, especially those with small account balances and small business retirement plans. Some of our current findings are shared below, and we will continue to provide responsive data and evidence to any future requests made by the Department.

These findings already demonstrate that the Department's previous economic analyses were flawed and inaccurate, overstating benefits and under-estimating costs. Accordingly, we recommend several changes to the Rule (relating to the exemptions and to the regulatory definition of fiduciary advice) and reiterate our request that the Transition Period be delayed for a minimum of 18 months, and as much longer as needed to fix problems in the Rule and to provide for an orderly transition.

Specifically, we would recommend changes to incorporate the following:

[3] Wall Street Journal, "Labor Department Seeks 18-Month Delay in Fiduciary Rule" August 9, 2017.

- Sales activity with clear disclosure should not be fiduciary advice;
- The Best Interest Contract Exemption ("BIC Exemption") should be replaced with a streamlined exemption modeled on the Transition version of the BIC Exemption;
- The Transition version of PTE 84-24 (the version adopted in 2006 with the addition of the Impartial Conduct Standards) should be the final version;
- "Roll-in" (plan-to-plan transfer) recommendations, and all contribution recommendations (whether and how much to contribute to a qualified plan or IRA) should not be fiduciary advice; and
- Recommendations to reinvest Required Minimum Distribution proceeds should not be fiduciary advice.

Our initial findings make clear that financial institutions adopted substantial changes in policies and procedures, as well as to products available to retirement investors in the first few months since the Fiduciary Rule became applicable on June 9, 2017. This data shows the substantial compliance efforts already underway even at the beginning stage of the new obligations defined by the regulation. This process is on-going, with additional changes forthcoming as financial institutions and advisors gain more experience and familiarity with the Rule.

Despite high levels of compliance activity during the Transition Period, financial institutions are still concerned about future difficulties in complying with an enormously complex rule. These concerns are largely caused by the currently-scheduled rapid end of the Transition Period on January 1, 2018, when the unworkable BIC Exemption and related PTE's are set to take effect. The proposed 18-month extension of the Transition Period will help grant the Department time to fix these unworkable requirements, as the additional burdens imposed by the deferred provisions of the exemptions are extensive, and attempting to comply with them by January 1 would be very difficult. The stability provided by the proposed extension would make it easier for advisors to find optimal compliance solutions during the Transition Period that better balance the needs of retirement savers with the compliance obligations of their advisors. For example, our outreach to Chamber members shows that a number of advisors have reduced the type and number of investment products available to retirement investors receiving fiduciary advice—this is due, in part, to the need to comply with one set of rules during the seven short months of the current Transition Period followed by the need to comply with a very different and more restrictive and burdensome set of rules after January 1st.

Perhaps most importantly, the proposed extension period would grant the Department sufficient time to coordinate with the SEC, FINRA, state insurance commissioners, and other state and federal regulators in order to craft a long-term solution that is in the best interest of American investors. These agencies have critical expertise and experience that the Department sorely lacks, and we believe the SEC in particular should play a leading role in developing appropriate standards of conduct for investment professionals. To that end, the Chamber was encouraged when SEC Chairman Jay Clayton solicited public comments earlier this year on appropriate standards of conduct for investment advisers and broker-dealers.[4]

We encourage the Department to undertake implementation monitoring efforts of its own through surveys, field interviews and focus groups so that it may directly gather helpful data—an extended Transition Period would provide the necessary time for the Department to conduct such studies.

As we noted in our previous comment letter, the Transition Period can be extended without any harm to retirement investors because the substantial changes occurring now are in response to the Impartial Conduct Standards—there is no enforcement need for the deferred provisions of the exemptions. Changes that the Department has stated benefit retirement savers are already occurring. The January 1, 2018, scheduled implementation of the harmful deferred provisions should be delayed due to the Impartial Conduct Standards already being in place. Extending the current Transition Period allows advisors and financial institutions the flexibility to innovate new approaches under these new fiduciary standards, developing better product offerings, clear information disclosure and reasonable compensation models.

The Chamber will also file a comment letter with the SEC addressing appropriate standards of conduct for investment advisers. We reiterate our call on the Department and the SEC to coordinate on this topic to help promote the interests of investors and the capital markets that serve their needs. We look forward to working with both agencies on this important issue.

