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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-5655
Washington, DC 20210

Re: Request for Information (RFI) Regarding the Fiduciary Rule and Prohibited Transaction Exemptions
RIN 1210-AB82

Dear Sir or Madam,

I am a Senior Executive Director and Head of U.S. Life, Retirement and Wealth Management at AXA[1] ("AXA US") and a member of the company's Executive Management Committee. We appreciate the opportunity to provide comments to the Department of Labor (the "Department") in response to the Department's request for information ("RFI") regarding its examination of the final rule issued on April 8, 2016 defining the term "fiduciary" under the Employee Retirement Income Security Act of 1974 (the "Rule"), including the Best Interest Contract Exemption (the "BIC Exemption") and the amendments to prohibited transaction exemption 84-24 ("Amended PTE 84-24").

In business since 1859 and as one of the country's leading life insurance and retirement savings companies with nearly 2.5 million customers nationwide, AXA US is well-positioned to understand the wide-ranging intended and potential unintended consequences of the Rule for retirement savers and the industries that serve them, which we discussed at length in our previous letters to the Department. With parts of the Rule already in effect, we commend the Department for seeking input on how the Rule can be modified to alleviate these harms in advance of the fast-

[1] "AXA US" is the brand name of AXA Equitable Financial Services, LLC and its family of companies, including AXA Equitable Life Insurance Company (NY, NY), MONY Life Insurance Company of America (AZ stock company, administrative office: Jersey City, NJ), AXA Advisors, LLC (NY, NY) and AXA Distributors, LLC (NY, NY).

approaching January 1, 2018, applicability date (the "Applicability Date") of certain provisions of the BIC Exemption and Amended PTE 84-24 (the "2018 Provisions").

On July 7, 2017, we submitted a letter with respect to Question 1 in the RFI regarding a potential delay of the Applicability Date. In that letter, we urged the Department to delay the Applicability Date (1) to take the time necessary to coordinate with other regulatory authorities and develop a comprehensive and harmonized Rule; and (2) even absent such coordination, to allow industry participants sufficient time to prepare for implementation following final adoption of a revised Rule. In this letter, we offer our comments on the remaining questions in the RFI[2] and the Rule's impact on consumers, our company and the broader retirement savings marketplace.

Overview

From the time it was first proposed in 2015, we have been consistent in expressing the profound concerns we have about the Rule for its potential to cause harmful disruption to the marketplace – in the form of customer confusion caused by conflicting standards of care and substantially increased costs for financial services providers due to duplicative and inconsistent disclosure requirements as well as the threat of inconsistent enforcement through state court interpretation of contract law. Our fear has materialized: sales of variable annuities—the product most significantly impacted by the Rule— declined 7.6% in 2016 compared to 2015, and have continued to decline in 2017, with an expected drop of an additional 10-15%.[3] Ultimately, we believe that the Rule will leave many financial professionals unable or reluctant to advise the very clients that the Rule was intended to help.

Our comments in this letter are informed by the actual experience of our company and the industry in preparing for and coming into compliance with the Rule, and reflect an overarching theme: the Department should work with the Securities and Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA") and state regulators to develop a harmonized standard of care across the retirement savings marketplace that offers consumers significant and meaningful choice and protections while providing firms and their advisers with the regulatory certainty they need to serve clients at all income levels.

Our comments also describe the key modifications to the Rule needed to reach this objective of a uniform, workable standard of care; namely:

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[2] Note that we are not responding to questions that do not directly pertain to our business. In addition, please note that although we are not specifically answering Questions 4 and 12, we believe that our comments are responsive to those questions as well.

[3] *See* Karen Demasters, *DOL Rule Dragging Down Annuity Sales, LIMRA Says*, Financial Advisor, May 19, 2017 at http://www.fa-mag.com/news/dol-rule-dragging-down-annuity-sales--limra-says-32836.html; *see also* Karen DeMasters *Most Annuity Sales Dropped in 2016*, Financial Advisor, March 31, 2017 at http://www.fa-mag.com/news/most-annuity-sales-dropped-in-2016-32098.html.

- Elimination of the private right of action in the BIC Exemption;

- Addition of a workable exemption that levels the playing field for sales of all kinds of annuities; and

- Broadening of the grandfathering provisions to allow many existing customers to continue to receive investment advice from their financial advisers.

As the Department studies the comments it receives in response to the RFI and continues its review of the Rule in accordance with President Trump's February 3, 2017 Memorandum (the "Memorandum"), we ask that the Department swiftly complete its work and alleviate the uncertainty under which industry participants are currently operating. We also reiterate the request from our prior letter that the Department allow industry participants sufficient time to prepare for implementation of any changes following the final adoption of a revised Rule.

