T. Rowe Price®
INVEST WITH CONFIDENCE

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August 7, 2017

Via Email to: ESBA.FiduciaryRuleExamination@dol.gov

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

Re: RIN 1210-AB82

Dear Sir or Madam:

This letter is written on behalf of T. Rowe Price Associates, Inc. and its affiliates to provide our perspectives on the Request for Information concerning the Fiduciary Advice Rule, 29 C.F.R. §2510.3-21 and accompanying exemptions. We appreciate the Department's effort to seek additional public input on this important topic, and the opportunity to share our views.

A second look at the Rule by the Department is especially timely now. As the Securities and Exchange Commission—the primary regulator of many financial services firms—reinvigorates its evaluation of fiduciary standards, the time is ripe for the Department to recalibrate its own Fiduciary Advice Rule to avoid imposing adjacent, but not identical, requirements that do not improve outcomes for individual retirement investors or plan fiduciaries.

**T. Rowe Price Background**. T. Rowe Price Associates, Inc. serves as investment adviser to the T. Rowe Price family of mutual funds ("Price Mutual Funds") and collective trusts maintained by its affiliate, T. Rowe Price Trust Company. Price Mutual Funds, which are distributed by T. Rowe Price Investment Services, Inc., a registered broker-dealer, are known for their consistent investment process and strong investment performance at moderate cost.[1] Through mutual funds and commingled trusts, as well as its sub-advisory and separate account management services, T. Rowe Price serves institutions—including both large and small business retirement plans—and individuals. T. Rowe Price assets under management ("AUM")

[1] As of June 30, 2017, 85% of the Price Mutual Funds outperformed their 10-year Lipper averages and over 75% of Price Mutual Funds for individual investors have expense ratios below their peer category averages. In addition, 88% of the rated Price Mutual Funds' assets under management had an overall rating of 4- or 5-stars from Morningstar of 6/30/2017.

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total almost $811 billion as of December 31, 2016, of which 69% are held in retirement related accounts, including ERISA-governed plans and IRAs.

**Overview.** We share the Department's goal of insuring that those serving retirement clients and customers put client and customer interests first, and we respect the effort undertaken by the Department to advance that goal. Despite the Department's best intentions, however, the Rule that has resulted from this lengthy regulatory process has not drawn the line between advice and non-advisory interactions in the right place. As a result, the Rule's impacts are decidedly mixed. While certain developments spurred by the Rule have been positive (namely those relative to lower cost share classes and increased availability of "robo advice" products), the Rule is resulting in unintended harm to retirement investors, both small plan fiduciaries and individuals saving in plans or IRAs. In our prior letters, we have outlined some of the industry trends that are disturbing—the decision by some firms to restrict access to mutual funds in IRAs,[2] and the consolidation in the advisory services market. We've also highlighted some of the threats to individual retirement savers and small plan sponsor fiduciaries. Individuals have been deprived of helpful suggestions on topics important to their retirement readiness, such as consolidation (or rolling into plans), avoiding distributions before retirement, and diversification. Small plan sponsor fiduciaries that have historically chosen to work without an adviser are receiving fewer services since June 9, 2017, unless they have since hired (and agreed to pay) an adviser. Certain changes, especially in the retail space, have had impacts well beyond retirement savings, as industry was not allowed sufficient time to develop separate business models for retirement and non-retirement interactions. We believe that these are evidence that the Rule itself, as well as relevant exemptions, need to be changed.

The Rule's expansiveness results in a dangerous oversimplification. The Rule categorizes as fiduciary advice interactions that were never intended (or expected by recipients) to be anything other than helpful rules of thumb. As a result, the Rule has created a world where retirement investors must receive either full-blown fiduciary level advice or generic, non-individualized education. Such a bifurcation ignores the real world demand for basic guidance that is more relevant and individualized than education, but something short of full-blown, detailed advice.

