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Filed Electronically

Mr. Timothy D. Hauser  
Acting Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: Fiduciary Rule Examination (RIN 1210-AB79)**

Dear Acting Assistant Secretary Hauser:

Voya Financial, Inc.<sup>1</sup> welcomes the opportunity to comment on the re-examination of the regulation “Definition of the Term Fiduciary; Conflict of Interest Rule – Retirement Investment Advice”<sup>2</sup> (together with related exemptions, including the Best Interest Contract Exemption, the “Fiduciary Rule”).

Voya supports a best interest standard for individualized investment advice provided to retirement savers. Any such standard must, however, improve outcomes for retirement savers. The Fiduciary Rule would do the opposite by limiting access to investment advice and reducing the scope of financial products that will be made available to retirement savers – thus making it harder, not easier, for Americans to prepare for retirement.

In our previous comments on the Fiduciary Rule,<sup>3</sup> we encouraged the Department to replace the Fiduciary Rule with a “Customer’s Bill of Rights”. We continue to believe that this approach would better promote retirement

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<sup>1</sup> Voya Financial, Inc. (NYSE: VOYA), helps Americans plan, invest and protect their savings — to get ready to retire better. Serving the financial needs of approximately 13.5 million individual and institutional customers in the United States, Voya is a Fortune 500 company with a vision to be America’s Retirement Company®. Its mission is to make a secure financial future possible — one person, one family, one institution at a time. Voya provides a comprehensive portfolio of asset accumulation, asset protection and asset distribution products and services, and it works directly with clients and through a broad group of financial intermediaries, independent producers, affiliated advisers and dedicated sales specialists. Certified as a “Great Place to Work” by the Great Place to Work® Institute, Voya is equally committed to conducting business in a way that is socially, environmentally, economically and ethically responsible and has been recognized as one of the 2017 World’s Most Ethical Companies® by the Ethisphere Institute, and as one of the Top Green Companies in the U.S., by Newsweek magazine. For more information, visit [voya.com](http://voya.com).

<sup>2</sup> 81 Fed. Reg. 20946 (April 8, 2016).



saving by clearly and effectively communicating key information to customers, giving them the tools to make informed choices about the products and relationships they select.

The President has directed the Department to re-examine the Fiduciary Rule in its entirety, and to determine whether it “may adversely affect the ability of Americans to gain access to retirement information and financial advice”.<sup>4</sup> The President further directed the Department to address the following three specific questions relating to the rule, and to rescind or revise the Fiduciary Rule if the Department concludes that it will not “empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies”:

(i) Whether the anticipated applicability of the Fiduciary Rule has harmed or is likely to harm investors due to a reduction of Americans’ access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;

(ii) Whether the anticipated applicability of the Fiduciary Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

(iii) Whether the Fiduciary Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

In its final rule delaying the applicability of certain aspects of the Fiduciary Rule until June 9, 2017, and other aspects until January 1, 2018,<sup>5</sup> the Department announced that the revised definition of “fiduciary”, together with the “best interest” component of the Best Interest Contract (“BIC”) Exemption, will become applicable on June 9, even though the Department may not be able to complete the examination directed by the President before that date. The Department further announced that it may extend the January 1, 2018 applicability date as it conducts the required re-examination of the rule, but did not offer the possibility of extending the June 9, 2017 date. In other words, despite the Department’s duty to affirmatively answer the questions set forth in the President’s Memorandum before determining whether to rescind or revise the rule, the Department has announced that certain aspects of rule will take effect on June 9, 2017, possibly before that re-examination is complete, and regardless of

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<sup>3</sup> Letter from Charles Nelson to Office of Regulations and Interpretations and Office of Exemption Determinations, Employee Benefits Security Administration, dated July 16, 2015. Available at <http://go.voya.com/VoyaDOLComment>. We continue to have the concerns raised in this letter, and share many of the other concerns being raised by other providers of retirement products and advice, as well as industry associations. With the present letter, we want to focus on the aspect of the Fiduciary Rule we believe is most urgently in need of attention.

