MassMutual FINANCIAL GROUP®

April 17, 2017

Submitted electronically to: EBSA.FiduciaryRuleExamination@dol.gov

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

Re: Questions of Law and Policy Concerning the Fiduciary Rule (RIN 1210-AB79)

Ladies and Gentlemen:

Massachusetts Mutual Life Insurance Company ("MassMutual") appreciates the opportunity to provide these comments to the Department of Labor (the "Department") in connection with the Department's review of the final regulation defining the term "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended, the new Best Interest Contract Exemption (the "BIC Exemption"), and the amendments to prohibited transaction exemption 84-24 issued by the Department on April 8, 2016 (collectively, the "Fiduciary Rule") pursuant to the memorandum issued by President Donald J. Trump on February 3, 2017 (the "Presidential Memorandum").

Founded in 1851, MassMutual is a leading mutual life insurance company and Fortune 100 Company headquartered in Springfield, Massachusetts. As a mutual company, we operate for the benefit of our members and participating policyholders, and offer a range of quality financial products and solutions, including life, disability and long-term care insurance, annuities and retirement/401(k) plan services. MassMutual has a long record of supporting the goals of protecting investors and encouraging retirement savings. Acting in the best interest of our customers is at the core of our mission to secure their future and protect the ones they love. We support a workable best interest standard of care but believe changes are necessary to the Fiduciary Rule.

As the Department considers possible revisions to the Fiduciary Rule, it now has concrete evidence that many of the anticipated negative consequences of the Fiduciary Rule are in fact real. The Fiduciary Rule has already forced changes, and will continue to cause changes, in the retirement marketplace that will increase costs and decrease investment choices and access to advice for retirement investors. The Department should take advantage of this opportunity to revisit the Fiduciary Rule with the benefit of hindsight and fix those aspects that have proven to be most harmful. For example, since the final Fiduciary Rule was published last April:

- Independent research has concluded that 71% of advisors will disengage with some investors because of the Fiduciary Rule;
- Firms have announced they intend to stop providing advice or otherwise narrow the product choices available to retirement investors in commission-based accounts;
- Morningstar predicts hundreds of millions of dollars in class action litigation expenses in addition to costs estimated in the Department's regulatory impact analysis;
- Firms are incurring compliance costs that are multiples of what the Department estimated in the regulatory impact analysis.

These negative developments and corresponding consumer harm justify a detailed review of the Fiduciary Rule, consistent with the Presidential Memorandum, *before* it goes into effect. The Department should delay the applicability date of the Fiduciary Rule until this review is complete.

<u>Comments to the Fiduciary Rule in Response to the Presidential Memorandum</u>

The Presidential Memorandum directed the Department to prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Rule and to consider:

- 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;
- 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
- 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.

Furthermore, the President directed that if the Department makes an affirmative determination as to any of the above three considerations, or the Department concludes for any other reason, after appropriate review, that the Fiduciary Rule, prohibited transaction exemptions, or both are inconsistent with the priority of the Administration "to 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," then the Department shall publish for notice and comment a proposed rule rescinding or revising the Fiduciary Rule, as appropriate and as consistent with law. We believe the evidence requires the Department to make an affirmative finding as to each of the three considerations in the Presidential Memorandum.

First, as evident from the market reaction, the Fiduciary Rule as currently drafted will reduce retirement investors' options for retirement savings, advice and products. Since the Fiduciary Rule was adopted, some firms have announced that they intend to stop providing advice to retirement customers in commission-based accounts.[1] While intended to comply with the Fiduciary Rule, these changes will likely hurt some consumers, such as buy-and-hold investors, where a commission-based account was the right fit. Other firms have announced that they will no longer offer advice on certain product types to retirement customers in commission-based accounts.[2] And more broadly, retail distributors, including MassMutual's affiliated broker-dealer, MML Investors Services, LLC, are actively narrowing their product shelf, inevitably reducing the choices available to retirement investors.[3] Firms are finding it necessary to limit product offerings or exit the commission-based business not because the products offered are not in their clients' best interest, but rather because of the costs and litigation risks (discussed below) associated with the overly complex and ambiguous requirements of the BIC Exemption, such as neutral factors and grandfathering requirements.

Second, new independent data confirms that the applicability of the Fiduciary Rule will result in dislocations or disruptions within the retirement services industry that will adversely affect investors and retirees. In 2016, a non-commissioned report by CoreData Research UK concluded that 71% of financial advisors will disengage with at least some investors because of the Fiduciary Rule.[4] This negative impact is consistent with the United Kingdom's experience following its adoption of the Retail Distribution Review. Just last year, the then acting chief executive of the Financial Conduct Authority ("FCA"), Tracey McDermott, "acknowledged the Retail Distribution Review led to banks leaving the sector, making it harder for the less-affluent to seek advice".[5] And in July of 2016, Andrew Bailey, who succeeded Mr. McDermott as chief executive of the FCA, "revealed the part played by the Retail Distribution Review in creating the advice gap," noting that "FCA's product sales data suggested the proportion of retail investment products - including pensions, retirement income products and investments - sold without advice has increased, from around 40 per cent in 2011 to 2012 to around two thirds in 2014 to 2015".[6] Additionally, for MassMutual, if the Fiduciary Rule and the BIC Exemption become applicable as proposed, we anticipate that some of our advisors will leave the industry and no longer provide advice to clients.

