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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Attn: Fiduciary Rule Examination

RIN 1210-AB79

Ladies and Gentlemen:

This letter is written on behalf of Advisors Excel, LLC ("Advisors Excel or AE"), a Topeka, Kansas based independent marketing organization ("IMO"). Thank you for the opportunity to comment on the United States Department of Labor's ("DOL or Department") proposed Conflicts of Interest Rule ("Rule") and related prohibited transaction exemptions ("PTEs") including the Best Interest Contract Exemption ("BICE") and Proposed Best Interest Contract Exemption for Insurance Intermediaries ("IMO Exemption") in light of the President Trump's February 3, 2017 directive to the DOL Secretary.

As expressed in previous comment letters and during an in-person meeting with the Department, Advisors Excel wholly supports the intent of the Rule of acting in the best interest of the retirement investor. Acting in the best interest of the retirement investor is the current practice of the large majority of financial professionals, including Advisors Excel and our affiliated advisors.

Pursuant to the March 2, 2017 request by the Department regarding the Presidential Memorandum on the Fiduciary Duty Rule dated February 3, 2017, Advisors Excel submits the comments below in support of a revision or repeal of the Rule and related PTEs as currently promulgated for the following reasons.

Advisors Excel believes the Rule, as currently written, 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. Further, Advisors Excel believes the Rule will result in dislocations and disruptions within the retirement services industry that will adversely affect investors or retirees. Finally, Advisors Excel undoubtedly

believes the Rule is likely to cause an increase in litigation and increase the price investors and retirees must pay to gain access to retirement services.

Advisors Excel believes the Rule as currently written contains significant deficiencies which, if left unchanged, will result in industry disruptions and detrimental impacts upon retirement investors. Specifically, relating to the fixed indexed annuity ("FIA") industry, the Department failed to take into account the distribution system for these products. It appears the Department, when removing FIAs from PTE 84-24 and placing them in the BICE exemption, believed the Broker-Dealer ("BD") distribution model could simply be utilized for FIAs. This lack of understanding of the FIA industry has resulted in significant hardships for the industry in attempting to comply with the Rule.

Harm to Investors

Advisors Excel believes the Rule, if implemented in its current form will have a detrimental impact on retirement investors due to loss of access to sound retirement planning. The threat of private causes of action driven by incentivized plaintiffs' lawyers will result in financial advisors abandoning lower to middle income investors to the detriment of these clients. Retirement investors will lose access to financial planning advice that has been shown to benefit their retirement funds. Further, the push towards robo-advising away from alleged "conflicted advice" contains serious flaws and will result in a retirement advice gap that will harm investors. Finally, the experience of retirement investors in the United Kingdom should serve as a warning to the Department to re-evaluate the Rule as currently written to mitigate the loss of advice for retirement investors.

A report of the United States Senate Committee on Homeland Security and Governmental Affairs citing a 2015 Oliver Wyman study states that among individuals with $100,000 or less in annual income, retirement investors who receive investment advice save 38% more than individuals that do not receive investment advice. Committee on Homeland Security and Governmental Affairs & Senator Ron Johnson, *The Labor Department's Fiduciary Rule: How a Flawed Process Could Hurt Retirement Savers* (2d Sess. 2016). The same Senate report, citing data from Quantria Strategies, indicates the Rule will cause a loss of retirement savings of $68-80 billion per year and will jeopardize retirement readiness for 11.9 million IRA and retirement participants. *Id.* at 3. Further, testimony before a Senate Subcommittee on Employment and Workplace Safety indicates up to 7 million small investors could lose their current broker as a result of the Rule being put in place. *Restricting Advice and Education: DOL's Unworkable Investment Proposal for American Families and Retirees*, Hearing Before the Subcomm. on Emp't & Workplace Safety of the S. Comm. on Health, Educ., Labor & Pensions, 114th Cong. (2015) (statement of Peter Schneider, President, Primerica, Inc.).

Financial advisors play an integral role in retirement planning for lower to middle income retirement investors, which could be lost if the Rule is enacted as currently written. The 2015 Oliver Wyman report indicates 58% of households with under $100,000 in investable assets and 75% of households with over $100,000 in investable assets solicit professional financial advice.

