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April 14, 2017

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The Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Proposed Definition of Fiduciary Regulation
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: RIN 1210-AB79

On behalf of John Hancock Life Insurance Company (U.S.A.) (collectively referred to along with its affiliates and subsidiaries as "John Hancock")[1], this comment letter responds to the request by the U.S. Department of Labor ("Department"), published on March 2, 2017, for comments on whether and to what extent the Department should modify the Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice and Prohibited Transaction Exemption 2016-01, both published on April 8, 2016.

I. Executive Summary

[1] John Hancock Life Insurance Company (U.S.A.) and its subsidiary John Hancock Life Insurance Company of New York manufacture and issue fixed and variable annuities, life insurance, and long-term care insurance that may be issued to employer pension and welfare plans. John Hancock's U.S. affiliates also include: John Hancock Retirement Plan Services LLC (recordkeeping service provider); John Hancock Trust Company LLC; John Hancock Investments (registered investment companies); John Hancock Distributors LLC (U.S. broker-dealer); John Hancock Funds, LLC (U.S. broker-dealer); John Hancock Advisers, LLC (U.S. investment adviser); Hancock Capital Investment Management LLC (U.S. investment adviser); Hancock Natural Resource Group, Inc. (U.S. investment adviser); John Hancock Investment Management Services, LLC (U.S. investment adviser); Manulife Asset Management (US) LLC (U.S. investment adviser); John Hancock Personal Financial Services LLC (U.S. investment adviser); and Signator Investors, Inc. (U.S. broker-dealer and investment adviser).

As we have stated in previous comments, John Hancock shares the Department's focus on and concern regarding American retirement readiness and financial literacy. We support the goal of imposing a general fiduciary standard on all parties that provide investment advice to retirement investors, and of ensuring that conflicts of interest are fully disclosed to investors and minimized where possible. And we believe the Department's rule and PTE 2016-01 represent a substantive attempt to realize those goals.

Notwithstanding our general support of these goals, when we consider the three questions posed by President Donald Trump in a memorandum dated February 3, 2017, we are forced to conclude that the rule and PTE 2016-01 will result in harm to at least some retirement investors who own, or would like to own, an Individual Retirement Account ("IRA"). The primary cause of this harm is that different standards and compliance obligations will be imposed on IRAs than are imposed on other individual investment accounts, resulting in either increased expense for IRA investors or the decision by some providers to make certain investment products unavailable to IRA investors with smaller account balances. We believe this harm could be avoided if the Department were to withdraw the rule and PTE 2016-01 as to IRAs and allow the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA") to adopt a uniform fiduciary standard to be applied to all retail investment accounts.

While we suggest withdrawing the rule as to IRAs, thereby allowing uniform regulation of all individual accounts by the SEC and FINRA, we fully support the imposition of the rule as to employer plans subject to ERISA and the participants in those plans. However, we would suggest certain small changes that would substantially ease the burden of compliance while still protecting the interests of retirement investors. These suggestions are based on our experience preparing to implement the rule and PTE 2016-01 over the last twelve months. Our recordkeeping business has modified its services and communications with plan sponsors and participants to avoid giving unintentional fiduciary investment advice. Where such services could not be modified to avoid advice to plan participants, we have taken steps to ensure that the advice that is provided is in the best interest of the participants and fully complies with the requirements of PTE 2016-01. Signator Investors, Inc. ("Signator"), our affiliated broker-dealer and registered investment adviser, has modified its compensation arrangements and prepared for full compliance with PTE 2016-01. John Hancock Investments ("JHI"), our affiliated registered investment companies, have authorized a new share class (the so-called "T shares") at the request of distribution partners. And all of our businesses have worked with our distribution partners to modify compensation arrangements, add new services, avoid unintentional investment advice, and provide data that they may require to comply with their disclosure obligations under PTE 2016-01. In our efforts to prepare for full implementation of the rule and PTE 2016-01, John Hancock has spent over $8 million as of March 2017; barring changes to the rule or delays in its effective date, we anticipate spending another $6 million by January 1, 2018.

II. The President's Questions

In his memorandum dated February 3, 2017, the President asked the Department to consider three questions. To aid the Department in its consideration of those questions, we hereby provide our answers.

Question 1: Whether the anticipated applicability of the final 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 advices? We believe that, as to IRA investors, this must be answered in the affirmative. For example, several distributors are reported to be converting all IRA accounts to flat/level advisory fee products (rather than commission-based products). This change will deprive their clients of future access to products structures on a commission model, such as annuities. And even for investors who are only interested in mutual funds, a one-time commission is sometimes more cost-effective over the long term than an ongoing fee.

