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July 21, 2017

Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

Attention: Fiduciary Rule Examination - RIN 1210-AB82

Gentlemen and Ladies:

On July 6, 2017, the Department of Labor (the "Department") published a request for information (the "RFI"), which, among other things, solicited comments with respect to certain questions regarding the possibility of delaying the application of certain conditions (the "Additional Conditions") in addition to the so-called "Impartial Conduct Standards" applicable under the administrative exemptions (the "Accompanying Exemptions") accompanying the promulgation of the final regulation (the "Fiduciary Rule") [1] defining who is a "fiduciary" under section 3(21)(A)(ii) Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and section 4975 of the Internal Revenue Code of 1975, as amended (the "Code"). The Financial Services Roundtable ("FSR")[2] welcomes the opportunity to submit comments in support of a delay of the applicability of the Additional Conditions for 24 months.

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1 82 Federal Register 31278 (July 6, 2017).

2 FSR represents the largest integrated financial services companies providing banking, insurance, payment, investment and finance products and services to the American consumer. FSR member companies provide fuel for America's economic engine, accounting for $54 trillion in managed assets, $1.1 trillion in revenue and 2.1 million jobs.

I. Executive Summary

FSR believes a delay of the Additional Conditions for 24 months would be appropriate for the following reasons:

- To allow time for the Department to undertake the complete review of the Fiduciary Rule mandated by the Presidential Memorandum on Fiduciary Duty Rule;[3]

- To allow time for the Department to determine whether and to what extent eliminating or otherwise modifying the Additional Conditions will promote more effective compliance with the Fiduciary Rule without risk of diminishing access to advice or investment choices for Retirement Investors;

- To allow time for the Department to determine how best to address, and provide opportunities for the further development and implementation of, new products that minimize perceived conflicts of interests between institutions and Retirement Investors;

- To allow opportunities for other regulators to participate more effectively in the Department's review of the Fiduciary Rule and Accompanying Exemptions;

- To allow courts time to consider issues raised in pending challenges to the Fiduciary Rule and Accompanying Exemptions, before further requirements take effect on January 1, 2018;

- To allow time for financial services providers to take action to address changes in practices arising out of the Department's review of the Fiduciary Rule and Accompanying Exemptions, including implementation of new products developed in response to the Fiduciary Rule; and

- To avoid further confusion and disruption for Retirement Investors in the interim.

[3] 82 Federal Register 9675 (Feb. 7, 2017) (Presidential Memorandum on Fiduciary Duty Rule).

II. Introduction

FSR supports a delay of 24 months[4] to provide adequate time (1) for the Department to undertake the complete review of the Fiduciary Rule mandated by the Presidential Memorandum to determine whether the Fiduciary Rule may adversely affect the ability of Americans to gain access to retirement information and financial advice, [5] and (2) for entities providing services to employee benefit plans, individual retirement accounts ("IRAs") and other entities treated as plans for purposes of the Code (collectively, "Retirement Investors") to be able to take the actions necessary or appropriate to address any changes in practices arising as a result of the Department's review of the Fiduciary Rule and the Accompanying Exemptions. A delay also is required to avoid further confusion and disruption for Retirement Investors in the interim.

FSR believes that, at a minimum, significant revisions to the Additional Conditions are required to fulfill the objective of such Accompanying Exemptions to allow Retirement Investors continued access to particular investments and services. Of course, the Fiduciary Rule also continues to be challenged in litigation, and some or all of the requirements currently set to take effect on January 1, 2018, could be rendered unnecessary by forthcoming court rulings. Although we will not repeat them at length here, we do respectfully submit that the Fiduciary Rule raises a host of serious legal problems. Indeed, the Department itself has recently acknowledged in its legal briefing that the Accompanying Exemptions' restrictions on class-litigation waivers, which are among the requirements set to take effect January 1, are improper and should be vacated. A postponement of the January 1 deadlines is thus warranted to allow the courts additional time to consider these issues before further requirements take effect.