We urge the Department to listen to our recommendations to reform the Rule and improve the economic analysis. Our members, their employees, and their investors are the people this Rule was intended to help. The Department now has a chance to correct past errors by fully reviewing the Rule, fully understanding its negative impacts, and undertaking a measured, orderly and reasonable process to

[4] Chairman Jay Clayton, "Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers" June 1, 2017.

amend the Rule to address its significant defects. We applaud the Department for issuing this RFI as the first step in this new regulatory process.

1. Better Data, Better Analysis

As we consistently explained to the Department throughout the rulemaking process, the execution and implementation of the Fiduciary Rule has harmed retirement investors and small business plan sponsors. The Rule has increased costs for retirement investors, reduced access to advice and investment products (especially for persons with small accounts), and reduced choices for small businesses sponsoring plans for their workers.[5] While a portion of these negative outcomes have been delayed by the Transition Period, the most significantly harmful effects will be felt if the deferred provisions of the exemptions become applicable on January 1, 2018.

The Department has relied on the economic analysis prepared by the Obama Administration in connection with the April 2016 final rule in evaluating subsequent changes to the Rule, including delaying the applicability date of the Rule and establishing the Transition Period.[6] We have provided extensive comments explaining the significant flaws in that analysis that cause it to overstate benefits and underestimate costs. As an economic analysis, it is deficient and biased, but as a forecasting predictor of the actual effects of the Rule, it is even worse—it is not only wrong, but wildly off base.

To help the Department overcome this flawed economic analysis, which we believe that it cannot rely upon, we wish to present data to the Department as it considers further action as contemplated within the publication of the RFI. Since June 9th, the essential obligations of the Rule have been in effect. The Impartial Conduct Standards have been applicable, the only enforcement latitude provided has been based on diligent and good-faith efforts to comply, and the evidence shows that financial institutions are making substantial compliance progress. Financial institutions have significantly changed the way they provide advice and receive compensation in response to the Rule.

Rather than relying on academic estimates and prognostications in the Department's 2016 Regulatory Impact Analysis, we now have the ability to gather facts and empirical evidence following the June 9th implementation of the Rule.

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[5] See e.g. "The Data Is In: The Fiduciary Rule Will Harm Small Retirement Savers" U.S. Chamber of Commerce Spring 2017.

[6] *See,* 82 Fed. Reg. 16,902 (Apr. 7, 2017).

Through our monitoring of the Rule's implementation, we will know what is actually happening. The evidence supports what we have been saying all along: While some changes appear to promote improved advice quality, there are also important unintended adverse consequences, especially for small retirement savers and small retirement plans who are being left with inferior, impersonal advice, or even no advice at all to encourage their retirement saving efforts. The Rule must be substantially amended to stop hurting these small retirement savers and small retirement plans, and to avoid imposing unnecessarily costly and ineffective red-tape burdens on all retirement savers.

The scheduled implementation of the "full" BIC Exemption requirements in January 2018 is particularly of concern. In addition to truncating the current period of compliance innovation, we know by the Department's own calculations that the implementation of the "full" BIC Exemption will impose at least $550 million per year in additional compliance costs on broker-dealers who receive commissions for serving savers who make roll-overs or new contributions to IRA accounts. These costs will inevitably be passed to retirement savings investors in the form of higher fees for advice and transaction services, and the result will be lower investment returns and lower ultimate retirement savings accumulations. Based on the $71 billion total rollovers and new contributions to IRAs that the Economic Policy Institute estimated will be made through commission-compensated broker-dealers in 2018,[7] the $550 million annual paperwork burden calculated by the Department will be equivalent to a 78 basis point reduction in return on investment.

The scenario presented below clearly shows that even if compliance with the Impartial Conduct Standards is already producing the kinds of gains for investors envisioned by the Department, they could be largely offset by the application of the harmful and burdensome requirements of the deferred exemption. The Department never examined the marginal contribution the deferred provisions of the exemptions make to the mitigation of separately from the general contribution of the Impartial Conduct Standards already in effect. There is a significant risk that imposition of the full BIC Exemption and the revised version of PTE 84-24 in January 2018 will actually reduce the investment returns of retirement savers compared to what they are achieving under the current transitional rules.

[7] Economic Policy Institute, "Methodology for estimating losses to retirement investors of partial implementation of fiduciary rule," July 21, 2017, p. 1. The EPI paper, which is reflected in their comment to the RFI docket, asserts that delay of the scheduled January 2018 applicability of the full BIC requirement will "cost" retirement savers 50 basis points of investment earnings: EPI misapplies the Morningstar findings to apply only after full implementation of the BIC requirement rather than to the impact of changes during the transition period. EPI ignores the 78 basis point annual cost of the paperwork requirement calculated by the Department, which would more than offset their assumed 50 basis point mitigation effect.

