August 11, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5655
Washington, DC 20210
Attention: Fiduciary Rule Examination

Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption; Prohibited Transaction Exemption 84-24.
RIN 1210-AB82

Ladies and Gentlemen:

Cetera Financial Group, Inc. ("Cetera") is the corporate parent of a complex of seven broker-dealers and five registered investment advisors, with more than 8,500 affiliated representatives. Our firms collectively serve more than 2 million retail investors, the majority of whom are middle-class families with a vital interest in saving for retirement. Most of our customers are households that have both qualified and non-qualified investment assets. They seek holistic advice and solutions designed to address their financial well-being and long-term goals, without regard to whether or not their investments are in tax-advantaged accounts.

On July 6, 2017, the Employee Benefits Security Administration of the Department of Labor (the "Department") published a request for information (the "RFI") in connection with its examination of the final rule defining who is a "fiduciary" of an employee benefit plan for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("IRC"), and related prohibited transaction exemptions (collectively, the "Fiduciary Rule").[1] We have previously submitted written comments with respect to RFI Question No. 1, regarding a delay of the January 1, 2018 applicability date (the "Applicability Date") for certain provisions of the Best Interest Contract Exemption ("BICE"). This letter will address other questions in the RFI.

Cetera strongly supports implementation of a uniform standard of care applicable to provision of financial advice to all retail investors. However, we have significant concerns with aspects of the Fiduciary Rule in its present form. We believe that in many cases it will harm the very individuals it seeks to protect by increasing costs and reducing access to retirement advice, disrupting the retirement services industry, and causing a surge in unnecessary litigation. For the reasons outlined below, we recommend that the Department make substantive changes to the

[1] U.S. Department of Labor, Request for Information, and Definition of the Term Fiduciary (July 6, 2017) available at: https://www.the Department.gov/sites/default/files/ebsa/temporary-postings/definition-of-the-term-fiduciary-request-for-information.pdf

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Fiduciary Rule and delay the Applicability Date until the later of January 1, 2020, or the date that is one year after the Department takes final action with respect to it.

Summary of Comments

1. **The Department should collaborate with the SEC, FINRA, and state insurance regulators to develop a common best interest standard.**

   The Department should engage in a dialogue with the SEC, FINRA, and the state insurance departments to establish consistent and clear standards for advice to retail customers with respect to all securities and insurance products. The SEC and FINRA have expertise in regulating advisers who sell securities products, and the National Association of Insurance Commissioners (the "NAIC") has expertise in regulating advisers who sell insurance products. The Department lacks sufficient expertise to regulate effectively in these areas.

2. **The contract requirement and warranties in the BICE are inappropriate, unnecessary to promote compliance and should be eliminated.**

   It is inappropriate to outsource enforcement of the Fiduciary Rule to the plaintiffs' bar without express Congressional authorization. The contract requirement in the BICE is not necessary to promote compliance with the Impartial Conduct Standards and creates significant litigation risk for financial institutions.

3. **The disclosure requirements in the BICE should be streamlined.**

   The disclosure requirements in the BICE are exceedingly and needlessly complex, require massive and expensive information technology redesign to support, and are not designed to focus investors' attention on the most important information. They focus largely on fees, which is inconsistent with the Department's goal of ensuring that advisers are acting in their clients' best interest. The disclosure requirements should require that fees be discussed in the context of the benefits and services being purchased.

4. **Recommendations for IRA rollovers and distributions from qualified accounts should be treated as educational information and not fiduciary advice.**

   Employees who participate in employer-sponsored retirement plans should be encouraged to keep their savings in the retirement savings system when they separate from service with their employers. The Fiduciary Rule discourages financial advisers from providing education and advice to clients in connection with IRA rollovers and should be modified.

5. **Compensation arrangements with respect to transactions concluded prior to June 9, 2017 should be grandfathered.**

The current grandfathering provision in the BICE will effectively require firms and advisers to ignore the ongoing needs of their clients in order to take advantage of the relief provided by the Department. This would be contrary to the overall goal of requiring firms and advisers to act in the best interest of their clients.

6. **The January 1, 2018 Applicability Date should be delayed until the later of January 1, 2020 or one year after final action on the Fiduciary Rule.**

   If the Department adopts substantive changes to the Fiduciary Rule, financial institutions will need adequate time to implement those changes. Even if the Department makes no such changes, the current implementation timeline is unworkable and should be delayed. Delaying the applicability date will provide time for the Department to constructively engage with the SEC, the NAIC and other regulators to ensure regulatory clarity and consistency, and will allow the Department to assess the impact of the expanded definition of fiduciary and the Impartial Conduct Standards with minimal risk of consumer harm.

Discussion

Cetera strongly supports the implementation of a uniform best interest standard of care. However, we have long expressed significant concerns with the Fiduciary Rule because we believe it will harm investors by reducing their access to personal retirement planning services. A growing body of evidence demonstrates that the Fiduciary Rule will result in higher costs for the industry which will be passed to consumers, depriving them of advice, products and services that are crucial to retirement investors.

We are concerned that the cost and other impacts of full implementation of the Fiduciary Rule will have negative and unintended consequences for investors who benefit from and value personal retirement planning services. Without access to a financial advisor, investors lose a critical source of financial education. Financial advisors serve an important role in providing advice to investors who are often overwhelmed by the investment choices available to them. This is particularly true for middle-class and younger investors. Research has shown that investors who work with financial advisors save more, are better prepared for retirement, and have greater confidence in their retirement planning.[2] It is imperative that they continue to have access to financial education and guidance throughout this process. A study of the positive value of financial advice found that the investment assets of households working with a financial advisor gained 69% more value after four years, and grew to 290% more value over 15 years, which is 3.9 times the value of assets of a non-advised household.

