COMMONWEALTH *financial network*

VIA ELECTRONIC MAIL

August 7, 2017

Office of Exemption Determinations
EBSA (Attention: D-11933)
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

RE: RIN 1210-AB82

Ladies and Gentlemen:

Commonwealth Financial Network® ("Commonwealth") appreciates the opportunity to respond to the request for information ("RFI")[1] published by the Employee Benefits Security Administration of the U.S. Department of Labor ("Department").

As discussed in its letter dated July 21, 2017[2], Commonwealth supports a delay in the January 1, 2018, applicability date of the provisions of the Best Interest Contract ("BIC") Exemption, the Principal Transactions Exemption, and amendments to PTE 84-24 (collectively, "Exemptions"). A delay is necessary to allow the Department to conduct a complete examination of the Department's expanded "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 Exemptions.

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 continues to support a uniform fiduciary standard applicable to all investment advice—retirement and non-retirement—but we believe the Department should defer its rulemaking responsibility to the Securities and Exchange Commission ("Commission"). The Commission has a long history of regulating conflicts of interest in the financial services industry. The Department's Fiduciary Rule and related Exemptions are unnecessarily complex and will unnecessarily drive up compliance and litigation costs. The Commission is in a much better position to create a uniform fiduciary standard that will protect investors and provide transparency in the financial services industry, without undue disruptions and skyrocketing compliance costs.

The Department's stated goal of protecting retirement investors is undermined by the Exemptions' inherent litigation risk. 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

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[1] Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31,278 (July 6, 2017).
[2] See RIN 1210-AB82 Comment Letter (July 21, 2017), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00276.pdf.

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to retirement investors met the fiduciary standard, while plaintiffs are able to question these recommendations with the 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 drops, plaintiffs' attorneys will open the floodgates of litigation. The only group that truly benefits from the Fiduciary Rule is the plaintiffs' bar.

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 work with the Commission to promulgate a uniform fiduciary standard that it can enforce directly. Some firms have been forced to discontinue business lines that serve smaller investors to avoid the risk of class-action lawsuits from executing a BIC.

ANSWERS TO QUESTIONS

Commonwealth Believes the Interests of Consumers Are in Conflict with the Proposed Protections
The Fiduciary Rule and related Exemptions fail to strike a balance between the interests of consumers in receiving broad-based investment advice and addressing actual or potential conflicts of interest associated with the provision of that advice. As financial services providers undertake the monumental task of building new systems and changing policies and procedures to comply with the rule, the result will be that smaller investors will have less access to retirement investment advice and an overall decrease in consumer choice. The Department must create additional, broader exemptions so consumers will not lose access to broad-based investment advice. Otherwise, young workers with small accounts, such as SIMPLE IRAs and other start-up plans, will be unable to receive advice early on, when they are just starting out on their retirement savings journey. This advice about saving and investing is crucial to successful outcomes at retirement.

Support for an Alternative Approach to the Additional Exemption Conditions
During the transition period from June 9, 2017, through January 1, 2018, only the Impartial Conduct Standards ("ICS") of the Exemptions apply. While these standards increase investor protection—by requiring financial services providers to provide advice that is in the investor's best interest, charge no more than reasonable compensation, and make no misleading statements—the additional compliance costs are justifiable. Financial services providers are able to comply with the ICS by making reasonable changes to policies and procedures and providing guidance to RRs and IARs. Conversely, the additional investor protections provided by the additional Exemption conditions that apply on January 1, 2018, are far outweighed by the overwhelming costs to comply and the countless small clients who will no longer be served. For example, to comply with the BIC's up-front and on-demand disclosure requirements, financial services providers must build systems to track and disclose compensation, revenue sharing, and marketing support amounts at an unprecedented level of detail. Rather than require such detail, the Department should revise the BIC exemption to allow financial services providers to provide general disclosures about the type and nature of compensation from products, revenue sharing, and marketing support received from product issuers.

Support for Elimination of IRA Contract Requirements
If the Department eliminated or substantially altered the contract and warranty requirements of the BIC exemption, financial services providers would no longer face the threat of class-action litigation, but there would still be substantial incentives to comply with the ICS. If firms fail to follow the ICS, regulators will bring enforcement actions that could lead to large fines, settlements, and significant reputational harm. Individual investors also have numerous remedies and tools to settle disputes, whether through the Financial Industry Regulatory Authority, the Commission, state regulators, or litigation. The legal and regulatory risks associated with failing to meet the ICS provide firms with ample compliance incentives.