FSR believes a delay of 24 months is required to avoid further confusion and disruption for Retirement Investors. A delay also would allow all regulatory agencies having jurisdiction over the products, services and institutions which are affected by the Fiduciary Rule and the Accompanying Exemptions appropriate opportunity to help craft a regulatory regime that is logical, coordinated and effective in promoting the interests of Retirement Investors in having access to a wide array of investment advice and investment opportunities, within a framework that affords them reasonable protections that can be administered efficiently and effectively by persons serving the needs of such Retirement Investors.

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[4] This 24-month period would seem necessary to allow for the Department to complete the study mandated by the Presidential Memorandum, consider responses to the RFI, issue a notice of proposed rulemaking and consider comments on the rulemaking, finalize the rule, and allow at least one (1) year for financial institutions to implement. This time frame also would allow for regulatory coordination between the Department and other authorities, including the Securities and Exchange Commission, FINRA, and banking and insurance regulators.

[5] 82 Federal Register 9675 (Feb. 7, 2017) (Presidential Memorandum on Fiduciary Duty Rule).

We suggest this delay despite the fact that our members have already expended substantial recourses and incurred substantial costs to be prepared to comply with the Fiduciary Rule and Accompanying Exemptions as originally adopted. The constraints of the Fiduciary Rule and the Accompanying Exemptions required institutions to make radical changes to their business models, implement new compensation systems and revamp their compliance regimes, including having to overhaul systems and a vast array of policies and procedures.

The review mandated by the Presidential Memorandum caused all institutions uncertainty regarding whether, and to what extent, to implement the comprehensive training of financial professionals that is essential to implementing fully the revamped business model, and to what extent to communicate these changes to Retirement Investors, in light of the strong possibility that further material revisions—and retraining and further communication—would be required. The best interests of Retirement Investors require that appropriate time be allowed to conduct a careful and thorough review, not predicated on reliance on previous studies that do not reflect the realities of how the market place has responded to the Fiduciary Rule, and for institutions servicing such Retirement Investors to be able to respond accordingly to revisions, and properly implement such revisions.

Properly taking into account the market reaction that followed the adoption of the Fiduciary Rule,[6] FSR believes that the Department will necessarily conclude that appropriate revisions to the Fiduciary Rule and the Accompanying Exemptions would create a more efficient and effective regime for institutions and financial professionals to comply with their requirements, which will encourage them to continue to provide a full array of services and investment choices for such Retirement Investors, rather than to limit access and choice as would be required to meet the restrictive conditions now proposed to take effect.

In particular, the Accompanying Exemptions can be revised to reduce unnecessary burdens, including with regard to disclosure, eliminate the substantial litigation risks that would otherwise be applicable under the Accompanying Exemptions as currently

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[6] For example, in anticipation of the Fiduciary Rule, some firms responded by changing service models and product availability, including (a) moving clients to fee-based accounts, (b) eliminating commission-based IRAs; (c) raising investment minimums for commission-based IRAs; (d) eliminating variable annuity products; and (e) excluding certain products from commission-based IRAs (*e.g.*, annuities, mutual funds, and exchange-traded funds). *See* Wursthorn, *New Retirement Rule Is Delayed, but Not Its Impact*, Wall St. J. (Apr. 8, 2017); Wursthorn, *A Complete List of Brokers and Their Approach to "The Fiduciary Rule,"* Wall St. J. (Feb. 6, 2017).

Moreover, the Fiduciary Rule is expected to result in additional charges to Retirement Investors of approximately $800 per account or over $46 billion in the aggregate. Milloy, *The Consequences of the Fiduciary Rule for Consumers*, American Action Forum at 11 (Apr. 10, 2017), *available at* https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/.

proposed, and create safe harbors for integrating such exemptions with other regulatory schemes. A delay of an appropriate period also would allow the Department sufficient time to determine whether to develop streamlined conditions for compliance with regard to products and services that are developed to minimize conflicts of interests, and to determine whether such alternative exemptions would serve the best interests of Retirement Investors, or push them solely to particular types of products that may or may not best serve their long-term investment needs.

Importantly, FSR believes that these improvements to the Fiduciary Rule and the Accompanying Exemptions can be adopted without impairing the protection intended to be afforded to Retirement Investors.

III. The Applicability Date of Additional Exemption Conditions Should Be Postponed

In the RFI, the Department requested input on the following questions:

1. Would a delay in the January 1, 2018, applicability date of the provisions in the BIC Exemption, Principal Transactions Exemption and amendments to PTE 84-24 reduce burdens on financial services providers and benefit retirement investors by allowing for more efficient implementation responsive to recent market developments?

