April 12, 2017

Filed Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Examination of the Fiduciary Rule in Accordance with the President's Memorandum (RIN 1210-AB79)

Dear Sir or Madam:

As the second-largest retirement services provider in the U.S., with some 8.2 million people in the plans we serve, Empower Retirement appreciates the opportunity to share our comments as the Department of Labor, Employee Benefit Security Administration (DOL) considers the questions raised by President Trump in a Memorandum dated February 3, 2017 (Memorandum).

The Memorandum instructed DOL to determine if the Definition of the Term Fiduciary; Conflict of Interest Rule – Retirement Investment Advice (81 Fed. Reg. 20946 (April 8, 2016), (the Fiduciary Rule) as published in the Federal Register on March 2, 2017 (82 Fed. Reg. 12319) adversely affects the ability of Americans to gain access to retirement information and financial advice. It also asks DOL to prepare an updated economic and legal analysis, taking into consideration a number of factors. If DOL determines that the Fiduciary Rule is inconsistent with the priorities outlined in the Memorandum, DOL is instructed to rescind or revise the Fiduciary Rule.

Empower believes the questions in the Memorandum should be answered in the affirmative and DOL should consider rescission or revision.

Our mission at Empower is to help American workers replace – for life – the income they made while working. Towards that end we support the DOL's core goal of imposing a "best interest" standard of care on those who provide investment advice for a fee to retirement savers. We are concerned, however, that the Fiduciary Rule, as currently drafted, will result in many retirement savers receiving less help or paying higher costs for the help they currently receive.

Empower provided comments when DOL re-proposed these regulations and related proposed Prohibited Transaction Exemptions. Empower also provided testimony at the August 10 – 13, 2015 public hearings regarding the proposed regulations. The comments in this letter are in response to the questions raised in the Memorandum of February 3, 2017.

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Question 1: Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice.

We are concerned with the breadth of activities impacted under the Fiduciary Rule and the uncertainty within the regulated community regarding its practical application. We believe this will result in either a scaling back of services that plan sponsors and participants receive today, or an increase in the cost of those services. It is notable that while the Fiduciary Rule will clearly cause many call center conversations that are not fiduciary conversations today to become fiduciary, very few service providers have indicated that they will accept fiduciary status for their call center employees. The obvious alternative is that the level of help offered in those conversations will be scaled back. Similarly, service providers are evaluating their offerings to employers sponsoring, small retirement plans.

The following examples illustrate just a few of the services currently available that would be impacted.

1. Assistance to plan sponsors with qualitative analysis of their investment lineup Fund Performance Reviews

Many service providers, including Empower, offer periodic Fund Performance Reviews that are created based on objective data and in conformance with each plan's Investment Policy Statement. They are relied upon, particularly in the small plan market, to help plan sponsor fiduciaries focus their review of investments on those funds that may need to be replaced. Under the Fiduciary Rule we would no longer offer this analysis due to a concern that under the broad definition of what is fiduciary advice and the uncertainty around when "education" becomes "advice" the act of merely highlighting a fund for review can create fiduciary status.

2. Support for in-service distributions

The Fiduciary Rule does not distinguish between conversations with a participant taking a $1,000 hardship distribution and one looking to rollover their entire life savings as they enter retirement. In either case if a "recommendation" or "suggestion" is made, and the person or an affiliate receives any compensation as a result, fiduciary status and liability applies. This means that as a risk mitigation measure, many firms are likely to require call centers to provide only the most basic of education services around in-service distributions, as any movement from basic education is likely to result in status as a fiduciary. We are not sure whether retirement plan leakage can be prevented through basic educational counseling. Of the 2.3 million calls handled by our call center in 2016 regarding plan distributions, 1.3 million were related to in-service distributions. The loss of this valuable help should be considered in any economic impact analysis.

