



April 17, 2017

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

Re: RIN 1210-AB79; Proposed Delay and Reconsideration of DOL Regulation Redefining the Term “Fiduciary”

Ladies and Gentlemen:

RBC Capital Markets, LLC is pleased to provide comments regarding the Department of Labor’s (“Department” or “DOL”) proposed delay and reconsideration of its regulation under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and the Internal Revenue Code of 1986, as amended (“Code”) that will redefine the term “fiduciary” under section 3(21) of ERISA and section 4975(e) of the Code (the “Rule”).

RBC Capital Markets, LLC, together with its parent company, Royal Bank of Canada, and its affiliates, is a global financial services firm that provides products and services to a large and diversified group of clients. RBC Capital Markets, LLC is registered with the Securities and Exchange Commission (“SEC”) as both an investment adviser and a broker-dealer and, through its RBC Wealth Management – U.S. division (“RBC Wealth Management”), offers a wide variety of financial products and services to its clients.

At RBC Wealth Management, we are committed to acting in our client’s best interest and have long supported and continue to support a uniform best interest standard for broker-dealers that applies to all individual retail customers for all their investment accounts, not just their retirement accounts. However, we believe that several aspects of the Rule including the

expansion of the definition of “investment advice” (“Final Definition”), certain aspects of the Best Interest Contract Exemption (“BIC Exemption”), and certain aspects of the Class Exemption for Principal Transactions (“PrTE”) will have, directly or indirectly, a negative impact on retirement savers. Many of these negative impacts are raised by President Donald J. Trump in his Memorandum to the Secretary of Labor dated February 3, 2017 (“Presidential Memorandum”). We appreciate the opportunity to comment and hope that our comments are helpful.

I. Delay in Applicability Date

We greatly appreciate the 60 days delay of the applicability date of the Rule and accompanying exemptions, however, we do not agree with the Department’s view that delaying implementation of the Rule beyond June 9 would be “inappropriate” as the Department suggests. In fact, we strongly believe that an additional delay is necessary and prudent in light of the issues raised in the Presidential Memorandum. Further, we think it imprudent for the Department to ask firms to institute three significant portions of the Rule, (i) the Final Definition, (ii) the Impartial Conduct Standards required under the BIC Exemption, PrTE and other exemptions, and (iii) changes to widely used exemptions including DOL Prohibited Transaction Exemptions 77-4, 75-1 and 86-128 on June 9, 2017, while the Department continues the analysis required of it pursuant to the Presidential Memorandum.

As we noted in our comment letter to the initial 60 days delay, if the June 9 applicability date were to remain in effect while the Department is still reviewing the questions posed by the President, it is highly likely that “investors, advisors, and stakeholders could face two sets rather than one set of changes in regulatory requirements.” Further, we noted that “[i]n addition to causing unnecessary confusion, multiple sets of changes could also cause unnecessary market disruption, the costs of which would likely not be offset by commensurate benefits.”

For example, we point out below that the definition of “investment advice” is too broad and should not encompass activity that is currently contemplated under the Final Definition. In the event the Department reached this conclusion after performing its review that the definition is too broad or that the exclusions in the Final Definition are inadequate, the Department may issue a future regulation pursuant to which conduct that is “investment advice” on June 9 is no longer “investment advice” at some future date. We believe this result is contrary to the spirit of the Presidential Memorandum, a purpose of which is to avoid “dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees.”