[2] Claude Montmarquette, Nathalie Viennot-Briot. Centre for Interuniversity Research and Analysis on Organizations (CIRANO), The Gamma Factor and the Value of Advice of a Financial Advisor, available at https://www.cirano.qc.ca/files/publications/2016s-35.pdf

Many financial institutions have announced that the Fiduciary Rule will force them to alter their business in ways that will limit the choice of investment vehicles they offer to investors. For example, many firms have announced plans to offer only a single mutual fund share class. Instead of allowing financial advisers and retirement investors to make choices based on their individual circumstances, consumers may be forced into a "one-size fits all" approach. We do not believe that this is what the Department intended when it promulgated the Fiduciary Rule, and it is clearly not in the interest of most retirement investors.

The Department has previously delayed the Applicability Date of certain aspects of the Fiduciary Rule until January 1, 2018, which we believe was a wise and well-reasoned response to developments in the retirement services industry. As discussed below, we support a further delay in order to allow a detailed review of the Fiduciary Rule, its negative impact on investors' access to retirement planning services, and new innovations and approaches that may alleviate many of these concerns. We also believe that investors are currently well protected by existing federal and state regulatory structures and the application of the Fiduciary Rule's Impartial Conduct Standards, which became effective on June 9, 2017. It is essential that the Department consider substantive changes to the Fiduciary Rule, particularly whether close coordination between the Department and other regulators can eliminate or reduce these negative consequences. We believe that there are several ways in which the Fiduciary Rule's harmful effects can be eliminated and the Department can better accomplish its goal of enhancing protection for retirement investors by taking the actions described below.

I. The Department should work with the SEC, FINRA, and the NAIC to create a uniform best interest standard applicable to all investors

A. The Fiduciary Rule creates different and possibly conflicting standards for financial advice to retirement investors

The Fiduciary Rule has created one regulatory regime for tax-qualified retirement accounts and a different regime for all others. This is confusing and counterproductive for investors and unworkable for financial advisors. It ignores the fact that investors are household units who often have investment accounts that are both qualified and non-qualified. Their objective is to meet all of their financial needs and goals with the assets that they have accumulated, regardless of which account they may be held in. This can only be done through a holistic view of the investor's entire financial situation. The regime adopted by the Department encourages both investors and financial advisers to view investment assets in different ways. The increased costs of complying with inconsistent and overlapping regulatory regimes will inevitably result in higher prices and reduced investor access to retirement planning services. Instead of unilaterally implementing significant changes as if the other regulatory regimes and decades of industry practices did not exist, the Department should work with the SEC, FINRA and state insurance regulators (through the NAIC) to create a single best interest standard applicable to all investors. As FINRA observed in its initial comments on the Fiduciary Rule: "The Proposal would impose a best interest standard on broker-dealers that differs significantly from the fiduciary standard applicable to investment advisers registered under the federal and state securities laws, and it would impose the best interest standard only on retirement accounts. This fractured approach will confuse retirement investors, financial institutions, and advisers."[3]

These disparate and unclear standards will inevitably affect behavior. As has been widely reported, many firms have already raised account minimums or done away with commission-based accounts altogether in response to the Fiduciary Rule. Other firms have shut their doors or merged with larger firms because they do not have the resources to meet its onerous and overlapping requirements. Many advisers report that they are apprehensive about the possibility that their recommendations will be questioned years later with the benefit of hindsight. The cumulative impact of this will be to limit investor choice and access to investment advice. These developments are not based on what is in the best interest of investors, but rather on the massive regulatory burden and the risk of catastrophic litigation. This creates an artificial barrier to providing comprehensive advice that is in the best interest of clients.

B. The SEC and FINRA have existing authority and enforcement resources which the Department lacks

If the SEC adopts a best interest standard that is consistent with that of the Department, the SEC can serve as the primary enforcement body for such a standard. A workable best interest standard should utilize effective client disclosures and principles-based rules. Because of their unique expertise in the regulation of broker-dealers and investment advisers, the SEC must have a significant role in this process. In recent remarks to the Economic Club of New York, SEC Chairman Clayton observed that, "With the Department of Labor's Fiduciary Rule now partially in effect, it is important that the Commission make all reasonable efforts to bring clarity and consistency to this area. It is my hope that we can act in concert with our colleagues at the Department of Labor in a way that best serves the long-term interests of Mr. and Ms. 401(k)."[4] The SEC has clear statutory authority to regulate all financial advisors and securities products. Unlike the Department, the SEC and FINRA have existing examination and enforcement protocols and trained staff to perform these functions. Similarly, the NAIC has valuable expertise in regulating the insurance industry, including regulation of financial professionals who sell insurance products.

C. Regulatory Agency Coordination is necessary and will take time

Constructive engagement between the Department, the SEC, FINRA, and the NAIC will ensure that applicable regulations are workable and appropriate for their respective industries. However, coordination among the Department, SEC, FINRA, and state insurance regulators to develop a single uniform standard will require extensive work that simply cannot be completed prior to January 1, 2018. It will take time to

[3] Marcia Asquith, FINRA's July 17, 2015 comment letter on the Department's original Fiduciary Rule proposal
[4] https://www.sec.gov/news/speech/remarks-economic-club-new-york

develop a common standard, and once developed, the Department, the SEC, and other agencies will need to coordinate their respective rulemaking processes, all of which will include notice and comment periods. The SEC has recently issued a request for comment regarding standards of conduct for investment advisers and broker-dealers to evaluate potential regulatory actions in light of current market conditions.[5] In recent remarks, Chairman Clayton cautioned that "Any action will need to be carefully constructed so it provides appropriate and meaningful protections but does not result in Main Street investors being deprived of affordable investment advice or products."[6] Without collaboration among the SEC, FINRA, and state insurance regulators, and lacking sufficient time to consider regulatory options, the goal of regulation that is in the overall best interest of retirement investors is not likely to be achieved.

