August 4, 2017

Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Dear Sir or Madam:

As the second-largest retirement services provider in the U.S., with more than 8 million people in the plans we serve, Empower Retirement appreciates the opportunity to share our comments with the Department of Labor, Employee Benefit Security Administration (DOL) with respect to the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (RFI)[1].

Background and introduction

As we have noted in previous comments and in our testimony at the August 10 - 13, 2015 Public Hearing on Conflict of Interest - Definition of Fiduciary Investment Advice, we share DOL's interest in ensuring that any investment recommendations are in the best interests of plan sponsors, plan participants, IRA account holders and retirement savers in general.

We would also note that we share the concerns that were raised in President Trump's Memorandum (Memo) dated February 3, 2017[2]. Specifically, we are concerned that the current version of the Definition of the Term "Fiduciary"; Conflict of Interest Rule[3] (Rule) may adversely affect the ability of Americans to gain access to retirement information and financial advice.

The Memo directed DOL to consider three questions:

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;
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; and
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.

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[1] 82 Fed. Reg. 31,278 (July 6, 2017)
[2] 82 Fed. Reg. 9,675 (February 7, 2017)
[3] 81 Fed. Reg. 20,945 (April 8, 2016)

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If an affirmative determination is made as to any of the questions raised, then DOL must rescind or revise the Rule. We would also note the DOL was specifically directed to prepare an updated economic and legal analysis concerning the likely impact of the Rule.

In the RFI, DOL asks for additional input from the public about possible additional exemption approaches or changes to the Rule. As we noted in a comment letter submitted on April 12, 2017, we believe that all of the questions from the Memo must be answered in the affirmative, and in our comments below we offer our thoughts and suggestions.

Coordination between DOL and the Securities Exchange Commission (SEC)

We believe that a uniform standard of conduct should apply to all investments regardless of whether the investments are held by retirement investors or retail investors. Investors do not view the duties owed to them as differing depending on the nature of the investment. The expectation is that the same standards of care should apply to their 401(k) balances, their IRA holdings and their retail brokerage account, anything less results in needless confusion.

It is imperative that there be a closely coordinated rulemaking effort between DOL and (SEC). The SEC has significant expertise, experience and resources with respect to drafting regulations overseeing the financial service industry. DOL should draw upon this resource in the formation of a new best interest conduct standard. This coordination would result in a consistent and uniform standard of conduct required of financial advisors by both DOL and SEC that would be applied to all investment products, not just those related to retirement savings. This common standard could also be included in any prohibited transaction exemption drafted by DOL.

In the absence of this close coordination, plan sponsors, individual investors and service providers will be subject to significant confusion, disruption and harm. As we and others have noted in our previous comments, there are legitimate concerns surrounding the current Rule. These include limitations on assistance to plan sponsors, reductions in service and educational offerings to individual investors, and increased costs and administrative burdens to service providers. A lack of consistent uniform standards also results in needless confusion to investors regarding why there are different standards of conduct applied to the same investment offerings held in different accounts. Service providers would also be required to develop and maintain separate compliance procedures for different account types – potentially requiring extensive information technology spends and development of multiple processes and procedures, including training and oversight policies.

These concerns and others would be eliminated with a new rulemaking effort that is based on the joint efforts of DOL and the SEC. The review mandated by the President's Memo offers the opportunity for both agencies to start fresh, building off of the lessons learned and input received from the regulated community, to develop a single standard that meets the needs and protects all individual investors, regardless of whether they are investing for their retirement or for other goals. The common standard could be drafted with industry input to avoid unnecessary disruptions.

The SEC has indicated their interest in addressing the standards of conduct for investment advisers and broker-dealers. In a Public Statement posted on the SEC website on June 1, 2017, SEC Chairman Jay Clayton expressed interest in working with DOL on this issue and noted: "I believe clarity and consistency — and, in areas overseen by more than one regulatory body, coordination — are key elements of effective oversight and regulation."

During the rulemaking process for the 2016 Rule, there was limited coordination between DOL and the SEC. Responding to a question about the Rule in a June 27, 2017 hearing on the Fiscal Year 2018 Labor Department Budget Request before the Senate Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, the Secretary of Labor, Alexander Acosta, acknowledged this limited coordination when the Rule was finalized last year. Secretary Acosta stated: "Previously the SEC did not work jointly with the Department of Labor." Secretary Acosta further noted: "As I indicated quite publicly, I think the SEC has important expertise and they need to be part of the conversation, and I asked that the Chairman of the SEC if the SEC would be willing to work with us. The Chairman indicated his willingness to do so."