Oliver Wyman, *The Role of Financial Advisors in the US Retirement Market* 5 (2015). Financial advisors moving away from lower to middle income investors due to the Rule only harms access for investors by limiting their pool of options for financial advice.

In the absence of financial adviser provided retirement advice, it appears the Department believes a move to robo-advisors may fill the void. However the use of robo-advisors as an alternative means of financial advice under the Rule completely ignores the personalized element of financial advice that retirement investors seek. In an April 1, 2016, Policy Statement, the Massachusetts Securities Division astutely identified that retirement investors hire investment professionals to gain access to professionally personalized investment advice which cannot be provided by robo-advisors. The Policy Statement further illustrates the lack of due diligence performed by robo-advisors and highlights the problems which would exist in a robo-advisor driven industry. "Specifically, robo-advisers' failure to conduct due diligence, as well as robo-advisers' depersonalized structure, may render them unable to provide adequately personalized investment advice and make appropriate investment decisions." *Policy Statement of the Massachusetts Securities Division, April 1, 2016*. Reducing access to personalized financial advice and driving Americans toward robo-advisors will only exacerbate problems and leave people financially vulnerable in their retirement years.

Finally, it is worth noting that predictions of financial advisers leaving lower to middle income investors are rooted in recent history. In 2006, the United Kingdom's Financial Conduct Authority ("FCA") developed the Retail Distribution Review ("RDR"), which was implemented in 2013. Predictions of an increased advice gap accompanied the RDR with estimates that 43 million adults would fall into the guidance gap in Britain. Joe Tomlinson, *The DOL Fiduciary Rule: What We Can Learn from the U.K.,* Advisor Perspectives (September 28, 2015), *https://www.advisorperspectives.com/articles/2015/09/28/the-dol-s-fiduciary-rule-what-we-can-learn-from-the-u-k*. In July 2016, the Chief Executive Officer of the FCA admitted the RDR played a role in creating the advice gap. Emma Ann Hughes, *FCA admits RDR contributed to Advice Gap,* Financial Times Adviser (July 19, 2016), *www.ftadviser.com*. The article indicates the number of financial advisers offering professional advice in England has decreased from approximately 26,000 in 2011 to 24,000 in 2014 and indicated the proportion of retail investment products – including pensions, retirement income products and investments – sold without advice increased from around 40% in 2011 to 2012 to around 66% in 2014 to 2015. *Id.* Accordingly, the predicted loss of investment advice is not hyperbolic and given the experience of investors in England with a similar regulatory initiative it is likely the same will occur in the United States if the Rule is implemented as proposed. In sum, implementation of the Rule as currently written will bring harm to retirement investors.

Disruption to the Industry

Advisors Excel believes the Rule, and its implementation, already have caused substantial disruptions to the financial services industry, which ultimately will be to the detriment of the retirement investor. To date, Advisors Excel has spent in excess of $1 million in preparation for the Rule. Across the financial industry, compliance estimates range from Ameriprise spending in excess of $11 million in the first part of 2016 (Greg Iacurci, *Ameriprise spends $11 million-plus this year on DOL fiduciary rule,* Investment News (July 29, 2016), http://www.investmentnews.

com/article/20160729/FREE/160729927/ameriprise-spends-11-million-plus-this-year-on-dol-fiduciary-rule), to an estimate by the Securities Industry and Financial Markets Association ("SIFMA") indicating start-up costs for large and medium broker-dealers would total $4.7 billion with on-going costs of $1.1 billion. Kenneth E. Bentsen, Jr., Securities Industry and Financial Markets Association Conflict of Interest Rule Comment Letter (July 20, 2015), http://www.sifma.org/issues/item.aspx?id=8589955445. These estimates were well above the Department's own initial estimates of the cost to comply with the final rule, which were between $10 billion and $31.5 billion over 10 years and a primary estimate of $16.1 billion. Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,951 (April 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550). The fact that compliance cost estimates vary so significantly requires further study of the Rule to ascertain the actual costs and evaluate whether those costs outweigh the alleged benefit to consumers considering the costs will ultimately be passed on to those same consumers.