Similarly, the Department’s imposition of “stand-alone” Impartial Conduct Standards to comply with the BIC Exemption and PrTE on June 9 is premature given the requirements of the Presidential Memorandum. Further, such requirement raises a compliance challenge. The

Department has never issued clear guidance in connection with the Rule on how to apply the Impartial Conduct Standards apart from the other requirements of the BIC Exemption or PrTE. On a number of occasions, the Department has stated that the Best Interest requirement of the Impartial Conduct Standards should be applied in accordance with case law interpreting ERISA's duty of prudence and duty of loyalty and the common law of trusts. However, to our knowledge, no court has addressed with any specificity how a recommendation may be made "without regard to the financial or other interests of" the individual adviser, the supervising firm and any affiliates or parties in which they have an interest, particularly with regard to how the individual adviser is paid. This "without regard to" language is not included in ERISA section 404(a). Thus, it is not clear whether current compensation practices may be maintained and still meet the Impartial Conduct Standards without the applicability of the warranty requirements. One possible interpretation is that some changes may be necessary, but not the same changes that will be required on January 1, 2018. Of course, based upon the Department's review of the Rule, it may determine that changes now required as of June 9 and January 1 no longer apply. This uncertainty puts our firm and others in a difficult position as we try to retain and attract talented advisers.

We have invested heavily in preparing for compliance with the Rule and are prepared to make a significant additional expenditure once we are certain of the final requirements of the Rule. What we would like to avoid is the likelihood of incurring the significant additional expenses to comply with requirements that may undergo revision in the near term as a result of the Department's additional review. Whether such expenses are borne by firms or by investors, we believe it prudent that none of the provisions of the Rule should be effective until the Department completes its review.

In addition to a further delay of the June 9 applicability date, we strongly urge that the Department formalize a delay of the January 1, 2018 applicability date for the remaining provisions of the Rule. We do not believe eight months will be enough time for the Department to undertake a thorough review of the questions posed by the President, formulate an appropriate response that will likely include substantial revisions to the Rule and the accompanying exemptions, collect comments from the public, potentially hold public hearings, re-release a final rule and, most importantly, allow sufficient time for firms to comply with any new requirements in a manner that is not too disruptive to our clients. Additionally, firms will be required to make additional substantial capital investments in human resources and technology in the second and third quarters of 2017 to be in a position to comply by January 1, 2018, while such firms still face the uncertainty of changes to the Rule that may occur prior to or even after January 1, 2018. If our collective objective is to do what is in the best interest of retirement investors, we should be focused on getting it done right not getting it done right away.

Finally, we believe that there has been some confusion amongst firms about the applicability of the existing Frequently Asked Questions on the Rule issued by the Department given the additional review the Department is now undertaking. We request that while the Department conducts its review, the Department either clarifies the ongoing applicability of the FAQs or withdraws them.

II. Presidential Memorandum

On February 3, 2017, the President issued the Presidential Memorandum directing the Department to conduct an examination of the Rule to determine whether it may impede a key priority of the President’s Administration, which is to “empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies.” Therefore, the Presidential Memorandum directs the Department to prepare an economic and legal analysis concerning the likely impact of the Rule on this priority. The Presidential Memorandum further directs that this analysis should assess whether the final rule (i) has harmed or is likely to harm investors by reducing investors’ access to retirement-related investment products, information, or advice; (ii) has resulted or will result in dislocations or disruptions within the retirement services industry that may adversely affect investors; and (iii) is likely to cause an increase in litigation and in the sums that investors must pay to obtain retirement services. Lastly, the Presidential Memorandum directs that, if the Department makes an affirmative finding as to any of these three considerations, or if the Department concludes for any other reason that the final rule is contrary to the interests of investors, the Department “shall publish for notice and comment a proposed rule rescinding or revising the final rule” Spending the past year implementing the requirements of the Rule, we believe that there is a great likelihood that the concerns raised in the Presidential Memorandum will most certainly reflect reality.

A. Access to Services, Products and Retirement Savings Information

The Memorandum instructs the Department to assess whether the Rule will limit “investors’ access to retirement-related products, information, or advice.” Both the BIC Exemption and PrTE impose such limitations. Under the BIC Exemption firms must make a contractual warranty that it will not “use or rely upon quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives that are intended or would reasonably be expected to cause Advisers to make recommendations that are not in the Best Interest of the Retirement Investor.” The BIC Exemption states, by way of example, that this warranty may be met if differential compensation is “based on neutral factors tied to the differences in the services delivered...with respect to the different types of investments.” The preamble to BIC Exemption clarifies that such neutral

factors include the “difference in time and analysis necessary to provide prudent advice with respect to different types of investments.”

