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April 17, 2017

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

Re: **RIN 1210-AB79**; Proposed Rule; the examination described in the President's Memorandum and questions raised by the Department.
Definition of the Term "Fiduciary" and Related Prohibited Transaction Exemptions

Ladies and Gentlemen:

On March 2, 2017, the Department of Labor (Department) published a proposed rule and request for comments (Department's Request")[1] on the questions raised in the Presidential Memorandum of February 3, 2017, directing the Department of Labor (Department) to review the Department's final rule entitled, Definition of the term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice ("Fiduciary Rule") and the related prohibited transaction exemptions (the Fiduciary Rule and related exemptions, the "Rule").[2]

Massachusetts Financial Services Company and its subsidiaries, commonly known as MFS Investment Management or MFS, have a history of money management dating back to 1924, when it created the first open-end US mutual fund, Massachusetts Investors Trust (MIT). MFS offers a wide range of products and services to investors, including over 100 domestic mutual funds and institutional commingled and separately managed accounts services. MFS's products designed for retail investors — such as mutual funds and separately managed accounts — are distributed primarily through intermediaries such as financial advisors at major wire houses, regional brokerage firms, banks, insurance companies and registered investment advisors. MFS also manages assets for global institutional clients and discretionary managers, including corporate and public pension plans, defined contribution plans, multi-employer plans, investment authorities, sovereign wealth funds, endowments and foundations.

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[1] 82 Fed. Reg. 12319 (Mar. 2, 2017). Subsequently, the Department issued a final rule extending the Applicability Date of the Rule to June 9, 2017, see 82 Fed. Reg. 16902 (Apr. 7, 2017).
[2] Definition of the term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8, 2016).

Harm to Small Investors

The President's Memorandum asks:

"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."

The Department's Request asks:

"Are firms making changes to their target markets? In particular, are some firms moving to abandon or deemphasize the small IRA investor or small plan market segments? Are some aiming to expand in that segment? What effects will these developments have on different customer segments, especially small IRA investors and small plans?"

In our experience, the anticipated application of the Rule has resulted in many mutual fund investors – particularly, investors with small account sizes – losing access to advice from their broker dealers. As noted above, MFS distributes its mutual funds to retail investors (including small plans and IRAs) through intermediaries. Accordingly, MFS will generally sell its mutual fund shares only to an investor who has a broker dealer associated with the investor's account. This ensures that the shareholder will have access to advice as MFS does not provide that service.[3] The mutual fund industry refers to intermediary-sold accounts that have come to lack a broker dealer of record as "orphaned accounts." Generally, we understand that orphaned accounts are the result of a broker dealer's resignation from the account, though a shareholder could also instruct the mutual fund transfer agent to remove his or her broker.

Since August 2016, MFS has seen a large increase in the number of its orphaned accounts due to the Rule. Several broker dealers have instructed MFS to remove them as broker dealer of record from retirement accounts, such as IRAs, giving the Rule as the reason for the action.[4] These instructions affected over 14,400 accounts[5]; the average balance of the accounts by broker dealer ranged from $1,700 to $29,000. (As a comparison, in 2015 MFS was instructed by broker dealers to remove broker dealers from 1,525 accounts and in 2014, from 615 accounts.) In addition, MFS has received notice from additional firms indicating that if the Rule becomes effective in its current form they also will be instructing MFS to remove them as broker dealer of record; these pending instructions would affect over 9,400 *additional* accounts with an average account balance by dealer of about $30,000. We expect to receive notice of more resignations if the Rule were to become applicable in its current form.

The shareholders of these orphaned accounts consequently lack access to investment advice that was available to them before their accounts were orphaned. While it is MFS's practice to notify these shareholders of their orphaned status and encourage them to select a new broker dealer, in our experience few do so. If what MFS is seeing is evidence of a trend away from servicing small accounts, such shareholders may find it more difficult to locate a broker dealer that accepts small accounts.

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[3] MFS mutual funds are distributed through MFS Fund Distributors, Inc. ("MFD"). MFD is a limited-purpose broker dealer that does not engage in retail distribution or a general securities business. As such, it does not maintain customer accounts or effect securities transactions, and has no relationship with investors.

[4] MFS's understanding is that firms resigning from these accounts are either changing their business model and requirements or are concerned about the ability to monitor activity in accounts registered directly at the transfer agent.

[5] In some instances, the broker dealer included non-retirement retail accounts in its resignations, perhaps indicating that they are applying the business changes made to comply with the Fiduciary Rule to similar sized retail accounts.

MFS supports maintaining investment choice and access to investment advice for all investors, regardless of their account size. We urge the Department to carefully examine the Rule's impact on this market and make changes to the Rule that will encourage firms to develop options for all investors.

Disruptions to the Retirement Services Industry

The President's Memorandum asks:

"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 Department's Request asks:

"Have market developments and preparation efforts since the final rule and PTEs were published in April 2016 illuminated particular provisions that could be amended to reduce compliance burdens and minimize undue disruptions while still accomplishing the regulatory objective of establishing an enforceable best interest conduct standard for retirement investment advice and empowering Americans to make their own financial decisions, save for retirement and build individual wealth?"

