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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5655
Washington, DC 20210
Attention: Fiduciary Rule Examination

**Re: Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Prohibited Transaction Exemption 84-24
RIN 1210-AB79**

To Whom it May Concern:

The Insured Retirement Institute (“IRI”)¹ appreciates the opportunity to provide these comments to the Department of Labor (the “Department”) regarding the proposal to delay the applicability date of the final regulation defining the term “fiduciary” (the “Regulation”) under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), the Best Interest Contract Exemption (the “BIC Exemption”), and the amendments to prohibited transaction exemption 84-24 (the “Amended PTE 84-24”) issued by the Department on April 8, 2016 (collectively, the “Fiduciary Rule”). Under the proposal, the applicability date of the Fiduciary Rule would be extended from April 10, 2017 to June 9, 2017 (the “Proposed Delay”).

¹ IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95 percent of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country.

Executive Summary

1. IRI believes significant questions of law and policy exist with respect to the Fiduciary Rule, and therefore strongly supports delaying the applicability date of the Fiduciary Rule to give the Department time to review the Fiduciary Rule in accordance with the presidential memorandum issued on February 3, 2017.
2. Delaying the applicability date until the Department completes its review of the Fiduciary Rule is necessary because changing the rules multiple times in a relatively short period of time would cause market disruption and considerable confusion for retirement savers and advisers.
3. If the applicability date is delayed, firms would not have to incur potentially needless and wasteful expenditures or take final action on changes to their systems and processes that would be difficult and costly to unwind if the Fiduciary Rule is revoked or significantly revised.
4. While the proposed 60-day delay is a positive first step, IRI believes a substantially longer delay is necessary to allow an appropriate review by the Department, and therefore urges the Department to extend the delay for at least an additional 180 days.
5. The Department should also (a) delay the date on which full compliance with the BIC Exemption would be required (currently, January 1, 2018), (b) clearly state that assistance given during the pendency of the delay will be grandfathered if and when the Fiduciary Rule (or any successor thereto) becomes applicable, and (c) withdraw the proposed Best Interest Contract Exemption for Insurance Intermediaries pending the outcome of its review of the Fiduciary Rule.

IRI's views regarding the Proposed Delay are explained in greater detail below.

I. Comments in Support of the Proposed Delay

For the reasons outlined below, IRI strongly supports the Proposed Delay.

A. Delaying the Applicability Date Will Provide Time for the Department to Review Issues of Law and Policy Pursuant to Presidential Memorandum.

President Donald J. Trump issued a presidential memorandum on February 3, 2017 directing the Department to examine the Fiduciary Rule to “determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice.” Among other things, the memorandum called for “an updated economic and legal analysis concerning the likely impact” of the Fiduciary Rule.

The memorandum also called upon the Department to evaluate whether the Fiduciary Rule would adversely affect access to investment services and products, whether it

would cause dislocations or disruptions in the retirement services industry, and whether it would increase litigation and thereby increase consumer cost of retirement products and services. IRI believes these are issues worthy of careful review and justify delaying the applicability date.

Along the lines suggested by the president's memorandum, IRI and its members believe significant questions of law and policy exist with respect to the Fiduciary Rule. We have long supported a best interest standard for financial professionals who provide investment advice, and we believe the vast majority of financial professionals already act in the best interest of their clients (and recent IRI research shows nearly all retirement savers agree). However, we have the following significant concerns with the Fiduciary Rule:²

1. The Fiduciary Rule will make it harder for retirement savers to plan for retirement by depriving them of access to affordable, holistic financial planning and education and a wide range of investment options.

Financial professionals play a critical role in helping retirement savers understand the wide variety of annuity products available in the market and how best to utilize them to prepare for retirement. Americans accumulate more savings when working with a financial professional, saving twice the amount over a 7- to 14-year period.³ Working with a financial professional has a positive influence on retirement planning behaviors including: increased usage of tax-advantaged savings vehicles, improved asset allocation, greater portfolio diversification and less-speculative investing.⁴ Financial professionals have also been shown to help retirement savers earn 1.59 percent in additional returns, which over time historically has led to 22.8 percent more income in retirement.⁵ Moreover, financial professionals help their clients overcome the emotional aspects of investing, which can add 1-2 percent in net return.⁶ For many retirement savers, commission-based accounts are the most appropriate or most

² IRI will be filing a separate comment letter explaining these concerns in greater detail in response to the Department's separate request for public comments in connection with its review of the Fiduciary Rule.

³ Claude Montmarquette, Nathalie Viennot-Briot. Centre for Interuniversity Research and Analysis on Organizations (CIRANO). *Econometric Models on the Value of Advice of a Financial Advisor*, available at <http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf>.

