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July 21, 2017

TO:
The Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11933
Suite 400
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Submitted Electronically - EBSA.FiduciaryRuleExamination@dol.gov

Re: RIN 1210-AB82 – Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions: Response to Question 1 Relating to Extending the Transition Period of the Fiduciary Rule

Ladies and Gentlemen:

The Association for Advanced Life Underwriting ("AALU") is the leading organization of life insurance professionals who are a trusted voice on policy issues impacting Americans' financial security and retirement savings. Our 2,200 members are primarily engaged in providing life insurance planning solutions for individuals, families, and businesses nationwide.

As life insurance industry professionals, we work in the best interest of retirement savers every day, enabling individuals and families from all economic brackets to maintain independence in the face of potential financial catastrophe and to secure their retirement. Our members provide retirement savers with investment and insurance products that build and guarantee retirement income, protecting their retirement savings against a variety of risks that threaten their retirement security, from market downturns to outliving savings.

AALU appreciates the opportunity to submit comments on extending the January 1, 2018 applicability date of certain provisions in the Best Interest Contract Exemption ("BIC Exemption"); the Class Exemption for Principal Transactions in Certain Assets between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs; and Prohibited Transaction Exemption 84–24 ("PTE 84-24") (collectively, the "Transition Period"). Our comments here address the issues raised in Question 1 of the RFI regarding the extension of the Transition Period. AALU will separately comment on the remaining questions in the RFI subject in a subsequent letter.

Overview—The Department Must Extend the Transition Period by at Least One Year

From the beginning, AALU has expressed serious concerns regarding the Department of Labor ("Department") regulation redefining fiduciary investment advice and its related prohibited transaction exemptions (collectively, the "Fiduciary Rule" or "Rule").[1] Our comments consistently have focused on the very real negative impacts of the Rule on retirement savers who are experiencing reduced access to investment products and services, as well as higher costs. These comments have addressed problems with the substantive provisions of the Rule, particularly those that are reducing access to vital insurance products, as well as problems resulting from the rushed implementation of the Rule, which has already imposed significant costs and confusion on retirement savers.

[1] 81 Fed. Reg. 20,945 – 21,221 (Apr. 8, 2016).

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Unfortunately, the Department largely ignored these comments. It did not fix provisions preventing certain insurance professionals from providing recommendations regarding certain products, and rather than properly evaluating the harm the Rule is causing to retirement savers (especially those with small account balances), the Department instead put its faith in biased academic projections that overstated the benefits and underestimated the costs of the Rule, despite the growing body of the real-world evidence to the contrary.

The Department now has a chance to correct these mistakes. Through this RFI, the Department is gathering the information it needs to make informed evidence based decisions and to conduct the thorough review of the Rule ordered by President Trump.[2] We are encouraged that Secretary Acosta recently acknowledged the Department had not previously listened to the thousands of comments like ours as it raced towards promulgating and implementing the Rule. In his testimony at a U.S. House of Representatives Appropriations Subcommittee hearing, Secretary Acosta said that, "Those concerns certainly surfaced the first time around, and unfortunately, they were not heard."[3]

We urge the Department to seriously consider our comments in response to the RFI. While we have significant concerns with the Fiduciary Rule and believe it should be rescinded or substantially modified (we will explain these concerns in detail in our comment letter on the remaining questions in the RFI), <u>the first and most vital step the Department must take is to extend the Transition Period by at least one year, until January 1, 2019</u>. Only by doing so can the Department prevent further harm to retirement savers that the implementation of the "full" BIC Exemption and the modified PTE 84-24 will cause, and provide the time necessary to conduct a thorough, honest review of the Rule. Extending the Transition Period will also provide the time needed to properly coordinate with other regulators, including state insurance commissioners, the Securities and Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA"), and other relevant Federal and state regulatory entities.