A. Responses to *General Questions*[4]

Question # 2: *What has the regulated community done to comply with the Rule and PTEs to date, particularly including the period since the June 9, 2017, applicability date? Are there market innovations that the Department should be aware of beyond those discussed herein that should be considered in making changes to the Rule*?

Response: *Compliance Efforts to Date Show that the Rule Has Caused Disruptions to the Industry and a Reduction in Retirement Product and Services Offerings*.

Since its promulgation in April 2016, the retirement services industry has taken a wide range of significant steps to comply with the Rule, many of which have already caused substantial disruption to the marketplace in the form of reduced product offerings and limitations on access to retirement savings advice.[5] We appreciate the Department's request for information regarding market innovations, but urge it to instead consider and address the underlying flaws of the Rule causing this disruption.

It should be apparent from letters to the Department during prior comment periods, as well as from media reports, that firms have endeavored to comply with the Rule through a variety of innovative approaches.[6] These efforts have included attempts to transition completely to a fee-

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[4] We have responded to each of the selected questions directly, but have arranged the responses by subject area for ease of review.

[5] *See, e.g.*, U.S. Chamber of Commerce, *The Data Is In: The Fiduciary Rule Will Harm Small Retirement Savers* (Spring 2017), available at https://www.uschamber.com/sites/default/files/ccmc_fiduciaryrule_harms_smallbusiness.pdf [hereinafter *The Data Is In*] (describing loss of access to retirement advice and products).

[6] *See, e.g.*, Bernice Napach, *MFS Adds Funds With 'Clean Shares*', Investment Advisor, May 31, 2017, at http://www.thinkadvisor.com/2017/05/31/mfs-adds-funds-with-clean-shares (noting mutual funds issuing clean shares in response to Fiduciary Rule); *Commonwealth Financial Eliminates Commission-Based Retirement Products in Wake of DOL Rule,* InvestmentNews, Oct. 24, 2016, at

based regime;[7] smaller changes with reliance on the revised PTEs, such as the BIC Exemption;[8] and approaches in between.[9] The result – consumers are losing access to critical retirement savings tools that are more important than ever:

- One report found that 71% of advisers surveyed planned to stop providing advice to at least some of their small accounts due to the risk and costs of the Rule.[10]
- At one company alone, over 10,000 accounts have been deemed too small for the risk associated with providing advisory services to them under the Rule.[11]
- And a former Congressional Budget Office director estimates that the Rule has the potential to increase consumer costs by $46.6 billion – roughly equivalent to $816 annually per account – plus $1,500 in duplicative fees for those who already paid a commission and now must move their assets into a fee-based account.[12]

As discussed further below, some customers have been ostensibly "grandfathered" but, in reality, cannot access ongoing advice due to the compliance costs associated with their accounts. The reported experience of one consumer whose adviser has become reluctant to provide advice, and suggested she turn elsewhere,[13] is not unique. Although difficult to quantify, such a response to the Rule has deeply felt consequences.

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http://www.investmentnews.com/article/20161024/FREE/161029956/commonwealth-financial-eliminates-commission-based-retirement (discussing announcement to cease offering commission-based products in IRAs and qualified retirement plans).

[7] *Commonwealth Financial Eliminates Commission-Based Retirement Products in Wake of DOL Rule*, supra note 5 (discussing announcement to cease offering commission-based products in IRAs and qualified retirement plans)

[8] Greg Iacurci, *Insurance-Based Broker-Dealers Plan to Use BICE Under DOL Fiduciary Rule*, InvestmentNews, July 7, 2017, at http://www.investmentnews.com/article/20160707/FREE/160709959/insurance-based-broker-dealers-plan-to-use-bice-under-dol-fiduciary (noting that a number of insurers' networks will utilize the BIC Exemption).

[9] *See, e.g.*, Michael Wursthorn, *Moving Ahead with Fiduciary Plans, Merrill Signals It May Still Offer Commissions*, Wall St. J., Mar. 9, 2017, at https://www.wsj.com/articles/moving-ahead-with-fiduciary-plans-merrill-signals-it-may-still-offer-commissions-1489098692.

[10] *See The Data Is In*, supra note 4, at 4.