⁴ *Ibid.*

⁵ Morningstar. *Alpha, Beta, and Now...Gamma*, available at <http://corporate.morningstar.com/ib/documents/PublishedResearch/AlphaBetaandNowGamma.pdf>.

⁶ Vanguard Research. *Putting a Value on Your Value: Quantifying Vanguard Advisor's Alpha*, available at <http://www.vanguard.com/pdf/ISGQVAA.pdf>.

desirable way to pay for these valuable services (a fact the Department seemingly disregarded in adopting the Fiduciary Rule).

Unfortunately, recent research found that 64 percent of financial advisers think the Fiduciary Rule will have a largely negative impact on retirement savers with less than \$300,000 in net investable assets, 39 percent think financial advice will become too expensive for most retirement savers, and 71 percent will disengage from at least some retirement savers because of the Fiduciary Rule.⁷ Another recent study concluded that 57 percent of all retirement savers will be forced to terminate their relationship with their financial adviser.⁸

By way of example, for many retirement savers, professional insurance agents are an important source of financial advice and assistance and access to annuities and other products that provide financial security in retirement. This is particularly the case with regard to fixed indexed annuities (“FIAs”). In 2015, about 63 percent of FIAs were sold by professional insurance agents who were not affiliated with a broker-dealer. These agents, many of whom are small businesses or sole proprietorships, will be unable to satisfy the BIC Exemption and will be forced to exit the fixed-indexed annuity market unless the agents join a broker-dealer or other “Financial Institution” willing to assume the associated fiduciary liability. Those options are not viable for most insurance-only licensed agents who offer FIAs. The Department has proposed to adopt a new version of the BIC Exemption specifically designed for insurance intermediaries that provide various support services for insurance agents, such as independent marketing organizations (“IMOs”) and field marketing organizations (“FMOs”). However, this proposed exemption has serious flaws (as we explained in our comment letter on the proposal), and there is simply no way for the Department to address those concerns and finalize the exemption in time to avoid a disruption in services to clients of affected agents.

2. The Fiduciary Rule inappropriately expands the definition of fiduciary in a manner that is inconsistent with the statutory text of ERISA. Under ERISA, fiduciary status arises when a person “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.” The

⁷ CoreData Research, Fiduciary rule to leave US mass-market investors stranded, study shows, (November 2016), available at <http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-percentE2percent80percent93-CoreData-Research.pdf>

⁸ NERA Economic Consulting, *Comment on the DOL Proposal and Regulatory Impact Analysis*, July 2015, available at <http://www.sifma.org/issues/item.aspx?id=8589955443>

concept of “render[ing] investment advice for a fee” necessarily denotes something other than merely selling a product, or other sales-related communications. An agent who receives a commission on the sale of a product is paid for effecting the sale, not for any investment advice they may have provided. This is clear from the fact that agents are paid only if they make a sale, regardless of how much “advice” they provide in connection with it. Courts have long distinguished between “sales” and “advice.”

3. The Fiduciary Rule infringes on the jurisdiction of the SEC, FINRA and state insurance regulators. The federal securities laws provide that the SEC (and by extension, FINRA) are responsible for regulating the conduct of financial professionals engaged in the sale of securities products. The Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 913(g), 124 Stat. 1376, 1828 (2010) (“Dodd-Frank”) reiterated this point, expressly directing the SEC to undertake a study to determine whether changes should be made to the standards of conduct applicable to broker-dealers and registered representatives. Dodd-Frank also established parameters for any subsequent rulemaking based on the result of that study. Similarly, a broad network of state regulation governs the insurance industry and distribution of annuities and other insurance products. In adopting the Fiduciary Rule, however, the Department disregarded these other established and effective regulatory regimes and assumed for itself jurisdiction properly delegated by Congress to the SEC, FINRA and the state insurance departments.
4. The Fiduciary Rule inappropriately utilizes private litigation (or the threat thereof) as the primary enforcement mechanism by requiring that fiduciaries execute a contract, including required contractual warranties (and thereby exposing fiduciaries to contractual liability). Allowing state courts to interpret ERISA fiduciary standards of care is contrary to congressional intent as reflected in ERISA § 514(a) and is likely to result in inconsistent interpretations that will be particularly problematic for employers with employees in multiple states.
5. The Regulatory Impact Analysis overstated the benefits of the regulation, and ignored and underestimated the Fiduciary Rule’s direct and indirect costs to the financial services industry and retirement savers, including costs from class action lawsuits arising from the BIC Exemption, and costs to retirement savers from lost access to retirement assistance or lost access to the transaction-based fee model. The Regulatory Impact Analysis also failed to give meaningful consideration to the Fiduciary Rule’s impact on access to assistance with products providing guaranteed lifetime income (annuities). When all those

costs—which the record shows will total tens of billions of dollars—are properly considered, it becomes clear that the Fiduciary Rule will not deliver the financial benefits described in the Regulatory Impact Analysis.

