

August 7, 2017

**Filed Electronically** (EBSA.FiduciaryRuleExamination@dol.gov)

Office of Exemption Determinations  
Employee Benefits Security Administration  
(Attention: D-11933)  
U.S. Department of Labor  
200 Constitution Avenue, N.W., Suite 400  
Washington, DC 20210

**Re: RIN 1210-AB82**

To Whom It May Concern:

Lincoln Financial Network (“LFN”) is the marketing name for Lincoln Financial Group’s<sup>1</sup> two dually-registered broker-dealer/investment adviser entities: Lincoln Financial Advisors Corp. and Lincoln Financial Securities Corp. LFN submits the following comment letter in response to the Department of Labor’s (the “Department’s”) request for information regarding necessary changes to the Fiduciary Rule.

## **I. Introduction**

The Fiduciary Rule must be modified to eliminate its evident biases in favor of certain products, advice/service models and compensation methods. As written, the Fiduciary Rule clearly favors certain products and fee-based compensation, even in situations where commissions are more likely to be in a consumer’s best interest. Because of this bias, the rule has already had the following harmful impacts:

- **Limited investment product options for retirement investors.** The requirement to “levelize” commissions for similar commissionable products means that consumers now have extremely limited investment options in their retirement accounts. This is an unacceptable result for clients who need comprehensive financial planning and a broad range of investment solutions.
- **Decrease in needed guaranteed retirement income products.** Over the 12-month period ending on December 31, 2016, LFN’s sales of qualified variable annuities with guarantees declined 33%. The Fiduciary Rule has created the wrongful impression that commissioned products like annuities, which have higher costs because of the guarantees, are fundamentally not in the best interest of retirement investors. This unintended consequence is causing advisors to avoid offering the very products and solutions that retirement investors need – guaranteed lifetime income.

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<sup>1</sup> Lincoln Financial Group is the marketing name for Lincoln National Corporation (LNC) and its affiliated companies. LFN is an affiliate of LNC, whose other affiliated companies act as issuers of insurance, annuities, retirement plans and individual account products and services. The affiliates include, but are not limited to, The Lincoln National Life Insurance Company (LNL); Lincoln Life and Annuity Company of New York (LLANY) and Lincoln Financial Distributors, Inc. (LFD), Lincoln’s wholesaling arm, a broker-dealer registered with the SEC and a member of FINRA.

- **Accelerated shift to fee-based compensation.** Fee-based compensation for advice is not always in the best interest of consumers. Nevertheless, the Fiduciary Rule favors fees by streamlining exemptions for this advice model, creating a conscious bias against commissioned products as not in a client's best interest. A wholesale industry shift to fee-based accounts is occurring, even though commissions are the better option for many consumers.
- **Limited availability of advice for small investors.** Many LFN advisors have indicated their intent to shed smaller balanced accounts because they can no longer service those accounts with a narrower commissionable product universe. In addition, these accounts are too small to be charged an annual fee.

## II. Improvements to the Fiduciary Rule are Critical

LFN maintains an affiliation with over 8,200 financial advisors, including registered representatives, investment advisor representatives, insurance brokers and agents.<sup>2</sup> These financial advisors play an important role in providing advice and comprehensive financial planning to retirement savers across America. Their advice and financial planning recommendations help Americans save for retirement and build a stream of retirement income so that they do not outlive their assets. As independent broker-dealers, LFN's investment and advisory platforms give our financial advisors the ability to offer clients comprehensive financial planning and a wide spectrum of both insurance and investment products, including Lincoln's own products to ensure that the clients' financial needs are met. LFN's financial advisors work with more than 400,000 clients and advise nearly 400,000 qualified accounts with approximately \$54 billion in assets.

LFN recommends the following important changes so that our advisors can continue to provide holistic advice and offer a broad spectrum of solutions to retirement savers:

- **Treat Commissions and Fees the Same.** As the Fiduciary Rule is currently written, commissions and fees are held to different standards. This is evident in the Best Interest Contract (BIC) Exemption, which imposes a contract requirement (and resulting litigation risk as discussed below) only on commission-based accounts. The Department's preferential treatment of fees is causing a harmful shift of retirement assets from commission-based brokerage to fee-based advisory accounts, one that has little to do with consumers' best interests and everything to do with firms' and advisors' need to manage costs and risk. This shift is often more costly for consumers because over the long term, fee-based advice is often more expensive than commission-based brokerage. It is also confusing to retirement investors because retirement and non-retirement accounts are treated differently.

