RITA

RETIREMENT INDUSTRY TRUST ASSOCIATION

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August 7, 2017
EBSA.FiduciaryRuleExamination@dol.gov
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: RIN 1210-AB82

Ladies and Gentlemen:

The Retirement Industry Trust Association ("RITA") is a national trade association comprised of banks, trust companies and third party administrators administering self-directed retirement plans holding uncorrelated assets. We currently hold $100 billion in assets in these retirement plans. Our American savers put their assets to work to start small businesses, buy income producing real estate and help create jobs across the country.

In response to the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions published in the Federal Register on July 6, 2017, we respectfully wish to comment in an effort to address unintended consequences that we have observed since implementation of the Fiduciary Rule on June 9, 2017. For the reasons set out in this letter, we **recommend** that the Department expand the exceptions in the Rule to allow the sale of investments to IRA owners without triggering fiduciary obligations by the investment sponsor, or **at a minimum**, expand the independent fiduciary exception to include (1) IRA owners that are considered "accredited investors" under SEC Regulation D or Section 4(a)(5) of the Securities Act of 1933; and (2) IRA owners with respect to investments exempt from Securities Act registration under (a) Regulation Crowdfunding and Section 4(a)(6) of the Securities Act of 1933, as amended by Title III of the Jumpstart Our Business Startups ("JOBS") Act, and (b) Regulation A and Section 3(b)(2) of the Securities Act, as amended by Title IV of the JOBS Act.

As custodians for self-directed IRAs, a number of RITA members have observed the negative impacts on the access to, and cost of, private fund investment by IRA owners who choose not to have an adviser. Since implementation of the DOL Fiduciary Rule on June 9, 2017, some sponsors of private funds are limiting initial and additional IRA investment solely to those IRA owners that invest with the assistance of an independent financial

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advisor. Although RITA has and continues to support holding those that provide investment advice to a best interest standard, these are real and tangible negative effects that are already occurring and we felt critical to bring to the Department's attention as it reconsiders the Fiduciary Rule.

The negative consequences are occurring because the Fiduciary Rule provides an exception for marketing to "independent fiduciaries," including marketing to IRA owners through the owner's registered investment adviser, but the Rule provides no exception for marketing directly to IRA owners. The Department confirmed in an FAQ that this is the case regardless of the IRA owner's total assets or sophistication.

RITA members serve as custodians of "self-directed" IRAs. The individual IRA holder chooses to invest his or her retirement dollars in a wide variety of investment alternatives; they direct their own investments, and want to have choice. Many IRA owners for whom RITA members serve as a qualified IRA custodian do not invest, and do not want to invest through an independent investment advisor. These investors, who in many cases are "accredited" or otherwise sophisticated, capable investors, may lose access to retirement savings opportunities or face increased costs. Given the original Congressional intent from the 1974 enactment of ERISA, all IRAs can be self-directed and all American savers should have access to the wide range of investments allowed in IRAs without incurring unnecessary additional costs. A policy that, intentional or not, restricts Americans from a wide range of investments is also inconsistent with sections 408(a)(3) and 408(m) of the Internal Revenue Code, under which Congress specifically laid out the only restrictions on IRA investments (life insurance and collectibles).

Since implementation of the Fiduciary Rule, it is clear that there is considerable uncertainty in the marketplace over when the traditional selling efforts of a private fund (e.g., a private equity fund) to an IRA buyer cross the line to include an investment "recommendation" to invest in the fund, thereby rendering the fund sponsor seller a "fiduciary" to the arm's length IRA buyer. This uncertainty has had a chilling effect on the retirement savings investment market. Absent clear guidance over when ordinary course selling efforts become an investment recommendation, some fund sponsors have taken the conservative position ***to exclude all IRA investors who choose not to hire an adviser from the investment opportunity***, regardless of the sophistication of such investors and the desire of such investors to invest in these funds. A number of law firms have publicly suggested this approach of allowing IRA investment in their funds only through "independent fiduciaries."[1]

[1] See ERISA Fiduciary Rule Impact on Unregistered Investment Funds (June 8, 2017) http://www.goodwinlaw.com/publications/2017/06/06_08_17-erisa-fiduciary-rule-impact-on-unregist; Managers of Investment Funds: It Is Time to Consider Action to Address the DOL Fiduciary Rule (May 16, 2017), https://www.sidley.com/en/insights/newsupdates/2017/05/managers-of-investment-funds; FAQs for Fund Managers Related to DOL'S Fiduciary Rule Which Became Partially Effective June 9, 2017 (June 30, 2017) http://www.jdsupra.com/legalnews/faqs-for-fund-managers-related-to-dol-s-16541/.

The practical impacts of this market uncertainty are to reduce access to retirement savings options and/or to increase costs. The conservative approach to only allow investment from IRA owners that utilize an "independent fiduciary" forecloses access to private fund investments from unadvised, yet sophisticated, IRA owners. Alternatively, sophisticated IRA investors who are more than capable of making investment decisions without the benefit of an "independent fiduciary," are required to engage and pay an independent fiduciary in order to have access to these private investments, thereby unnecessarily increasing the cost of access to the retirement savings investment market. While we do not believe the Department intended to prevent sophisticated investors from accessing investments that they are legally allowed to invest in under the securities laws, unfortunately this appears to be happening because of the reaction of risk-adverse private fund sponsors. Fund sponsors are not willing to communicate because of the possibility of unintentionally making a "recommendation" under the Fiduciary Rule. Besides limiting choice, this adverse consequence also means limiting non-public companies, which are a significant source of job growth, from a major source of capital. This appears to be in direct conflict with the intent of the JOBS Act, which was implemented to encourage investment in new business and stimulate the American economy by creating more jobs.

We believe that the "independent fiduciary exemption" should not be limited to employer plan sponsors and individuals who have hired an adviser. With appropriate warnings, any investor should be able to appreciate that the sponsor of an investment is not undertaking to act as a fiduciary. We support other commenters that have recommended the expansion of a "seller's exception" as it existed in the original 2010 proposal. At a minimum, however, the Fiduciary Rule should not have the effect of preventing investors from accessing investments that Congress has specifically made available to them. Accordingly, at a minimum, we recommend that the Department expand the independent fiduciary exception to include (1) IRA owners that are considered "accredited investors" under SEC Regulation D or Section 4(a)(5) of the Securities Act of 1933; and (2) IRA owners with respect to investments exempt from Securities Act registration under (a) Regulation Crowdfunding and Section 4(a)(6) of the Securities Act of 1933, as amended by the JOBS Act and (b) Regulation A and Section 3(b)(2) of the Securities Act, as amended by Title IV of the JOBS Act.

Additionally, it would be helpful if the DOL were to issue guidance on how private fund sponsors can market to IRA owners, without becoming subject to fiduciary standards under the Rule. This could be done in the form of FAQs, an Interpretative Bulletin, a Field Assistance Bulletin, or other similar guidance.

We are available to discuss our concerns as stated above at your earliest convenience. For your information, because the issues we have discussed above are closely tied to the efforts of the SEC to implement the JOBS Act to expand access to capital, we will be sending a copy of this letter to SEC Chairman Jay Clayton in connection with his request for public comments.

Thank you for your consideration and your continued efforts to enhance the savings of hard working Americans.

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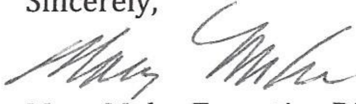
Sincerely,



Mary Mohr, Executive Director

Tom Anderson, President

cc: Chairman Jay Clayton, Securities and Exchange Commission (by email to *rule-comments@sec.gov*)