[11] *See, e.g.*, *Written Testimony of Jerry Lombard at the Hearing of Impact of the DOL Fiduciary Rule on the Capital Market* (July 13, 2017), available at http://www.sifma.org/issues/item.aspx?id=8589967967 (stating that "[u]pwards of 10,000 of our customer retirement accounts will be relegated to a 'no advice service' desk - as they are too small for the risks imposed by the DOL or too costly to place in an advisory account that would remove the supposed conflicts the DOL is trying to regulate").

[12] *See* Douglas Holz-Eakin, American Action Forum, *Impact of the DOL Fiduciary Rule on Capital Markets*, U.S. House of Representatives Comm'n on Financial Servs., Capital Markets, Securities, and Investment Subcommittee (July 13, 2017), available at https://financialservices.house.gov/uploadedfiles/hhrg-115-ba16-wstate-dholtzeakin-20170713.pdf.

[13] *See* Michael Wursthorn, *New Retirement Rule is Delayed, but Not Its Impact*, Wall St. J., Apr. 8, 2017, available at https://www.wsj.com/articles/new-retirement-rule-is-delayed-but-not-its-impact-1491652800 (describing customer who was told by her broker she should seek help elsewhere).

Our own experience has led to similar concerns. AXA Advisors, the affiliated broker-dealer for AXA US, is utilizing the BIC Exemption for virtually all of its client relationships subject to the Rule. To do so while also adhering to the impartial conduct standards of the Rule, we have made numerous changes to comply, including reducing product and service offerings – in some instances eliminating products and/or services altogether, while limiting the choices available for clients in others, and changing the fee and/or compensation structure for many of our available offerings. We made these changes in part to mitigate the litigation risk and other risks associated with the requirements of both the impartial conduct standards of the Rule and the BIC Exemption. Our third-party distribution partners have made similar changes, allowing only certain accounts/products to be recommended as a primary strategy to achieve specific client goals. Although we believe that these changes are necessary to achieve compliance with the Rule and to mitigate the significant litigation risk and related uncertainty associated with the BIC Exemption, we regret that they have limited the choices previously available to our clients.

We have also implemented new procedures and systems required for compliance, many of which we believe are unnecessarily duplicative and result in reduced options for consumers. For example, the disclosures required under the Rule are overwhelmingly duplicative and of uncertain benefit to consumers. Other regulators at both the federal and state level already require similar disclosures that provide more than adequate consumer protections. Registered investment advisers are required to provide clients with the SEC's Form ADV Part 2A and Part 2B, both of which discuss compensation and conflicts of interest. The Investment Advisers Act of 1940 ("Advisers Act") requires full disclosure of all facts material to an engagement, such as disciplinary actions, and FINRA also maintains substantial amounts of publicly available information on firms and brokers. Further, the Department's existing rules – 408(b)(2) and 404(a)-5 – also require disclosures regarding fees and conflicts. New York Regulation 194, as a state example, requires producers to disclose in writing at or prior to the time of application whether the producer will receive compensation from the selling insurer or other third party based on the contract being sold. Given these existing disclosure requirements, the new disclosures required under the Rule are not only unnecessary but may be confusing for customers who will be deluged with documents that contain substantially the same information in different formats.

In sum, we, along with the industry, have been struggling to find the most effective way to comply with the Rule while maintaining the best possible level of choice in products and services for consumers. Although we appreciate the Department's interest in innovative solutions, we respectfully request that the Department instead address the root of the problem – the Rule itself – in a sensible way that will promote retirement savings and work for businesses and consumers alike.

Question # 3: *Do the Rule and PTEs appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest?*

Do they effectively allow Advisers to provide a wide range of products that can meet each investor's particular needs?

Response: ***The Rule Does Not Appropriately Balance the Interests of Consumers and Has Already Caused Advisers to Reduce their Product Offerings*.**

As noted above, the Rule has forced firms to reduce the range of product offerings and advisory services available to retirement savers. And, ironically, those savers who would benefit from advice the most are the people most negatively affected by the Rule. While wealthier savers can continue paying for ongoing advice through fee-based arrangements, those of more modest means have fewer affordable options – unassigned accounts at one company, which nearly doubled the first three months of this year, have an average reported account value of $21,000.[14] This means that, as we feared, younger savers and savers of modest means are already finding it difficult to access financial advice and education. These negative consequences of the Rule are not offset by a corresponding protective benefit. To the contrary, the Rule's requirements as currently written are of uncertain, if any, value, and should be revised to more efficiently promote informed retirement savings.