“Neutral Factors” Approach is Impractical with Compensation Structures that are Wholly Dissimilar

Over the past year RBC Wealth Management has gone through extensive exercises to define the level of service needed to recommend various investment products and to identify differentials that appear to not be based on neutral factors. The challenge with this exercise is that it requires a comparison of apples to oranges, i.e., investment products whose compensation structure differs so much that they cannot be compared with mathematical precision. Further, in many cases the compensation structure of a product is outside of the control of the firm providing fiduciary advice: mutual funds, annuities and unit investment trusts are structured by investment companies that distribute product through a multitude of different firms. Even where these investment companies have been open to developing new structures that better align with traditional commission schedules on equities, options, and fixed income, each distributing firm has a different perspective on what type of compensation structure it wants from the investment company.

Antitrust law prohibits discussion among distributing firms and investment companies, thus limiting the ability for consistency. Even where these issues have been managed, the fact remains that mutual funds and annuities are structured with a front-end load, trail and no compensation upon liquidation, whereas equities, options, and fixed income products generate commission on both the purchase and the sale.

Attempts may be made to normalize these fundamental differences through assumed hold periods and other modeling methods. However, with the uncertainty of interpretation of neutral factors in the courts (and no clear guidance as to what neutral factors are), many firms have determined that the risk of offering products with fundamentally different compensation structures side-by-side is too great, and as a result may eliminate entire categories of products from their platforms, thus limiting investor access to retirement-related products.

The Principal Transaction Exemption Unduly Limits Investor Access to New-Issue Preferred Securities

The PrTE also places significant limitation on investor access to certain kinds of securities. For example, because risk-based principal transactions are only permitted under specific circumstances, the PrTE effectively eliminates investor access to new-issue preferred securities unless a party is willing to request of the Department an individual prohibited transaction exemption or class prohibited transaction exemption, which is a process that can take

a significant amount of time. In the meantime, as discussed below, clients of firms like ours, which are large and underwrite securities offerings, are precluded from participating in the offering of new-issue preferred securities even though such securities may be very beneficial and unmatched by other types of investments.

As currently written, the PrTE will address prohibited transactions that arise in connection with the sale of a new-issue preferred security from a firm's inventory only if the firm providing investment advice in connection with the transaction or its affiliate is not the underwriter. This limitation is unfortunate for investors who have accounts with large firms who also do underwriting because such investors will be required to open small accounts at other firms just to get access to these securities, which is wholly inefficient. Even if clients did open small accounts at other firms, these firms are less likely to have access to many of the new-issue preferred offerings as the majority of the shares are offered through the large underwriting syndicates. Importantly, access to new-issue preferred securities is often beneficial to small as well as large investors because in order to efficiently publicly place the new issue these securities are priced at a discount to securities available on the secondary market, inclusive of the distribution expenses. If an investor has to wait for a new preferred security to list on a public exchange, he or she could be disadvantaged because he or she will have to pay more for the security than he or she would have to pay if purchased as part of the underwriting syndicate.

The Department in the preamble to the PrTE did not appear to acknowledge that issuers looking to raise capital must, together with their underwriters, conduct an analysis of current market conditions in order to price the new issue at a level where institutional and retail investors are willing to forego other investment opportunities. In other words, securities laws require that the new issues be priced very favorably. Finally, such securities generate taxable income, which make them particularly attractive to retirement investors in a tax-advantaged account like an IRA. In summary, the PrTE as currently written unnecessarily prohibits our clients from gaining access to new-issue preferred securities that we underwrite notwithstanding substantial benefits unless they wait several years for the Department to issue an individual or class exemption, assuming the Department would be amenable to issuing such exemption.