Exclusion for Transactions with Independent Fiduciaries with Financial Expertise

MFS applauds the Department's deferral to 2018 of certain compliance requirements of the Best Interest Contract Exemption and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, the costs of which might otherwise be passed on to the retirement account shareholders that the Rule is designed to protect. The Department could achieve additional cost savings by eliminating or simplifying the requirements for the exclusion of transactions with independent fiduciaries with financial expertise ("IFE").[6]

MFS appreciates that the Department recognized that transactions with independent fiduciaries with financial expertise should be excluded from the final Fiduciary Rule as the parties to these transactions understand that these are arm's length transactions where neither side assumes that the investment professional interacting with the plan is acting as an impartial or trusted adviser.[7] However, the Fiduciary Rule's requirements to implement the IFE exclusion are overly burdensome, costly and will interfere with normal business-to-business interactions and sales to large plans.

In order to meet the requirement that a firm fairly inform the financial institutions with which it does business and institutional clients[8] that it is not undertaking to provide impartial advice or as fiduciaries and disclose its financial interest in transactions will require mass mailings. Many businesses may find themselves on both the sending and receiving end of such notices, depending on their various business models. Further, as suggested in the Rule, to fully ensure compliance, firms will likely wish to receive representations from the business partner or institutional client that the partner or client meets the independent fiduciary requirements: (1) that it is a financial institution or manages at least $50 million, (2) that it is capable of evaluating investment risks independently, (3) that it is a fiduciary and responsible for exercising independent judgment, and (4) that no fee has been paid from the plan fiduciary or retirement plan or IRA for investment advice in connection with the transaction. This requires either a stand-alone document or an amendment to an existing agreement – either of which will require significant allocation of

[6] Paragraph (c) of the Fiduciary Rule, 29 CFR 2510.3-21(c).
[7] In the preamble to the Fiduciary Rule, the Department stated: "As explained in the proposal, the purpose of the proposed carve-out was to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial or trusted adviser." 81 Fed. Reg. 20946 (Apr. 8, 2016)
[8] Plans with a fiduciary that manages at least $50 million dollars.

expensive legal resources. This toll on resources is bound to be exacerbated by negotiations that will often be protracted due to unwillingness of financial institutions to commit to the IFE requirements in writing.

The approach taken by the Department to the IFE seems to assume that any transaction will involve a written contract or account application which might include these representations. However, our experience has demonstrated that is not always the case. For example, MFS may be asked to respond to an RFP for a plan or have a meeting with representatives of a plan that is considering changing its investment options. If the plan invests through a mutual fund platform or dealer that has an omnibus account with the MFS funds, there would be no application or agreement between MFS and the plan. In fact, MFS may never be notified that the plan selected MFS funds. Similarly, if the plan relied upon a consultant for fiduciary guidance regarding investment selection, there would be no application or agreement between MFS and the consultant. In this type of situation, MFS may never be notified that MFS funds were included in the plan's investment menu.

In our view, these requirements are unnecessary for persons that the DOL has recognized have no expectation of fiduciary advice in a sales situation; identifying that the counterparty (or prospective counterparty) is a type of financial institution as specified in the IFE or manages $50 million should be sufficient to establish this exception. The DOL has not cited to any research or studies that would support the need for the multiple representations or conclusions that the IFE requires.

Our observations concerning some of the other individual components of the exception:

Counterparty is capable of evaluating investment risks independently: It should be a given for any financial institution or fiduciary that manages $50 million that it is capable of evaluating investment risks independently. The counterparty should not be responsible for confirming that the fiduciary is capable of fulfilling its role. If the Department were to retain this requirement at all, we suggest that this determination be limited to instances where the fiduciary is a natural person that is not associated with a financial institution.

Fiduciary status: It is not clear why it is necessary that the advice provider affirm the fiduciary status of the person transacting on behalf of the plan. If the individual is advising the plan on the transaction, it is reasonable to assume it will be a fiduciary under the Rule. If the individual is not a fiduciary, then the exception is not needed as the advice provider is not advising a plan fiduciary. Fiduciary status may be relevant if the plan or IRA client is present while the selling party is providing recommendations. However, as it is in the interest of the selling party to ensure an IFE qualified fiduciary is present so that it can rely on the exception, it doesn't seem necessary to make this a required step of the IFE.

No fee has been paid directly by the plan fiduciary or retirement plan or IRA for investment advice in connection with the transaction (as opposed to other services). In the Department's preamble to the Rule, it indicated that this requirement was included because "[i]f a plan expressly pays a fee for advice, the essence of the relationship is advisory…. Thus, the person may not charge the plan a direct fee to act as an adviser with respect to the transactions and then disclaim responsibility."[9] The Department's rationale makes sense in a situation where an adviser is hired to provide advice for a particular plan. However, a person should not be regarded as a fiduciary where it does not know the identity of the plan or has not tailored the advice to a particular plan. Unfortunately, FAQ 29[10] adds confusion to the issue as the person is providing a tool that has not been tailored to a particular plan and has no knowledge of the plan. Further, FAQ 29 implies that whether or not a person is a fiduciary will depend on whether the fiduciary receiving

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[9] 81 Fed. Reg. 20983 (Apr. 8, 2016)
[10] See, Independent Fiduciary Exception under Conflict of Interest FAQ 28 (Set II).

the advice creates a separate line item for the fee. We hope that was not the Department's intent and that, instead, it would want to encourage fee transparency. More clarity is needed on both these points.

Thank you for the opportunity to comment. We have touched on only a few of the issues with the Rule. We encourage the Department to carefully review the Rule as required by the President's Memorandum and to rescind or revise the Rule.

Sincerely,

Heidi W. Hardin
Executive Vice President and
General Counsel