First, as discussed above, we and others have been forced to limit our product offerings in order to comply with the Rule, a result that reduces the choices available to retirement savers. In addition, as demonstrated by the announcements of certain firms, there has been a notable shift in the industry toward fee-based compensation. While fee-based arrangements are appropriate for some consumers, as discussed in more detail in response to Question 8, such an approach can cause some consumers to ultimately pay more than they would under a commission-based regime, and consumers with small account values face the potential of being forced into more expensive fee-based accounts or simply turned away.[15]

Second, the Rule and its exemptions' new requirements are duplicative and costly. As discussed above, the new disclosures have little, if any, incremental value, yet dramatically increase compliance costs and confusion among consumers and the industry – all of which is compounded by the inconsistency that the Rule's new fiduciary standard has introduced. For example, the Rule differs from the SEC's best interest fiduciary standard, which appropriately recognizes that actual and potential conflicts of interest can be alleviated by simple and straightforward disclosures. Similarly, while the Advisers Act differentiates sales activity by providing a clear exemption for "incidental" advice from fiduciary status, the Rule mandates that broker-dealers acknowledge fiduciary status prior to any sales transaction, regardless of whether any advice is incidental to the sale. Under SEC rules, solicitor activity does not always imply full

[14] For additional discussion, please see our comment letters submitted July 21, 2015 and April 17, 2017. *See* also *The Data Is In*, supra note 4, at 4 (reporting that the number of unassigned accounts at one large mutual fund provider nearly doubled in the first three months of 2017, and that the average balance was $21,000; the company estimated that 16% of its accounts would be unassigned this year, due to the Rule).

[15] *See, e.g.*, Wursthorn, *New Retirement Rule is Delayed, but Not Its Impact,* supra, note 13.

fiduciary obligations, and is subject to disclosure requirements, whereas the Rule would make it the full equivalent of the adviser to whom the solicitor is referring business. We anticipate that the significant increase in compliance costs associated with these inconsistent yet equally applicable standards will ultimately be passed on to consumers in the form of price increases, and as discussed earlier, reduced access to advice for less affluent consumers.

These harms are not offset by a corresponding benefit. Given the already robust regulatory regime governing retirement products and the Rule's largely duplicative disclosure requirements, consumers are receiving limited, if any, incremental benefit from the Rule, even as currently implemented. Adding the contract requirement of the BIC Exemption and other items effective January 1, 2018 are similarly of uncertain benefit yet will undoubtedly cause a substantial additional strain on the industry. (See response to Question 5, below).

> Question # 11: *If the Securities and Exchange Commission or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors, could a streamlined exemption or other change be developed for advisers that comply with or are subject to those standards? To what extent does the existing regulatory regime for IRAs by the Securities and Exchange Commission, self-regulatory bodies (SROs) or other regulators provide consumer protections that could be incorporated into the Department's exemptions or that could serve as a basis for additional relief from the prohibited transaction rules*?

> **Response: *It Is Critical that the Department Work With Other Regulatory Authorities to Develop a Harmonized Standard.***

The uncertain and inconsistent regulatory environment caused by the Rule has plagued the market – to the detriment of consumers, advisers and other participants – for more than two years. In order to ensure that the retirement savings marketplace continues to function well for consumers, it is imperative that the Department, the SEC, and other agencies and self-regulatory organizations work together effectively and transparently towards a consistent regulatory framework.

The potential for harmonization is not hypothetical. In May, Secretary Acosta acknowledged the SEC's "critical expertise" and invited it to be a "full participant" during the Department's review of the Rule.[16] SEC Chairman Jay Clayton publicly accepted this "invitation to engage constructively" with the Department in the review process and the SEC is currently soliciting public comments to help it "evaluate the range of potential regulatory actions."[17] And

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[16] *See* Sec'y Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too*, Wall St. J., May 22, 2017, available at https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029.

[17] *See* Chairman Jay Clayton, *SEC, Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers*, June 1, 2017, at https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31#_edn1.

on July 25, 2017, SEC Commissioner Michael S. Piwowar submitted a comment letter to the Department urging the Department to "redouble its efforts to work with the Commission and its expert staff, who may bring to bear [] decades of experience in enforcing multiple disclosure-based regimes."[18] The SEC's clear desire to work with the Department on a harmonized rule should not be ignored.