Coordination among regulatory agencies is critical in order to avoid unintended (though predictable) consequences for retirement investors and capital markets. The securities markets are much larger and more complex than they were more than 40 years ago when ERISA was enacted. This heightened complexity makes it likely that the Department's approach will result in significant unintended consequences, as noted above. Indeed, the SEC's deliberate approach to rulemaking with respect to the uniform fiduciary standard under section 913 of the Dodd-Frank Act reflects the significant amount of time and work necessary to understand the impact and reduce unintended effects. To avoid these potentially drastic consequences, the Department needs to leverage the SEC's experience, expertise, historical context, knowledge, and resources to fashion conduct standards that will not cause significant disruption in the securities markets. This has not occurred to date, and we submit that it cannot happen until such time as the Department engages with the SEC and other regulatory agencies.

Congress enacted specific checks and balances to ensure that regulations affecting the securities markets and market participants do not impede efficiency, competition and capital formation. Section 23(a)(2) of the Securities Exchange Act of 1934 provides that:

> The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this chapter, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this chapter, the reasons for the Commission's or the Secretary's determination that any burden on competition imposed

[5] https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31
[6] Note 5, above.

> by such rule or regulation is necessary or appropriate in furtherance of the purposes of this chapter.[7]

The Department's rulemaking process effectively circumvented the statutory requirements that apply to SEC rulemaking, and the result, while well intentioned, represents risky experimentation with a significant portion of the U.S. economy. At a minimum, the Fiduciary Rule establishes a radically different and untested regulatory regime for investors. At worst, it will be extremely disruptive to competition and access to capital. It is important to note that the requirements of the Fiduciary Rule are in addition to, not in place of, the already complicated, costly and often redundant and/or contradictory regulations imposed by a myriad of federal, state and self-regulatory securities and banking regulators. There can be no doubt that the Department's approach would benefit from coordination with the regulatory regimes of other agencies, and applying the considerations and safeguards that Congress intended to apply to regulations impacting the securities markets.

We believe it is critical that the Department and the SEC engage constructively with each other to ensure regulatory clarity and consistency. Absent such engagement, financial professionals will find themselves subject to multiple different and potentially incompatible sets of rules. We commend the Department and Secretary Acosta for expressing an interest in engaging with the SEC, and we strongly encourage the Department to pursue this in connection with its review of the Fiduciary Rule. However, such engagement will take time and should not be approached with any artificial deadlines looming. As such, we believe the Department should delay the Applicability Date to allow adequate time to effectively engage with the SEC and other interested regulators on this important subject.

II. The Department should eliminate the written contract requirement, warranties, and private right of action provisions in the BICE

A. The contract, warranty, and private right of action are not necessary to promote compliance with the BICE

The contract and warranty requirements in the BICE are not necessary to promote compliance with the Impartial Conduct Standards and should be eliminated. The Department, as well as the IRS, the SEC, FINRA, and the state insurance and securities departments already have adequate and effective tools at their disposal to enforce the Impartial Conduct Standards and protect consumers.

[7] 15 U.S.C. § 78w(a)(2); see also id. § 78c(f) ("Whenever pursuant to this chapter the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.") (emphasis added).

The SEC and the NAIC are also currently engaged in efforts to establish a best interest standard of care that will further enhance existing enforcement mechanisms. SEC Chairman Clayton recently issued a public statement[8] in which he asked for public comments to help the SEC "evaluate the range of potential regulatory actions." Similarly, the NAIC has formed a working group to consider possible revisions to the NAIC Suitability in Annuity Transactions Model Regulation (the "NAIC Model"), including possible incorporation of a best interest standard into the NAIC Model.

B. Outsourcing enforcement of the warranty provisions in the BICE to the plaintiff's bar is an inappropriate enforcement mechanism

Recent experience demonstrates that outsourcing enforcement to the plaintiffs' bar is not an effective way to protect consumers. From 2009 to 2016, plaintiffs in lawsuits alleging breaches of ERISA fiduciary duties received just $116 on average.[9] In fact, the real beneficiaries of these cases were the plaintiffs' attorneys, who collected roughly $204 million for themselves.[10]

In February 2017, Morningstar, Inc. conducted a study of the litigation risk created by the contract and warranty requirements, and found that class action lawsuits under the BIC Exemption[11] will cost the industry between $70 million and $150 million each year. In the near term, these costs could be several times higher "as firms try to figure out how to determine, demonstrate, and document best interest." Ultimately, significant portions of this litigation expense will likely be passed along to retirement savers in the form of increased costs for products and services.

Retirement savers are also being harmed as a result of this litigation risk in other important ways. For example, a recent Cerulli study found that 55 percent of plan sponsors view litigation risk as a very important consideration when making decisions for their plans.[12] The same study found that "improving participant outcomes" ranked only slightly higher at 63 percent.[13] This fear of litigation is driving many plan fiduciaries to focus on easily quantifiable factors such as the fees associated with particular products or services to the exclusion of other important considerations such as the value of those products or services and their appropriateness for the plan's participants.

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[8] Note 6, above
[9] DC Dimensions, Summer 2016, ''Fiduciary Benchmarks: Protect Yourself at All Times,'' by Tom Kmak, https://us.dimensional.com/-/media/Dimensional/Documents/US/Auxiliary/Defined-Contribution/Summer-2016/02-Fiduciary-Benchmarks-Protect-Yourself-at-All-Times.pdf
[10] Id.
[11] We note that the Department has recently conceded that the BIC Exemption's prohibition on class action waivers in pre-dispute arbitration agreements violates federal law and should be vacated. While we applaud and appreciate this decision, it is important to note that broker-dealers and their registered representatives are subject to FINRA rules that prohibit class action waivers, and therefore will continue to face significant class action litigation risk as long as the BIC Exemption contract requirement remains in place.
[12] Cerulli Associates, The Cerulli Report – U.S. Retirement Markets 2016: Preparing for a New World Post---Conflict of Interest Rule
[13] Id.

During the rulemaking process, numerous commenters expressed serious concerns about these costs,[14] as well as the risks inherent in abdicating interpretation and enforcement of the Fiduciary Rule to fifty different state courts across the country. The Department simply disregarded these extensive comments, assigning no cost estimate to class action litigation in the Regulatory Impact Analysis. As a result, the Department improperly failed to assess the adverse impact associated with one of the most controversial elements of the Fiduciary Rule. Allowing state courts to issue conflicting, state-specific interpretations of ERISA fiduciary standards under the guise of contracts and warranties also directly contradicts congressional intent as reflected in ERISA § 514(a).