While the industry may incur the costs of compliance initially, the ultimate price will be paid by retirement investors. The industry in general will not absorb the costs of compliance into their bottom line. Rather, the costs of compliance will be passed on to consumers via higher pricing in products and fees associated with transactions. Given that the Department's estimate that $17 billion is lost to conflicted advice per year is highly disputed, retirement investors who did not suffer from "conflicted advice" will still pay for the compliance costs associated with the Rule's implementation regardless of whether they suffered any of the alleged harm or not.

While the precise disruption to the industry is difficult to quantify, it is clear this Rule represents the biggest change in the history of the FIA and its distribution system. Many of the systems required for operation under the Rule do not currently exist and must be built. The amount of time required to create and implement these systems is far greater than what has been allowed by the Department. As pointed out in a previous Advisors Excel comment letter, each carrier maintains policies, procedures, and systems unique to their company in areas as diverse as applications, data maintenance and transfer, producer contracting, product features, paymaster issues, compensation structure, selling agreements, producer monitoring, marketing, and policies and procedures development etc. Every one of these areas, and more, are impacted by the Rule and needs to be built out sufficiently before the industry can begin to function under the Rule. Finally, it is apparent by the Department's actions moving FIAs from PTE 84-24 to the BICE exemption that the DOL believed a broker-dealer distribution system could be seamlessly implemented into the FIA industry. That simply was not the case and the result has been mass confusion in an effort to practically implement the Department's philosophical objectives. If this system is not built properly, it will cause substantial disruptions to every facet of the retirement services industry. If the Department is truly concerned with protecting retirement investors, it will allow the necessary time to appropriately build the systems needed to ensure that retirement investors are properly served.

Increase in Litigation and Associated Litigation Costs Passed On to Retirement Investors

Advisors Excel strongly believes that the Rule, coupled with the BICE and IMO exemptions' requirement of a written contract with retirement investors that prohibits mandatory arbitration of class and other representative actions, will certainly cause an increase in litigation and in

compliance costs designed to reduce the risk of such litigation. These litigation and compliance costs will be passed on to retirement investors in the form of higher fees. While the DOL and Internal Revenue Service ("IRS") do maintain enforcement authority, the Rule contemplates that practical enforcement will be carried out by a plaintiff's bar with a financial incentive to bring lawsuits under BICE and the IMO Exemption. "It is very likely that the plaintiffs' bar will play a primary role in enforcing the new rules in the IRA space. And it is possible if not likely, that the Fiduciary Rule will result in a spate of class action litigation in the not-too-distant future." Michael Kreps & George M. Sepsakos, *The Impact of the Department of Labor's Fiduciary Rule,* Business Law Today (November 2016), *http://www.americanbar.org/ publications/blt/2016/11/keeping_current.html.*

The Department itself realized there would be increased costs associated with the Rule and associated exemptions with regard to errors and omissions insurance. While the Department's Regulatory Impact Analysis fails to address the increase in litigation costs associated with the Rule for insurance producers directly, it does indicate an estimated $99.7 million increase in errors and omissions insurance premiums for broker-dealer representatives subject to the Rule. Dep't of Labor, Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest- Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions (April 2016).

With respect to the BICE's and the IMO Exemption's requirement to enter into an enforceable agreement with the retirement investor, the DOL has historically not imposed such a requirement in PTEs for individual retirement accounts and other investment vehicles excluded from ERISA but subject to the prohibited transaction provisions of the Internal Revenue Code ("Code"). The Department stated that it imposed such a requirement to give an enforceable private right of action to retirement investors investing through non-ERISA plans because it felt that the excise taxes triggered by the Code were an inadequate means of incentivizing compliance. Best Interest Contract Exemption, 81 FR 21002, 21022 (Apr. 8, 2016) ("Without a contract, the possible imposition of an excise tax provide an additional, but inadequate, incentive to ensure compliance with the exemption's standard's based approach."). However, the DOL cited no support for this conclusion even though it is a dramatic departure from the DOL's 40 plus years practice of not imposing such a requirement as a condition of relief under class PTEs for products sold to IRAs and other non-ERISA plans. We also agree with the position taken by plaintiffs challenging the validity of the Rule in litigation that the DOL should not be able to impose indirectly through BICE a private right of action for violations of the Code when it does not have the statutory authority to do so directly.