There will likely be firms that choose not to rely on the PrTE because of complexities and potential unintended liabilities. Clients of these firms will be further disadvantaged as they will no longer be able to pursue a successful investment strategy because they will be forced away from those asset classes. Clients will no longer benefit from the relationships they have developed with their firms and advisors to make use of firm inventories to provide attractive investment options.

The BIC Exemption and PrTE have gone well beyond requiring investment advice providers to act in an investors "best interest." Rather, the Department has set parameters via

these exemptions that do not comport to the realities of how financial products and services are priced or allow for the evolution of such products and services over time. Further, the exemptions effectively prohibit firms from recommending products and securities that are otherwise in certain investors' best interest. Yet, the Department is, effectively, dictating to firms what products are appropriate for certain investors via the terms of the BIC Exemption and PrTE. Therefore, we recommend substantial revisions to such exemptions to accommodate investor needs and interests in the broad array of financial products and services and securities currently available in the marketplace and that may be so available in the future.

B. Dislocations or Disruptions within the Retirement Services Industry

In our view, the Rule will result in dislocations or disruptions within the retirement services industry that will adversely affect investors. We believe that we have begun to see such disruption and dislocation in the industry. This is particularly the case with regard to impacts on commissionable business and small accounts. Notwithstanding a number of statements by the Department that it does not intend to disallow any kind of compensation structure or favor one over another, it is difficult to read the BIC Exemption and the preamble in any manner other than the Department has a strong bias against the use of commission-based accounts. We are aware of several firms that will no longer offer commission-based accounts or will only do so in a self-directed account where an adviser or firm will not provide investment advice even if an investor might otherwise benefit from such advice. Such firms likely are concerned about the litigation and compliance risk posed by the BIC Exemption and the PrTE in their current forms. Other firms, like our own, will continue to offer commission-based advice because we believe that such accounts are appropriate for a certain investors despite the attendant litigation and compliance risk. However, due to such risks, we and other firms believe that it may not be economically viable to provide any recommendations, whether the account is commission-based or fee-based, in the event the account does not meet certain asset minimums. In light of these considerations, we believe that dislocations and disruptions are already present in the retirement industry and will magnify as the Department begins enforcement of the Rule and investors bring class actions against firms who rely upon the BIC Exemption or PrTE.

C. Increased Litigation and Related Expenses

With the Rule and its exemptions as currently formulated, we are anticipating and preparing for a dramatic increase in compliance resources, litigation costs and insurance expenses. There is no question that the Rule and its exemptions will increase litigation – that was the stated intent of the Department. Indeed, the Department states in the preamble to the Rule that the purpose of the contract requirement under the BIC Exemption is to create on behalf of IRA owners and participants and beneficiaries in non-ERISA plans “an independent statutory right to bring suit against fiduciaries for violation of the prohibited transaction rules.” 81 F.R. at

21021. The Department further provides that the contract requirement of the BIC Exemption “creates a mechanism for investors to enforce their rights and ensures that they will have a remedy for misconduct.” The Department expresses the same intent in the preamble to the PrTE. 81 F.R. at 21095. We highlight below two areas of concern.

Lack of Mutual Understanding will Lead to Increased Litigation

The Rule does not require the service provider and the retirement investor to have the same understanding. Current law requires a mutual understanding or agreement between the parties regarding fiduciary advice. We are particularly concerned that the Department has removed the requirement that there be a “mutual” understanding between the financial professional and recipient that the recommendation being provided is intended to be “investment advice,” and replaced this clear standard with what may be as little as a unilateral understanding, which may ultimately be asserted by the retirement investor after the fact.

We have taken great care in defining our role and responsibilities with clients. Our contractual provisions are crafted to make clear the rights and obligations of each party, and our program structures, supervision and surveillance, compliance oversight and extensive training programs are developed on the basis of those legal obligations. At the time of entering into an arrangement, both parties are free to negotiate or modify these terms as the situation warrants – but once the agreement is executed, we must be able to operate based on a mutually agreed-upon level of obligations. The Rule’s deletion of “mutual” is, therefore, particularly problematic, as we believe the roles of each party to any transaction should be clearly defined and understood by both parties in advance – one party should not be given the ability to recast it after the fact. In doing so, the Rule is opening the door to practically indefensible litigation claims.

