Ralph C. Derbyshire
Senior Vice President and
Deputy General Counsel

FMR LLC Legal Department

Mail: 200 Seaport Blvd., V7A Boston, MA 02210
Office: 245 Summer Street, Boston, MA 02210
Phone: 617-563-0296 Fax: 508-357-8568
Ralph.Derbyshire@fmr.com

SUBMITTED ELECTRONICALLY

July 21, 2017

Office of Exemption Determinations Employee Benefits Security Administration
U.S. Department of Labor
Suite 400
200 Constitution Avenue, NW
Washington, D.C. 20210

Attention: D-11933

Re: *Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (RIN 1210-AB82)*

Ladies and Gentlemen:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to respond to the request for information on a potential delay of the January 1, 2018 applicability date for certain provisions of the BIC Exemption, Principal Transactions Exemption, and amendments to PTE 84-24 (the "RFI") published by the Department of Labor ("Department") in the Federal Register on July 6, 2017.[2] As one of the nation's leading retirement services providers, Fidelity has a deep and long-standing commitment to working with the Department on its rulemaking in the area of investment education and advice.

Our goal is to ensure that investment advice is provided in the investor's best interest and that the rules for investment advice allow savers continued choice and access to the products and services they need. As we have stated in our previous comment letters on the rule, we continue to believe that the Department's new framework for regulating investment advice under ERISA and the prohibited transaction provisions of the Code is misguided. As the long-standing primary regulator charged with investor protection, the Securities and Exchange Commission ("SEC") should lead the rulemaking on this topic through coordinated and constructive engagement with the Department to develop a workable solution that results in uniform fiduciary protections for

[1] Fidelity was founded in 1946 and is one of the world's largest providers of financial services. Fidelity provides recordkeeping, investment management, brokerage and custodial/trustee services to thousands of Code section 401(k), 403(b) and other retirement plans covering approximately 25 million participants and beneficiaries. Fidelity is the nation's largest provider of services to individual retirement accounts ("IRA") with more than 7 million accounts under administration. Fidelity also provides brokerage, operational and administrative support, and investment products and services to thousands of third-party, unaffiliated financial services firms (including investment advisors, broker-dealers, banks, insurance companies and third party administrators) that may in turn provide investment advice to plans, participants and IRA owners.

[2] *Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions*, 82 FR 31278 (July 6, 2017). Capitalized terms not otherwise defined have the meaning ascribed to them in the RFI.

investors and a uniform set of rules for all advisers. A delay in the January 1 applicability date would provide the SEC and Department an opportunity to jointly consider public comments on the experiences of investors and the regulated community thus far in connection with the implementation of the rule and constructively determine the best path forward.

Further, as we stated in our comment letter of April 17, 2017 relating to a delay in the Rule pending the examination directed by the President's memorandum of February 3, 2017, we have deep concerns with the Department's decision to make the Rule applicable while it conducts the examination. By making the Rule applicable on June 9, 2017, before it had considered comments on the examination, the Department effectively ensured the very frictional costs and disruption to retirement investors and the marketplace that a delay would have avoided. Plans, participants and IRA investors now run a significant risk that they will be subject to multiple changes in the investment-related services they receive over the next several months. Failing to delay the additional requirements scheduled to become effective January 1, 2018 will only exacerbate this situation, resulting in further confusion and dissatisfaction, as well as potentially increase costs to retirement investors. Since we expect to advocate for a complete reset on the rulemaking to allow for a coordinated approach between the Department and financial services rulemakers, the Department should not underestimate the impact of imposing the additional disclosure, contract and other aspects of the January 1, 2018 requirements on tens of millions of customers who will then potentially face implementation of a completely different set of rules in a short period of time.

A simple, concrete example illustrates this point. One of the additional requirements of the BIC exemption that becomes applicable on January 1, 2018 is a written contract with IRA customers. Under section II(f)(2) of the BIC exemption, the contract cannot contain any waiver or qualification of the customer's right to bring or participate in a class action. That provision is currently being challenged in litigation and, in a brief filed on July 3, 2017[3] the Department declared that it would no longer defend the prohibition on class-action waivers. If the court finds the provision invalid, section II(f)(4) of the BIC exemption then provides that the prohibition can be severed from the BIC exemption (for contracts subject to the jurisdiction of the court that finds the provision invalid). Requiring advisors to move forward in the contracting process in compliance with a class action requirement that the Department itself no longer supports and that may be invalidated will create confusion and disruption of customer relationships, potentially requiring execution of multiple contracts as the exemption is modified either through court action or Department rulemaking.

The RFI itself provides other examples. The Department specifically asks for input on whether the BIC exemption's disclosure requirements can be simplified or restructured, whether the contract requirement is necessary or could be eliminated, and whether potential streamlined exemptions could be created that would presumably eliminate the need for advisers to comply with some or all of the BIC exemption's January 1 requirements if other requirements are met. Action on any of these possibilities could change, eliminate or render moot the January 1, 2018 requirements and could thus subject retirement savers to multiple disclosure and compliance approaches absent postponement of their current applicability date.

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[3] Brief for appellees filed July 3, 2017 in *Chamber of Commerce v. U.S. Dept. of Labor*, (5th Cir. No. 17-10238).

Moreover, the additional requirements scheduled to become effective January 1, 2018 are not needed to achieve the goals of the Rule as evidenced by the Department's final rule adopting a 60-day extension of the Rule's applicability date. In connection with the adoption of the delay, the Department stated that the imposition of the Impartial Conduct Standards alone will avoid the losses that retirement investors would have otherwise incurred by a longer delay. If that is the case, then the additional costs involved in complying with the requirements that are scheduled to take effect on January 1, 2018 are unnecessary because they are not required to obtain the benefits that the Rule purports to achieve. We estimate that those costs of compliance for Fidelity are in the tens of millions of dollars. If the Impartial Conduct Standards alone effectively avoid investor losses and preserve their investment gains between June 9, 2017 and January 1, 2018, then the significant additional disclosure and other requirements that are scheduled to become effective on January 1, 2018 cannot be justified.

Accordingly, we request that the Department delay the additional January 1, 2018 requirements until a reasonable period following the conclusion of the examination directed by the President's Memorandum and the consideration of the RFI responses. The length of the delay should depend on the results of those efforts. If there are no changes to the Rule, the requirements should become effective six months from the date those results are announced. This six-month period would roughly correspond to the period between the June 9, 2017 general applicability date of the Rule and the original January 1, 2018 applicability date of the additional requirements. If there are changes to the Rule following the examination and RFI, the Department should provide sufficient additional time from the date those changes are announced in light of the specific changes made to the Rule. In all events, the Department should announce the postponement of the January 1, 2018 applicability date as soon as possible.

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We would be pleased to respond to any questions or comments regarding this letter.

Sincerely,

Ralph C. Derbyshire

cc: **United States Securities and Exchange Commission**
The Honorable Jay Clayton, Chair
The Honorable Kara M. Stein, Commissioner
The Honorable Michael S. Piwowar, Commissioner

Financial Industry Regulatory Authority
Robert Cook, Chairman and Chief Executive Officer, FINRA
Robert Colby, Chief Legal Officer, FINRA