The Department's preferential treatment of fee-based solutions has also impeded the ability of advisors who engage in comprehensive financial planning to provide a variety of solutions for customers. The BIC Exemption requirement to "levelize" commissions has compelled financial institutions to significantly reduce or eliminate a number of investment solutions and asset classes previously available to retirement investors. For example, before the Fiduciary Rule took effect,

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<sup>2</sup> LFN's broker-dealer and investment adviser entities are subject to primary regulatory oversight by the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA) and the States.

LFN's advisors were able to offer retirement investors access to over 430 mutual fund families (over 22,000 mutual funds). Today, LFN's retirement investor clients have lost access to about ninety percent (90%) of those fund families in their retirement accounts. Further, the number of fixed income mutual funds available is significantly reduced because the commission structure could not be standardized with the commission structure on equity funds. Finally, the availability of alternative investments has been all but eliminated.

A financial planner cannot truly provide holistic financial planning and advice without a broad range of solutions necessary to construct a properly allocated portfolio. The Fiduciary Rule has eliminated needed solutions by favoring certain products and compensation structures over others. The equity offerings available for LFN advisors today are acceptable, despite the significant reduction in fund options. However, a proper asset allocation, which aims to balance risk and diversify an investor's portfolio, needs more than just equity funds. A proper asset allocation requires broad categories like cash, equities, fixed income products, non-correlated assets (e.g., real estate) and hedging products. Unfortunately, the universe of fixed income and alternative investment product offerings now available is critically lacking, which can hamstring the LFN advisor's ability to provide comprehensive financial planning and proper asset allocations in commissionable accounts. Fixing this requires the Department to discontinue its harmful regulatory favoritism.

- **Make PTE 84-24 available for all insurance products and harmonize with other exemptions.** PTE 84-24 should continue to be available for all annuity and insurance products. This exemption should also permit the same types of revenue/compensation as the BIC Exemption, so as not to disadvantage annuities and insurance to other investment products. The disclosure obligations in PTE 84-24 should also be aligned to the disclosure requirements in the BIC Exemption, so that products sold within one exemption are not disadvantaged to those sold using another exemption.
- **Streamline all exemptions to make them consistent and unbiased.** PTE 84-24 is not the only exemption that needs modified in order to remove the inherent biases towards certain products or compensation methodologies. As already stated, the Department's existing exemptions create an unjustified bias towards fee-based products and advice. The Department will make matters worse if it creates new, streamlined exemptions that purportedly favor marketplace "innovations" and products. It is not an appropriate exercise of the Department's rulemaking authority to favor particular business models or products. It is not the Department's role to decide that a clean share mutual fund is better than a T-share mutual fund, or that a fixed annuity is better than a variable annuity. Rather, the Department's proper role is to create a regulatory framework that places all advice and compensation arrangements on a level playing field so that consumers have equal access to all products and service models. This way, each consumer can choose what is in his or her individual best interest. To do this, the Department should look for every opportunity to streamline all existing prohibited transaction exemptions, not just those available for fee-based advice or specific products, by eliminating obstacles that disadvantage certain products or compensation structures. And, the Department should avoid creating new, streamlined exemptions that will perpetuate this paternalistic approach.
- **Eliminate the Private Right of Action.** The BIC Exemption's contract requirement creates a private right of action that expressly invites open-ended class action litigation by plaintiffs' attorneys to enforce compliance. Enforcement through class action litigation is an ineffective way to police or incentivize compliance with the Fiduciary Rule. A private right of action will also result in inconsistent interpretations of the regulations and lack of uniformity across the industry.

Instead, enforcement should be handled by the appropriate regulators. Regulators have a particular expertise in the regulations they are tasked with enforcing and play a valuable role in the marketplace. They ensure consistency in the interpretation of laws and regulations and bring needed uniformity to industry compliance and best practices. In the case of individual retirement accounts, the Internal Revenue Service is tasked with enforcing the prohibited transaction provisions applicable to those accounts. There is no reason to believe that the IRS enforcement mechanism is insufficient to ensure compliance.

- **Harmonize with the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA).** The Department must collaborate with other regulators to develop a single harmonized “best interest” standard of care that applies to all investments, not just retirement investments. Treating retirement assets differently than non-retirement assets can only harm retirement investors. It increases costs and results in more limited solutions for retirement accounts as compared to non-retirement accounts. A uniform standard applied across the marketplace for all investors, not just retirement investors, would ensure that there are no “winners and losers” in the investment advice marketplace. A harmonized standard will also ensure that it is efficiently enforced through existing regulatory enforcement mechanisms, such as those available through the states, SEC and FINRA.

Fortunately, the Department and the SEC have both committed to constructively engage on standards of conduct applicable to both investment advisers and broker-dealers serving retirement and non-retirement investors.<sup>3</sup> The Department should take whatever steps are necessary to facilitate this harmonization process.