Further, share class changes that are helpful to some investors may harm other investors. The new T share classes authorized by many mutual funds have increased breakpoints at which fees are reduced, which means a smaller investor is much less likely to reach the point at which costs will go down.[2] And most of these T shares no longer provide cumulative breakpoints (under which an investor's holding in one fund is used to determine eligibility for a breakpoint in other affiliated funds) or rights of accumulations (under which a series of purchases made over time are used to determine eligibility for a breakpoint), which again disadvantages smaller buy-and-hold investors.

Question 2: Whether the anticipated applicability of the final rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees? Again, we believe that, as to IRA investors, the answer to this question is "yes." For example, some distribution firms are not able to make the process and technology investments needed to comply with the rule, or are unwilling to accept the risk of class action litigation, and will no longer serve IRA investors; their clients will have to find new advice providers. Some firms are increasing the minimum account size for all clients, which will require clients with smaller accounts to find other providers. Similarly, other firms are imposing minimum account size thresholds for access to human advisers, relegating clients below that threshold to digital advice tools. While such digital advice tools are excellent in some contexts, they are simply not equivalent to full-service advice from a human being. And clients with small balances typically have a greater need for full-service advice that will help them understand all of their options as they try to improve their retirement readiness.

We also note that due to the Department's focus on cost as a proxy for prudence, many advisers are seeking protection from litigation by offering primarily index exchange traded funds ("ETF") to IRA investors, which is likely to result in unanticipated consequences. Unlike mutual funds, ETFs do not trade based solely on a net asset value of their underlying investments, and are traded intraday. This can result in significant price swings because of market volatility and not the value of the underlying holdings. Large inflows to these products will only compound this issue.

We are also concerned that the fear of litigation may cause advisers to give advice that is unnecessarily conservative so as to avoid losses that could result in claims. There are times when risk is absolutely appropriate (for example, for a retirement saver at the beginning of a career) and avoiding it may be harmful for an investor's long-term interests.

Question 3: Whether the final rule is likely to cause an increase in litigation, and an increase in the price that investors and retirees must pay to gain access to new retirement services? Because the conditions of PTE 2016-01 create the potential for state court class action litigation against IRA service providers, there is no doubt that the answer to this question is "yes." Compounding the potential for these class action suits is that, depending on state law, such claims may be heard before juries, with judges who are completely unfamiliar with ERISA and the statutory, regulatory, and case law concerning the prudent administration of plans and the investment of plan assets. Distribution firms are being compelled to procure more robust errors and omissions

[2] While many fund companies have authorized T shares, most have not yet launched them because broker/dealer firms have held off making decisions on whether to sell them pending more certainty about the conflict of interest rule and PTE 2016-01.

insurance and enhance their supervisory surveillance and recordkeeping infrastructure in anticipation of such litigation. Such expenses will be reflected in the fees their clients are assessed.

III. The Rule Should Be Withdrawn as to IRAs, Allowing the SEC and FINRA to Regulate All Individual Accounts

As should be clear from our answers to the President's questions, the harms that will be caused by the rule only affect IRA investors. There are two primary drivers of those harms. First, the imposition of one standard on IRAs and another on other individual accounts creates compliance costs that will either be passed on to IRA investors or result in changes to the market to the detriment of those investors. Second, the possibility of class action litigation concerning IRAs will result in increased expenses for IRA investors and a decrease in the products and services offered to IRA investors. Both problems could be solved if the Department were to defer regulation of IRAs to the SEC and FINRA.

John Hancock supports the imposition of a reasonable fiduciary standard, including full transparency on fees and conflicts of interest and the requirement that advice be given in the best interest of the recipient, on all parties providing investment advice to individuals. Having a single applicable standard would reduce compliance and administrative costs, resulting in savings that could be passed on to investors. And a single standard would avoid consumer confusion regarding the standard of care and available remedies applicable to different investment products. Unfortunately, the Department has no jurisdiction to impose a fiduciary standard on individual accounts other than IRAs. But the SEC and FINRA do have such authority, and should be allowed to exercise it.