We are pleased to note that DOL has signaled an intention to coordinate with the SEC, which has also requested information related to the development of a fiduciary standard. We believe that it is critical that the agencies work closely together to craft a practical approach that will apply in a targeted, effective way, without introducing unnecessary, inconsistent requirements that, by reducing investor access to advice and investment products, may well harm the very savers that the Rule seeks to protect. A coordinated review may require additional time to complete, but in our view, this is time well spent. On this critical issue, we cannot afford to act without careful consideration and coordination in arriving at a uniform standard of conduct.

Modifications to the 2016 Fiduciary Rule

While, as noted earlier, we believe that a fundamental reexamination of the Rule in coordination with the SEC would best serve all investors, there are specific modifications to the Rule we would suggest.

1. Basic Definition of Advice – The core of the definition is the concept of making a "recommendation." At 2510.3-21(b)(1) of the Rule, recommendation is further defined as: "A communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."[4] Under this definition, casual suggestions regarding investments or distributions that are clearly not intended to be relied upon as advice could be deemed a fiduciary act. We believe the Rule should be clarified by specifying that a recommendation must be a call to action to take or refrain from taking a specific course of action, a much higher and clearer standard than a mere suggestion.

Recordkeepers are uniquely challenged by the vagueness and breadth of the current definition. We are in constant contact with the over 8 million participants we serve via phone, e-mail, mailings and web-based communications. We have hundreds of employees engaged in these communications. It is very difficult under the current definition to provide meaningful help without risking fiduciary status, even with extensive scripting, training and monitoring. For example, if a participant were to call requesting a hardship distribution, and a customer service representative were to advise them of the tax penalty for taking a distribution before age 59 ½, it is possible this would be considered fiduciary advice under the rule.

Another troubling aspect of the Rule is that a recommendation to hire anyone else offering fiduciary services is deemed to be a fiduciary act. Merely making a plan sponsor or participant aware of the services and providers

[4] 81 Fed. Reg. 20,997 (April 8, 2016)

available to them, whether or not of a fiduciary nature, should not be a fiduciary act in itself. We believe this added layer of protection is not necessary because the recipient will receive the benefit of ERISA protection if and when they decide to make use of the fiduciary service being offered. We would request that this provision be deleted from 2510.3-21(a)(1)(ii) of the rule.

Greater clarity is also needed around what is considered advice and what would be considered educational communications. Question 14 of the RFI asks: "Should recommendations to make or increase contributions to a plan or IRA be expressly excluded from the definition of investment advice?" We strongly believe that recommendations regarding contribution levels are education, not investment recommendations, and should not be included in the definition of advice.

We believe that helping participants determine the level of contributions needed to achieve their retirement goals is one of the most important services we offer. We have 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 more 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.[5] Currently, there is uncertainty under the Fiduciary Rule regarding when information might be considered a "recommendation." This results in there not being a clear line between education and advice.

Other examples of communications that should be considered educational include discussions around the allocation of contributions between a retirement plan and a health savings account (HSA) and retirement account consolidation.

Many employers offer both a 401(k) plan and a high deductible healthcare plan with access to an HSA. Participants must decide how best to make use of the unique tax advantages available under both arrangements. Helping participants make informed decisions could include discussions around first maximizing any employer matching contributions and then considering whether saving for retiree healthcare expenses is advantageous.

Of similar nature are discussions around retirement account consolidation. Many recordkeepers, including Empower, currently offer educational services designed to inform participants entering a new plan about the ability to roll over 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, it gives them the ability to view their entire retirement picture and make better informed decisions. Indeed, in recent years the Department of the Treasury and the Internal Revenue Service have explored ways to make it easier for participants to make "plan-to-plan" rollovers. The Rule, as currently written, would view 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.

2. Need for Mutual Agreement between Adviser and Advisee – Any Rule should make clear that discussions or communications around investments or distributions should not be deemed a fiduciary act unless there is a

[5] Empower Retirement study based on website usage by more than 8,000 participants January 1, 2013 through December 31, 2013.

mutual agreement or understanding that the advice is individualized and that there will be material reliance on that advice. The agreement should also be able to define the scope of the fiduciary advice and whether there is an ongoing duty to provide advice or whether the advice was offered with respect to a single or a limited series of transactions. This would help prevent casual or informal conversations that are not intended to be relied upon as advice giving rise to a fiduciary duty.

Bipartisan legislation was introduced in the 114th Congress that provides a blueprint on how the Rule could be revised to reestablish a mutual agreement while protecting retirement investors from "hidden disclaimers." H.R. 4293 – the Strengthening Access to Valuable Education and Retirement Support Act and H.R. 4294 – the Affordable Retirement Advice Act were introduced in 2016. Similar legislation has been introduced in the current Congress.