In addition, the National Association of Insurance Commissioners ("NAIC") has already formed a working group to consider possible revisions to the NAIC Suitability in Annuity Transactions Model Regulation, including possible incorporation of a best interest standard into its model regulation.[19] The Department should work closely with the NAIC, in additional to federal partners, to ensure that the final Rule will not conflict with state-based standards. In fact, the need for such coordination grows by the day, as state insurance and securities departments have already begun imposing their own inconsistent rules. For instance, new laws in Nevada and Connecticut are imposing yet another layer of compliance on firms, and other states reportedly may soon follow suit.[20] Ensuring that there are consistent federal and state rules governing transactions in the retirements services marketplace would give both retirement savers and service providers the certainty they need when participating in the retirement services marketplace and also avoid the increased compliance costs, and litigation risks and customer confusion associated with conflicting regulatory regimes.

As we and others have previously discussed, there is already significant overlapping regulation that should be leveraged to harmonize standards rather than, as is the case today, make compliance more difficult, costly, and confusing. The SEC, FINRA and state regulators all have in place rules and regulations governing the conduct of advisers. Notably, the Rule differs from the SEC's best interest fiduciary standard and its recognition that potential conflicts of interest can be alleviated by simple and clear disclosures. As pointed out by Commissioner Piwowar, scholars have found that "disclosure and full-information is a solution to conflict problems and that 'sunshine is the best disinfectant.'"[21] A harmonized regime should take into account this research and allow for a streamlined disclosure-based exemption to the Rule. Such an exemption would avoid the increased compliance and litigation risks associated with conflicting regulatory regimes

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[18] SEC Comm'r Michael S. Piwowar, *Comment Letter in Response to the Department of Labor's 'Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions'*, July 25, 2017, at https://www.sec.gov/news/public-statement/piwowar-comment-dol-fiduciary-rule-prohibited-transaction-exemptions.

[19] *See* NAIC, *Annuity Suitability (A) Working Group, Meeting Summary Report*, Apr. 8, 2017, available at http://www.naic.org/meetings1704/cmte_a_aswg_2017_spring_nm_summary.pdf?1497225743769.

[20] *See, e.g.*, Joe Lustig, *Fiduciary Rule May Go Away, But States Are Stepping In*, BNA, June 28, 2017, at https://www.bna.com/fiduciary-rule-may-b73014460927/; Robert Steyer, *Connecticut Increases Fee Transparency in 403(b) Plans*, Pensions & Investments, July 24, 2017, available at http://www.pionline.com/article/20170724/PRINT/170729934/connecticut-increases-fee-transparency-in-403b-plans.

[21] *See* SEC Comm'r Michael S. Piwowar, *Comment Letter*, supra note 18.

while giving both retirement savers and service providers the certainty they need when participating in the retirement services marketplace.

Finally, each of these organizations has well established enforcement frameworks that ensure consistent interpretation of their rules, unlike the BIC Exemption where enforcement is left to state courts thus subjecting firms who utilize the exemption to the uncertainty of conflicting interpretations of the exemption by various courts.

> Question # 8: *How would advisers be compensated for selling fee-based annuities? Would all of the compensation come directly from the customer or would there also be payments from the insurance company? What regulatory filings are necessary for such annuities? Would payments vary depending on the characteristics of the annuity? How long is it anticipated to take for an insurance company to develop and offer a fee-based annuity? How would payments be structured? Would fee-based annuities differ from commission-based annuities in any way other than the compensation structure? How would the fees charged on these products compare to the fees charged on existing annuity products? Are there any other recent developments in the design, marketing, or distribution of annuities that could facilitate compliance with the Impartial Conduct Standards*?

Response: ***Fee-Based Annuities Are Simply Not Appropriate for Every Consumer*.**

As a company that has offered fee-based annuities for years, we can attest that these products are not a panacea. There is no one size fits all solution for American retirement savers, who come from diverse economic backgrounds, and have vastly different needs that require tailored solutions. Fee-based products are appropriate for *some* savers in *some* situations. They are not always the best or most cost-effective product.

In general, under a fee-based model, advisers are compensated through a fee that is based on the client's total assets under management, and the insurance filings for such products generally do not differ substantially from commission-based products. However, some state insurance departments have already taken issue with the sale of both a fee-based and commission-based version of a product, forcing firms to abandon one or the other compensation model or develop entirely new product lines. This undermines efforts to provide flexible compensation options for retirement savers.

Regardless of the reaction of state insurance departments, however, the result of a shift to fee-based products is that consumers are left with potentially fewer options that are appropriate for their needs. First, the fact that a product is fee-based does not necessarily mean that it is less expensive for a consumer. For some retirement savers, fee-based arrangements may be beneficial because the cost for services is based on assets under management as opposed to a set up-front commission cost. For others, however, a fee-based arrangement will be a costlier alternative. For instance, for those retirement savers who trade infrequently, compensation based on assets under management on a yearly basis may ultimately result in far greater payments to an adviser than

would a one-time commission-based fee. Thus, in situations where significant advice is provided up front, but less on an ongoing basis, commissions may be more appropriate and economical for the client.