PTE 2016-01 prohibits contractual terms that waive the right of a retirement investor to bring or participate in a class action against their adviser. We understand that this provision is based on the Department's view that individual claims brought by investors against an adviser don't result in sufficient relief for investors harmed by an adviser's misconduct and don't provide sufficient disincentive for bad behavior on the part of advisers. We believe that the available evidence supports a different conclusion – that the arbitration system run by FINRA to handle claims by individual investors against advisers results in significant relief for investors harmed by adviser misconduct. Based on data from FINRA, for the years 2013 through 2016, between 3,345 and 3,822 complaints were filed with the FINRA arbitration system.[3] During those years, between 57% and 64% of cases were settled through direct negotiation between the parties or settled after mediation. It is true that only between 21% and 24% of complaints filed were decided by an arbitration panel, but that is because advisers typically only insist on going to arbitration (as opposed to settling) where the adviser is confident in their defense. But even though only the strongest claims in favor of the advisers go to arbitration, arbitrators still awarded damages to complainants between 38% and 42% of the time. Thus, over time, approximately 70% of all complaints filed against advisers with FINRA result in compensation to the investors harmed by adviser misconduct. If the SEC and FINRA were allowed to impose a uniform fiduciary standard on all investment advisers to individual accounts, we see no reason that the FINRA arbitration system would produce results that are any different than these.

We also note that in addition to providing remedies for individuals harmed by adviser misconduct, the FINRA arbitration system provides an incentive for firms to monitor and supervise their individual representatives to avoid patterns of bad behavior. Because the FINRA arbitration system pushes consumer complaints into a single system for resolution (something that cannot be said about a private right of action in

[3] http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics

50 different state courts), FINRA and the SEC can quickly identify firms that are attracting more than their fair share of complaints, and can investigate them to determine if the complaints are the result of systemic problems at the firm. Avoiding investigations and enforcement actions by these regulators provides a strong incentive for firms to prevent large-scale or ongoing abuses by their representatives.

We understand that the Department may be concerned that if it withdraws the rule as to IRAs, the SEC and FINRA may not act to impose a fiduciary standard on all investment advisers to individual accounts. But we believe that because the Department has demonstrated its willingness and ability to craft a rule that covers IRAs, these other agencies understand that if they want to preserve a uniform standard of care for all investors, they can no longer stand by and refuse to act. And if the SEC and FINRA refuse to take action within a reasonable period of time, the Department could revisit the question of whether the rule should be applied to IRAs.

IV. Modifications to the Rule

While we encourage the Department to withdraw the rule as to IRAs (thereby allowing for SEC and FINRA regulation), we believe the rule should go forward as to employer-sponsored plans and their participants. That said, our extensive efforts to prepare for the implementation of the rule have brought to light several areas in which we believe the rule could be modified in ways that ease compliance burdens on advisers and other service providers to plans. And, to the extent that the rule continues to apply to IRAs, the same changes would mitigate the harm on IRA investors by reducing the administrative and compliance burden on advisers.

A. The Definition of "Level Fee Fiduciaries" Should be Changed

Under PTE 2016-01, an adviser cannot be a "Level Fee Fiduciary" if the compensation that will be received by the adviser's financial institution or its affiliates will vary in any way based on the particular investment recommended. This unnecessarily narrow definition increases the risk that an adviser will unwittingly fail to be a Level Fee Fiduciary, while also imposing additional compliance burdens on advisers who fail to meet it but who provide advice that is not subject to any actual conflicts of interest. The definition should be changed so that if the individual adviser will not receive any additional compensation or other consideration in connection with investments in particular funds, the adviser should be able to use the level fee BICE even if the adviser's financial institution or its affiliates may receive additional compensation in connection with such investments.

Modern financial institutions are often extraordinarily complex. For example, John Hancock is an insurance company that issues life insurance and group annuity contracts and provides recordkeeping services to defined contribution plans, with several different affiliated broker/dealers, a mutual fund complex, a trust company, and a number of registered investment advisers. Further, we enter into relationships with unrelated financial institutions to provide subadvisory services to mutual funds and collective investment trusts, and custodial services for all types of assets. And our products are sold by thousands of independent financial advisers working for hundreds of different firms. These complicated relationships mean that in many cases an individual adviser will not know that some affiliate of his or her firm will be earning additional revenue in connection with an investment. For example, a representative of an independent broker/dealer may advise an IRA client to invest in a particular John Hancock mutual fund without knowing that an investment manager affiliated with the broker/dealer firm is acting as a subadvisor for some of the assets of that mutual fund. The fact that an affiliate of the adviser's firm will benefit from the investment has no impact on the adviser's compensation and clearly does not create an incentive for that adviser to steer investments to that fund.