Response to Question 1—Extending the Transition Period is in the Best Interest of Retirement Savers

In Question 1, the Department asks several questions related to its evaluation of the need to extend the Transition Period. In addition to the costs and benefits of doing so, it asks about several factors relevant to that decision, such as whether an extension "would benefit retirement investors by allowing for more efficient implementation responsive to recent market developments" or would "carry any risks" for retirement savers.[4]

As we explain in more detail below, we strongly believe that an extension of the Transition Period will offer significant benefits to retirement savers, and pose little, if any, risks.

- **Extension Avoids Denying Retirement Savers Access to Recommendations Regarding Valuable Insurance Products**

Since 2015, AALU has pointed out an essential flaw in the Fiduciary Rule that the Department has not yet corrected—the Rule, once fully implemented, will prevent some insurance professionals from being able to offer some investment products on any terms, removing a valuable source of information and assistance to retirement savers.

Unless the Transition Period is extended, on January 1, 2018, only the "full" BIC Exemption will be available to permit the payment of commissions for annuities that are not fixed-rate annuities. After that date, PTE 84-24 will no longer be available for any annuities that are not "fixed-rate" annuities. Because only banks, registered investment advisors, insurance carriers, and broker-dealers are eligible to be financial institutions under the BIC Exemption, independent insurance agents that do not also have a securities license will have no financial institution willing to enter into a BIC Exemption arrangement on their behalf.

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[2] See, President's Memorandum, 82 Fed. Reg. 9675 (Feb 7, 2017).
[3] "Labor Secretary Acosta: Concerns with DOL Fiduciary Rule 'Not Heard' During Original Rulemaking," InvestmentNews, Greg Iacurci, June 7, 2017.
[4] 82 Fed. Reg. 31279 (Jul. 6, 2017).

As a result, these agents, even though they are already fiduciaries currently operating under the Impartial Conduct Standards, will no longer be able to recommend Variable or Fixed Index Annuities. While the Department has suggested that insurance carriers could fulfill the financial institution role, the reality is that insurance carriers are unlikely to enter into the liability risks imposed by the "full" BIC Exemption for agents they do not supervise.

The Department provided a temporary solution during the Transition Period by retaining the current scope of PTE 84-24, but it has deferred any decision on the underlying issues. While we also note that there is a pending insurance intermediary class exemption that would allow a small number of entities to be financial institutions modeled on the BIC Exemption (though with many additional and controversial conditions), no further discussion of what would constitute a "workable" class exemption has taken place.[5]

We appreciate that the Department has asked for comments on how to address this concern in RFI Question 17,[6] but that does not change the basic problem relevant to January 1, 2018—a failure to extend the Transition Period will immediately deny retirement savers access to trusted insurance professionals. The Transition Period must be extended.

- **Extension Avoids Costs and Confusion from Inefficient Regulation Resulting from Implementation of Rapidly Changing Regulatory Requirements**

Some of the most burdensome and flawed requirements of the Fiduciary Rule do not yet apply during the Transition Period. The "full" BIC Exemption and modified PTE 84-24 will require extensive and expensive changes for advice providers, as well as prohibit certain insurance professionals from providing assistance to retirement savers as discussed above. These costs, and the confusion and dislocation resulting from implementing them, will be borne by retirement savers, who have already gone through a costly and confusing transition just last month on June 9th.

One of President Trump's policy priorities is efficient regulation—in fact, one of his early acts was to issue an Executive Order to reduce the regulatory burden the federal government places on the American people.[7] Consistent with this, the Department stated in its previous rule delaying the applicability date from April 10th to June 9th that one of its considerations was that it does not want to implement policies only to change them later, disrupting the marketplace and confusing retirement savers.[8]

However, that is exactly what will happen unless the Transition Period is extended. The whole purpose of the RFI is to determine whether the Department will make changes to the Rule. It is directly contrary to the President's policies to cause major regulatory change to occur on June 9, 2017, followed by major regulatory change on January 1, 2018, when there is a significant likelihood of yet another major regulatory change in 2018 or 2019.