BICE and the IMO exemptions not only impose a private right of action for breach of contract, they prohibit binding arbitration of class and other representative actions. It is well-documented that arbitration provides a more efficient means of resolving disputes rather than litigation and is favored by the Federal Arbitration Act. Moreover, nothing under ERISA prohibits an ERISA plan fiduciary from requiring participants to resolve through binding arbitration class and other representative claims. While the DOL's regulations applicable to internal claims and appeals of ERISA claims prohibit binding arbitration, that prohibition applies only to health and disability plans, and not retirement or pension plans. 29 C.F.R. §§ 2560.503-1(c)(4) and 2560.503-1(d). And the sole remedy for violating this requirement is that participants are permitted to go

directly to federal court rather than exhaust their administrative remedies under the plan. 29 C.F.R. § 2560.503-1(l). Accordingly, the prohibition of binding arbitration of class and other representative actions in BICE and the IMO Exemption is a requirement that is not imposed on fiduciaries of ERISA retirement plans. Consequently, this appears to be an arbitrary requirement imposed by the the DOL without adequate analysis or cost justification.

With respect to IMOs, the IMO Exemption goes even farther and requires the IMO to have either an unencumbered, liquid asset set-aside or fiduciary insurance, in either case in an amount equal to at least 1% of average annual premium sales of fixed annuity contracts sold. We are unaware of any PTE where the DOL has required such an unprecedented amount. For example, the PTE 84-14 for qualified professional assets managers, one of the most relied upon exemptions used in the marketplace, only requires a maximum equity capital of $1,000,000 for registered investment advisers and broker dealers. The Department did not provide a policy justification for imposing this requirement solely on IMO financial institutions and for requiring a level of asset set-aside or insurance that is unprecedented and significantly beyond anything the Department has imposed on the fiduciaries in other PTEs.

These measures -- the private right of action, prohibition on binding arbitration of class and other representative actions, and the IMO Exemption asset set-aside/insurance requirement -- make clear the Department's objective of empowering plaintiffs' lawyers with the basis to file class action lawsuits to enforce breaches of the best interest contract, and in the case of IMOs, to provide an unprecedented amount of unencumbered assets or insurance to satisfy any judgment. We are unaware of any other area of rulemaking in the prohibited transaction context where the Department has imposed a private right of action and required the fiduciary or other party in interest to maintain sufficient assets to satisfy private litigant claims in litigation. These unjustified and arbitrary measures will undoubtedly lead to increased litigation which will result in lower product choices and higher costs for retirement investors. Accordingly, Advisors Excel believes that if the Department is intent on implementing the Rule, the BICE and IMO Exemptions should be rewritten to eliminate the private right of action, the prohibition on binding arbitration of class and other representative actions and the IMO Exemption asset set-aside/insurance requirement.

Conclusion

Advisors Excel appreciates the efforts undertaken to re-evaluate the Rule in its entirety. As previously stated, we believe acting in the clients' best interests is of the utmost importance and we believe this standard is adhered to by a large majority of financial advisors today. Unfortunately, this Rule as currently written will have a detrimental effect on retirement investors and the industry by limiting access for consumers, continuing to create substantial disruption to the insurance industry, and lastly driving up litigation and compliance costs which will be passed on to consumers.

Simply put, the objective of this Rule is appropriate, the Department's execution, however, is fatally flawed. Respectfully, Advisors Excel believes the Department's lack of subject matter understanding in this arena has led to a philosophically based Rule which is woefully short on practical guidance for implementation for the industry to rely upon. This has led to substantial

confusion in the industry that will result in a chaotic patchwork scheme going forward and will benefit only plaintiff's attorneys seeking to capitalize on the confusion. Advisors Excel believes enhanced regulation in this area should be delegated to subject matter experts that reside in state insurance departments and the SEC. Permitting entities who understand the objectives of the Rule and the industry to craft workable standards will result in a smoother implementation which ultimately benefits the end client.

Thank you for the opportunity to comment.

Sincerely,

Eric R. Keller
of PAUL HASTINGS LLP

cc: Michael Spafford