- Even if the full mitigation effect WITH the deferred BIC Exemption requirements fell within the Department's rosy impact estimate (between 81 and 101 basis points) the net effect after deducting the 78 basis point deferred BIC Exemption would wipe out much of the gain from the rule that the Department hypothesized.

- Clearly, the Department needs to delay the scheduled January 2018 implementation of the "full" BIC Exemption and other deferred exemption provisions so that it can collect data to ascertain how much gain in investment quality has been achieved under the Transition Period of the rule; to determine realistically the costs that will result from application of the deferred provisions; and to examine alternative approaches—such as securities laws-based disclosure requirements—that may be more cost-effective.

2. **The Reality of the Rule**

The Chamber has consistently maintained that the effects of the Rule would not be the rosy scenarios predicted by the Department's economic analysis. We appreciate that Secretary Acosta noted the prior Administration's unwillingness to engage with our criticism of their academic models in a meaningful way in his recent testimony before a Congressional Committee, stating that "Those concerns certainly surfaced the first time around, and unfortunately, they were not heard."[8] Rather than debating academic models, though, we would prefer to focus on the facts.

Questions 2 and 3 of the RFI ask several important questions that get to the heart of the effect of the Rule on retirement investors. They ask what "the regulated community has done to comply with the Rule and PTEs to date…"; whether the Rule "appropriately balance[s] the interests of consumers in receiving broad-based investment advice while protecting them…"; and whether the Rule "effectively allow[s] Advisers to provide a wide range of products that can meet each investor's particular needs?"[9]

To answer these questions, the Chamber last month began an ongoing effort to monitor the implementation of the Rule and its impact upon investors. Our initial

[8] "Labor Secretary Acosta: Concerns with DOL Fiduciary Rule 'Not Heard' During Original Rulemaking," InvestmentNews, Greg Iacurci, June 7, 2017.

[9] 82 Fed. Reg. at 31,279.

outreach to 14 firms that collectively manage $10 trillion in assets to find out exactly what these service providers did to implement the Rule and what it has meant for retirement savers.

Not surprisingly, nearly all of the institutions reported excluding some investment products from retirement investors in response to the rule, largely due to concerns about the pending "level" fee requirements of the "full" BIC Exemption. All of these firms reported that overall, small retirement savers were going to be worse off under the Rule than they were before, and many believe that individual advisers are beginning to move away from small savers and small plans. Reasons provided were the risks, costs, and time related to advising small clients after the Rule, which makes it less practical to serve them.

Most of the institutions also reported using the "grandfathering" provisions included in the final rule, meaning that a substantial number of investors would be prevented from receiving new[10] investment advice going forward, unless they decide to change the type of account they have (e.g. change from a transaction-based account to a fee-based account). It is unfortunate that a rule intended to help retirement investors has forced so many to either receive no advice, or to–in most cases–pay more in order to receive advice.

Our findings are consistent with recent data that the Department has received during this latest comment period.[11] It is important to note that the Impartial Conduct Standards and other portions of the rule have only been in effect for about two months. Monitoring the Rule's impact is of extreme importance, and we will provide the Department with further data and details as appropriate.

3. **How the Rule Must Be Changed to Protect Retirement Investors**

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[10] What is meant by "new" advice is an example of the difficulty in comparing data here. One institution might have revised its service agreements to provide that no advice other than a sales recommendation would be provided after June 9th in a "grandfathered" account; other institutions might agree to provide ongoing investment recommendations for contributions received after June 9th if part of a pre-existing, periodic contribution arrangement; other institutions might consider all accounts "grandfathered" without any contractual change until a request for new advice arises, at which point they then discuss alternatives with the IRA client before providing new advice. What is consistent among these approaches is that advice will be limited in some fashion, affecting the IRA owner.

[11] See e.g. August 9, 2017 study from Deloitte & Touche study which found that 53% of study participants limited or eliminated access to advice for brokerage accounts, impacting 10.2 million accounts. 95% of study participants also indicated they had reduced access to or choices within products offered to retirement savers. https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf

As the facts above show, the Rule must be materially amended if it is to achieve its purpose of ensuring retirement investors have access to quality investment advice. The comments that follow are intended to help the Department understand what changes should be made, and why they are necessary to protect retirement investors. These changes include not only significant revisions to the prohibited transaction exemptions, but also modifications to the definition of fiduciary advice as well.