Second, customers with more modest account values may find themselves shut out from fee-based offerings at certain firms and at the same time unable to access transactional advisory services as the market shifts toward fee-based products. Indeed, the decision by a firm to use the BIC Exemption or shift to a fee-based model may make economic sense only with respect to its wealthiest clients, where the compliance risks and potential compensation structures are more aligned. As discussed in our response to Question 2, other less wealthy clients are either shut out or forced to computer-based "robo-advisers" or similar, less personalized, advisory services.

In sum, fee-based models are an important option for some retirement savers, but they are not the answer to all retirement needs – nor could there be one solution given the wide range of income levels, risk tolerances needs and preferences that exist among retirement savers. We recommend that the Department work with state insurance departments to make fee-based products more readily available, but we caution against attempting to rely on them as a solution to conflicts of interest for all retirement savers. The result will be less – or sometimes no – choice and higher cost for some consumers as they make some of the most impactful decisions on their retirement.

B. Responses to *Contract Requirement in BIC*

Question # 5: *What is the likely impact on Advisers' and firms' compliance incentives if the Department eliminated or substantially altered the contract requirement for IRAs? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the contract requirement and, if so, how?*

Response: *Elimination of the Contract Requirement Will Dramatically Improve the Rule and Ultimately Serve the Interests of Retirement Savers.*

We strongly recommend that the Department eliminate the contract requirement – including the private right of action and warranty provisions. Doing so not only would have virtually no impact to compliance incentives, it would alleviate much of the increased compliance costs of the Rule which are already causing tremendous strain on the industry and will ultimately increase prices for retirement products and advisory services. Given the existing regulatory framework, compliance incentives, and enforcement mechanisms, an appropriate rule and exemptions can and should function effectively without such a requirement.

First, advisers and firms are already subject to extensive regulatory oversight by multiple state and federal regulatory authorities that require strict compliance programs. For instance, providers are subject to the SEC and FINRA rules governing the sale of registered securities, as well as state insurance department regulations applicable to insurance companies and products –

rules which apply to the sale of both retirement and non-retirement products. These include, among others, FINRA Rule 2330, which governs suitability and supervision in relation to the sale of variable annuities and the NAIC Suitability in Annuity Transactions Model Regulation – adopted by many states – which provides requirements for suitability across annuity sales at the state level. In addition, the Internal Revenue Service ("IRS") has the power to enforce rules under the Employee Retirement Income Security Act of 1974 ("ERISA") in relation to IRAs.

In the absence of a private contractual right, a harmonized regulatory framework would be able to leverage existing enforcement mechanisms available to the SEC/FINRA and state regulators. There is no need for the Department to develop its own enforcement regime or other new alternatives. FINRA, for example, has successfully administered regulatory enforcement and oversight of the activities of registered investment advisors and broker dealers for many years. Its rigorous examination and enforcement regime ensures market participants comply with the regulations governing their behavior or face considerable penalty, all without providing investors with a private cause of action that would create unnecessary burdens without enhancing investor protection.[22] And state insurance regulators have similarly conducted oversight of sales of non-registered products under longstanding and robust rules with which all industry participants are familiar. Given this already comprehensive regulatory framework, the contract requirement is wholly unnecessary.

Second, by removing the private right of action the Department will alleviate a significant burden – requiring financial institutions who utilize the BIC Exemption to execute a contract subject to state law and thus varying interpretations across the 50 states. The result of the contract requirement will be an uneven application of the law, at best; at worst, it will lead to significant inconsistencies across jurisdictions. Either way, the uncertainty for firms using the BIC Exemption is unacceptably high and creates enormous litigation risk. In addition, the prohibition on class action waivers means that firms and advisers could be subject to class action suits at any time, the costs of which may be so prohibitive as to cause firms to stop offering advice to all but their wealthiest clients, where the trade-off between the increased compliance costs and potential compensation makes economic sense.[23]

Left untouched, the contractual private right of action will clog court calendars with frivolous litigation that only benefits trial lawyers, not consumers. Eliminating the contract requirement in its entirety is the most impactful action the Department can take to make the Rule efficient and effective for consumers and the industry. Although there would remain significant