Extending the Transition Period provides needed stability, avoids imposing massive new costs related to the "full" BIC Exemption and modified PTE 84-24, and ensures that there is no unnecessary round of change in response to a Rule that is currently under review.

- **Extension Provides Time Needed for New Products and Coordination with Other Regulators**

The changes resulting from the Fiduciary Rule are significant, especially for the insurance industry. By rushing to implement the Rule, the Department did not provide the time needed for the marketplace to develop products and services responsive to the new regulatory environment, or to have such innovations reviewed and approved by state insurance regulators, the SEC, and other regulatory entities.

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[5] 82 Fed. Reg. 7,336 (Jan. 19, 2017).
[6] 82 Fed. Reg. 31,279 at 31,281.
[7] *See.,* Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339 Feb. 3, 2017).
[8] 82 Fed. Reg. at 12,320, "Additionally, absent an extension of the applicability date, if the examination prompts the Department to propose rescinding or revising the rule, affected advisers, retirement investors and other stakeholders might face two major changes in the regulatory environment rather than one. This could unnecessarily disrupt the marketplace, producing frictional costs that are not offset by commensurate benefits."

The Transition Period provides a period of stability during which all of these activities can occur. We strongly urge the Department to coordinate with other regulators due to overlapping jurisdiction. For example, it is possible for an insurance professional's recommendation to be simultaneously regulated by the Department, a state insurance commissioner, the SEC, and FINRA. These regulatory requirements must fit together, and by rushing ahead without adequate coordination, the Department does a disservice to retirement savers who will lose access to valuable products and services due to regulatory conflicts.

- **Extension Will Not Harm Retirement Savers**

In establishing the Transition Period, the Department considered the effect it would have retirement savers. According to the Department's economic analysis in the April 7, 2017 rule, the Impartial Conducts Standards, which became applicable on June 9th, provide the vast majority of the benefits it predicted. In April, the Department concluded that, "Because of Firms' anticipated efforts to satisfy the Impartial Conduct Standards…the Department believes that most…of the investor gains predicted in the 2016 RIA for the transition period will remain intact," and that, "…affected investors will generally receive the full gains due to the fiduciary rulemaking."[9]

We can assure you that our members have been highly focused on compliance with the Impartial Conduct Standards, and we have worked hard to assist them in their efforts to understand the Rule and comply with its requirements. Across the insurance industry, our members and financial partners have devoted millions of dollars and countless hours to comply with the Rule. As a result of this large-scale compliance effort, we believe the Department should conclude that the extension carries no additional risk to retirement savers.

Conclusion

Our members are committed to acting in the best interest of retirement savers, and have worked hard to comply with the Rule. However, unless the Transition Period is extended as we request, retirement savers will be the losers. They will face expensive, confusing, and unnecessary change. They will not benefit from better coordination with other regulators that can provide optimal solutions in the new regulatory environment. In fact, they will lose access to insurance professionals and products due to flaws in the regulation. Finally, the Department itself does not have enough time before January 1, 2018 to complete the regulatory process related to any changes it concludes are necessary.

In the Appendix below, we provide real-world evidence of the negative impacts the rule has already inflicted on retirement savers since implementation began in April 2016--highlighting the benefits to be gained from thoughtfully reviewing the rule and correcting its many flaws.

The benefits of extending the Transition Period are significant, while the costs and risks are nearly non-existent. We would be happy to answer any questions you may have.

Sincerely,

David J. Stertzer
Chief Executive Officer
AALU

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[9] 82 Fed. Reg. 16,902 at 16,907 and 16,909 respectively (Apr. 7, 2017).