The Deferred Requirements of the Exemptions Provide No Additional Benefit, but Do Impose Significant New Costs for Retirement Savers

Questions 4-6 of the RFI address a variety of issues related to the "full" Best Interest Contract Exemption ("BIC Exemption"), the "revised" Prohibited Transaction Exemption 84-24 ("PTE 84-24"), and the "full" Principal Transaction Prohibited Transaction Exemption ("Principal Transaction Exemption"). These exemptions contain critical flaws that will deny access to advice from certain financial professionals and impose significant new costs.

The incremental benefits of the deferred requirements of these exemptions are very small. This is because, as our experience and data show, financial advisors are making every effort to comply with the Impartial Conduct Standards. The Impartial Conduct Standards have already been applicable since June 9th, requiring fiduciary advice in the best interest of plans, participants and IRA owners, as well as being designed to ensure reasonable fees. As the Department stated in the April 7 rule establishing the Transition Period, it is these already applicable standards that benefit retirement investors, writing "Because of Firms' anticipated efforts to satisfy the Impartial Conduct Standards…the Department believes that most…of the investor gains predicted in the 2016 RIA for the transition period will remain intact," and that "…affected investors will generally receive the full gains due to the fiduciary rulemaking."[12]

By contrast, the costs associated with the deferred portions of the exemptions are extremely high, and will likely more than offset any marginal gain in conflict mitigation benefit. For example, the "full" BIC Exemption:

- Imposes substantial costs on investors in the form of inefficient class action lawsuits in which county judges in multiple states will try to interpret new Federal fiduciary standards in the context of state contract law, resulting in conflicting decisions and confusion for investors;

[12] 82 Fed. Reg. at 16,907 and 16,909 respectively.

- Imposes poorly designed disclosure requirements that are not clear and concise; that are not modeled on existing SEC or FINRA disclosures; and that require significant IT investment, making it particularly difficult for advisors that are small businesses to compete with large financial institutions;
- Imposes level compensation limitations that are inherently biased against commission-based compensation, artificially attempting to change the compensation structures of investments that are regulated and approved by other regulatory entities;
- Imposes as an alternative to level compensation a neutral factor compensation structure that is ill-defined and requires inherently subjective determinations that will likely result in even more litigation; and
- Imposes unnecessary contract and warranty requirements that should be removed as they serve only to facilitate state class action litigation. The conditions of an exemption apply without need for a contract to enforce them—the IRS has enforcement authority in IRA prohibited transactions, and the extensive regulation of the conduct of advisors by the SEC, FINRA, state insurance commissioners and other regulatory entities will ensure continued compliance with the Impartial Conduct Standards.

Implementation of the BIC paperwork requirements will impose at least $550 million per year in additional compliance costs on broker-dealers who receive commissions for serving savers who make roll-overs or new contributions to IRA accounts. In reality, the paperwork costs applicable to the commission-compensated broker-dealer segment of the market may be substantially higher. Previous comments by the Chamber have detailed questionable assumptions by the Department used to calculate paperwork costs. The Department should revisit its estimate of the paperwork costs of the BIC Exemption along with other exemptions, conduct surveys, experiments, and empirical research to establish credible estimates of the time and labor costs associated with these requirements. In particular, the Department should consider the overhead opportunity cost that should be added to requirements that redirect scarce labor services from productive work to regulatory compliance work.

There is no such thing as a free lunch, and these costs will inevitably be passed to retirement savings investors in the form of higher fees for advice and transaction services, and the result will be lower investment returns and retirement savings

accumulations. As discussed above, these costs could actually make the net result of "full" implementation a lower benefit to retirement savers.

The BIC Exemption Should Be Replaced with a Streamlined Exemption Modeled on the Transition BIC Exemption

Questions 7-10 address potential new, product specific exemptions as well as a "streamlined" exemption. With respect to the BIC Exemption, the problems above are best addressed by replacing the "full" BIC Exemption with a streamlined exemption modeled on the Transition Period version of the BIC Exemption. This streamlined BIC Exemption would provide clear and concise disclosure of the advisor's financial interests (based on SEC and FINRA requirements), and would require adherence to the Impartial Conduct Standards. It would not require a contract, limit arbitration rights, promote class action litigation, or require specific warranties and representations. Instead, the Impartial Conduct Standards would protect the rights of retirement investors, ensuring they receive fiduciary advice and pay no more than reasonable fees.