This also illustrates the problems created by eliminating the "mutuality" component of the current Fiduciary Rule and preventing advisers and advice recipients from defining the terms of their relationship, even with full disclosure. The Fiduciary Rule, as currently written, will create fiduciary status in many situations where the advice recipient has no reasonable expectation that the advice they're receiving is fiduciary advice and prevents the recipient from choosing less expensive non-fiduciary help even when that is not what he or she wants.

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3. Proactive retirement readiness communications and services

Empower, along with many other service providers, has made significant investments in communications designed to help participants understand where they stand in relation to being financially prepared to retire, and what actions they might take to improve their retirement readiness. Possible suggested actions include saving more or diversifying investments. These tools are designed to be both individualized and action-oriented as we have learned that this is the most effective way to improve retirement readiness. For example, when we introduced our web-based planning tool incorporating individualized data and identifying specific action steps to improve results, we found that 35% of participants changed their deferral rate with an average 25% deferral increase. [i] Currently, there is uncertainty under the Fiduciary Rule regarding the time at which information might be considered a "recommendation" and no clear line between education and advice. There should be a clear exemption for call center conversations, web-based tools, or other "one time" communications that are based on good, general financial principals (e.g. "take advantage of your catch up contribution; "diversify your account by investing in a portfolio with age-appropriate asset allocation – could be a target date fund"). We would note that in the Conflicts of Interest FAQs (Part II – Rule) issued on January 2017 DOL addressed call centers providing guidance regarding contributing to the level of employer match and created uncertainty about the ability of service providers to engage in broad conversations covering the need to save for retirement.

4. Retirement account consolidation services

With the average employee working at 11.7 different jobs between the ages of 18 and 48[ii], the problem of scattered small balance accounts with no comprehensive investment planning occurring across those accounts, has become a significant impediment to ensuring secure retirement outcomes for many employees. Many record keepers, including Empower, currently offer services designed to encourage participants entering a new plan to rollover assets that may be held in a prior plan in order to consolidate their retirement savings. For the participants who elect to take advantage of this service, these services offer the ability to view their entire retirement picture and make informed decisions. Indeed, in recent years the Department of the Treasury and the Internal Revenue Service has explored ways to make it easier for participants to make "plan-to-plan" rollovers. The Fiduciary Rule would cause those conversations to be fiduciary in nature, which will increase the cost and limit the availability of this help to participants, particularly those with small account balances.

This problem cannot be solved with an automated or negative consent solution. Tax code rules prevent the use of these solutions to account consolidation for any amount in excess of $5,000 so they only occur based on participant choice. Our experience shows that the effect of inertia results in participants keeping balances in their former employers' plans. This will likely impact the ability of participants to prepare effectively for retirement. This cost was not included in the DOL's original analysis.

Question 2: Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees.

The Fiduciary Rule has called into a question a wide array of compensation practices (both external fees and internal incentive compensation practices) that have been in wide use for years. Today, there remains some uncertainty regarding what alternatives are considered acceptable. This has caused, and will continue to cause disruptions to investors, retirees, plan sponsors and retirement service providers.

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1. Problems with the Best Interest Contract Exemption ("BIC")

There is uncertainty around the application of the BIC, which is the most broadly available mechanism for dealing with conflicted compensation.

While conceptually we support the DOL's efforts to create a broad-based exemption permitting conflicted compensation to be received with adequate disclosure and protection for investors, we believe the current BIC to be too restrictive, burdensome and costly. Core problems we see are:

- The BIC is limited in its availability and is not available to cover compensation with respect to all advice covered by the rule.
- The disclosure requirements are burdensome. A simple, streamlined disclosure at the time advice is provided would be far more effective than the complex and costly regime of disclosures currently anticipated for 2018. For example, while we believe it's important for clients to understand whether conflicts exist in fee arrangements, the detailed descriptions of third party payments currently required adds significant cost to the disclosure with little or no additional benefit.
- The public website requirements, as well as the on-demand and annual transactional disclosure requirements, have the potential of creating significant disruptions for the same reason and are proving to be difficult and expensive to program for posting and delivery by computer systems. We also note that with the delay announcement of April 7, 2017, we do not have certainty about what BIC disclosures may ultimately be required for 2018. It takes a very significant amount of time and money to plan and program our recordkeeping systems for elaborate new disclosure regimes like those contemplated by the BIC, and prior planning cannot be easily reversed or amended without incurring unexpected material expenses, and disrupting other programming efforts that are needed to achieve client requirements and business goals.
- The warranties currently required in the disclosures also increase the likelihood of litigation beyond what is contemplated in the ERISA statute.
- The method for compliance with impartial conduct standards severely limits flexibility in compensation practices while still adhering to a best interest standard. It would be more appropriate to require that financial institutions adopt and comply with written policies and procedures designed to ensure that its Advisers will act in the best interest of advice recipients without being prescriptive about goals and compensation practices.
- The provisions concerning sale of proprietary products are burdensome, disruptive to the industry, and invite litigation. It appears that some provisions of the BIC's rules on proprietary products (for example, the findings required by BIC Section IV(b)(3)) are designed mainly to enable class action litigators to second guess the judgment of a financial institution. While it is appropriate to disclose the potential for conflicts of interest when proprietary products are sold, there seems to be little reason to treat those conflicts differently than any other.

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The goals of providing adequate disclosure and protecting investors from harm resulting from conflicted compensation can be accomplished in a much clearer and less costly manner. We would welcome the opportunity to discuss possible alternatives with DOL.

2. Fewer/more limited services available to small plans

Many small plans today use non-fiduciary advisors and rely on support from record keepers or other non-fiduciary service providers to operate their retirement plans. These advisors will not be able to continue offering their services without risk of becoming fiduciaries and support services will be curtailed out of the same concern. Small plans will be left either "orphaned" with no help, or offered "robo" services or other more generic, less helpful support. The result may be termination of the plan or offering of a plan that is less valuable to retirement savers.

3. Fewer/more limited services available to small accounts

It costs more to provide fiduciary services than non-fiduciary services due to the additional training, licensing and monitoring as well as additional liability and insurance costs inherent in fiduciary services. Internal data would indicate that the call center compensation and training costs associated with meeting the new standards under the Fiduciary Rule represents a significant increase over current costs.

The Fiduciary Rule does not allow individual savers and the people from whom they're seeking help to agree that advice will not be fiduciary in nature, even with full disclosure of that fact and any potential conflicts of interest that may be involved. The cost of fiduciary advice is too expensive for many plan and IRA accounts so they will be left with no help at all -- or very limited and generic help. The Department's original economic analysis does not appear to include any cost estimate for the difference in value or retirement outcomes between generic or "robo" advice, and personalized advice.

4. Challenges in supporting 3rd party fiduciary services and selling to small plans

Empower currently offers fiduciary services delivered by a 3rd party, such as managed accounts or 3(21) fiduciary services delivered by an independent investment advisory firm. Currently, we can discuss these services with clients interested in them and support their delivery without becoming a fiduciary. Under the Fiduciary Rule it will be more risky to engage in these communications with small (less than $50 million in assets) plans unless their financial advisor is also present in the communication, which will add both cost and time to the delivery of these services.

The Fiduciary Rule's provisions regarding the standards for an advice recipient who has qualified financial expertise to allow sales conversations to occur without concern for creating fiduciary status appears to be arbitrary. The conditions contained in this exception for selling to fiduciaries with financial expertise ensure that the advice recipient understands they are *not* receiving fiduciary advice and that they believe they are capable of evaluating the risks and benefits of the transaction. With these disclosures and protections in place we see little reason to limit the exception to fiduciaries managing plans with at least $50 million in assets. The limitations in this exception are disruptive to the ability to service the small plan market.

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Question 3: Whether the Fiduciary Duty Rule is likely to cause an increase in litigation and an increase in the prices that investors and retirees must pay to gain access to retirement services.