There is no doubt that the Fiduciary Rule will increase the cost of regulatory compliance, which in turn will increase the prices that investors will pay for advice and reduce access to retirement planning services. One significant area that the Department needs to re-evaluate is the private right of action created by the BICE. Rather than coordinating with FINRA and the SEC – and leveraging their existing enforcement regimes – the Department chose to rely primarily on private litigation to enforce its new standards and requirements. The private right of action created by the Fiduciary Rule's BICE is certain to result in an increase in litigation, directly contributing to an increase in cost to investors. It has and will continue to drive market participants to make decisions unrelated to providing advice in clients' best interests. Investor access to retirement planning services can be best preserved by reducing the high costs that will flow from the BICE.

An inevitable consequence of this is that the economics of managing small accounts will change, and the fixed cost of servicing these accounts will often exceed the revenue they can produce. As a result, many financial institutions have stated that they will raise their minimum account size, offer smaller investors access only to "robo-investing" account services, or force them to move their accounts to other firms. These small (often entry-level, novice investors) will lose access to the personalized retirement advice that is vital to their planning for a dignified retirement. As FINRA noted in its comments on the Department's proposal, "many broker-dealers will abandon these small accounts, convert their larger accounts to advisory accounts, and charge them potentially higher asset-based fees. They will do so largely because of the BICE constraints on differential compensation, the ambiguities in the best interest standard, the lack of clarity concerning various conditions, the costs of compliance, and uncertainty about the consequences of minimal non-compliance."[15] Based on the foregoing, the Department should remove the contract and warranty requirements from the BICE.

C. The disclosures required by the BICE are unduly burdensome and not calculated to give investors useful information

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[14] Commenters have also provided extensive new data and information to the Department in connection with the Department's review of the Fiduciary Rule pursuant to the Presidential Memorandum issued on February 3, 2017

[15] FINRA Comment Letter, supra note 6, at 6.

The disclosure obligations mandated by the Fiduciary Rule are extremely burdensome for financial institutions to comply with, and are not calculated to provide investors the type of information that they actually need. The complicated and expansive nature of these disclosures makes it highly unlikely that they will be effective in achieving the Department's goal of transparency and usability for investors. Investors do not need or want voluminous and duplicative disclosures. They likely will not read, refer to, or rely on them, and the cost of compliance for financial institutions vastly outweighs their marginal usefulness. Instead, a streamlined, easy-to-read, global disclosure document containing information that is most pertinent to investors would be much more appropriate. Research has shown that providing consumers of any product with too much information, especially if it is provided in the legalistic form that would be required by the BICE, is actually less effective than providing less information in a more digestible form.

The Securities Industry and Financial Markets Association (SIFMA) estimates that annual compliance costs incurred by the financial service industry will range from $240 million to $570 million over the next ten years,[16] and a recent study by the American Action Forum found reported compliance costs from just four companies to be $106 million in 2016.[17] These compliance costs increase the prices that investors will pay for retirement planning services, restricting access to those services to the detriment of investors. The complex requirements also make it possible, or even likely, that firms operating in good faith to comply will make unintentional errors in their disclosures. This may further confuse clients and create significant financial consequences for financial institutions without a corresponding benefit to investors.

A redesigned and simplified disclosure regime is more likely to produce information that will be most usable by investors, and would also significantly reduce compliance costs. Experience has demonstrated that more disclosure is not necessarily better disclosure. As an example of this, the Gramm- Leach-Bliley Act of 1999 required financial institutions to make very detailed annual disclosures to consumers. Supporters and opponents of these rules concluded that the resulting notices were too long, complex, and written in legalistic jargon that was difficult for consumers to understand. In 2006, Congress directed the financial regulatory agencies to jointly develop a streamlined model financial privacy form. Consumer testing showed that consumers were more likely to read notices that were simple, provided key context up front, and had pleasing design elements, such as large amounts of white space. This testing indicated that simple and concise disclosure in the form of a table was more effective than the long notice originally required by the law, which was viewed as ineffective. These findings were successfully incorporated into the agencies' model forms.

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[16] Morningstar, Inc., Weighing the Strategic Tradeoffs of the U.S. Department of Labor's Fiduciary Rule (February 2017).
[17] American Action Forum, The Consequences of the Fiduciary Rule (April 10, 2017) available at: www.americanactionforum.org/research/consequences-fiduciary-rule-consumers.

The Department has maintained throughout the rulemaking process that "disclosing conflicts alone would fail to adequately mitigate the conflicts or remedy the harm. However, the Department has not discussed why disclosure coupled with other less burdensome requirements could not offer a superior alternative to that embodied in the Fiduciary Rule. The SEC has greater expertise related to investor disclosure regimes and would be well positioned to aid the Department in drafting disclosures to maximize their effectiveness. As SEC Commissioner Michael Piwowar observed in his recent comments on this RFI,[18] the SEC has historically made a great effort to ensure the accuracy and effectiveness of disclosures to investors. He pointed to the work of the SEC's Office of the Investor Advocate—the Policy Oriented Stakeholder and Investor Testing for Innovative and Effective Regulation (POSITIER) Initiative, which is engaged in an evidence-based study of the impacts of proposed policy changes, including disclosure-oriented policies. Commissioner Piwowar stated that, "[r]ather than dismiss out of hand the role of disclosure in policing conflicts of interest, I would strongly encourage the Department to redouble its efforts to work with the Commission and its expert staff, who may bring to bear our decades of experience in enforcing multiple disclosure-based regimes."[19] We believe that such coordination is critical to avoid unintended (though predictable) consequences for retirement investors and capital markets.