<sup>4</sup> 82 Fed. Reg. 9675 (Feb 7, 2017) (the “President’s Memorandum”).

<sup>5</sup> 82 Fed. Reg. 16902 (April 7, 2017).



the outcome of the re-examination. Therefore, in the event its re-examination is not complete prior to June 9, 2017, Voya strongly urges the Department to further delay applicability of the Fiduciary Rule in its entirety, rather than implementing some aspects of the rule before the Department has completed its work.

If, after completing its re-examination, the Department concludes that retaining the revised definition of “fiduciary” and the “best interest” component of the BIC Exemption are consistent with the priorities set forth in the President’s Memorandum, we urge the Department to modify the Fiduciary Rule to eliminate aspects that would limit the availability of high-quality financial advice and reduce the scope of products made available to consumers.

The aspect of the Fiduciary Rule that we believe will create the strongest disincentive to providing needed advice and products to retirement savers is the combination of a vague “best interest” standard with a potentially arbitrary and punitive enforcement regime. A person seeking to rely on the BIC Exemption must provide advice that is in the customer’s “best interest”, but the Department has provided little guidance on how to apply that standard.<sup>6</sup> Rather, the Department is largely relying on the court system to define the contours of the standard through litigation, and, by prohibiting waivers of class actions in the BIC contract, invites enterprising private law firms to bring costly law suits against providers of retirement advice. We believe this approach to standard-setting – implementing a vague definition and inviting private litigation to resolve ambiguities that could have been resolved by the rule maker in the first instance – is not a good or effective use of the private litigation system. We urge the Department to provide a clear standard before the rule takes effect, rather than adopting a rule that, by design, will clarify itself only through costly conflict.<sup>7</sup>

Faced with an unclear standard and the potential for expensive litigation, we believe providers of high-quality retirement advice will serve fewer customers and offer them fewer retirement products. We do not share the apparent assumption on which the Fiduciary Rule relies: that the same customers will continue be served by the retirement industry, but with improved advice and products. While Voya remains committed to serving all retirement investors, we are concerned that the rule will force many advisors to practice defensively, offering less

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<sup>6</sup> The Department has referred to ERISA jurisprudence as a source of guidance, but the BIC Exemption provides an entirely new context for providing advice – one that has not yet been the subject of any litigation, so this body of jurisprudence provides little practical comfort for providers of advice.

<sup>7</sup> Moreover, we remain concerned that the Department’s re-examination of the Fiduciary Rule is and will be flawed because it will be unable to adequately respond to the President’s directive to provide an updated economic and legal analysis regarding the impact of the Fiduciary Rule and PTEs, including the likely increase in litigation. To date, the Department’s updated analysis appears to consist solely of its statement that by delaying enforcement of the Fiduciary Rule to January 1, 2018, this delay “minimizes or eliminates the risk of litigation, including class-action litigation.” But the President’s directive to provide an updated analysis requires the Department to examine the cost of litigation beyond this narrow window selected by the Department, and the circularity of the Department’s reasoning – that delay in enforcement will eliminate the risk of litigation, and there is no risk of litigation because the Department delayed enforcement – does not withstand scrutiny. As a consequence, the Department’s stated position regarding the likely increase in litigation effectively precludes the Department from conducting the very analysis that the President’s directive requires.

advice, providing less education and assistance, and steering their customers towards the lowest possible cost products, even when a higher-cost product may better serve the customers' financial objectives.

In summary, first and foremost we urge the Department to adopt our proposed Customer's Bill of Rights, which we believe would more effectively serve retirement savers than the Fiduciary Rule in its current form. If, however, the Department decides to retain the Fiduciary Rule, we wish to highlight our concern that the combination of a vague best interest standard and enforcement through private class action lawsuits runs contrary both to the policy objectives set forth in the President's Memorandum and to the Department's own stated objectives in adopting the Fiduciary Rule.

Sincerely,

A handwritten signature in blue ink, appearing to read "Alain M. Karaoglan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Alain M. Karaoglan  
Chief Operating Officer  
Voya Financial