As such, IRI strongly endorses the president’s decision to initiate a thoughtful and comprehensive review of the Fiduciary Rule. Delaying the applicability date will provide time for the Department to conduct this review and take appropriate action to protect retirement savers from its negative consequences.

B. The Proposed Delay Will Have a Neutral or Favorable Economic Impact.

IRI and our members believe the benefits of the Proposed Delay (and any extension thereof) far outweigh the potential costs. In our view, the most important benefit of a delay is that it will avoid serious and harmful consequences if the Fiduciary Rule becomes applicable before the Department completes its review and the Department ultimately concludes the Fiduciary Rule should be revoked or significantly revised:

1. Changing the rules multiple times in a relatively short period of time would cause considerable confusion for both retirement savers and financial professionals. The Department acknowledged this in the preamble, noting that “affected advisers, retirement investors and other stakeholders might face two major changes in the regulatory environment [which] could unnecessarily disrupt the marketplace.”
2. IRI members continue to expend significant resources every day to prepare for implementation of a rule that may soon be revoked or significantly revised. For example, firms are actively engaged in training their advisers and support staff on compliance with the Fiduciary Rule; these same individuals will have to be trained again if the Fiduciary Rule is revised. A delay will allow firms to avoid these potentially needless and wasteful expenditures until there is more certainty about the outcome of the Department’s review.
3. In light of the president’s memorandum and the Proposed Delay, many firms have been waiting as long as possible to take final action on changes to their systems and processes (e.g., implementation of point of sale and other forms) in order to implement the Fiduciary Rule. Moreover, our members have indicated that many of their clients simply do not want these changes to be made unless they are required by law. Firms will be unable to recover the cost of making these changes, and it will be difficult and costly for firms to unwind these changes if the Fiduciary Rule is revoked or significantly revised.

The preamble to the Proposed Delay acknowledges that a delay “could defer or reduce start-up compliance costs, particularly in circumstances where more gradual steps toward preparing for compliance are less expensive” and “would likely relieve industry of relevant day-to-day compliance burdens.” We agree that such cost savings will be meaningful and should be taken into account.

We note, however that the Department’s estimates of these cost savings and the potential investor losses associated with the Proposed Delay are extrapolated from the the Department’s existing economic impact analysis. We believe such extrapolation is flawed and inappropriate.

Even if the original economic impact analysis was correct, it assumed full implementation of the Fiduciary Rule. If the Department was correct in assuming that substantial activity would be directed to the BIC Exemption, then it should be noted that the BIC Exemption does not go fully into effect until January 1, 2018, and the Proposed Delay makes no change to this date.

The calculation included in the preamble assumes that the impact to cost would be equally distributed across the 10-year period covered by the original economic impact analysis. However, there is nothing to support such a conclusion. Statements by former Labor Assistant Secretary Phyllis Borzi in late 2016 suggested that some of the anticipated changes in the fee landscape already occurred well before the applicability date. If that is correct, any early savings may have already occurred, meaning the Proposed Delay would be of little or no consequence.

For the reasons highlighted in prior hearing testimony and comment letters, the economic impact analysis itself was flawed. Moreover, we believe it is inappropriate to rely on the existing economic impact analysis to assess the Proposed Delay, given that the Proposed Delay is intended to allow time for the Department to conduct a new economic impact analysis pursuant to the president’s directive. We continue to believe that retirement savers will benefit from a delay that succeeds in resolving existing concerns in the guidance.

C. The Implementation Timeline Is Inadequate and Inconsistent with Precedent.

The timeline for implementation of the Fiduciary Rule significantly underestimated the amount of time annuity providers and distributors would need to come into compliance. This is the most significant change to the investment advice delivery system in 50 years, yet the Department provided a far shorter implementation period than it has typically provided for new regulations. A delay in the applicability date, along with adoption of a more orderly process going forward for ultimate disposition of the Fiduciary Rule, will

help to avoid potentially very detrimental market disruptions as a result of the impracticable implementation timeline.