In granting the SEC authority to adopt rules governing product-specific disclosures for retail investors, Congress included a requirement that "the Commission shall consider whether the rules will promote investor protection, efficiency, competition, and capital formation"[20] Congress was clearly concerned about the degree to which additional disclosure requirement could impair operation of the securities markets. This is a critical consideration given the extensive degree to which the Fiduciary Rule mandates specific and highly burdensome disclosures regarding securities products and services. However, the Department's decision to create a new disclosure regime applicable to retirement investors again circumvented these critical considerations. The Department should revise the disclosure requirements in cooperation with the SEC as described below, and should not adopt any revised disclosures unless it can make these important findings with respect to investor protection, efficiency, competition and capital formation, which were not included in the Department's rulemaking process

D. Uniform Streamlined Disclosure will best accomplish to goals of the Fiduciary Rule

Financial institutions should have the option to deliver a "global" disclosure document to investors which describes their services, the standard that applies to the relationship (i.e., fiduciary or otherwise), a general disclosure of the forms of compensation that the institution or adviser will receive, and material conflicts of interest and how they will be addressed and mitigated. This document should be delivered to the investor at the time an account is established. The relevant disclosures should also be

[18] https://www.sec.gov/.../piwowar-comment-dol-fiduciary-rule-prohibited-transaction
[19] Id.
[20] § 78o(n)(2)

available on a website maintained by the firm, and access to it should be deemed equivalent to delivery of the disclosures for all existing clients. Firms should be required to make good-faith efforts to furnish complete and up-to-date disclosure regarding information that is material to investors, but should not be subject to liability for immaterial errors or omissions, and should be given reasonable opportunities to update information and cure deficiencies that are identified. The disclosure regime should be designed to insure that firms supply information to customers that is usable and important, and not to create incentives for plaintiff's attorneys to file lawsuits over trivial matters. Such an approach has been considered effective by both investors and regulatory agencies in a working group[21] convened by the North American Securities Administrators Association (NASAA) that has developed a model fee disclosure template that offers a concise and cogent summary of account expenses that can serve as a model for disclosing relevant data to investors via the Internet.

As financial institutions have worked in the months since the Fiduciary Rule was promulgated to build technological systems to comply with the necessary disclosures, it has become apparent that industry-wide changes must be considered, reviewed, structured, and implemented. It is now clear that this process will require far more time than is realistic with a January 1, 2018 implementation date. A new and comprehensive review of the scope and timing for implementation of these disclosures must be undertaken.

III. The Department should revise and clarify the Impartial Conduct Standards as they relate to compensation

The Impartial Conduct Standards prohibit financial institutions, financial advisors, and their affiliates from receiving more than "reasonable" compensation in connection with recommendations to retail investors. "Reasonable" depends on the facts and circumstances surrounding the recommendation, including the market price for the product or services provided, and the complexity of the investor's financial situation. The Department has stated that reasonable compensation does not necessarily mean that the lowest cost product must always be recommended, but we are concerned that without further clarification, this requirement will create a presumption in favor of the lowest cost product or service without regard to the qualitative factors that ultimately determine its value. We believe it is virtually inevitable that the plaintiff's bar will argue for this interpretation, and that some state courts will adopt it. This is made more problematic by the fact that the Fiduciary Rule creates incentives for plaintiffs' attorneys to bring class action claims in state courts, which apply different standards to the scope of a fiduciary relationship. As Congress recognized when it adopted the Securities Litigation Uniform Standards Act[22] this is inconsistent with the nature of commerce in the United States and ultimately counterproductive to the interests of both

[21] The Working Group consists of state securities regulators, representatives of the Financial Industry Regulatory Authority (FINRA), the Securities Industry and Financial Markets Association (SIFMA), the Financial Services Institute (FSI), LPL Financial LLC, Morgan Stanley Smith Barney LLC, Prospera Financial Services, and Signator Investors, Inc.
[22] Pub. L. 105-353, 112 Stat. 3227

investors and the economy in general. The benefits of applying common standards to businesses that operate across many jurisdictions have long been recognized, and requiring financial institutions to account for the 50 different state standards in designing their product offerings is unrealistic. The primary by-product of such an approach will be increased costs for investors without any offsetting benefit, and the natural reaction of financial advisers will be reduce to their product and service offerings in favor of a lowest-common-denominator, "one size fits all" approach. Reflexively offering the lowest cost product to all investors in order to ensure limit litigation risk will not benefit investors.

Cetera supports the concept of reasonable compensation for financial institutions and advisers, but the standards in the Fiduciary Rule are too vague, create significant compliance challenges, and will stifle innovation. In addition, application of the reasonable compensation standard and related requirements will harm investors by limiting their choices and/or increasing their costs. Recent media reports have noted the intention of some institutions to limit their product offerings and change their service models, including the following approaches:

- Recommending that clients move to fee-based accounts;
- Eliminating commission-based IRAs;
- Raising investment minimums for commission-based IRAs; and
- Excluding certain products from commission-based IRAs (annuities, mutual funds, and exchange-traded funds).

There is a need for usable guidance on what constitutes "reasonable compensation" in order to ensure that investors maintain access to products and services. We support a principles-based approach to the definition of reasonable compensation while providing the necessary guidance for financial institutions to have confidence in the quality of their compliance efforts.

Another important concern is the definition of the term "Best Interest" in the BICE. We believe that this definition is overly prescriptive and should be revised to make clear that advisers and financial institutions must always put their clients' interests first, but would not be required to completely disregard their own legitimate business interests. The phrase "without regard to the financial or other interests of the fiduciary, any affiliate or any other party" is problematic because it appears to require that any advice provided wholly ignore the business and economic reality that financial advisers need to generate enough revenue to cover their costs and earn a reasonable profit in order to stay in business. This is no different than practitioners in any other profession and should be explicitly acknowledged in the Fiduciary Rule.