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[1] Michael Wursthorn, *Merrill Lynch to End Commission-Based Options for Retirement Saver*, The Wall Street Journal, Oct. 6, 2016. Jed Horowitz, *Commonwealth Defends Ban on Commission-based Retirement Products,* AdvisorHub, Oct. 25, 2016.
[2] Megan Leonhardt, *Why This Brokerage Won't Let Investors Buy Funds and ETFs in Their IRAs,* www.Time.com/money, Aug. 22, 2016.
[3] Ben Yahr and Gerry Murtagh, *Three significant challenges for annuity advisors in 2017.* Ernst & Young LLP, Originally published on Dec. 21, 2016.
[4] CoreData Research, *Fiduciary rule to leave US mass-market investors stranded,* press release Nov. 2016.
[5] Emma Ann Hughes, *FCA admits RDR made advice too expensive*, FT Adviser, Mar. 4, 2016.
[6] Emma Ann Hughes, *FCA admits RDR contributed to advice gap*, FT Adviser, July 19, 2016.

Finally, it is incontrovertible that the Fiduciary Rule will cause an increase in litigation. The Department itself made clear in the preamble to the BIC Exemption that exposure of financial institutions and their advisors to class action litigation was intended to serve as the primary means of enforcing this new exemption. Requirements in the Fiduciary Rule, such as a mandatory contract with individual retirement account owners, restrictions on limiting class actions, and disclosures on public websites (that are redundant with disclosure provided to the actual client) are not simply intended to allow individual retirement investors to seek restitution for actual harm, but rather are specifically intended to encourage enforcement of regulations through class action litigation.

Class action litigation will lead to increased costs for retirement investors without commensurate benefits. The exorbitant expenses associated with defending class actions and the resulting settlements, which disproportionately benefit the lawyers involved,[7] will inevitably be borne by those the Fiduciary Rule is designed to protect. A recent analysis by a Morningstar senior equity analyst estimated "a long-term annual range for the industry from class-action settlements of $70 million–$150 million", with likelihood that near-term class-action lawsuit settlements could exceed this by a multiple.[8] The expected increase in class action litigation inevitably will impact the cost of and access to retirement advice, including firms and advisors leaving the middle class market; neither of which is an outcome in the best interest of the retirement investor.

Flaws in the regulatory impact analysis require a new assessment

The reduction in customer access to retirement advice and the increase in litigation cost cannot be justified in light of flaws in the regulatory impact analysis. The Department contends that elimination of conflicted advice will result in gains "to IRA investors worth between $33 billion and $36 billion over 10 years".[9] The research cited in support of the Department's estimate, however, relies on a flawed comparison. The research compares the performance of front-end load funds (which are generally associated with a commission-based model where advice is provided by a broker) to no-load funds (which are generally sold directly with no advice provided to the customer). It is not surprising therefore that the estimated decrease in fund performance when comparing front-end load and no-load funds equates roughly to the cost of the advice. A more relevant analysis, apparently not undertaken by the Department, would be to compare investor gains when obtaining advice through a fee-based model versus a commission-based model. The regulatory impact analysis must be revised to compare "apples to apples" and assess the impact on performance that takes into account both commissions (e.g., front-end loads) and fee-based compensation (e.g., an advisory fee).

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[7] Mayer Brown LLP Study, "Do Class Actions Benefit Class Members" concludes that the vast majority of cases they studied provided no benefits to most members of the putative class.

[8] Jeff Benjamin, *DOL fiduciary rule class-action cost could top $150M a year,* InvestmentNews, Feb. 9, 2017.

[9] Regulating Advice Markets, Regulatory Impact Analysis for Final Rule and Exemptions, Apr. 2016 (at page10).

The regulatory impact analysis failed also to address the impact of including life insurance products held in welfare plans within the scope of the Fiduciary Rule. The Department subjected these products, which are sold for death benefit protection not investments, to the Fiduciary Rule without analysis at a time when more Americans than ever lack sufficient life insurance protection.

Finally, our actual experience proves that the regulatory impact analysis materially underestimated compliance costs to the industry. In our initial comment letter on the proposed Fiduciary Rule, MassMutual estimated that the cost to comply with the proposal would exceed the Department's estimates. We can report that MassMutual expects to spend, by December 31, 2017, in excess of $30 million on compliance with the Fiduciary Rule which is more than three times the estimate in the regulatory impact analysis for enterprises like ours.[10] A significant portion of these costs are associated with requirements of the BIC Exemption that have yet to been implemented; further justifying the need for a delay to the Fiduciary Rule before these costs are incurred.

The Presidential Memorandum directed a review of the economic and legal analysis to resolve exactly these issues. This review mandated by the Presidential Memorandum requires that the Fiduciary Rule be delayed in whole until the updated economic analysis can be completed. Furthermore, the remaining requirements scheduled to become applicable on January 1, 2018 need to be delayed to avoid the cost associated with implementation until modifications to the Fiduciary Rule are finalized.

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We very much appreciate the opportunity to comment on these important issues. As noted at the outset, the best interest of our customers is at the very core of MassMutual's business. We support the objectives of protecting retirement investors, and believe that modifications of the Fiduciary Rule are necessary to avoid disrupting the retirement services industry and the ability of Americans to gain access to financial advice for their retirement accounts. We welcome the opportunity to discuss with the Department the modifications that are necessary.

[10] Section 5.3 of the final 2016 regulatory impact analysis estimates, under its medium reduction scenario, start-up costs of $7,366,000 for large broker-dealers, $2,045,000 for insurers (using the SIFMA data), and $49,000 each for plan recordkeepers and for registered investment advisers utilizing the BICE level fee fiduciary exemption, all of which are represented in the MassMutual enterprise. Out of conservatism, we have not backed out the cost savings projected in the 2017 regulatory impact analysis of the delay in the applicability date and related changes.

Please do not hesitate to contact us with any comments or questions, or if further information would be helpful.

Respectfully submitted,

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