The requirements and conditions included in the Fiduciary Rule are exceedingly complex and require massive and expensive information technology re-design and build outs to support. Despite the industry's best efforts to prepare for implementation, without a delay, many institutions will implement sub-optimal compliance procedures, while others may simply not be able to meet the Fiduciary Rule's requirements within such a short time frame and would therefore be forced to suspend the delivery of services to retirement savers. If the Department does not revoke or significantly revise the Fiduciary Rule, delaying the applicability date is necessary to avoid unnecessary market disruptions and to give firms and advisers adequate time to develop and implement appropriate, effective and efficient compliance processes and procedures.

A delay is also needed to allow time for the Department to provide additional guidance regarding various aspects of the Fiduciary Rule, and for the industry to implement such additional guidance. For example:

- There are circumstances under which wholesalers will not be able to rely on the exception from fiduciary status for individuals who make recommendations to independent fiduciaries with financial expertise. However, wholesalers can not easily satisfy the conditions of the BIC Exemption or any other available prohibited transaction exemption.
- The line between education and fiduciary investment advice is not completely clear, particularly in the context of call center conversations and other one-time interactions.

The compliance challenges were further exacerbated by two sets of guidance issued by the Department in October 2016 and January 2017, as well as an insurance intermediary exemption proposed by the Department in January 2017 but not yet adopted. This new guidance requires changes to many firms' implementation plans, but the issuance of this guidance with just three to six months before the applicability date creates even greater challenges. In some cases, the new guidance also raises new questions of law and policy. For example:

- The guidance issued on January 13, 2017 indicates that recommendations to purchase life insurance using funds withdrawn from a retirement account in order to comply with required minimum distribution ("RMD") rules would give rise to fiduciary status. In our view, this constitutes regulatory overreach; the Department simply does not have the authority to dictate how Americans use their own hard-earned savings after taking it out of their retirement plan (and

paying applicable taxes). Perhaps even more troubling, the guidance does not make clear whether this position would vary depending on the nature of the purchase. In other words, would an adviser be a fiduciary if she recommends that a client use their RMD funds to pay bills or start a college fund for their grandchild? Would a car salesman be a fiduciary if he recommends that the individual use the funds to buy a new car?

- The guidance also appears to suggest that fiduciary status could apply to a service provider who recommends that a participant increase his or her contributions in order to improve retirement readiness, or to an employee of a plan sponsor who makes a similar recommendation outside the context of maximizing their receipt of matching contributions. Many participant websites currently encourage participants who are not on track for retirement savings to increase their contribution amount as a possible solution. In this sense, the guidance is extremely problematic and inconsistent with the goal of helping participants prepare adequately for retirement.

These are just two examples of ways in which the Department's recent guidance raises more questions than it answers, further complicating efforts to comply with the Fiduciary Rule. Similarly, the Department's proposed insurance intermediary exemption created tremendous uncertainty for segments of the insurance industry with respect to compliance with the Fiduciary Rule. IRI commented separately on its many concerns regarding that proposal and how it would adversely affect distribution of certain annuity products.

In addition, it is our understanding that a number of mutual fund companies have indicated they need more time to complete development of new products designed to comply with the Fiduciary Rule. By all accounts, the first such products will not be available until late June 2017. In the interim, a number of distribution firms have decided not to allow recommended sales of mutual funds in retirement plan and IRA brokerage accounts until these new products come to market, leaving retirement savers with access to far fewer investment options.

We also note that the applicability date falls approximately one week before the deadline for submission of income tax returns to the Internal Revenue Service. Tax return season is the busiest time of year for many financial professionals. The Proposed Delay would ease the burden on advisers and their clients, allowing them to focus on tax preparation in April before turning their attention to the significant changes necessitated by the Fiduciary Rule.

The implementation timeline is also inconsistent with the Department's past practices for new regulations. For example, the Department provided a two year implementation period for service providers to implement the section 408(b)(2) regulations. By comparison, the industry was given just 12 months (20 months for certain elements of the BIC Exemption) to meet the far more challenging and complex requirements under the Fiduciary Rule.

D. A Delay is Appropriate in Light of the Pending Litigation Regarding the Fiduciary Rule.

The Fiduciary Rule continues to be the subject of pending litigation. IRI believes it would be entirely appropriate, beneficial and consistent with past precedent to delay applicability of the Fiduciary Rule pending resolution of this litigation.