IV. The Department should revise the Fiduciary Rule as it relates to IRA rollovers

The Fiduciary Rule includes recommendations for rollovers of assets in employer-sponsored retirement plans to IRAs within the definition of fiduciary advice. Rollovers of assets in employer-sponsored retirement plans are undoubtedly significant to retirement investors, but we believe that they are fundamentally different from investment advice and should be treated differently. When an employee separates from service with an employer, they have multiple options for what to do with their retirement assets. They can:

- Roll the assets from the previous employer's plan to a new employer's plan;
- Roll the assets into an IRA;
- Leave the assets with the previous employer (if the account balance exceeds the plan's automatic cash-out/rollover limit); or
- Take a distribution of their account balance.

Studies have shown that as many as 43% of terminated employees will cash out plan balances when changing jobs.[23] Since today's average employee will change jobs multiple times during his or her working life, it is easy to see how potentially damaging this can be to long-term retirement savings accumulation. According to the Bureau of Labor Statistics, as of January 2016, the median period that employees remain with one employer is only 4.2 years, down from 4.6 years in 2014.[24] Over a 40-year career, that approximates10 job changes and 10 opportunities to cash out retirement benefits. Further statistics show an alarming impact: An estimated 1.5% of 401(k) and IRA assets are prematurely withdrawn each year, reducing wealth at retirement by approximately 25%[25]

In order to limit harmful premature cash-outs from retirement plans (also known as "leakage"), the Fiduciary Rule should encourage retirement investors to seek information regarding their options with respect to rollovers from employer-sponsored retirement plans, and should encourage financial advisers to provide that information without subjecting themselves to the myriad liabilities that flow from fiduciary status and the BICE. In its current form, the Fiduciary Rule makes it extremely difficult for financial advisers to provide education about rollover options without subjecting themselves to the risk of fiduciary status. Advisers who do not want to become fiduciaries are often unwilling to provide any guidance to clients, despite the benefits that clients can derive from it. The predictable end result is increased leakage from the retirement system in the form of withdrawals.

From a retirement savings policy perspective, this result does not make sense. With the increasing number of job changes occurring in the career of the average employee, retirement policy should encourage employees to carefully evaluate their options with respect to balances in employer-sponsored retirement plans, with the ultimate goal of keeping as much of these assets as possible in the retirement savings system. The responsibility and risk that attach to fiduciary status make this a hazardous activity for financial advisers, many of whom will choose to avoid it entirely. So long as there is no recommendation from the

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[23] Aon 2016 Universe Benchmarks: Employee Savings and Investing Behavior in Defined Contribution Plans
[24] Bureau of Labor Statistics News Release "Employee Tenure In 2016," (September 22, 2016), available at https://www.bls.gov/news.release/pdf/tenure.pdf
[25] Munnell, Alicia H. & Webb, Anthony. (February 2015) Center for Retirement Research at Boston College. The Impact of Leakages on 401(k)/IRA Assets. Retrieved from http://crr.bc.edu/wp-content/uploads/2015/02/wp_2015-2.pdf

adviser with respect to specific investment products, recommendations to roll over assets to an IRA should be excluded from the definition of fiduciary advice.

On a more practical level, financial institutions that are considering how to manage fiduciary status in connection with IRA rollovers have struggled to determine what will be required in order to satisfy the best interest standard. Many have concluded that it requires the financial adviser to produce a side-by-side comparison of the costs and features of the employer-sponsored plan and the IRA. In many cases, the information necessary to perform such a comparison is not readily available, and if available, it is often incomplete and difficult to synthesize into a form that is usable to an investor. This regime also assumes that a comparison of an employer-sponsored plan to an IRA should be primarily focused on cost. Employer-sponsored plans and IRAs are fundamentally different. Employer-sponsored plans are generally less expensive, but they offer much less in the way of investment options and very little in the way of personalized advice. Any comparison that is primarily focused on cost accounts for only part of the equation, and is of limited practical use to an investor.

The Fiduciary Rule should be revised to provide that financial advisers may deliver a disclosure to clients about rollovers with a general description of features and costs. It should focus on the major qualitative differences between IRAs and employer-sponsored plans, and should recognize that a rollover recommendation that is not coupled with specific investment recommendations is more akin to education, or a "hire me" discussion than fiduciary advice. (The Department has recognized that "hire me" discussions do not constitute fiduciary advice within the ambit of the Fiduciary Rule.) A concise disclosure document setting forth the primary differences between employer-sponsored plans and IRAs, with a clear statement about the fact that costs of IRAs are generally higher is sufficient.

Similarly, we believe that a recommendation to take a distribution from a plan or IRA should not give rise to fiduciary status, and should be expressly excluded from the definition of fiduciary advice. Any accompanying recommendation regarding the use of the proceeds of a distribution should be separately evaluated to determine whether it meets the definition of investment advice under the Fiduciary Rule. If fiduciary status is triggered, only the accompanying recommendation should be required comply with the conditions of an applicable prohibited transaction exemption.

V. The Department should expand the grandfathering provisions of the Fiduciary Rule to definitively cover ongoing compensation in connection with securities purchased prior to June 9, 2017

The Fiduciary Rule applies to recommendations to purchase or sell securities after June 9, 2017. However, there is considerable confusion about how it may apply to securities that investors purchased prior to that date and which have ongoing compensation, such as 12b-1 fees on certain mutual funds. A lack of clarity about this will lead financial institutions to stop servicing small accounts and abandon customers who have pre-June 9, 2017 holdings in accounts with small balances. One large mutual fund sponsor reports that its number of orphaned accounts nearly doubled in the first three months of 2017, and that the average account balance in these orphan accounts is just $21,000. Further, it projects that ultimately 16% of the accounts it services will be orphaned this year because of the Fiduciary Rule. Extrapolating this prediction suggests that at least 1.6 million small retirement savers have already lost access to investment assistance since January 2017, and an additional 1.6 million are likely to lose access after the Rule becomes fully applicable.[26] The Department should make it clear that compensation received by a financial institution with respect to securities purchased prior to June 9, 2017 is grandfathered, and that financial advisers may continue to receive ongoing compensation without being required to comply with the provisions of the BICE. A specific example of why this is necessary arises out of FINRA Rule 2111, (the "Suitability Rule"), to which all broker-dealers are subject. FINRA Rule 2111 applies to "hold" recommendations, in which a financial adviser recommends to a customer that they maintain an existing securities holding. Such a recommendation must be suitable under the FINRA suitability standard, but since it does not involve a purchase or sale of securities, it should be excepted from the definition of advice in the Fiduciary Rule. If this is not the case, financial institutions and advisers face two unappealing choices: Abandon investors with small account balances, or send written contracts to all customers with existing securities positions and comply with the other provisions of the BICE. This creates an incentive for advisers to stop servicing existing accounts because the expense and potential liability that flows from the BICE will render it uneconomic.