The barriers to personalized guidance imposed by the Rule are particularly dangerous in our current environment where web and mobile experiences proliferate. The barrage of information provided through digital channels has conditioned individuals to ignore content unless it is ***personalized*** and ***relevant*** to their circumstances, and all firms have responded by providing increased levels of personalization and targeting in their communications. Against this backdrop of increasingly personalized content, the Rule insists that interactions about retirement

[2] Mutual funds have played an important role in the financial lives of millions of Americans, with benefits of transparency and ready access to diversified portfolios that are professionally managed. According to data published by the Investment Company Institute, in 2016, nearly half of all IRA assets ($3.7 trillion, or 47%) were invested in mutual funds. See http://www.icifactbook.org/ch7/17_fb_ch7#individual. A Rule that has caused at least one leading brokerage firm to announce its intention to restrict IRA holders' access to mutual funds (including mutual funds of T. Rowe Price and other low-cost, high quality investment firms) does not serve the interests of retirement investors.

investing must either be generic education or become advice. Such formalization risks discouraging the interaction by imposing too high a barrier on the delivery of meaningful guidance—retirement investors must be willing to provide sufficient information to the advice provider to support a fiduciary-level interaction, and must wade through disclosures and contracts in order to receive even "starting point" suggestions. Many providers will not build for these interactions because they are not what retirement investors want (or have time to accommodate). As a result, retirement investors will be left without the critical guidance that would assist them in identifying starting points for their decisions. By injecting excess formality into the interaction, the Rule also discourages interactions that offer help to individuals but present little if any risk of abuse, such as individualized suggestions to diversify, or suggestions not to take a distribution from retirement accounts before retirement.

Exemptions accompanying the Rule also need revision. The Best Interest Contract Exemption is too complex, requires repetitive disclosure and imposes unnecessary conditions, all of which drive up provider cost but do little to render real benefit to the investing public. In addition, except for insertion of the Best Interest Standard, Prohibited Transaction Exemption 77-4 has not been modernized since its issuance 40 years ago, and needs to be updated to facilitate advice delivery. Our detailed suggestions follow.

**Specific Rule Revisions**

**A. Change The Rule To Accommodate Individualized or Specifically Directed Suggestions Without Triggering Fiduciary Status.**

The definition of investment advice should be changed to allow suggestions that are not intended or expected to have fiduciary import but are designed to give the recipient basic guidance. A suggestion is different than a recommendation. A suggestion is a starting point for consideration, while a recommendation is more prescriptive and is intended to spur the proposed action. Daily life is full of distinctions between suggestions and recommendations. Contractors provide rough estimates on how much a home improvement might cost, but the actual estimate and recommended approaches and finishes will not be provided until the contractor has received more information about the homeowner's goals and budget and there is an understanding between homeowner and contractor that the formal quote will govern the relationship. Yet, few homeowners will contact a contractor for a formal bid without first understanding the basic "starting point" rough ballpark cost for a job like theirs.

Changing the definition of recommendation to encompass only formal, prescriptive interactions (and removing 'calls to action' as a hallmark of advice) would allow individuals and small plan fiduciaries to receive helpful starting points for further investigation. For example, suggesting three funds to an IRA owner is hardly an interaction that would justify treatment as fiduciary advice (and in fact, has not been considered advice under FINRA principles for what constitutes a recommendation); it is not sufficiently formal or precise, even if phrased as a "suggestion" and relevant to the articulated needs of the individual. Other informal suggestions that are not based on extensive collection of information from an individual or small plan fiduciary should also not trigger advice, such as the suggestion of a specific category of funds for