The Fiduciary Rule will clearly result in an increase in litigation. By increasing the number of people serving plans and participants who will become fiduciaries, it increases the number of potential defendants who can be sued for a breach of fiduciary duty.

The BIC creates a new contractual cause of action for IRA owners that will also increase litigation. In both the BIC and the Fiduciary Rule there are many new standards which are disruptive and difficult to effectively implement (for example, what does it mean to provide advice "without regard" to one's own interest if you are in the business of providing advice?) as well as a number of terms and standards that are unclearly defined (such as where education ends and advice begins, etc.), all of which provide fertile ground for plaintiff's lawyers to initiate litigation.

By some estimates the BIC alone is likely to cause an annual settlement cost in ERISA class action lawsuits of between $70 and $150 million.[iii] Participants are not the primary beneficiaries of these awards, as a Fiduciary Benchmarks survey conducted in 2016 concluded that out of $698 million awarded, attorneys received $204 million and the average participant award was $116. There is also evidence that the proliferation of these lawsuits is causing plan fiduciaries to focus disproportionately on cost rather than fulfill their fiduciary obligation to look at cost in the context of risk and performance.[iv]

Final Rule: Extension of applicability date

We would also like to take this opportunity to comment on extending the applicability date of the Fiduciary Rule for 60 days, or until June 9, 2017 (82 Fed. Reg. 16902). We appreciate and welcome the delay granted, but would also urge that the Fiduciary Rule not become applicable until after DOL has completed the examination called for in the Presidential Memorandum. Should, as the result of that examination, DOL begin a new notice and comment period on a proposed rule revising or rescinding the Fiduciary Rule, any applicability date should be further delayed until the new rulemaking process has been completed.

As discussed above, making the Fiduciary Rule applicable will result in the very limitations on retirement savings and education, industry disruption and litigation risk that the administration was seeking to avoid when it directed DOL to conduct its review and examination. Allowing the Fiduciary Rule to go into effect prior to the completion of the mandated review would appear to run contrary to the intent of the Presidential Memorandum.

In the final rule published on April 7, 2017; DOL has indicated that: "Following completion of the examination, some or all of the Rule and Prohibited Transaction Exemptions (PTEs) may be revised or rescinded, including the provisions scheduled to become applicable on June 9, 2017." This would result in an unnecessary disruption to the industry. Plan sponsors and participants would have been subjected to a rule that adversely affected their ability to gain access to retirement information and products. Retirement service providers would be forced to make multiple changes to their business models and the systems that support delivery of their service offerings. This would result in expenses that could have been avoided and would create confusion for plan sponsors and participants. We strongly urge DOL not to allow the Fiduciary Rule or its related PTEs to become effective prior to the full completion of the examination mandated by the Presidential Memorandum.

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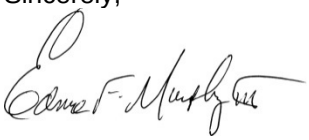
At Empower we are in the business of helping people save for a financially secure retirement. The products and services we create and sell are designed for that purpose. It seems reasonable and appropriate that a rule, while ensuring that best interest standard, is followed with simple and understandable disclosure of fees and potential conflicts, allow service providers the ability to communicate, sell products and services, provide appropriate incentives to employees for retaining existing accounts or selling new ones and maintain a reasonable level of compliance cost so that we can invest more robustly in the development of new tools to help people save for retirement. Service providers, and the plan sponsors and participants they serve, need certainty and clarity.

I look forward to the DOL's reconsideration of the Fiduciary Rule and would welcome the opportunity to discuss alternatives.

Sincerely,



Edmund F. Murphy, III | President
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[i] Empower study based on website usage by more than 8,000 participants 1/1/2013 – 12/31/2013
[ii] US Bureau of Labor Statistics National Longitudinal Study, 2016
[iii] Morningstar "Financial Services Observer", February 2017
[iv] Cerulli Associates, "Large Plan Sponsors: Primary Reason for Choosing Passive Investments", 2015