Using the BIC Exemption Contract Requirement as an Enforcement Mechanism is Misguided at Best and Harmful to Retirement Investors at Worst

The BIC Exemption requires a written contractual commitment and warranties, with the expressed intent of the Department to allow the standard of care and warranties to be enforced primarily by private rights of action (including class actions). This enforcement by private litigation is troubling in several respects:

- (1) We will most certainly see private plaintiffs’ lawyers take full advantage by bringing lawsuits in an effort to drive defendants to settle, while exacting huge legal fees, generally more than a third of the total recovery, without proving any violation and without changing or improving the offerings available to the retirement investor.

- (2) The increased litigation costs will most certainly result in decreased competition in the financial services industry as the costs of defending these lawsuits will be cost prohibitive for small and medium sized firms.
- (3) We are deeply concerned with the unintended consequence of substituting the judgment of an informed, experienced regulatory professional with the opportunistic plaintiffs' bar, primarily driven by financial incentives. When a regulatory agency is doing its job by enforcing the regulations, the agency is able to influence behavior and weigh costs and benefits. By creating an enforcement-by-private-litigation mechanism, the result will be an economic determination by broker-dealers to further limit services available to clients in order to eliminate any risk, thereby also eliminating any chance for growth of retirement assets.

The likelihood of litigation is best illustrated by the proliferation of breach of ERISA fiduciary duty claims that are brought against fiduciaries and non-fiduciaries to ERISA-covered, participant-directed defined contribution retirement plans. Based upon our review of available court records, we estimate that no fewer than fifty class action lawsuits have been filed in which the plaintiffs and their attorneys allege that plan fiduciaries to large retirement plans who were responsible for selecting the investment options made available under these plans breached their fiduciary duties by making available investment options that were too expensive. We note that many of these cases were resolved by the courts in favor of the fiduciaries or for dollar amounts substantially less than the damages originally alleged by the plaintiffs. Additionally, in such cases plaintiffs continually attempt to bring breach of fiduciary duty lawsuits against non-fiduciary service providers and other non-fiduciary parties notwithstanding long-standing jurisprudence that such providers or parties are not fiduciaries.

Given the long history of the plaintiffs' class action bars' litigation activities with regard to ERISA class action lawsuits, we believe it is obvious that the firms who focus on this area of practice will bring class action law suits against large firms who provide advisory services to IRAs and that rely upon the BIC Exemption or PrTE due to the contract requirement within each of those exemptions. In addition, history strongly suggests that they will bring suit against every affiliate that is even remotely connected to the firm that ultimately provides investment advice even if such affiliates do not provide investment advice.

Furthermore, in relying on the plaintiff's class action bar to, effectively, act as an enforcement agency for the federal government, we believe the Department fails to recognize the effectiveness of the enforcement structure that has been in place for decades. The Department has for many years regulated financial services companies through its interpretation of how the Code's prohibited transaction provisions apply to tax preferred accounts not covered by ERISA, but subject to the prohibited transaction provisions of the Code, e.g., IRAs. Further, fiduciaries to such accounts have always been subject to the threat of excise taxes levied by the IRS

pursuant to Code section 4975 for failure to meet the prohibited transaction requirements. We are very sensitive to the levy of such excise taxes and the reputational risk associated with failing to comply with the prohibited transaction provisions. As such, we take care to make sure our firm and our financial advisers do not run afoul of the prohibited transaction provisions. We believe the current DOL and IRS authority coordinated with the current robust regulatory environment established by other state and federal regulators that have jurisdiction is sufficient on balance when weighed against the disruption that will occur by reason of the contract requirement in the BIC Exemption and PrTE and a firm's need to address related class action lawsuits.

III. Concerns with Implementing Parts of the Rule and the Best Interest Contract Exemption

A. The Rule

As we have worked towards implementation of the Rule in time for the first applicability date, we remain concerned about retirement investors' access to information.

