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FILED ELECTRONICALLY

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-5655
Washington, DC 20210

Re: RIN 1210-AB79 – Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-01); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 84-24, and 86-128

Dear Sir or Madam,

I am a Senior Executive Director and Head of U.S. Life, Retirement and Wealth Management at AXA[1] ("AXA US") and a member of the company's Executive Management Committee. We appreciate the opportunity to provide comments to the Department of Labor (the "Department") on proposed rule RIN 1210-AB79 ("Proposed Delay"), which would extend for 60 days the April 10, 2017 applicability date of the Department's final rule entitled Definition of the Term "Fiduciary;" Conflict of Interest Rule – Retirement Investment Advice (the "Rule").[2] As described in more detail below, we support the Proposed Delay and further urge that 180 days is a more appropriate time period for such a delay.

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[1] "AXA US" is the brand name of AXA Equitable Financial Services, LLC and its family of companies, including AXA Equitable Life Insurance Company (NY, NY), MONY Life Insurance Company of America (AZ stock company, administrative office: Jersey City, NJ), AXA Advisors, LLC (NY, NY) and AXA Distributors, LLC (NY, NY).

[2] Note that, in order to avoid confusion and ensure that the Proposed Delay has its intended effect, the Proposed Delay should also take into account the January 1, 2018 effective date applicable to those requirements of the Rule that do not take effect on the April 10, 2017 deadline. The Proposed Delay currently makes no mention of the January 1 date – a delay of only the April 10 date is far less meaningful without a corresponding delay for the January 1 date.

As one of the country's largest life insurance and retirement savings companies with nearly 2.5 million customers nationwide, AXA US is well-positioned to understand the wide-ranging intended and potential unintended consequences of the Rule on both consumers and the industry. We share the Department's objective of ensuring that retirement plan participants, individual retirement savers and their families, as well as small business plan sponsors and potential sponsors have ongoing access to high quality, impartial and affordable retirement savings education and advice. However, we believe that the Rule is a significantly flawed attempt to meet these goals, and will cause a dramatic reduction in choice for retirement savers by restricting the opportunities for these savers to obtain even basic investment education – all without meaningfully enhancing consumer protection. For the reasons discussed below, we support a delay of at least 60 days – and preferably at least 180 days – in order for the Department to conduct a comprehensive examination and analysis of the Rule as required by President Trump's February 3, 2017 Memorandum on Fiduciary Duty Rule ("Memorandum").[3]

I. A Delay Is Necessary for the Department to Adequately Conduct the Required Economic and Legal Analysis of the Impact of the Rule.

First, a delay is necessary to allow sufficient time for the Department to conduct an adequate examination and analysis of the Rule as directed by the Memorandum. In the Memorandum, the President directed the Department to determine whether the Rule may adversely affect Americans' ability to access retirement information and financial advice, and to conduct an updated economic and legal analysis on the likely impact of the Rule. Accordingly, the Proposed Delay is necessary in order to allow the Department to conduct an adequate analysis of how the Rule is already adversely impacting, and could further adversely impact, the American retirement savings marketplace.

As discussed in our July 21, 2015 letter commenting on the Rule, the ability of retirement savers to choose from a wide array of high quality, affordable retirement solutions will be dramatically reduced by the Rule's blanket extension of fiduciary status and curtailment of workable exemptions allowing for commission-based compensation. As we and others in the industry have previously noted, the cost of retirement products and services will inevitably increase due to compliance costs and heightened liability, leading many firms to cease certain product offerings entirely or to substantially reduce their range of products and services.[4] In fact, these consequences have already begun to materialize. For example:

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[3] White House Office of the Press Secretary, *Presidential Memorandum on Fiduciary Duty Rule* (Feb. 3, 2017), at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

[4] *See, e.g.,* Mark Schoeff, Jr., *FINRA's Ketchum Criticizes DOL Rule*, Investment News (May 27, 2015), at http://www.investmentnews.com/article/20150527/FREE/150529942/finras-ketchum-criticizes-dol-fiduciary-rule; Commissioner Daniel M. Gallagher, *Remarks at The SEC Speaks* (Feb. 20, 2015), at http://www.sec.gov/news/speech/022015-spchcdmg.html.

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- In September 2016, State Farm directed 12,000 of its agents to cease offering mutual funds and variable annuities, among other products, and clients will be directed to a call center for assistance with their accounts rather than to agents;[5]

- Commonwealth Financial Network and JPMorgan Chase have announced that they will cease offering commission-based retirement accounts;[6] and

- Others, while retaining some form of commission-based products, have made reductions in the number of choices for such offerings in reaction to the Rule, while still others are currently undecided.

In effect, retirement savers who value the advice of a financial professional and are currently free to engage and pay for a fiduciary level of advice only when they choose to will essentially be forced into product regimes that require paying for fiduciary advice, and at a likely significantly higher price due to increased compliance costs associated with the Rule.[7] For many retirement savers, affordable personal investment advice will not be available. The result: while wealthy retirement savers will continue to have access to the same services they currently utilize, lower-income retirement savers will be deprived of the affordable choices and investment services they need and have access to today.

The President's directive provides that the Department must consider a range of potential impacts of the Rule, including harm to investors due to reduction in access to certain products and advice, disruptions within the industry, and increased cost of retirement services.[8] This is no simple task; in fact, the Office of Management and Budget Office of Information and Regulatory Affairs designated the Proposed Delay "economically significant,"[9] meaning that it may have an annual effect of $100 million or more, or materially adversely affect the economy or some sector of the economy. This designation demonstrates the critical impact that the Rule itself may have on the economy and underscores the need for a thoughtful and thorough examination of the complex issues that it raises – issues that to date have not been given sufficient consideration.[10]

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[5] Steve Daniels, *Why State Farm Agents Are Getting Out of the Investment Game*, Crain's Chicago Bus. (Sept. 3, 2016), at http://www.chicagobusiness.com/article/20160903/ISSUE01/309039993/why-state-farm-agents-are-getting-out-of-the-investment-game.