2. Would such a delay carry any risk?

3. Would a delay otherwise be advantageous to advisers or investors?

4. What costs and benefits would be associated with such a delay?

FSR believes that a delay in the implementation of the additional conditions of the Accompanying Exemptions, including the BIC Exemption, Principal Transactions Exemption and the amendments to PTE 84-24, would significantly reduce burdens on financial services providers and benefit Retirement Investors.

There are many reasons such a delay would prove beneficial, including, but not limited to, allowing sufficient time for the marketplace to consider and, if deemed to promote the long-term best interests of Retirement Investors, to implement new products and structures, including those noted in the RFI. Time is an essential element for Retirement Investors to determine whether the new products being developed and implemented in response to the restrictions on the ability to provide services in reliance on a commissions-based business model that necessarily follow from the expanded scope of being an investment advice fiduciary under the Fiduciary Rule will best serve their long-term needs.

The remaining few months between now and January 1, 2018 is inadequate to gauge the benefit of these products, and for the regulators that may or will need to act (such as granting approvals, or providing interpretative advice) concerning these and other developments arising from the Fiduciary Rule and its practical consequences to act thoughtfully and effectively.

Risks and Advantages

With regard to the risks associated with such a delay, FSR notes that the Department has previously concluded that (1) the Fiduciary Rule should become effective as of June 9, 2017, and (2) the Accompanying Exemptions would also become effective as of that date, but subject only to the requirement that the "Impartial Conduct Standards" be satisfied during a transitional period from June 9, 2017 to January 1, 2018. These Impartial Conduct Standards require, among other things, that individuals and institutions providing investment advice to Retirement Investors must comply with the "Best Interest Standard". This standard incorporates into the Accompanying Exemptions both the duty of prudence and the duty of loyalty otherwise applicable under Section 404 of ERISA to persons serving as fiduciaries to ERISA subject plans. Such an incorporation was required, in the Department's view, because the applicable provisions of ERISA and the Code do not require a person serving as a fiduciary to a Retirement Investor that is not an ERISA subject plan to comply with these duties as mandated under Section 404 of ERISA.

The Fiduciary Rule was promulgated by the Department in response to what it saw as a deficiency in the protections afforded to Retirement Investors. The Department believed that any person making investment recommendations to a Retirement Investor should be prohibited from providing advice that could be motivated in substantial part by such person's financial interests. By adopting the Fiduciary Rule, the Department embarked on a path to require any person making such recommendations to act with an "eye single" toward promoting the interests of the Retirement Investor. It did this by including the Best Interest Standard into each of the Accompanying Exemptions. The standard of conduct required to comply with the Best Interest Standard establishes a very strict standard of conduct. Just as it does for fiduciaries under ERISA, the Best Interest Standard should preclude a financial professional or institution from acting improperly with regard to a Retirement Investor due to a conflict of interest.

Moreover, the Impartial Conduct Standards also incorporate the requirement that any person providing investment advice in reliance on any of the Accompanying Exemptions must not receive more than reasonable compensation in connection with the provision of such advice. The reasonable compensation standard has long been applicable under ERISA in the context of a number of statutory and administrative prohibited transaction exemptions. It is the safeguard the Congress dictated to permit service providers who are otherwise parties in interest to ERISA subject plans or disqualified persons with respect to IRAs to perform services for such entities without engaging in a

non-exempt prohibited transaction. Congress and, in many of the administrative exemptions it granted over the 40 plus years following the enactment of ERISA, the Department have concluded that this standard provides a material level of protection to ERISA plans or other Retirement Investors against a related person abusing its position at the expense of such plan or investor.

In reaching the determination to make the Fiduciary Rule applicable as of June 9, 2017, and allow the Accompanying Exemptions to be available after such date solely in reliance on the Impartial Conduct Standards, the Department necessarily concluded that the application of the Impartial Conduct Standards, standing alone, "provides retirement investors with the protection of basic fiduciary norms and standards of fair dealing," pending the effectiveness of the Additional Conditions the Department initially built into the Accompanying Exemptions.