APPENDIX

Real-World Data on Market Implementation of DOL Fiduciary Rule since April 2016

As ordered by the President, the Department of Labor requested new information about the economic effects of the Fiduciary Rule. This new data, based on actual experience rather than academic guesswork, shows that the Department's original predictions were wrong. The facts show that the Department significantly underestimated the negative effects of the rule, particularly in reducing access to advice for small retirement savers and small businesses.[i]

New Information: Loss of Consumer Access to Retirement Advice and Retirement Products

- A survey of advisors finds 71% will stop providing advice to at least some of their current small accounts due to the risk and increased costs of the rule. On average, these financial professionals estimate they will no longer work with 25 percent of their mass-market clients, creating an advice gap for low-balance investors.[ii]

- One large mutual fund provider reports that its number of orphaned accounts nearly doubled in the first three months of 2017, and that the average account balance in these orphan accounts is just $21,000. Further, it projects that ultimately 16% of the accounts it services will be orphaned this year because of the Fiduciary Rule. Extrapolating this prediction suggests that at least 1.6 million small retirement savers have already lost access to investment assistance since January 2017, and an additional 1.6 million are likely to lose access after the Rule becomes applicable.

- Many advisors plan to exit the business entirely. In a blind online poll of 459 advisors conducted by Fidelity Clearing & Custody Solutions from August 18-26, 2016, 10% of advisors reported they are planning to leave or retire from the field earlier than expected because of the rule, and another 18% said they are "reconsidering their careers as advisors."[iii]

New Information: Loss of Consumer Access to Retirement Products

- Adverse effects on annuities have already occurred. "The variable annuity industry took a beating in 2016, with several of the top sellers inking losses upwards of 25% on the year and some exceeding 40%. The Department of Labor's fiduciary rule, issued in its final form last spring, played a big role in the industry's bruising, observers said."[iv]

- For IRA purchases, sales declined 22% in 2016 compared to the prior year.[v] The ambiguous regulatory structure of the Rule is expected to result in additional decreases in purchases of variable annuities, which represents a significant amount of IRA annuity purchases.

New Information: Compliance Costs

- One recent study by the American Action Forum found reported compliance costs of at least $106 million in 2016, representing up-front costs from just four companies.
- "The costs that will be incurred to comply will most likely force smaller firms to consolidate or close their doors. In other words, lost jobs. A Morningstar quote for their technology solution which would assist with compliance procedures was $1,014,540 annually. We don't have $1,000,000 of net income annually. How would we pay for this? Other solutions quoted in the several hundred thousand dollar range, again annually. We have already spent over $300,000 in legal costs and staff hours trying to develop our compliance procedures. We won't survive."[vi]
- "The proposed rule has already substantially increased our compliance costs. We estimate compliance costs have increased 450% as a result of this rule."[vii]
- "To date, Advisors Excel has spent in excess of $1 million in preparation for the Rule. Across the financial industry, compliance estimates range from Ameriprise spending in excess of $11 million in the first part of 2016, to an estimate by the Securities Industry and Financial Markets Association ("SIFMA") indicating start-up costs for large and medium broker-dealers would total $4.7 billion with on-going costs of $1.1 billion."[viii]

Procedural Flaws

- The Department failed to consider how the Rule would likely create an "advice gap" for low- to middle-income families. The Department dismissed concerns of loss of access, and instead found "little evidence" that "financial advisers improve retirement savings." However, this conclusion is contradicted by the Department's own assessment in a prior rulemaking that investment mistakes cost investors approximately $114 billion per year, and that access to financial assistance reduced the cost of those mistakes by $15 billion per year, and that increased access to financial assistance would enable them to save billions more.
- The Department chose to ignore evidence regarding the impact of similar rules established in other jurisdictions. Most notably, following the United Kingdom's 2013 move to a fee-based compensation model, the U.K. regulator determined that retirement savers – particularly those with lower incomes – were adversely affected and acknowledged that its "high standard of advice is primarily accessible and affordable only for the more affluent in society." Rather than taking advantage of the opportunity to learn from mistakes made by other countries, the Department simply denied the existence of an "advice gap" in the U.K. and dismissed the possibility that a similar "advice gap" would develop in the U.S. under the Fiduciary Rule.