Section VII of the BICE does not provide for true grandfathering, which would usually act as an exclusion or exemption from the requirements of a new rule for activities conducted before that rule took effect. Section VII purports to provide for grandfathering, but it does so on a strictly transactional basis that does not comport with the way advisers and clients typically interact. In the real world, firms and advisers generally do not to avoid compartmentalize different aspects of their client relationships. It would be illogical to place one part of a single client relationship into one bucket (assets acquired on or prior to June 9, 2017) and another part of the same relationship into a separate bucket (assets acquired after June 9, 2017). More importantly, we expect that many clients would be confused and frustrated by such arrangements.

Section VII will effectively require firms and advisers to ignore the ongoing needs of their clients in order to take advantage of the relief provided under the provisions of the Fiduciary Rule. This would be contrary to the overall goal of requiring firms and advisers to act in the best interest of their clients. It would also run afoul of FINRA's regulatory expectations that advisers should periodically check with clients to see if their needs or objectives have changed and if their holdings remain consistent with their current circumstances.

There are other practical concerns regarding transactions executed prior to June 9, 2017. The negative consent provisions of the BICE are helpful, but do not address the millions of brokerage and advisory relationships for which compensation arrangements will

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[26] Letter from Randel Johnson & David Hirschmann, U.S. Chamber of Commerce, to DOL Employee Benefits Security Administration (April 17, 2017) available at: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01295.pdf.

be changed as a result of the Fiduciary Rule. Many existing investment advisory, brokerage, custody, financial planning and other agreements will need to be amended to reflect revised fee and compensation provisions as mandated by the Department's rules. The Department should work with the SEC and other regulators as necessary to allow a one-time process under which financial institutions may amend these agreements by negative consent, assuming that proper disclosures are made to affected customers.

To avoid these adverse consequences, the Department should replace the current grandfathering provision with a provision under which the Fiduciary Rule (including the expanded definition of the term "fiduciary") would not apply to arrangements entered into prior to June 9, 2017, including future advice regarding any assets acquired prior to that date.

VI. The Applicability Date should be delayed until the later of January 1, 2020 or the date which is one year after the Department takes final action on the Fiduciary Rule

A. If the Department Adopts Changes to the Fiduciary Rule, Additional Time will be Needed to Allow Financial Institutions to Implement Them

1. The review directed by the President has yet to be completed

On February 3, 2017, President Trump sent a memorandum (the "Memorandum") to the Department directing it to undertake a review of the Fiduciary Rule. The Memorandum posed several specific questions about whether or not the Fiduciary Rule would accomplish its intended aims, with or without undesirable collateral consequences. On April 4, 2017, the Department published a notice delaying the applicability date of the Fiduciary Rule to June 9, 2017, in part to allow time to conduct a study of the Rule's impact as the President directed. The Department was prudent to delay implementation of the Fiduciary Rule, but the 60-day delay was an insufficient amount of time to conduct the required study. We understand that the Department is still in the process of reviewing and analyzing comments received in response to its request for comments on issues raised in the Presidential Memorandum.[27] As many commenters have noted, and as the Department appears to realize, innovations in investment products and services are underway that will create new methods to meet the requirements of the Fiduciary Rule and better accomplish its stated goals. With respect to mutual funds – the investment vehicle most frequently purchased by retail retirement investors – the rule requires drastically different compensation paradigms than those that have existed for decades, and there is no efficient or effective product solution that would preserve clients' continued ability to acquire them under a transaction-based compensation arrangement. We are concerned that full implementation of the Fiduciary Rule without giving these innovations sufficient time to be developed and put in place will greatly reduce investor choice and access to retirement planning services, and that it

[27] U.S. Department of Labor, Request for Information, and Definition of the Term Fiduciary (July 6, 2017) available at: https://www.dol.gov/sites/default/files/ebsa/temporary-postings/definition-of-the-term-fiduciary-request-for-information.pdf

is necessary to delay implementation of the Applicability Date to allow an appropriate review to occur.

The preamble to the RFI states that, concurrent with the ongoing review of the Fiduciary Rule pursuant to the Memorandum, the Department is "seek[ing] public input that could form the basis for new exemptions or changes/revisions" to the Fiduciary Rule. Once the Department makes a final decision on the Fiduciary Rule – and regardless of whether that decision is to make extensive changes, minor modifications, or no changes at all – financial institutions will need a reasonable amount of time to prepare for compliance. The Department will be hard pressed to issue a revised final rule in time to give financial institutions and their representatives sufficient time to adopt necessary changes before the Applicability Date. Such a short time period will inevitably lead to unnecessary market disruptions.

Cetera is committed to complying with all laws, rules and regulations applicable to our business, and will work in good faith to achieve compliance. However, an unreasonably short implementation period will force us and many similar institutions to rush changes into effect and in some cases, force us to suspend the delivery of services to retirement savers. Delaying the Applicability Date will give firms and advisers adequate time to develop and implement appropriate, effective and efficient processes and procedures to comply with the final version of the Fiduciary Rule, including any changes made by the Department based on public comments on the questions raised in the RFI. A delay will also allow time for the Department to provide additional guidance regarding any changes that are incorporated in the final rule, and for the industry to implement such additional guidance.