FSR believes that Retirement Investors will benefit significantly from a delay in the applicability of the Additional Conditions, as this delay will enable the Department to address the substantial information that has become available since the April 2016 promulgation of the Fiduciary Rule, including data regarding the limitations that would have been expected to be applied to such Retirement Investors' access to investment advice and investment choices due to the conditions of the Accompanying Exemptions. Moreover, FSR believes that, just as the Department determined to be appropriate during the transition period it has created between June 9, 2017 and January 1, 2018, extending the period during which only the Impartial Conduct Standards are applicable under the Accompanying Exemptions to permit the time needed to refine such Accompanying Exemptions should provide more than adequate safeguards to prevent material harm to Retirement Investors.

Indeed, FSR believes that the more significant risk to such Retirement Investors would arise if the Department does not take the time needed to conduct an appropriate and *de novo* review of the Fiduciary Rule and the Accompanying Exemptions or concludes that changes are not required to be responsive to market place developments, including the adverse effects that would otherwise occur for Retirement Investors with regard to access to investment advice and investment products and services.

Proper Compliance with Material Changes Requires Time to Implement and Communicate

As the financial services industry has repeatedly stated since the Fiduciary Rule was proposed in April of 2015 and adopted in April of 2016, the time frame for implementing the mass changes that the Fiduciary Rule has compelled with regard to the previously existing business model used to service such Retirement Investors was, and continues to be, inadequate. In practical terms, the Fiduciary Rule and the Accompanying Exemptions mandated that all entities (whether banks, broker-dealers, independent agents

and intermediaries, insurance companies or mutual fund companies), serving the investment needs of Retirement Investors, undertake extensive reengineering of the commission-based business models that each had employed for many years in accordance with the lawful provisions of the previously applicable regulatory regimes.

For small and modest sized accounts and for certain investment products, it is simply not viable to "flip a switch" and convert all relationships into a "level fee" arrangement. The relaxed conditions of the level fee exemption reflected in the Best Interest Contract Exemption supports the conclusion that the Department's perception was that, in an optimal world, all advice would be obtained without the need for transaction-related compensation.

However, as evidenced by the further guidance provided, the Department has recognized that a level fee arrangement may not be in the best interests of all Retirement Investors. Where investors' accounts are modest in size, a flat fee that the Retirement Investor would believe reasonable in relation to the level of assets available for investment would not provide a level of compensation that would be reasonable for the services required to service properly such an account on such a basis. And for Retirement Investors who follow a long-term hold strategy such a fee could otherwise not be in their best interests. But the Accompanying Exemptions impose conditions, restrictions, and virtually unlimited litigation risks that do not, as a practical matter, permit institutions to continue to provide services in accordance with the commissioned-based models that the prior regulatory regime permitted.

To try to continue to be responsive to the needs of Retirement Investors within the narrow path that has been permitted by the Fiduciary Rule and Accompanying Exemptions, new structures have needed to be identified. Once identified, these structures need time to be made operational. Yet, the industry has tried diligently to find answers to the needs of Retirement Investors, who could otherwise be relegated by the constraints of the Fiduciary Rule and Accompanying Exemptions to a choice between a level fee arrangement or severely reduced access to investment products and services.

Implementing such new structures, with appropriate tests and safeguards to protect investors' assets, has taken and will continue to take an extraordinary amount of time and effort, even before taking into account the significant effort, time and expense required to train those advisors who would be working directly with Retirement Investors with regard to the implementation and operation of the new structures. In a multi-faceted regulatory regime, where institutions not only need to assure that their actions comply with the Fiduciary Rule, but also the rules, regulations and pronouncements of their primary regulators, who may be focused on other, potentially competing, interests for the benefit of the investment community as a whole. And, of course, for any new investment regime to be effective in gaining the confidence of investors, an extensive communications effort is essential in explaining to the Retirement Investors how the new system differs from what

they have been accustomed to, and why these changes are required and how they will operate to allow them to build their investment portfolios effectively for their retirement. The mere fact that a new system has been mandated by government regulation does not guarantee its acceptance by investors.