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[22] See, e.g., FINRA Enforcement Home Page, available at https://www.finra.org/industry/enforcement (in 2016, "FINRA brought 1,434 disciplinary actions against registered individuals and firms, and levied $176.3 million in fines" and also "ordered $27.9 million in restitution to harmed investors"); FINRA 2017 Exam Priorities Letter, available at https://www.finra.org/industry/2017-regulatory-and-examination-priorities-letter (noting that 2017 FINRA exams will focus on, amongst other things, sales practices issues including suitability).
[23] The Department has taken the position that it no longer defends prohibitions on class action waivers. Accordingly, we request the Department to remove this prohibition provision from the BIC Exemption.

compliance obstacles, removal of the right of action would substantially reduce the litigation risk – and thus keep the cost of products lower – but would not leave consumers unprotected; to the contrary, the already robust regulatory framework is more than sufficient to ensure appropriate consumer protections.

> Question #13: *Are there ways to simplify the BIC Exemption disclosures or to focus the investor's attention on a few key issues, subject to more complete disclosure upon request? For example, would it be helpful for the Department to develop a simple up-front model disclosure that alerts the retirement investor to the fiduciary nature of the relationship, compensation structure, and potential sources of conflicts of interest, and invites the investor to obtain additional information from a designated source at the firm? The Department would welcome the submission of any model disclosures that could serve this purpose*.

> **Response:** ***The Department Should Eliminate Two of the BIC Exemption Disclosures – the Transaction Disclosure and the Website Disclosures.***

We strongly support a more simplified and streamlined set of disclosures that will be sensible and better for consumers and we appreciate the Department's willingness to consider alternative models. In particular, the Department should eliminate the transaction disclosure and the website disclosure from the BIC Exemption.

Transaction disclosure upon request: We recommend that the Department eliminate this disclosure because it is redundant and confusing to clients, as fee disclosures already exist at the point of sale through prospectuses. Adding the system capability for this disclosure is extremely costly and, given its uncertain benefit to consumers, it should be removed from the exemption. In the alternative, we recommend that such disclosures be applicable only to new accounts opened on or after the Applicability Date.

Website disclosure: We also recommend that, as part of any streamlined exemption, the Department eliminate the web disclosure requirement. Already, post-June 9, there are extensive disclosures being provided to consumers relating to potential conflicts of interest. An additional web-based disclosure has no incremental value[24] and only serves to add to the compliance cost imposed on firms, which ultimately will drive up prices for consumers. It would be far more effective, as suggested by the Department's question, to provide for a simple disclosure with additional information akin to the current required website disclosure available to those consumers who request it. In the alternative, we recommend that the Department revise the website disclosure requirement to apply only to accounts established after the Applicability Date. Information regarding fees and commissions on existing accounts is simply not useful to customers who have already made a purchase decision. Therefore, it should be required to be provided only to new

[24] For instance, fee and conflict of interest disclosure requirements already exist in ERISA rules 408(b)2 and 404a-5.

customers, and should be required to offer only a high-level overview of general fees and commissions, which will be more easily digestible and meaningful to consumers.

C. Responses to Additional Questions Regarding PTE 84-24 and a Streamlined Exemption

Question #17: *If the Department provided an exemption for insurance intermediaries to serve as Financial Institutions under the BIC Exemption, would this facilitate advice regarding all types of annuities? Would it facilitate advice to expand the scope of PTE 84–24 to cover all types of annuities after the end of the transition period on January 1, 2018? What are the relative advantages and disadvantages of these two exemption approaches (i.e., expanding the definition of Financial Institution or expanding the types of annuities covered under PTE 84–24)? To what extent would the ongoing availability of PTE 84–24 for specified annuity products, such as fixed indexed annuities, give these products a competitive advantage vis-a`-vis other products covered only by the BIC Exemption, such as mutual fund shares*?

Response: ***PTE 84-24 Should Be Expanded to Cover All Annuities*.**

We support making PTE 84-24 available for sales of all annuities, including variable annuities. An exemption should not be allowed only for some products and not others, as such treatment results in an uneven playing field within the industry in which certain products and distribution channels are favored over others. Variable annuities, for instance, are an important option for consumers to ensure a guaranteed stream of income in retirement. We further recommend that the Department modify the exemption to allow for revenue sharing, in order to make the exemption a practically viable option.

Question # 10: *Could the Department base a streamlined exemption on a model set of policies and procedures, including policies and procedures suggested by firms to the Department? Are there ways to structure such a streamlined exemption that would encourage firms to provide input regarding the design of such a model set of policies and procedures? How likely would individual firms be to submit model policies and procedures suggestions to the Department? How could the Department ensure compliance with approved model policies and procedures*?