II. Additional Comments Regarding the Proposed Delay

IRI respectfully offers the following additional comments regarding the Proposed Delay:

A. The Proposed Delay Should Take Effect Immediately Upon Publication of a Final Rule.

The preamble to the Proposed Delay indicates the delay "would be effective on the date of publication of a final rule in the Federal Register." This statement implies an acknowledgement by the Department that "good cause" exists within the meaning of Section 808 of the Congressional Review Act (5 U.S.C. § 808) to justify immediate effectiveness without the need for a delay pending congressional review. IRI and our members emphatically agree with this assessment. As noted above, allowing the Fiduciary Rule to become applicable despite the fact that it could be revoked or significantly revised based on the Department's comprehensive review or as a result of the pending litigation would result in significant confusion and harm to retirement savers and the industry. In our view, this alone is sufficient to justify a determination to cause the Proposed Delay to take effect immediately.

In the event that the delay takes effect after the applicability date, the Department should expressly provide that the delay applies retroactively to avoid exposing advisers and firms to potential liability for compliance during the period between the applicability date and the effective date of the delay.

B. The Department Should Delay the Applicability Date and Extend the Transition Period for at Least an Additional 180 Days.

As noted above, IRI supports the Proposed Delay. However, we believe it will take substantially longer than 60 days for the Department to conduct the comprehensive review contemplated by the president. When the Department undertook a similar review of participant investment advice regulations in 2009, it initially delayed the

applicability date for 60 days but ultimately needed two additional 180-day delays to complete its work.

A longer delay will also give the new Assistant Secretary for EBSA the opportunity to participate in the review and decision-making process. While the Department could pursue a series of shorter delays to provide adequate time for its review of the Fiduciary Rule, this approach would cause confusion and uncertainty for retirement savers and their advisers. As such, we believe the Department should extend the delay for an additional 180 days or longer.

Similarly, we urge the Department to also extend the transition period provided under the BIC Exemption to delay the full implementation deadline of January 1, 2018. Our members still have to expend significant resources to prepare for compliance with the requirements that will apply beginning on that date. Extending the transition period will provide certainty around what rule requirements will be before additional expenditures are incurred to build those solutions.

As noted above, a longer delay would also be consistent with the Department's own precedent in that significant regulatory changes have typically afforded industry far more time to comply. For example, the Department's section 408(b)(2) regulations did not take effect for two years after publication. By contrast, the Department provided just one year to comply with the far more complex Fiduciary Rule (plus an additional eight months for certain elements of the BIC Exemption).

C. The Department Should Clearly Grandfather Advice Given During the Pendency of the Delay.

While it would appear that a delay in the applicability date would also have the effect of delaying the date prior to which an account could qualify for grandfathering under the BIC Exemption, we ask that final guidance on the Proposed Delay make this clear. If the Fiduciary Rule goes into effect as scheduled, it will harm retirement savers in many ways. It will reduce choice, increase costs and make it more difficult for low and middle income retirement savers to obtain financial advice. The Department should therefore declare clearly and plainly in the preamble to the final delay regulations that it is considering a much broader grandfather rule that would fully protect transactions entered into prior to any future applicability date, including future advice regarding any assets acquired prior to that date. The preamble should indicate that neither the Fiduciary Rule, nor any potential successor rule, will apply to advice given, or transactions entered into, during the pendency of the delay. Otherwise, the adverse impacts of the Fiduciary Rule will continue to harm retirement savers while its effectiveness in promoting the goals of the president is under review.

D. The Proposed Delay Should be Revised to Clearly and Explicitly Delay the Withdrawal of IB 96-1.

In adopting the Fiduciary Rule, the Department also withdrew Interpretive Bulletin 96-1 (“IB 96-1”), effective as of April 10, 2017. The Department indicates in footnote 2 in the preamble to the Proposed Delay that it would treat IB 96-1 as “continuing to apply during any extension of the applicability date of the final rule.” IRI and our members support this position and believe it would be appropriate to expressly incorporate this in the regulatory language.

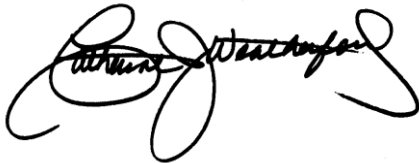
E. The Department Should Withdraw its Proposed Best Interest Contract Exemption for Insurance Intermediaries (the “Proposed Exemption”) During the Pendency of the Delay

The Department issued a proposal to create a Best Interest Contract Exemption for Insurance Intermediaries on January 19, 2017, with comments due by February 21, 2017. As indicated in the comment letter IRI submitted to the Department on February 21, 2017, we believe the Department should withdraw this proposed exemption until it completes its review of the Fiduciary Rule.

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If you have questions about anything in this letter, or if we can be of any further assistance as the Department undertakes to review the Fiduciary Rule, please feel free to contact me or Lee Covington, IRI’s Senior Vice President and General Counsel.

Sincerely,



Catherine J. Weatherford
President & CEO
Insured Retirement Institute