Instead of level or neutral compensation, this streamlined exemption would require reasonable compensation. Reasonable compensation protects retirement investors while recognizing differences from one type of product to another—attempting to impose purely level or neutral compensation is arbitrary and extremely difficult, resulting in bias against commission-based products.

The Chamber does not believe the streamlined exemption based on Transition BIC should require compliance with a set of one-size-fits-all policies and procedures. This rigid structure is one of the failings of the "full" BIC Exemption. The best interest fiduciary standard provides the protection needed by participants, but also provides flexibility, as the appropriate fiduciary conduct is based on the facts and circumstances of the particular situation.

We believe, however, the streamlined exemption is also necessary. The streamlined exemption would be available to all investment product types, ensuring its applicability to new marketplace innovations going forward. Further, as discussed in Question 11, the streamlined exemption could be used to respond to new fiduciary standards developed by the SEC. Additionally, exemptions should allow for substitute compliance for advisors who are already in compliance with a regulatory regime administered by another federal regulator. For example, a broker registered with FINRA or an investment adviser registered with the SEC would be deemed to have met the conduct conditions of the exemption if they are currently registered and

deemed to be in compliance with relevant rules governing their conduct. This will ensure that there is no conflict between simultaneously applicable fiduciary standards.

The Transition Version of PTE 84-24 Should Be Adopted as the Final Version

In the revised version of PTE 84-24 scheduled to become applicable on January 1, 2018, the Department made a number of troubling and unnecessary changes that will make it harder for retirement savers to get advice regarding annuity products. These included limiting the scope of PTE 84-24 to apply only to "fixed-rate" annuities, rather than to all annuities, and changing terms and definitions that have long been part of the exemption. The exemption, and the predecessor exemption it expanded and replaced, has been in effect since 1977, and has been effectively utilized since then by sellers and purchasers of annuity products.[13]

The Department should make the Transition version of PTE 84-24 the permanent version. This treatment is consistent with the amendments made to PTE 77-4, and would avoid several serious problems while also protecting retirement savers through the addition of the Impartial Conduct Standards.

As the Department alludes to in Question 17, limiting the scope of "revised" PTE 84-24 to only fixed-rate annuities prevents independent insurance agents from providing advice to their clients. In practice, after January 1, 2018, independent agents would be unable to recommend non fixed-rate annuities under any terms, because only the BIC Exemption could be used to receive commissions related to such annuities. The definition of financial institution in the "full" BIC Exemption does not include insurance intermediaries that independent agents commonly work with, and insurance carriers are unlikely to accept fiduciary responsibility for the acts of independent agents they do not control. Transition PTE 84-24 remedies this problem by retaining traditional scope of the exemption, making it available for all annuities.

The "revised" PTE 84-24 also changes some terms and definitions in the current version of PTE 84-24. These confusing new definitions are unnecessary in light of the Impartial Conduct Standards, and provide no additional protections. We urge the Department to retain the original PTE 84-24 language (with the addition of the Impartial Conduct Standards) to ensure advice is available to retirement investors

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[13] PTE 84-24 amended and superseded PTE 77-9, expanding its scope—the Transition version of PTE 84-24 is the text as last amended in 2006 with the addition of the Impartial Conduct Standards.

from their insurance agents, as well as to prevent confusion in the implementation of the Rule.

The Department Must Provide a New "Grandfathering" Provision to Address the Transition Period

As we explain in our discussion of the effects of the Rule above, millions of accounts were grandfathered on June 9th. However, the limitations of the grandfather provision are not in the best interest of retirement savers, and a further round of grandfathering is necessary in relation to the end of the Transition Period.

The new grandfather provision should fully-exempt all transactions entered into after June 9 and prior to the end of the Transition Period, as well as all advice regarding any assets acquired prior to any delayed applicability date. There should be no limitations on new contributions to a grandfathered arrangement, or on exchanging mutual funds within such an arrangement.

These changes would ensure that existing arrangements that were in the best interest of retirement investors and charging only reasonable fees are not unnecessarily limited going forward.