Against the need for such monumental challenges, the Department initially provided an implementation period of one year. However, that limited period did not afford institutions the time reasonably and rationally required to prudently and carefully implement a completely new regime for the investment of the life savings of Retirement Investors. The Presidential Memorandum directing the Department to conduct the very review that the RFI pertains to confirms the current Administration's concerns that the Retirement Investors' best interests have not been properly advanced by the Fiduciary Rule and Accompanying Exemptions.

Revisions Needed to Assure that Investor Access and Choice Not Be Materially Reduced

The open-ended litigation exposure imposed in the Best Interest Contract Exemption, due to the Department's reliance on class action attorneys[7] to enforce compliance with the Fiduciary Rule has been one of the (but not the only) conditions of such Accompanying Exemptions that has led institutions toward limiting investor access and choice. In an environment of complex regulation from a series of different federal, state and local regulators, this condition raises the specter of unique and unprecedented risks for an industry that has been under substantial pressure and direction from their primary regulators to avoid unnecessary and unpredictable risks.

In addition to the other costs and risks that the Fiduciary Rule and the Additional Conditions that are included in the Accompanying Exemptions added to the business equation, institutions had to evaluate the unknown litigation costs, exposure and disruption that they would be assuming in continuing to service Retirement Investor accounts. As originally adopted, the Best Interest Contract Exemption presents the almost certain risk of an institution confronting expensive litigation due to alleged foot faults arising from developing in good faith, but in a severely constrained time frame, an entirely new business model guided by a regulatory regime where the question of whether conduct was proper or improper would often depend on the eye of the beholder. Perhaps the Department's concession with regard to the class action waiver in the pending litigation regarding the Fiduciary Rule reflects an acknowledgement that the Additional Conditions went too far, as least with regard to this important consideration.

[7] It is ironic that the persons selected to enforce the Impartial Conduct Standards and to avoid any potential damage that derive from a conflict of interests are persons largely motivated by the rewards that they can receive from asserting challenges to the compliance of an institution with the Fiduciary Rule and/or the applicable Accompanying Exemptions.

Thus, prior to the Trump Administration mandating that the Department revisit the consequences of the Fiduciary Rule and its potentially adverse effects on Retirement Investors, many institutions had concluded that the risks associated with continuing to provide services to Retirement Investors with small and modest accounts was too great. Accordingly, such institutions were being economically compelled by the Fiduciary Rule to cease providing assistance to the investors likely in the greatest need for professional advice. And, for the institutions that had concluded to forge ahead despite the risks associated with continuing to provide investment advice to Retirement Investors, their decision to proceed was often coupled with a determination that they could only comply with the constraints imposed under the Fiduciary Rule and the Accompanying Exemptions by materially constraining the product offerings made available to such Retirement Investors.

Time Needed to Prepare for Changes and Communicate Effectively with Investors

As a result of the Trump Administration's directions, the Department postponed imposing the Additional Conditions until January 1, 2018. However, the aggressive implementation schedule originally mandated by the Fiduciary Rule, created a small window in which to consider whether to delay the applicability date of the Fiduciary Rule, and in which to conduct the current review. This in turn has created substantial uncertainty for the industry, as it tries to comply with the unavoidable changes to the commission-based business model, as well as massive confusion and disruption for Retirement Investors and the financial professions who have the complex and challenging task of advising such Retirement Investors with regard to the investment of their assets in a tumultuous world.

For these reasons alone, there is an urgent need for the Department to afford institutions a significant period of time to respond to and implement, and then subsequently convey to the financial professionals charged with implementing investments within the applicable parameters and the directly affected Retirement Investors in an understandable and persuasive manner the effect of any revisions to the Fiduciary Rule and/or the Accompanying Exemptions. The success of any new process or program will be dependent on explaining to Retirement Investors why these changes will not impede their investment goals and objectives. Thus, once the final review of the Fiduciary Rule and its progeny has been properly and thoroughly completed and the industry knows with certainty what the applicable conditions and restrictions are in the context of providing advice and guidance to Retirement Investors, there will need to be adequate time to change policies and procedures, train personnel and communicate with the Retirement Investors.

FSR believes a 24-month delay is the minimum period of time that is required for the various constituencies to take the actions necessary and appropriate to address revisions to the Fiduciary Rule and the Accompanying Exemptions essential to the implementation of a regime that will actually further the interests of Retirement Investors in the manner intended by the promulgation of the Fiduciary Rule.