Response: ***Yes, the Department Could Create Such a Streamlined Exemption in Consultation with the Industry.***

We appreciate the Department's willingness to consider a streamlined exception with input from the industry. We recommend meetings with industry trade group representatives as an important first step in the process. The ability to come to a mutual understanding of the contours of a streamlined exemption would allow firms to then draft model language for the Department's consideration. And with respect to compliance, we believe that the Department could leverage

existing enforcement mechanisms such as those referenced in response to Question #5 above. This approach would provide sufficient incentive while not being overly burdensome.

D. Responses to Questions Regarding Grandfathering/Contributions

Question # 16: *To what extent are firms and advisers relying on the existing grandfather provision? How has the provision affected the availability of advice to investors? Are there changes to the provision that would enhance its ability to minimize undue disruption and facilitate valuable advice*?

Response: ***The Rule's Grandfathering Provision Must Be Revised to Provide Necessary Relief.***

While we have been relying on the grandfathering provision to the extent that it is applicable (and we understand that others in the industry are doing so as well), the current grandfathering exemption is far too narrow to provide the necessary relief. As can be seen from industry reports, many clients are becoming unassigned because their advisers are unable to continue providing them investment advice due to the ballooning costs of compliance.[25] Were advisors permitted to continue providing them with advice on existing accounts while not being subject to the Rule, we believe that there would be far fewer clients left without advisory options. Accordingly, the Department should revise the exception to allow for traditional grandfathering – i.e., advice provided to clients' existing accounts after the effective date of the Rule should not be subject to the Rule. This approach would allow advisers and clients to preserve long-standing and important relationships.

Question #14: *Should recommendations to make or increase contributions to a plan or IRA be expressly excluded from the definition of investment advice? Should there be an amendment to the Rule or streamlined exemption devoted to communications regarding contributions? If so, what conditions should apply to such an amendment or exemption*?

Response: ***Advice Regarding Contributions Should be Excluded from the Definition of Investment Advice.***

Recommendations to make or increase contributions to a plan or IRA should be specifically excluded from the definition of investment advice. Advisers already are concerned about the impact of providing investment advice that triggers fiduciary obligations. This austere effect of the Rule, contrary to protecting consumers, will ultimately harm them by failing to encourage more savings and exacerbating the retirement savings crisis. Those who work with advisers have been

[25] *See, e.g.*, Wursthorn, *New Retirement Rule is Delayed, but Not Its Impact,* supra note 13.

shown to be better prepared for retirement,[26] and thus the Department should facilitate, not discourage, such interactions.

The Department should therefore explicitly carve out advice regarding contributions from the definition of investment advice. While such an exclusion would be the most well-reasoned and effective solution, the Department could, alternatively, craft an exemption based only on disclosures that would permit advisers to make such recommendations following disclosures regarding their compensation structure.

This issue is tied closely to that of grandfathering and the Department's failure to allow for advisers to provide advice on contributions on existing accounts without application of the Rule. Thus, should the Department decline to take either of these actions, we recommend, as discussed above, that the Department provide for true grandfathering, which will allow advisers to provide advice regarding contributions to client accounts existing before the Rule went into effect.

* * *

Conclusion

We continue to believe that a harmonized standard of care for the retirement services industry is both necessary and achievable. Such a standard should rely on existing, well-developed enforcement mechanisms in place of the private right of action, which will allow for a consistency without unduly burdening the industry and ultimately harming consumers. In considering changes, we urge the Department to act swiftly to clarify the path toward the final Rule, which will end the current uncertainty that is paralyzing the industry. A clear view of the future framework as early as possible will help us to mitigate the harmful impact of the current environment. We appreciate the Department's consideration of our comments and look forward to continued engagement.

Respectfully submitted,

Brian Winikoff

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[26] *See, e.g.*, Javier Simon, *Americans Without Advisers Are Far Less Prepared for Retirement*, PlanAdviser, Mar. 28, 2017, at http://www.planadviser.com/Americans-Without-Advisers-Are-Far-Less-Prepared-for-Retirement/ (reporting that only 46% of Americans who have never hired a financial professional have a retirement plan or emergency fund, compared with 77% of those who have hired financial advisers); Jamie Hopkins, *Not Enough People Have Financial Advisers and New Research Shows They Should*, Forbes, Aug. 28, 2014, available at https://www.forbes.com/sites/jamiehopkins/2014/08/28/not-enough-people-have-financial-advisers-and-new-research-shows-they-should/#697ab44052e5 (discussing studies documenting value of working with financial advisers).