- Under Executive Order 12866[ix] and related guidance issued by OMB,[x] consideration of viable alternatives is a fundamental element of federal agency rulemaking. However, the lack of consideration given to all relevant costs of the Fiduciary Rule prevented the Department from properly evaluating less burdensome alternatives that would have greatly reduced the costs of the Fiduciary Rule, effectively coordinating the Department's regulatory regime with that of the SEC and, because they would have applied only to relationships in which the client has no reasonable expectation of fiduciary status, would not have caused any meaningful consumer harm. However, as a result of the Department's flawed process, it arbitrarily rejected these and other alternatives.

Evidence from the UK: Financial Conduct Authority Study

Based on the Financial Advice Market Review analysis of the commission ban issued by the UK's Financial Conduct Authority in March 2016:[xi]

- The number of advisors dropped by 25% from 2011 to 2015 (40K to 31K)
- The average minimum account balance increased 50% from 2011 to 2015 (50K to 75K)
- The opening of investment accounts with less than $100,000 fell by 50% from 2011 to 2015
- Only 8 percent of consumers were willing to pay more than £500 (~$800) for investment advice, and just 14 percent were willing to pay between £200 to £500 (~$320 to $800) for advice. [On average, it takes about 9 hours to provide advice on a pension, costing more than £1300 ($2100)]
- According to Tracey McDermott, Acting CEO of the Financial Conduct Authority, "The Financial Conduct Authority is examining the possibility that commission payments be allowed once again for certain investment or pension products."
- Many advisors surveyed told the FCA that their concerns about future liability are preventing them from giving advice today. There was also a lot of concern from employers about offering financial support to their employees.
- Robo-advice "failed to get traction" in the mass market.

Analytical Flaws

- The Department relied on flawed and problematic factors and data in their Regulatory Impact Analysis projections. Specifically, the Department admitted to basing savers' projected financial gains on research regarding "only one" issue: the purported "conflict that arises from variation in the share of front-end-loads that advisers receive when selling different mutual funds that charge such loads to IRA investors." This research provides no basis for

regulating products—such as annuities—that may not invest in mutual funds at all, and was not even a proper assessment of mutual fund performance.

- Vanderbilt Professor and former SEC Chief Economist Dr. Craig Lewis noted the research relied on by the Department did not analyze the performance of mutual funds held in annuities, relied on old data not reflecting the current marketplace, and the author of one of the key studies later revised his work to show the "cost" of conflicts was about 1/6th of the amount originally estimated.[xii]

- The Department was far too optimistic in relying on "robo advisers" to alleviate the potential loss of access to retirement advice for small savers. The Chamber of Commerce is currently unaware of any "robo advisor" that recommends annuity products to generate retirement income, despite the clear need for those products.

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[i] The information in this Appendix was compiled from other comments provided to the Department of Labor in April 2017.

[ii] CoreData Research UK, Fiduciary rule to leave US mass-market investors stranded, study shows, (November 2016), available at http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-percentE2 percent80 percent93-CoreData-Research.pdf.

[iii] ThinkAdvisor *DOL Fiduciary Has Many Advisors Mulling Career Change: Fidelity Survey,* (Nov. 3, 2016).

[iv] Greg Iacurci, "Department of Labor's fiduciary rule blamed for insurers' massive hit on variable annuity sales," InvestmentNews, March 28, 2017.

[v] Id. See also LIMRA Secure Retirement Institute, Fourth Quarter 2016.

[vi] Comment Letter submitted by Securities Management & Research, Inc. (March 10, 2017).

[vii] Comment Letter submitted by Lyon Capital Management LLC (March 14, 2017).

[viii] Comment Letter submitted by Advisors Excel (April 17, 2017).

[ix] Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

[x] Office of Mgmt. & Budget, Circular No. A-4, Regulatory Analysis (Sept. 17, 2003).

[xi] *"DOL Viewpoints*," LIMRA Secure Retirement Institute, 2016.

[xii] *See* Craig M. Lewis, "An Inflated $17 Billion Talking Point from DOL," Forbes (Dec. 16, 2015).