a need that the individual or small plan fiduciary has articulated. For example, under the current Rule, T. Rowe Price risks engaging in an inadvertent advice interaction if it suggests T. Rowe Price target date funds to a prospective IRA investor who has identified retirement investing as his or her goal, and similarly risks stepping across the fiduciary advice line if it provides a list of T. Rowe Price taxable money market funds to an IRA investor calling T. Rowe Price for ideas about temporary investments. Yet, extensive and formal advice interactions are not what these callers/website visitors seek. Our data on web visitors, for example, demonstrates that there is a substantial drop off rate in those seeking to open an IRA on line if there are extensive disclosures and contracts that must be delivered before an investor can be given an easy path for choosing an investment, such as simple starting points. The same barriers to action are imposed on our interactions with plan participants. Without substantial disclosures and acknowledgments, T. Rowe Price cannot send to plan participants invested in a single fund (such as a money market or company stock) personalized messages with clear calls to action suggesting that they diversify. In short, the Rule forces a formal fiduciary-level interaction or nothing; informal guidance or rules of thumb are simply not available to retirement investors. They must either receive education, requiring them to extract the relevant information and next steps for themselves, or they must engage in a much more formal interaction with information collected, disclosures or contracts provided, and advice rendered.

The Rule should be changed to re-introduce the principle of a mutual understanding to the definition of investment advice. Alternatively, the Rule should be revised to remove the reference to narrowing, and to change the definition of "recommendation" to exclude informal suggestions made without collection of detailed information or representation of fiduciary status, and references to "calls to action" as a hallmark of an advisory interaction should be removed.

**B. Remove Savings Recommendations From Coverage Under The Rule.**

We laud the Department's clarification in Frequently Asked Questions (FAQs) issued days ago that delivery of targeted and specific savings messages to retirement investors does not constitute fiduciary advice. As you are aware, this guidance is very important to T. Rowe Price, a firm that has long believed in the importance of helping retirement investors understand the basic steps that they can take to be ready for retirement. In our meeting with the Department on July 1, 2017, we showed Department representatives very clear evidence that T. Rowe Price's decision—motivated by the Fiduciary Advice Rule and FAQ guidance—to steer away from targeted, relevant communications to individuals about retirement savings containing clear calls to action (e.g., "save more") was already having a dramatic impact on individuals' readiness to take action to save or save more for retirement.

While we appreciate the August 2017 FAQ discussion of savings interactions, we continue to have questions about the circumstances in which calls to action in targeted and personalized materials delivered to retirement investors are acceptable. We are also uncertain whether the Rule treats as fiduciary advice targeted and personalized recommendations—based on general principles—that provide a specific savings hierarchy to retirement investors (e.g., for a younger individual eligible to contribute to a Roth IRA who is participating in a plan with an employer match: save up to the level of any employer match, then save in a Roth IRA, then save

in the employer plan, etc.) We believe that the Department's view on calls to action should be clarified. Are calls to action only appropriate when the message is about savings, or are calls to action generally acceptable about investment or investment management topics? We also believe that the industry should be provided clear lines as to what individualized savings recommendations, if any, constitute investment advice and what do not.

As we noted in our meeting, T. Rowe Price and others in the industry were surprised by the implication in sub-regulatory guidance issued in January 2017 that individualized savings recommendations could be fiduciary advice. Neither we nor others in the industry had previously understood that personalized retirement savings recommendations were covered by the Rule.[3] When the Department sought to change prior law to cover distribution recommendations, it engaged in a transparent, public process, and used clear language to convey the Rule's meaning. Making savings suggestions a potential topic of fiduciary advice represents a similar startling change from prior law, and should not be undertaken through implications from sub-regulatory guidance, but should result from a clear, transparent process with full examination of potential costs and benefits of such a change.

If an individualized recommendation to save for retirement *is* a topic of fiduciary advice under the current Rule, it must be changed. Providing an individual with suggested savings targets based on general principles (including detailed savings hierarchies relevant to an individual's age and circumstance) is an example of informal guidance that—if required to be provided with the disclosures or contracts required—is unlikely to be sought or provided. More generally, we are aware of no evidence in Department analysis supporting the proposition that personalized suggestions to save for retirement (or to save in specific accounts or vehicles) have resulted in harm to the retirement investors. If anything, publicly available data suggests such a substantial shortfall in retirement savings adequacy that savings suggestions are unlikely to cause any harm.[4]

It would not be appropriate to solve an improvident interpretation of the Rule concerning savings suggestions with the issuance of an exemption. As noted in the earlier section, formal fiduciary level advice (with the accompanying risk of enforcement) suggests that firms should require individuals to submit information of the sort a full financial planning interaction might entail. But such an interaction is not likely to occur as it is not what any individuals want or need (or what their busy lives will accommodate). Instead, they seek quick, helpful rules of thumb that can serve as starting points for their actions.