One area of concern is that the Final Rule's education exception remains impractical in that it would restrict the retirement industry's ability to provide real-world examples of asset allocations to those individuals that most likely need it the most. We are concerned that the Rule will also halt any incidental advice currently provided by our financial professionals in brokerage accounts and we would urge the Department to reconsider this exception.

The Education Exception Leaves Retirement Investors without Valuable Information

The Final Definition provides an exception for investment education and is an improvement from the Department's original proposal. However, we believe the Final Definition combined with the requirement that in most cases an adviser and firm rely upon the BIC Exemption still may result in retirement savers not receiving sufficient information.

Additional changes to the education exception under the Final Definition with regard to non-ERISA retirement accounts are necessary to ensure that retirement savers can continue to receive information regarding account services and options, which is consistent with the Department's goal of improving access to educational services. The Department's unwillingness to treat IRAs the same as ERISA-covered retirement plans for purposes of the asset "allocation models" subsection of the investment education exception and the proposed changes to the regulation of distribution and rollover conversations will limit the availability of important information to investors.

B. Best Interest Contract Exemption

Contract Requirement

As has always been the case, RBC Wealth Management strongly supports a uniform best interest standard for broker-dealers that applies to all individual retail customers for all their investment accounts. We, however, are concerned that the Rule coupled with the Best Interest Contract Exemption may not be the best means to that end. We have discussed previously our concerns with using the contract requirement as a means of enforcement and would strongly encourage the Department to abandon the contract requirement. Rather, we believe the Department's and IRS' current authority, which has been in place for decades, and coordination with other key regulators such as federal and state securities regulators, state and federal banking regulators and state insurance regulators is appropriate.

Insufficient Guidance on Managing Conflicts

To date, we do not believe sufficient workable guidance has been issued by the Department whereby our firm and others can manage conflicts and whereby a court can determine whether we managed such conflicts in a manner that complies with the BIC Exemption or PrTE, without moving to a pure asset-based fee or a completely fee-neutral environment. Therefore, notwithstanding the fact that our firm understands the importance of the Department's conflict of interest concerns and our desire to address those concerns through compliance with the Department's prohibited transaction exemptions, we are concerned that a contract requirement coupled with a lack of sufficient guidance will leave us and others so exposed to litigation risk that the retirement services industry out of necessity will reduce the range of products and services made available to investors or certain groups of investors.

Website Disclosure

The BIC Exemption requires firms to maintain a web page that lists all product manufacturers and other parties with whom the "Financial Institution maintains arrangements that provide Third Party Payments to the Adviser or the Financial Institution." 81 F.R. at 21080. This presumably requires the detailing of the financial arrangements or every product manufacturer, issuer, service provider and other parties with whom the firm and possibly affiliates maintain business relationships.

In mapping out our compliance for this website disclosure, these requirements will be extremely costly and complex to build, administer and maintain. The website disclosure appears to provide a road map for the Plaintiffs' bar to find any detail that may be construed incorrectly and without context that may serve as the basis for costly litigation. Establishing and maintaining a website is a massive undertaking, requiring daily review for product and fee changes, and we anticipate that our costs for creating and maintaining this website will be millions of dollars. We have difficulty believing that this web page would serve the interests of

the public and it certainly could not be cost justified. We strongly recommend that the Department take a close review of this requirement in light of the anticipated costs for compliance.

IV. Conclusion

RBC Wealth Management has always strived to put our clients' interests first and strongly supports enhancing investor protections through the promulgation of a uniform best interest standard for broker-dealers that applies to all individual retail customers in all their investment accounts, not just their retirement accounts. We appreciate the opportunity to comment and hope that our comments are helpful.

Respectfully submitted,

A handwritten signature in cursive script that reads "Lee Thoresen". The signature is written in black ink and is positioned below the text "Respectfully submitted,".

Lee Thoresen
Senior Associate General Counsel, RBC Wealth Management – U.S.