Support for a Streamlined Exemption
A streamlined exemption based on model disclosures could standardize compensation disclosures and make it easier for investors to compare costs. The challenge would be creating a one-size-fits-all model disclosure. The model would have to provide enough flexibility to cover all of the different business models in the financial services industry. Commonwealth supports this approach and would welcome the opportunity to be involved in the design of the model disclosure.

In addition to the existing fiduciary standards applicable to investment advisers, the Commission has solicited comments on a new uniform fiduciary standard applicable to investment advisers and broker/dealers[3]. If the Commission adopts a uniform fiduciary standard for the provision of investment advice to retail investors, the Department should create a streamlined exemption for advisers subject to those standards. One of the major shortcomings of the BIC exemption is that it is not available for discretionary managed accounts. Investment advisers offering discretionary managed accounts are already held to a fiduciary standard under the Investment Advisers Act. Once the Commission has adopted the uniform fiduciary standard, the Department should provide exemptive relief to investment advisers and broker/dealers.

Recommendations to Make or Increase Contributions to a Plan or IRA Should Be Expressly Excluded
For public policy reasons, the Department should expressly exclude from the definition of investment advice recommendations to make or increase contributions to a retirement plan or IRA—even if the recommendation refers to a specific investment product. Americans are woefully unprepared for retirement[4], and the Department should do everything in its power to encourage retirement savings. The potential for conflicts of interest surrounding recommendations to make or increase retirement contributions is completely outweighed by the benefits of increased savings to the retirement investor.

Changes Necessary for the Grandfather Provision
While the grandfathering provision allows financial services providers to continue providing limited advice regarding positions purchased prior to June 9, 2017, the grandfathering provision could be greatly improved. As written, the exemption only provides relief for investment advice regarding selling, holding, or exchanging *positions* purchased prior to June 9, 2017, not for *accounts* set up prior to that date. If, for example, a client decides to increase a periodic investment plan or make an additional contribution to an existing account, grandfathering relief would be lost. This is particularly troubling in the case of variable annuities. Existing annuity products are, in many cases, superior to products that insurance companies are issuing today when it comes to the guarantees and features provided to investors. The rigidness of the existing grandfathering provision unfairly denies investors access to advice on whether to make additional contributions or rollovers into these better products.

In addition, if the RR changes firms, the grandfathering relief is lost because it applies to the financial institution. The Department should expand the grandfathering provision to apply to the entire account and expressly allow the grandfathering relief to "carry over" if the RR changes firms.

Recommendation to Repeal or Revise the Rule and Exemptions
The Fiduciary Rule and related Exemptions need to be repealed or comprehensively revised to ensure that smaller investors do not lose access to much needed retirement investment advice. The Fiduciary Rule and

[3] *See* https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.
[4] Choe, Stan, "Nearly half of young adults lack retirement savings, pension," (the Associated Press, October 29, 2016), at https://www.usatoday.com/story/money/personalfinance/2016/10/29/nearly-half-young-adults-lack-retirement-savings-pension/92361590/, and Eisenberg, Richard, "Why Americans Still Feel So Shaky About Retirement, (Forbes, March 21, 2017), at https://www.forbes.com/sites/nextavenue/2017/03/21/why-americans-still-feel-so-shaky-about-retirement/#4190fca7e18a.

the Exemptions create numerous unintended consequences that limit investor access to investment advice—advice that is vital to helping them meet their retirement savings goals. The Department should defer to the Commission to create a uniform fiduciary standard that applies to all investors—retirement and non-retirement. The Commission has the expertise to create a uniform fiduciary standard applicable to investment advisers and broker/dealers in a way that will not limit access to retirement advice or decrease investor choice.

The Department should act quickly to delay the applicability date of the Fiduciary Rule for at least 18 months. Not only is the delay necessary to fulfill the Department's mandate under the Presidential Memorandum, but the delay also will protect against investor confusion and marketplace disruptions. The Department needs to take this opportunity to revise the Fiduciary Rule in a way that will protect investors without limiting access to retirement advice or investor choice.

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