Benefit of Time to Coordinate Regulatory Efforts

In addition, the task of compliance with the new regime, and the ability to manage effectively, the associated risks for the entities that will continue to provide such services will be greatly eased to the extent that the several other federal and state regulators that have primary oversight responsibilities for the operation and stability of the various institutions—banking, insurance and securities—that provide support to Retirement Investors have an opportunity to coordinate their regimes with that created by the Fiduciary Rule. Simplified and coordinated compliance will benefit Retirement Investors by not compelling institutions to constrain access and investment choices. Additionally, such regulators will also need time to address, whether through granting requisite approvals or consents or providing essential interpretative guidance or exemptions, the new products that the industry has developed in response to the new paradigm that the Fiduciary Rule has created.

Each financial service institution is subject to a myriad of regulatory requirements in addition to those that the Department oversees, and changes to their operations need to be carefully considered and reviewed against the backdrop of the intricate regulatory landscapes in which these institutions operate. Additional time for these various regulatory authorities, whether the Securities Exchange Commission, FINRA, the various federal and state banking regulators or the individual state insurance departments, to respond to changes in operations and any new products developed in response to the Fiduciary Rule will ensure that Retirement Investors will not be impaired by, or the institutions subjected to unnecessary or unfair litigation exposure due to, uncertainty and lack of coordination among the applicable regulators. Such additional time will also allow those regulators that choose to provide input to the Department in respect to developing a more effective and cohesive system of regulation that addresses the needs of Retirement Investors across multiple regulatory jurisdictions an appropriate opportunity to take such action.

With a coordinated effort, the objective of achieving an overall result that enhances all aspects of investing for Retirement Investors can be more readily achieved. The absence of adequate time for coordination will cause institutions to have less clarity and less ability to analyze risk within reasonable boundaries. Lack of such coordination to date has created, and would continue to provide, an impetus for institutions to reduce choices for such Retirement Investors.

IV. Conclusion

For the reasons noted above, we believe that the interests of Retirement Investors and those institutions that currently are providing investment advice and products to such investors will benefit from a delay of the applicability date of the

Accompanying Exemptions: (i) to allow time for the Department to undertake the complete review of the Fiduciary Rule mandated by the Presidential Memorandum; (ii) to allow time for the Department to determine whether and to what extent eliminating or otherwise modifying the Additional Conditions will promote more effective compliance with the Fiduciary Rule without risk of diminishing access to advice or investment choices for Retirement Investors; (iii) to allow time for the Department to determine how best to address, and provide opportunities for the further development and implementation, of new products that minimize perceived conflicts of interests between institutions and Retirement Investors; (iv) to allow opportunities for other regulators to participate more effectively in the Department's review of the Fiduciary Rule and Accompanying Exemptions; (v) to allow courts time to consider issues raised in pending challenges to the Fiduciary Rule and Accompanying Exemptions, before further requirements take effect on January 1, 2018; (vi) to allow time for financial services providers to take action to address changes in practices arising out of the Department's review of the Fiduciary Rule and Accompanying Exemptions, including the implementation of the new products that further the objectives of the revisions reflected in the Fiduciary Rule; and (vii) to avoid further confusion and disruption for Retirement Investors in the interim.

Moreover, we believe the delay to allow for the required review and study to be effectively conducted will not result in any harm to Retirement Investors because the Impartial Conduct Standards under the Accompanying Exemptions became effective as of June 9. Indeed, greater harm would likely befall Retirement Investors from not adopting such a delay, because of the disruption in the services that would be expected to be available to such Retirement Investors were the Additional Conditions to be effected as currently included in the Accompanying Exemptions.

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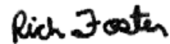
FSR welcomes the opportunity to work with the Department on how to address the concerns raised by the Final Rule and Accompanying Exemptions. If it would be helpful to discuss FSR's specific comments or general views on this issue, please contact me at Richard.Foster@FSRoundtable.org or Felicia Smith, Vice President and Senior Counsel for Regulatory Affairs, at Felicia.Smith@FSRoundtable.org.

Sincerely yours,



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