[6] Elizabeth Dilts & David Henry, *JPMorgan Chase to Drop Commissions-Paying Retirement Accounts*, Reuters (Nov. 2016), at http://www.reuters.com/article/us-jpmorgan-wealth-compliance-idUSKBN1343LK; *Commonwealth Financial Eliminates Commission-Based Retirement Products in Wake of DOL Rule*, Investment News (Oct. 24, 2016) at http://www.investmentnews.com/article/20161024/FREE/161029956/commonwealth-financial-eliminates-commission-based-retirement.

[7] The American Action Forum reports that in 2016 compliance costs likely exceeded $100 million for just a handful of companies. *See* Sam Batkins, *Rule Has Already Taken its Toll: $100 Million in Costs, Fewer Options*, Insight (Feb. 22, 2017), at https://www.americanactionforum.org/insight/fiduciary-rule-already-taken-toll-100-million-costs-fewer-options/,

[8] White House Office of the Press Secretary, *Presidential Memorandum on Fiduciary Duty Rule* (Feb. 3, 2017), at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

[9] *See* https://www.reginfo.gov/public/do/eoDetails?rrid=127214.

[10] For additional discussion on this point, please see our supplemental comment letter on the Rule submitted September 24, 2015.

A substantial delay of the Rule's applicability date will enable the Department to meet its mandate and fully examine the Rule and its varied implications for the American retirement savings marketplace.

II. The Industry Requires Additional Time to Prudently Implement the Rule.

Second, a delay is also appropriate because the industry requires additional time to implement required changes while minimizing disruption to client services. As we and others have noted, the condensed implementation timeline imposed by the Department in the Rule is inconsistent with prior Department practice. For instance, the Department permitted entities covered by its 408(b)(2) regulation a full two years to implement the required changes. Here, in contrast, the industry is faced with a 12-month deadline for most aspects of the Rule and just 20 months to fully comply with the Best Interest Contract Exemption, which imposes entirely new and extensive, enterprise-wide compliance and disclosure requirements.

Exacerbating this truncated timeline is the critical economic impact of the Rule, which requires us to engage in extremely careful planning and thoughtful implementation strategies in order to avoid suspending or disrupting services such as provision of advice to retirement plan participants regarding rollovers and other distributions. Our response to the Rule requires not only development of new procedures but also substantial, time consuming updates to technology infrastructure. These types of large-scale changes are exceptionally difficult to complete in the time frame imposed by the Department. In addition, recent guidance issued by the Department (e.g., relating to circumstances in which fiduciary status may be triggered and the requirements of the BICE) compounds the difficulties in establishing workable compliance structures by raising new issues with which industry participants must contend as they re-structure their retirement offerings.[11]

Moreover, and of particular concern to an insurance carrier like AXA US who sells intermediated products via captive and third-party distribution partners, not all industry participants are planning to satisfy the Rule with the same compliance structure. For instance, third-party distribution partners are settling on different strategies for implementation: some have eliminated commission-based products altogether, while others are developing compliance programs intended to utilize the BICE – and some, as demonstrated by Merrill Lynch's recent reconsideration of commission-based alternatives, are even now still working to determine how they will comply. Accordingly, the Rule forces carriers like AXA into a reactionary posture. We need sufficient time to accommodate the broadly differing approaches of our distribution partners, which will require, among other actions, updating and filing product applications and other policy forms for approval with relevant state Insurance Departments.

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[11] *See, e.g.*, U.S. Dep't of Labor, *Conflict of Interest FAQs (Part II – Rule)* (Jan. 2017), available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf; U.S. Dep't of Labor, *Conflict of Interest FAQs (Part I – Exemptions)* (Oct. 2016), available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-1.pdf.

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Lastly, a delay will also allow for the litigation currently pending regarding the Rule to be resolved thereby providing additional certainty and clarity around the Rule's applicability and requirements. Indeed, we believe that a 180-day delay is warranted on this ground alone.

III. Advice Provided During the Delay Period Must Be Clearly Excluded from the Scope of the Rule.

Should the Department move forward with a delay, it is imperative that, as part of the delay process, it provide the industry with certainty and continuity during the delay period. The Department should therefore make clear in its final delay regulation that advice provided during the delay period – and compensation earned as a result of such advice – will not later be subjected to the requirements of the Rule. This assurance is critical to ensure that disruption to client services is minimized while the Department completes its examination and analysis.[12]

* * *

In conclusion, we share the Department's goal of ensuring that all Americans have access to a broad range of high quality retirement products and investment advice at multiple price points without causing extensive and ultimately harmful disruption to the current retirement services marketplace. We support a delay in the applicability of the Rule and urge that the delay be extended to at least 180 days to allow for the fulsome analysis mandated by the Memorandum.

Respectfully submitted,

Brian Winikoff

[12] We appreciate the Department's March 10, 2017 guidance in Field Assistance Bulletin 2017-10, which provides that the Department (1) will not bring an enforcement action for any violations of the Rule during a gap period between the current April 10 applicability date and the issuance of a final rule providing for a delay; and (2) in the event that no delay is issued, will not bring an enforcement action for any violations of the Rule as of the April 10 applicability date provided that the relevant party meets the requirements of the Rule within a reasonable period after the decision not to issue a delay. We urge the Department to reiterate this guidance in its final rule as appropriate, in addition to making clear that any advice provided during the delay period will not later be subject to the Rule.