2. **If the Department delays implementation or makes other substantive changes to the Fiduciary Rule, investors are sufficiently protected by the application of the Impartial Conduct Standards**

During the transition period from June 9, 2017, through January 1, 2018, financial institutions and advisors relying on the BICE must adhere to Impartial Conduct Standards which it contains. The Impartial Conduct Standards require financial institutions and advisors to provide advice in the retirement investors' best interest, charge no more than reasonable compensation for their services and to avoid misleading statements. We are informed and believe that the large majority of financial institutions are relying on the BICE as a primary prohibited transaction exemption. Firms that are relying on the BICE have implemented procedures to ensure that they are meeting their new obligations, and are continuing to review and adopt additional measures. These new procedures may include changes to compensation structures, restrictions on the availability of certain investment products, changes to due diligence review of products and service providers, enhancements to efforts to monitor the sales practices of their affiliated financial advisors, and creation and maintenance of books and records to demonstrate compliance with the Impartial Conduct Standards. Thus, investors are already benefitting from stronger protections since the Fiduciary Rule became partly applicable on June 9, 2017. As a result, we believe that any harm to investors caused by further delay of the additional requirements is largely mitigated by the application of the Impartial Conduct Standards. In addition, many of the provisions in the BICE will require more extensive efforts in order to achieve compliance. For example, many firms will be required to create and distribute large volumes of information in connection with all customer transactions. We do not believe that these mechanisms can be implemented effectively by January 1, 2018. The cost of forcing financial institutions to rush untested enhancements into production should be weighed against the incremental value that they provide. In this instance, we submit that the balance leans heavily toward a delay in the Applicability Date.

3. In addition to the Impartial Conduct Standards, investors are well protected by existing regulatory structures

The sale of retirement savings products through financial institutions is already heavily regulated. Broker-dealers and financial advisors are subject to comprehensive regulation and legal obligations under federal and state securities laws, rules, and regulations. The SEC regulates broker-dealers through its antifraud authority in the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act), and certain Exchange Act rules. It similarly regulates investment advisers through the Investment Advisers Act of 1940 and related regulations. Under these rules, broker-dealers are required to deal fairly with their customers while investment advisers are subject to a fiduciary duty and extensive disclosure obligations.

Broker-dealers and individual financial advisers are also subject to self-regulatory organization (SRO) rules, oversight, and frequent examinations. A broker-dealer may transact business only after it satisfies the membership requirements of an SRO, which is typically the Financial Industry Regulatory Authority, Inc. (FINRA). SRO rules require broker-dealers to commit to observe just and equitable principles of trade and high standards of commercial honor. In addition, broker-dealers are obligated to disclose certain material conflicts of interest to their customers, and federal securities laws and FINRA rules strictly prohibit broker-dealers from participating in certain transactions that may present acute potential conflicts of interest.

FINRA member firms are required by FINRA Rule 3110 to develop and enforce written supervisory procedures reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. They must also establish, maintain, and enforce a system of supervisory control policies and procedures that test and verify that the member's supervisory procedures are reasonably designed. FINRA members are also required to create additional or amend existing supervisory procedures where the need is identified by testing and verification. Both the SEC and FINRA diligently pursue non-compliance through vigorous enforcement efforts and the industry is further held accountable by an active plaintiff's bar.

There has been considerable debate about the substantive differences between the level of investor protection provided by a standard such as that embodied in the Fiduciary Rule and the "suitability" standard dictated by FINRA and SEC rules. It is our view that the difference among the two standards is not practically significant, but even assuming that the standard embodied in the Fiduciary Rule produces a meaningful improvement, the Impartial Conduct Standards are already in place. The current combination of regulatory structures and access to the courts serves as an effective mechanism to protect retirement investors and will remain operative should the DOL choose to further delay the January 1, 2018 Applicability Date. This represents a sufficient level of investor protection during any interim period.

B. Even if the Department Makes No Changes to the Fiduciary Rule, the Implementation Timeline is Unworkable and Should be Delayed

As we have noted in our previous comment letters, the timeline for implementation of the Fiduciary Rule significantly underestimated the amount of time that would be necessary for product sponsors and financial advisers to implement the changes necessary to achieve compliance. The Fiduciary Rule is the most significant change to the investment advice delivery system in the United States in 75 years, yet the Department provided a far shorter implementation period than it has typically provided for new regulations.[28] A delay in the Applicability Date, along with adoption of a more orderly process for final implementation of the Fiduciary Rule, will help to avoid detrimental market disruptions resulting from an impracticable implementation timeline. In particular, the timeline for implementation fails to properly account for the sequential nature of the adjustments that will be required. For example, the RFI refers to development of "clean shares," a new class of mutual fund share that both the Department and a number of commenters believe represents an effective way to resolve potential conflicts of interest that arise in connection with sales of mutual funds. However, although there is a general view of this new share class, there is not yet any form of industry consensus on all of the details regarding how clean shares would be structured and implemented. Even if all of these details had been decided, we are informed and believe that it will take at least several months for sponsors of mutual funds to draft, submit, and receive approval for clean shares. More importantly, even that resolves only one step in the distribution process. Providers of investment platforms such as clearing brokers must make large-scale changes to their systems and processes in order to accommodate clean shares, and work on this effort cannot really begin until clean shares are reviewed and declared effective by the applicable authorities. In addition, retail distributors of mutual funds will also be required to implement significant changes to their due diligence and product approval processes and commission payment systems,

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[28] For example, the Department provided a two year implementation period for service providers to implement the section 408(b)(2) regulations

many of which cannot begin until the providers of investment platforms complete their own adjustments. This ripple effect cannot be ignored.

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Cetera supports the implementation of a uniform standard of care applicable to all financial advisors providing personalized investment assistance to retail clients, but we have many concerns about the Fiduciary Rule in its present form, as described above. We look forward to working with the Department during this process to ensure access to retirement products and services for all investors. If you have questions or we may provide any further information, please contact me or Mark Quinn, the Director of Regulatory Affairs for Cetera.

Sincerely,

Robert J. Moore
Chief Executive Officer