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[3] Topics that can constitute fiduciary advice, if addressed in an individualized or specifically directed recommendation for a fee, are listed in 29 C.F.R. 2510.3-21(a)(1). Distributions from retirement plans and accounts are listed; contributions to these vehicles are not.

[4] The Employee Benefit Research Institute's analysis published in February 2015 concluded that the aggregate national retirement deficit (the amount by which overall private savings fall short of anticipated retirement needs) amounts to $4.13 trillion for all U.S. households where the head of household is between 35 and 64, assuming Social Security benefits continue. *See* EBRI Issue Brief No. 410 (February 2015).

The Department should either clarify that the current Rule does not encompass retirement savings suggestions that are distinct and separate from investment suggestions as a topic of fiduciary advice, or revise the Rule to exclude savings suggestions as a topic of advice.

**C. Encourage virtuous suggestions by restricting topics of advice to traditional investment topics and rollovers or distributions *out of* plans or retirement accounts.**

The expansiveness of the Rule has discouraged interactions with very little or no risk of harm. As a result, the Rule places a premium on avoidance of immaterial potential conflicts at the expense of providing helpful information for retirement plan investors, whether they are small plan fiduciaries or individuals. For example in the retail arena, without the required disclosures and/or contracts, T. Rowe Price cannot provide "virtuous" suggestions, such as suggestions that an individual NOT take a distribution from his/her plan before retirement, or that a new employee roll his/her retirement accounts into their current employer's plan that accepts rollovers. There is little appreciable potential for abuse in these interactions, yet making them into fiduciary acts has imposed a high burden—both on those providing the putative advice, and those receiving it—and made such interactions far less likely.

The Rule should be revised to exclude individualized recommendations NOT to take a distribution from a retirement account before retirement, to rollover into a new employer's plan or to diversify from a single non-diversified investment option.

**D. Remove the Rule's Bias Against Small Plan Fiduciaries.**

Since ERISA's inception, plan fiduciaries of all sizes have been held to a standard of skill, care, diligence and prudence, without regard to their financial expertise or size. For the first time, the Rule distinguishes between fiduciaries who are deemed to be capable of discernment, and those who are deemed incapable. Accordingly, the Rule creates two classes of fiduciaries, and in the process, deprives smaller plan fiduciaries without advisers—no matter how financially savvy—of services, insight and assistance that they received as standard servicing before June 9, 2017.

This decision has real world impacts for small plan fiduciaries that choose to operate without an adviser. Examples illustrate this point. Suppose a small plan fiduciary wants to replace a particular fund in a plan line-up. In order for a recordkeeper to provide starting point suggestions outside of a formal fiduciary interaction (such as three or four possible replacement funds available on the platform) the small plan fiduciary must work with an adviser to whom the recordkeeper can direct its suggestions. If that small plan fiduciary does not already have an adviser, the recordkeeper cannot provide the small plan fiduciary with a handful of names of advisers in their area who might be able to assist. A larger plan fiduciary in similar circumstances will readily receive starting point suggestions of funds in the same category as the underperforming fund, and a short list of advisers who might potentially assist, if needed. In short, smaller plan fiduciaries must be self-reliant and/or incur expenses to receive helpful information that large plan fiduciaries need not incur. These new expenses are a direct result of the Rule, and are borne only by smaller plans (if expenses are not paid by the plan sponsor).

There is no legal basis in ERISA for such a distinction between large and small plan fiduciaries. The Rule should be revised to remove the $50 million threshold from the definition of an independent fiduciary with financial expertise.

