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***Via* e-mail to e-OED@DOL.gov**

Mr. John J. Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Proposed Conflict of Interest Rule and Related Proposals ("Proposals") [RIN 1210-AB32]

Dear Mr. Canary,

Thank you for the opportunity to participate in the public hearing on August 12, 2015 (Panel 16) to provide input on the U.S. Department of Labor's (the "Department") Proposals. [1] The purpose of this letter is to provide additional feedback primarily based on requests made or questions posed by members of the Department during my testimony. We hope that our testimony and these supplemental comments are helpful to you as you continue your work on this important rulemaking.

1. **Investment Advice:** As I mentioned in my testimony on August 12 (Panel 16), one of the primary objectives must be to help individuals save and invest towards a better, more secure retirement. Advisors play a critical role in helping individuals think about and prioritize their long-term financial needs over conflicting, short-term consumptive demands. Establishing a relationship with an advisor is often a key first step in retirement planning that is of tremendous individual and societal benefit. In this respect, the Department's proposal goes

[1] For a copy of the written testimony, please see http://www.dol.gov/ebsa/pdf/1210-AB32-2-WrittenTestimony20.pdf.

too far when it characterizes communications during the selling process as fiduciary investment advice. Such an expansion will have a material adverse effect in that it will significantly reduce a service provider's willingness to offer its services to new accounts. This will reduce the propensity of individuals to establish relationships with advisors which will undermine the overall objective the Department seeks to advance. In that way, the Proposal will discourage advisors from engaging in practices that lead to the establishment of a client relationship and, once that relationship has been established, the individual's receipt of beneficial retirement planning based upon fiduciary advice.

During my testimony, members of the Department asked for specific recommendations as to how the Department should consider defining "advice" in this context. We strongly recommend that the final regulation exclude all communications made prior to the formalization of a client relationship (*e.g.,* the opening of an account, deposit of funds, fiduciary status acknowledged, etc.) from the definition of investment advice for purposes of determining whether the advice is to be regulated under a fiduciary standard. To the extent the Department is concerned about unsophisticated clients (see items 2 and 3 below) mistakenly believing that such communications are investment advice, the Department could incorporate a simple, straightforward condition to qualify for this exclusion (*e.g.,* the delivery to the prospective client of a written statement in plain-English that a fiduciary relationship does not exist prior to the formalization of a relationship and, as such, no communication provided to the prospective client prior to the opening of an account constitutes investment advice). Furthermore, to the extent that the Department is concerned that there will be instances of advice being given prior to an account opening and which, but for the account not being opened prior to that advice, would be the type of advice the Department seeks to regulate, we believe that the "cost" of that accommodation is easily more than offset by the benefits noted above from increased market certainty and decreased provider reluctance.

2. Large Plans: In my testimony I also stated that we believe that the existing definition of investment advice has worked for the past 40 years in a satisfactory manner in the

context of large, highly sophisticated plans; and, as a result, that the new rule should not be extended to such plans. Such an extension would, in many situations, create a significant level of uncertainty as to whether a service provider is rendering fiduciary investment advice and would unnecessarily increase administrative costs and burdens without providing offsetting benefits or needed protections to such plans.

During my testimony, the Department panel asked several question about the specifics of how we recommend that the Department implement this in its rulemaking. Analogous to what it did in its Section 408(b)(2) regulation, the Department should limit the new rule to "covered plans" which, for this purpose, should be defined, at a maximum, to be (i) individual retirement accounts and annuities, (ii) Section 401(a) tax-qualified plans that are not subject to Part 4 of Subtitle B of Title I of ERISA (*e.g.,* Keogh plans), (iii) employee benefit plans that are subject to Part 4 of Subtitle B of Title I of ERISA but that have aggregate plan assets with a fair market value of less than $50 million[2] at the time of the communication, and (iv) in the case of communications with individual plan participants, participant-directed accounts in employee benefit plans that are subject to Part 4 of Subtitle B of Title I of ERISA regardless of plan size.

3. Sophisticated Investors: During my testimony, I also recommended that, in addition to the exclusion of large, highly sophisticated plans discussed in item 2 above (*i.e.,* all plans that are not "covered plans," as that term is defined in item 2 above), sophisticated covered plans as well as sophisticated individuals (both IRA owners and individual participants in participant-directed or one person plans) should be allowed to opt out of the new definition in which event the existing definition would apply.

The Department members asked in my panel session for criteria it could use in rulemaking both as to who would be deemed sophisticated and the extent to which an investor meeting such criteria would be treated under the proposed rule. In response to that inquiry,

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[2] This dollar amount is consistent with the size standard utilized by the Department in identifying large, highly sophisticated plans in a number of individual and class prohibited transaction exemptions that have been granted by the Department over the years. See, e.g., PTE 2002-12.

the Department should utilize the standard of financial and investment sophistication (the "accredited investor" standard) long utilized by the U.S. Securities & Exchange Commission and well-recognized in the investment industry. If necessary, the Department could obtain additional comfort with respect to such opt-outs by requiring that the sophisticated investor's opt-out be in writing and include both a representation that the client is an accredited investor (upon which the service provider would be entitled to rely) and an acknowledgement by the sophisticated covered plan or individual that communications from the service provider cannot be relied upon as fiduciary investment advice unless they fall within the existing definition of investment advice.

These suggestions are a few of the primary concerns we hope that the Department will consider in its efforts to finalize a new rule. Thank you again for your thoughtful consideration of our comments. If you have any questions after today, please feel free to contact me.

Sincerely,

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