VIA ELECTRONIC MAIL

April 17, 2017

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

RE: RIN 1210-AB79

Ladies and Gentlemen:

On April 7, 2017, the Department of Labor ("Department") published a final rule extending the applicability date of the "Definition of the Term 'Fiduciary'; Conflict of Interest Rule–Retirement Investment Advice" ("Fiduciary Rule") under the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1986 ("Code"), as well as the related prohibited transaction exemptions, until June 9, 2017.[1] In its proposal to delay the Fiduciary Rule,[2] the Department also requested comments on issues raised by the Presidential Memorandum dated February 3, 2017—specifically, whether the Fiduciary Rule may adversely affect access to retirement advice, has resulted in disruptions to the retirement services industry, and will likely cause an increase in litigation.[3]

Commonwealth Financial Network® ("Commonwealth") is an independent broker/dealer and an SEC-registered investment adviser with home office locations in Waltham, Massachusetts, and San Diego, California, and more than 1,700 registered representatives ("RRs") and investment adviser representatives ("IARs") who are independent contractors conducting business in all 50 states (collectively, "advisors"). Virtually all of Commonwealth's advisors work with qualified retirement plans or IRAs and will be affected by the Fiduciary Rule.

Commonwealth appreciates the opportunity to comment on the delay, the questions raised in the Presidential Memorandum, and the legal and policy-related issues concerning the Fiduciary Rule and its related exemptions. Commonwealth supports a uniform fiduciary standard applicable to retirement investment advice, but we believe the Department should defer rulemaking responsibility to the Securities and Exchange Commission ("Commission"), as it has long been the primary regulator of the financial institutions most affected by the Fiduciary Rule.

The 60-Day Delay of the Applicability Date

Commonwealth welcomes the 60-day delay of the applicability date of the Fiduciary Rule, but until the Department completes its review per the Presidential Memorandum, the financial services industry will continue to be in a state of limbo. The Department must act quickly to complete its review and provide relief from the unprecedented upheaval caused by the Fiduciary Rule. The uncertainty caused by the rule has stifled innovation by diverting resources away from products and services that provide value for investors

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[1] *See* 82 Fed. Reg. 16,902 (April 7, 2017).
[2] Definition of the Term "Fiduciary," 82 Fed. Reg. 12,319 (March 2, 2017).
[3] *See* Presidential Memorandum on Fiduciary Duty Rule (Feb. 3, 2017), available at https:/ /www.whitehouse.gov/the-press-office/2017 /02/03/presidential-memorandum-fiduciary-duty-rule.

and create efficiencies for financial institutions into compliance systems and products that may never see the light of day.[4]

Questions Raised in the Presidential Memorandum
The president directed the Department to review the Fiduciary Rule, and if the answer to any of the following questions is affirmative, the Department has a duty to propose a rule rescinding or revising the Fiduciary Rule.[5]

> ***Is the Fiduciary Rule likely to harm investors due to a reduction of access to retirement savings offerings, products, information, or financial advice?***
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> Yes, unintended consequences of the Fiduciary Rule have already started to appear as financial institutions reduce product offerings and move away from business lines to avoid the legal and regulatory risks associated with offering these products through the Best Interest Contract exemption ("BIC exemption"). For example, a number of firms, including Commonwealth, have made the difficult decision to cease offering commission-based products in retirement accounts. We still believe commission-based accounts are appropriate in many circumstances, particularly for small investors. The incredible compliance burdens, however, combined with increased exposure to litigation risk and a lack of "BIC-exemption-compliant" products available from product manufacturers, make the BIC exemption an untenable option for Commonwealth. The litigation and operational risks associated with complying with the BIC exemption have forced us to stop offering commission-based products to small IRA investors and start-up retirement plans. Unfortunately, it is the small investor who desperately needs financial advice who will be most harmed by the unintended consequences of the Fiduciary Rule and the BIC exemption.
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> ***Has the anticipated applicability of the Fiduciary Rule resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees?***
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> Yes, the uncertainty created by the Fiduciary Rule has been a massive disruption to the retirement services industry. Commonwealth has dedicated a tremendous amount of time and effort to reviewing its business lines, developing systems, and creating policies and procedures to comply with the Fiduciary Rule. The Fiduciary Rule has created an incredible amount of anxiety among Commonwealth's advisors and confusion among our clients. In addition, some of the costs associated with developing new systems to comply with the Fiduciary Rule will necessarily be passed on to investors. Furthermore, as product offerings shrink, this will reduce investors' freedom of choice to pay for retirement services as they see fit. Rather than allowing investors to decide the best way to compensate their advisors, the Department is imposing its opinion on the retirement services industry—to the detriment of investors and advisors alike.
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> ***Is the Fiduciary Rule likely to cause an increase in litigation?***
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> Yes, the Fiduciary Rule is *designed* to increase litigation. Because the Department has no enforcement authority over IRAs, it relies on litigation from individual investors and class-action attorneys to enforce the private right of action created by the BIC exemption. In litigation under the BIC exemption, financial institutions must prove that all recommendations to retirement investors met the fiduciary standard, while plaintiffs are able to question these recommendations with the

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[4] *See*, *for example*, "DOL Rule Delay Imperils T Shares," *Barron's*, at http://www.barrons.com/articles/dol-rule-delay-imperils-t-shares-1488835541, accessed April 12, 2017.
[5] *See* 82 Fed. Reg. 12,319 (March 2, 2017).

benefit of hindsight. This shifting of the burden of proof creates a presumption that the financial institution has breached its fiduciary duty any time an investor makes an allegation against his or her advisor. If the Fiduciary Rule and the BIC exemption are not replaced or substantially modified, every time the market goes down, plaintiffs' attorneys will come out of the woodwork and open the floodgates of litigation. The only group that truly benefits from the Fiduciary Rule is the plaintiff's bar.

The fundamental flaw in the BIC exemption is that plaintiffs' attorneys will enforce the Department's rule through individual and class-action lawsuits because the Department lacks jurisdiction in the context of IRAs. Rather than moving forward with a rule that creates this indirect enforcement dynamic, the Department should repeal the Fiduciary Rule and its related exemptions and allow the Commission to promulgate a uniform fiduciary standard that it can enforce directly.

Legal and Policy Issues
As a policy matter, Commonwealth supports a uniform standard of care applied to all investment advice—retirement and non-retirement. The investing public will be better served by a fiduciary standard consistently applied across all product types. Commonwealth questions, however, the Department's ability to craft common-sense regulations that transcend the retirement industry and apply to all investments. The Commission is in a much better position to create regulations applicable to both retirement and non-retirement investment advice.

Conclusion
The Department must act quickly to complete its analysis and repeal the Fiduciary Rule. This is necessary to end the disruption to the financial services industry caused by the Department and give the Commission the opportunity to propose a fiduciary standard without the unintended consequences of the Department's Fiduciary Rule. By acting now, the Department will allow financial institutions to continue providing unencumbered access to retirement advice to investors of all types—large or small.

Thank you for the opportunity to comment on the proposal. If you have any questions regarding our comments or concerns, please call me at 781.736.0700.

Sincerely,

Commonwealth Financial Network

/s/ Brendan Daly
Legal and Compliance Counsel