**E. Re-Introduce a Seller's Exception.**

One final implication of the breadth of this Rule is the implication that a firm's sales activities are fiduciary in nature. This occurs in two contexts. First, the Rule has allowed "hire me" conversations with respect to advisory services, but only when there is no accompanying discussion of a specific investment. Yet, discussions of investment advisory services (especially investment management) do not occur in a vacuum. Typically, such interactions involve discussions of the manager's expertise in a particular discipline, or perspectives on allocation to particular securities or asset classes. Such discussions provide the context that plan fiduciaries need to determine the breadth of a firm's capabilities. Such an artificial constraint on sales activities should be eliminated. Second, the Rule falsely distinguishes between investment management services and investment products, such as mutual funds and collective investment trusts. This suggests that selling products is a fiduciary interaction and illustrates the impact of drawing the line in the wrong place. Few in America fail to understand the difference between selling and fiduciary-level interactions. The dilemma is particularly stark for investment management firms like T. Rowe Price that sell proprietary mutual funds and collective investment trusts. Just as those who enter a Ford dealership expect to receive suggestions about Fords, those who approach T. Rowe Price expect us to suggest T. Rowe Price products and services. Turning such an interaction into a fiduciary level interaction is not necessary to protect individuals or plan fiduciaries from confusion about the nature of the relationship.

## Specific Exemption Revisions

**A. Convert BICE to a Standards-Based "Best Interest" Exemption, Expand Its Scope and Clarify Its Meaning.**

The Best Interest Contract Exemption ("BICE") is unworkable. By trying to dictate specific mechanisms by which firms must meet prudential standards *and* additional mechanisms by which advice recipients can themselves police that conduct, it risks falling under its own weight. Firms like T. Rowe Price have declined to use BICE, not only because of the expense and difficulty of creating such a structure in the modest amount of time provided before the Rule became applicable, but also because of its impact on the audience BICE seeks to protect. In short, BICE requirements are not only burdensome to the advice provider—they so interfere with interactions between a firm and the individual that they are likely to discourage individuals from seeking or receiving help.

Rather than a detailed set of prescriptive disclosures and compliance regimes found in BICE, the Department should adopt a streamlined, standards-based exemption. If a fiduciary advice provider has acted in the best interest of the advice recipient (for example, in compliance with the Impartial Conduct Standards), then the conduct should be exempt. This has the virtue of solving the excessive and repetitive disclosures and actions required under BICE. BICE's

requirements are not just internally duplicative. For some firms, such as federally registered investment advisers (RIAs), there is an added dimension of duplication because BICE requirements are not necessarily satisfied by similar—but not identical—requirements under securities laws. For example, RIAs are subject to a compliance regime under Rule 206 that requires both an officer to monitor compliance activities and disclosure of material conflicts through Form ADV. Despite this, BICE imposes its own standard for materiality of conflicts, its own conflict disclosure regime and its own specific requirements for compliance oversight. This duplication does not improve retirement investor protection.

A streamlined exemption would remove any further need for disclosures, contracts, compliance regimes, or web-based disclosures.[5] To the extent that enforcement is needed, there is no need for DOL exemptions to create a contract right of action—existing law provides DOL and IRS with substantial tax penalty tools to enforce prohibited transaction rules, and the extent of the penalties are substantial deterrents to misconduct.

An additional challenge of BICE has been its limited applicability. BICE does not cover discretionary advice; in a standards-based model, there is no purpose to be served in that limitation, and it should be eliminated. BICE cannot be used for robo-advice yet there is very little reason to believe that delivery of advice through a digital channel somehow presents greater potential for conflicts than other methods of advice delivery. BICE excludes firms seeking to provide advice to their own employees without explanation as to why the BICE approach to conflict mitigation for third parties is not adequate for a firm's own employees. (This is particularly odd for financial services firms like T. Rowe Price who could use BICE to advise third parties, but could not assist their own employees under similar circumstances). BICE cannot be used with independent fiduciaries with financial expertise, subjecting firms using BICE to a potential foot fault if the assets managed by a plan fiduciary move above $50M. All of these gaps should be addressed in any exemption replacing BICE.