Even where the relationships between advisers' firms and their affiliates are evident, that affiliation does not necessarily give rise to an impermissible conflict. For example, representatives of Signator, John Hancock's affiliated broker-dealer and investment adviser, do not receive any additional compensation in any form if they advise a client to invest in a John Hancock mutual fund or ETF. Nor do they receive any additional consideration in connection with bonuses or promotions or any other aspect of employment. They have absolutely no incentive to use John Hancock funds over any other available investments. (And John Hancock funds make up only 7% of the funds available as investments to Signator's clients.) Yet if advisers believe a John Hancock fund is the best investment for a client's IRA, the fact that the level-fee version of PTE 2016-01 is unavailable to them means they can recommend that fund only by opening themselves (and Signator as a firm) to potential class action litigation. Paradoxically, this means that a greater burden is being imposed on firms like Signator that have worked hard over the years to remove conflicts of interest by ensuring equal treatment for all investments, regardless of affiliation, while firms that sell only proprietary products and are therefore inherently more conflicted are able to rely on the easier version of PTE 2016-01 that is available to a Level Fee Fiduciary.

The current definition of Level Fee Fiduciary raises the prospect that an adviser will fail to qualify out of ignorance, and forces a financial institution to expend unreasonable efforts to track down every possible compensation relationship of every one of its affiliates in order to determine whether it can satisfy the definition. It also punishes firms that use a mix of proprietary and non-proprietary funds but that have taken steps to ensure that the firms' advisers have no incentive to favor the proprietary funds. Changing the definition will eliminate these burdens while still protecting retirement investors against the risk that an adviser will recommend a particular fund out of a desire to increase the adviser's own compensation.

B. Insurance Agents Should Qualify as "Independent Fiduciaries with Financial Expertise"

In the rule, the Department provided that certain transactions with "independent fiduciaries with financial expertise" would not give rise to fiduciary investment advice if certain conditions were met. The definition of "independent fiduciaries with financial expertise" was drawn to specifically capture broker-dealers, registered investment advisers, banks, and insurance companies, the same financial institutions and advisers that are able to rely on PTE 2016-01. Insurance agents were explicitly left out of this definition. Insurance agents should be eligible for the carve-out for communications with an independent fiduciary with financial expertise.

We don't question the Department's determination that insurance agents unconnected to a broker/dealer may not possess the compliance infrastructure necessary to properly meet the conditions of PTE 2016-01.[4] But when an insurance agent is acting as an adviser to a plan sponsor and takes on fiduciary liability, they are doing so because they have the expertise to advise a plan, and often have significant experience doing so. For example, John Hancock works with one insurance agent adviser in California that provides services to 112 plans with over $200 million in assets. John Hancock has been working with this adviser in the small plan space for approximately 30 years, and his firm has expertise in all aspects of plan administration. The adviser's firm assists with plan design, participant education, selection of service providers, and (using tools provided by recordkeepers) the selection and monitoring of plan investments. Once the new rule is applicable, the adviser

[4] That said, we generally support the proposed exemption for independent marketing organizations, and we urge the Department to repropose the exemption in a form consistent with any changes made to the rule and PTE 2016-01.

acknowledges that he will be acting in a fiduciary capacity. John Hancock works with a second insurance agent adviser in California that provides services to 60 plans with $110 million in assets. He's been in business since 1978, keeps an Enrolled Retirement Plan Agent on staff, and works closely with outside ERISA counsel on plan issues. When dealing with ERISA-covered plans, these insurance agents have as much financial expertise as any broker-dealer or registered investment adviser. Where state securities and insurance regulators have determined that insurance agents are able to sell the types of group insurance products used to fund small employee benefit plans, John Hancock wholesalers should not have to treat them differently in order for John Hancock to avoid becoming a fiduciary to the plans they serve, and those insurance agent advisers (and their clients) deserve to have access to the entire range of tools and services that recordkeepers make available to advisers. Unfortunately, to avoid becoming fiduciaries themselves, the current rule forces recordkeepers to treat these insurance agents differently.