### III. A Delay Is Crucial

LFN has been and continues to be fully committed to compliance. We have expended significant resources to prepare for the Fiduciary Rule, including dedicating eighty (80) personnel to overhauling LFN’s business model and systems, including its retirement platform, products, service models and technology offerings. However, the Department needs to get this rule right so that its adverse impact on retirement savers can be reversed. To accomplish this, a delay of the January 1, 2018 deadline is critical.

The Department has indicated clearly, through this current RFI, its March 2 request for comment, as well as other public statements by Department officials,<sup>4</sup> that it is actively contemplating changes to this rule. An extension of the January 1, 2018 applicability date would ensure that the market does not experience a destabilizing effect from continued regulatory uncertainty. To require the industry to

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<sup>3</sup> In an SEC statement requesting comments from the public on standards of conduct for broker-dealers and investment advisers, Chairman Jay Clayton confirmed that clarity, consistency, and coordination – especially in areas overseen by more than one regulatory body – are key elements of effective oversight and regulation. [See https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31](https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31).

<sup>4</sup> For example, in a May 22 opinion piece for the Wall Street Journal, Secretary of Labor Alexander Acosta wrote “Trust in Americans’ ability to decide what is best for them and their families leads us to the conclusion that we should seek public comment on how to revise this rule.” In addition, Secretary Acosta and SEC Chair Jay Clayton have publicly signaled an intention to work together on potential revisions to the rule. [See Ignites.com \(“SEC, DOL Vow to Cooperate in Fiduciary Rule Review”\)](#), June 28, 2017.

engage in extensive and costly preparation for requirements that could very well change does not make sense under any cost-benefit analysis. It will only confuse customers, and generate unnecessary costs to cover the building and then dismantling or altering of processes in response to the changes -- costs that will inevitably be passed along to consumers. As the rule currently stands, LFN is evaluating whether to close or impose new fees on small accounts in order to cover the costs of maintaining them. Instead, allowing time for financial institutions to implement the rule as eventually revised in an orderly way (and in a way that would not disadvantage certain cohorts of retirement investors), would make the transition to complete implementation more cost-effective and a more positive experience for consumers.

A delay is crucial because the industry has had insufficient time to properly implement the current versions of the rule. This lack of readiness will continue to disadvantage retirement investors while certain products and services are not yet available. Two product categories are illustrative:

- **Mutual Funds.** Mutual fund product manufacturers have yet to develop and make available mutual funds that offer consistent/level compensation, despite the fact that this is required to comply with the BIC Exemption. Many mutual fund manufacturers intend to offer a “T-share class” mutual fund, with breakpoint and compensation structures that are consistent with most T-share class mutual funds. A number of mutual fund manufacturers have filed these new products with the SEC. However, a deep and expansive T-share mutual fund universe is not yet available, depriving retirement investors of cost-effective mutual funds. Until these products are ready, retirement investors will have extremely limited commissionable mutual fund options because the compensation structures are not the same across the fund industry. LFN currently offers less than thirty mutual fund families (down from over four hundred before the Fiduciary Rule took effect) because these are the only mutual funds that have substantially the same level of compensation. Unfortunately, these mutual fund families are not the ones most commonly purchased today by retirement investors and do not include a breadth of important categories like fixed income mutual funds or passive mutual funds.
- **Annuities.** With the shift away from commission-based products, yet the continued need for guaranteed lifetime income, fee-based annuities are vital for retirement investors. However, fee-based annuities, while available, are effectively not accessible in LFN or the marketplace. Currently, there is no easy way for retirement investors to access these important products because the fee-based annuity technology has yet to be installed on fee-based retirement platforms. Annuity manufacturers need additional time to install these important fee-based products on LFN’s and other distributors’ fee-based platforms and to allow for industry adoption of these alternatives to commission-based annuities.

#### **IV. Conclusion**

The President’s memorandum expressed concern that the Fiduciary Rule may (1) harm retirement investors due to reduced access to retirement savings products and services, (2) disrupt the retirement marketplace in a manner that is harmful to retirement investors, and (3) cause an increase in litigation and an increase in costs to retirement investors. The market developments and LFN’s own experience, as highlighted above, show that these impacts are already occurring.

Perhaps most disturbing is that the Fiduciary Rule is affecting LFN's retirement investors by limiting their ability to receive advice and access to comprehensive products and solutions. It is not too late for the Department to make the necessary changes to reverse this result.

LFN appreciates the opportunity to comment and is willing to assist the Department with any further guidance or modifications necessary to accomplish the overarching goal of ensuring retirement investors receive advice that is in their best interest.

Regards,

A handwritten signature in black ink, appearing to read "David S. Berkowitz". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David S. Berkowitz, President  
Lincoln Financial Network