Finally, BICE has created the potential for unnecessary litigation about what it means to be a fiduciary advice provider by using language that is imprecise. The standard for best interest—described in BICE as identical to fiduciary standards of prudence and loyalty—is defined as acting "*without regard to the financial interests*" of the advice provider, the firm, its affiliates or other related parties. Yet, in the section addressing recommendations limited to proprietary funds or nonproprietary funds that pay revenue to the firm, this "without regard" language was dropped. Instead, the BICE standard specific to proprietary and revenue-paying fund sales forbids advice that is "based on" the financial interests of the firm or adviser, or recommendations that "subordinate the interests" of the advice recipient to those of the advice provider. It is the latter standards that appropriately characterize the duties of loyalty and prudence for commercial firms serving as fiduciaries to their clients and customers. The "without regard" language is a linguistic puzzle that clouds fiduciary requirements, and sow the

[5] If the Department declines to adopt a streamlined exemption based solely on compliance with the Impartial Conduct Standards, then it should certainly adopt an exemption that is premised on allowing advice from firms that are providing advice in accordance with their primary regulator, whether that be a securities law regulator (such as the SEC) or an insurance or banking regulator.

seeds for future litigation. The Department should make clear that best interest means putting the interests of clients first, but does not prohibit commercial firms from meeting fiduciary and exemption standards.

**B. Modernize Prohibited Transaction Exemption 77-4.**

As more interactions have become fiduciary level investment advice, it is critically important to modernize exemptions that facilitate advice, such as PTE 77-4. These modernization efforts should not be left to another rulemaking exercise. The fact that PTE 77-4 has not been revised for 40 years—except for the revision accompanying the promulgation of the Fiduciary Advice Rule—illustrates why the Department should not leave the task of modernization unfinished. PTE 77-4 needs three important updates:

1. The original exemption requires fiduciaries to be presented with prospectuses before engaging the investment advice provider who will recommend funds advised by it or an affiliate. The exemption makes clear that the primary purpose is not to ask the hiring fiduciary to determine the wisdom of the advice to be provided; rather, the prospectus is designed to allow the fiduciaries to assess the compensation that the advice provider will receive. A much more expeditious way to convey that information is through a chart or similar information listing management fees and total expense ratios of the funds involved in the advice. Firms seeking to take advantage of the exemption should be entitled to use either prospectuses (including summary prospectuses) or a fee chart.

2. The original exemption requires affirmative consent of the hiring fiduciary in the event of a fee change to the mutual funds. The exemption should be updated to exclude from the consent requirement changes which *lower* overall expenses to be borne by the investor. Even if the change results in an increase in fees, the exemption should be changed to allow negative consent. Mutual fund fee changes are already subject to substantial safeguards designed to protect shareholders under the Investment Company Act of 1940 and its regulations. No substantial additional protections are afforded to retirement investors receiving advisory services under 77-4 by requiring affirmative consent to such fee changes. In over 22 private exemptions patterned on PTE 77-4, the Department has allowed negative consent to fee changes. There is no reason to require firms to undertake the time and expense of a private exemption application to receive this relief. The class exemption itself should be modified to level the playing field for all users of PTE 77-4.

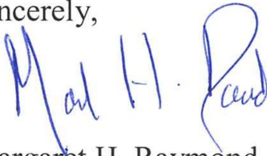
3. Mutual funds' use of subadvisers has increased since 1977. PTE 77-4 should be updated to specify that the deduction that is required from the top-level advisory fee, if any, is the amount of management fee paid to the adviser that is serving as the advice provider or its affiliate, not the overall management fee.

4. The original exemption is limited to mutual funds. In 6 private exemptions patterned on 77-4, similar relief has been afforded to advice providers who seek to invest a

client's account in collective investment trusts advised by the advice provider or an affiliate. (This relief has included the relief for negative consent to fee changes of the underlying CITs.) Similar relief should be made available to all under PTE 77-4.

We appreciate the Department's willingness to collect additional input at this advanced stage of the regulatory process. We hope that our input will help you to identify and implement important needed revisions.

Sincerely,



Margaret H. Raymond

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