C. The Grandfathering Rule Should be Clarified

The current grandfathering rule imposes the risk of becoming a fiduciary even if an adviser has not taken any action that would be considered fiduciary advice under the new rule. By stating that a new deposit into an investment would end the availability to rely on grandfathering, the Department seems to have assumed that all new deposits result from an interaction with an adviser. While that may be the case for certain types of investments, it is not at all true of variable annuities.[5] Once an adviser has helped a client purchase a variable annuity, that client may choose to circumvent the adviser by contacting the issuer of the contract directly to make new deposits or request changes in the investments held under the contract. Some broker-dealer firms are so concerned about new deposits creating unintended fiduciary liabilities that they have asked John Hancock, as an issuer of variable annuity contracts, to refuse to accept new deposits. This is clearly not in the interest of these retirement investors (and may not be permitted by the terms of the contracts issued by John Hancock). The grandfathering rule should be changed so that a non-fiduciary client will not become a fiduciary client unless and until there has been an interaction between the client and adviser that amounts to investment advice under the rule that will result in a change to the adviser's compensation.

D. A Safe Harbor for Referrals

In the preamble to the final rule, the Department aptly noted that a referral need not rise to the level of a recommendation that would give rise to fiduciary investment advice. Nevertheless, the facts and circumstances nature of the definition of investment advice has created anxiety that innocent referrals to other service providers could unintentionally lead to fiduciary status. And the broad definition of "direct or indirect compensation" only amplifies that anxiety. If a third-party administrator gives a plan sponsor a referral to an adviser and that adviser later gives a different plan sponsor a referral to that third-party administrator, has the third-party administrator received "compensation"? Or if a recordkeeper gives a plan client a referral to an adviser and that adviser later recommends that the plan add a mutual fund that is subadvised by an affiliate of the recordkeeper (even if the adviser is not aware of that relationship), has the recordkeeper received compensation? This may seem like a minor issue, but service providers to plans and IRAs have had to devote considerable resources to determining how they can assist their clients with referrals without risking becoming a plan fiduciary. The Department could solve this conundrum by providing a clear safe harbor in which a referral containing the names of at least two service providers of the type sought by the plan investor will not be a

[5] By discussing the problems that the current grandfathering rule causes with variable annuities, we do not mean to suggest that there are not other types of investments affected in the same way.

recommendation provided there is no direct compensation to the person providing the referral and no quid pro quo understanding in connection with the referral.

E. Reduce Public Website Disclosures

In order to rely on PTE 2016-01, an adviser and financial institution are required to post on a publicly available website detailed information about the compensation split between the adviser and the financial institution. This information is of no value to the retirement investor, but is very important to the financial institution and the adviser. If two different advisers, associated with two different firms, are each offering advisory services for a fee of .50%, the fact that one of those firms passes on 90% of the fee to its adviser while the other passes on only 85% is of no interest to the investor. But these types of splits are a factor on which broker-dealer firms compete in their efforts to attract and retain qualified representatives, and firms typically maintain this information on a confidential basis. Requiring them to expose this information to all of their competitors in a way that provides no actual benefit to investors is unreasonable.

We have no objection to disclosure rules that require an adviser and financial institution to disclose compensation arrangements that would have the effect of providing an incentive for an adviser to select a particular investment, or that would increase the costs being imposed on the investor. But where internal compensation arrangements don't create conflicts of interest and don't increase costs, disclosing them provides no benefit to the investor.

In the event the Department does not reduce the types of information that must be disclosed in connection with compensation arrangements, we urge that financial institutions and advisors be able to disclose this information to investors in writing or on websites that are open only to registered users. This would at least reduce the harm caused by these disclosures by making it more difficult for competitors to access the information.

F. Eliminate the Written Contract Requirement

PTE 2016-01 requires the execution of a contract in connection with at least some advice, exposing the adviser (and the adviser's firm) to potential state court class action litigation. As previously discussed, this imposes unreasonable risks and costs on advisers, and those costs will be passed on to investors. We believe that eliminating this requirement, while still requiring full disclosure of conflicts and the use of a best interest standard, will provide sufficient protection for investors. The risk of harm to a financial institution's reputation, coupled with the risk of excise tax liability under section 4975 of the Internal Revenue Code, are more than enough to provide an incentive for firms to supervise advisers to reduce conflicts of interest. And since section 4975 requires the correction of any violations, investors harmed by misconduct will be put into the position they would have been in but for the violation, providing protection to the interests of individuals.

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John Hancock is committed to its customers and appreciates the opportunity to provide these comments to the Department. If the Department has any questions or would like more information regarding this letter, please contact me.

Sincerely,

James D. Gallagher

James D. Gallagher
Executive Vice President and General Counsel

John Hancock Life Insurance Company (U.S.A.)