Changes to the Definition of Advice are Necessary to Protect Retirement Investors

In addition to the necessary changes to the exemptions under the Rule, the definition of fiduciary advice in the regulation needs to be modified in several key respects. These modifications are necessary to serve the best interests of retirement investors:

- Sales Activity with Clear Disclosure is Not Fiduciary Advice

In all versions of the Fiduciary Rule, beginning with the first proposal in 2010, the Department has acknowledged the distinction between sales and advice.[14] This distinction has been a hallmark of financial regulation for the better part of a century. As SEC Commissioner Piwowar noted in his comment letter, Congress established this distinction, and, "[t]he substantive regulation of broker-dealers and the tailored

[14] *See,* 75 Fed. Reg. 65,263 (Oct. 22, 2010)

regulation of 'selling' and 'advice' activities are core principles of our securities regulatory regime that should not be overlooked."[15]

Retirement investors will benefit from greater access to retirement services and products. With clear disclosure, there is no reason to be concerned about confusion or misrepresentation. We urge the Department to return to the scope of its original 2010 position, and exclude from fiduciary advice clearly disclosed sales activity regulated by other Federal or state enforcement entities. This decision will significantly reduce the prohibited transaction issues created by the Rule by attempting to label as "fiduciary advice" information incident to a sale that was never intended by Congress to be fiduciary advice.

- "Roll-in" Recommendations and Contribution Recommendations (Whether and How Much to Contribute) Should be Excluded from Advice

While the Department has tried to allow recommendations to contribute to retirement plans to be viewed as education in recent guidance,[16] the reality is that this issue will remain a concern for advisors who provide comprehensive advice regarding qualified and non-qualified accounts. A recommendation to contribute to one type of account necessarily implicates the other, and can be said to be a recommendation as to whether and how much to contribute. These concerns are not clearly addressed by the examples in the guidance—the basic issue is defining the scope of the Rule.

The best way for the Department to ensure the scope of the Rule is clearly defined and appropriately limited, as well as to facilitate recommendations to increase contributions, is to exclude such recommendations from the definition of fiduciary advice.

Similarly, recommendations to "roll-in" a balance from a prior employer's retirement plan to the current employer's plan are defined as fiduciary advice. Advisors are unlikely to be able to perform the necessary fiduciary due diligence of gathering information about the prior plan to make a fiduciary recommendation, especially given that there is likely a prohibited transaction implicated in the "roll-in"

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[15] "Comment Letter in Response to the Department of Labor's 'Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions,'" Securities and Exchange Commissioner Michael S. Piwowar, July 25, 2017.

[16] *See,* Conflict of Interest FAQs (Transition Period), Q12., April 2017; and Conflict of Interest FAQs, (408b-2 Disclosure Transition Period, Recommendations to Increase Contributions and Plan Participation), Q2. and Q3., August 2017.

as well. As a result, those participants are more likely to take a taxable distribution from their old plan than to roll it into their new plan on their own.

Given the public policy goal of preventing plan "leakage" and the very low potential for abuse, this consolidation recommendation should be excluded from the definition of advice.

- Recommendations Related to RMDs

The Department has taken the position that recommending how to invest the proceeds of a Required Minimum Distribution ("RMD") is fiduciary advice, issuing guidance providing the example of using the distribution to purchase life insurance.[17] This outcome should be beyond the scope of the Rule.

In an RMD situation, the law compels the distribution, not the advisor. Thus, the advisor has not given advice to benefit itself. Whether the Rule applies to the recommendation on reinvesting the proceeds of the mandatory distribution should not turn on the technical question of whether the recommendation was given before or after the distribution was received. That technicality highlights that the application of the Rule is this example is not grounded in a viable principle about protecting retirement investors, but is an overreach in the scope of the Rule.

4. **Conclusion**

The Fiduciary Rule in practical execution has not achieved it goals. However noble the intent, the reality is that small plans and small investors are experiencing reduced access to advice and increased costs. The data being provided to the Department clearly shows that the Department must change its methodology in analyzing the effects of the Rule because the policy bias in the academic predictions has been refuted by the facts.

Even more important, the Department must materially change the exemptions and definitions in the Rule to prevent further harm. The first step is to extend the Transition Period by 18 months to provide time for change and stability for retirement investors. The next step is for the Department to collaborate with the SEC and FINRA to modify the Rule in the ways we suggest, ensuring a coordinated set of regulations protecting retirement investors.

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[17] *See,* Conflict of Interest FAQs (Part II -Rule), Q4., January 2017.

The Department has the opportunity to fix the Rule, and we look forward to working with you to do so. We appreciate the opportunity to provide these comments and would be happy to answer any questions you may have.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration, & Employee Benefits

David Hirschmann
President & CEO
Center for Capital Markets