The legislation proposed that advice must be rendered pursuant to: "A written acknowledgment of the obligation of the advisor to comply with section 404 (of ERISA) with respect to the provision of such recommendation; or a mutual agreement, arrangement, or understanding, which may include limitations on scope, timing, and responsibility to provide ongoing monitoring or advice services, between the person making such recommendation and the plan that such recommendation is individualized to the plan and such plan intends to materially rely on such recommendation in making investment or management decisions with respect to any moneys or other property of such plan." The legislation also makes it clear that this disclaimer would apply to plans, plan participants, beneficiaries and IRA account holders.

The legislation provided guidance on how a disclaimer of a mutual agreement must be provided. The disclaimer must state: "This information is not individualized to you, and there is no intent for you to materially rely on this information in making investment or management decisions." The disclaimer must be in writing and communicated in a clear and prominent manner such that an objective person would reasonably conclude that based on facts and circumstance there was no mutual agreement or understanding.

The Rule should include language similar to the congressional proposal. This would allow greater access to educational services while providing protections against hidden "boilerplate" disclaimers.

3. Expansion of the "Seller's" Exception – Under the Rule, an exception from the definition of advice is provided for fiduciaries that hold or have under management or control total assets of at least $50 million. Individual investors and plan fiduciaries with less than $50 million are not included in this carve out.

The Rule should be revised to allow financial professionals who make it clear that they are selling or marketing their services and products and not attempting to provide impartial advice are not subject to fiduciary standards. The exception to the definition of advice should be made available when communicating with any plan fiduciary regardless of the amount of assets under their management. The exception should also be available for communications with plan participants and IRA account holders.

This seller's exception would be similar to the one outlined in Definition of the Term Fiduciary first proposed by DOL in 2010.[6] The original proposed rule provided that a person would not be considered as providing fiduciary advice if it can be demonstrated that: "(t)he recipient of the advice knows or, under the circumstances, reasonably

[6] 75 Fed. Reg. 65,263 (October 22, 2010)

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should know, that the person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice."[7]

We would take exception with the phrase *"whose interests are adverse to the interests of the plan or its participants or beneficiaries"* in the language cited above. We believe that the term "adverse" cannot properly be used to describe the plan and service provider relationship. Financial service providers are not engaged in caveat emptor transactions with their clients. State and/or federal laws governing the conduct of financial service providers prohibit them from considering only their own interests. These providers must take into account the needs of their clients, consistent with their legal obligations under the prevailing duty of care, such as the securities law standard of suitability or fiduciary obligation. As a result of these legal duties, a service provider cannot properly be considered "adverse" to his or her client. We would recommend replacing the language with: *"who has a financial interest in the purchase or sale of the security or other property."*

Again, the bipartisan legislation discussed above could provide guidance on how it may be reasonably determined that the recipient should have known the person providing the recommendation was doing so in a sales or marketing capacity. The same process and standards could be required – a full and fair disclosure in writing that the person providing the information is doing so in a marketing or sales capacity and that the person is not intending to provide impartial investment advice. As with the disclaimer of a mutual agreement, this notice would require communication in a clear and prominent manner such that an objective person would reasonably conclude that based on facts and circumstance that the information was being provided as part of a sales and marketing process.

Changes to the Best Interest Contract (BIC) Exemption

The changes to the core definition recommended above will substantially reduce the need to rely on the BIC. However, even if those changes are made, we support DOL's effort to create a flexible prohibited transaction exemption that can be used to address compensation issues arising in connection with a variety of transactions and investment products. That being said, significant changes to the BIC are necessary to appropriately balance the goals of providing adequate and meaningful protections to investors while avoiding unreasonable or unnecessary costs and litigation risks.

1. Eliminate the Contract Requirement – The BIC currently requires execution of a contract with IRA customers or any other customer covered by the rule that is not protected under Title I of ERISA. The effect of this provision is to support and encourage private litigation as an enforcement mechanism. It has been estimated that the fiduciary rule will increase ERISA fee litigation settlements by $75 million to $150 million annually.[8] A recent study[9] suggests there are significant negative impacts of increased ERISA litigation settlements on fiduciary decision making. It is encouraging fiduciaries to focus myopically on fees and litigation avoidance and

[7] Ibid at 65,277

[8] Morningstar Report, "Weighing the Strategic Tradeoffs of the U.S. Department of Labor's Fiduciary Rule, Financial Services Observer, February 2017

[9] Cerulli Associates, The Cerulli Report – U.S. Retirement Markets 2016: Preparing for a New World Post-Conflict of Interest Rule

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discouraging them from looking more broadly at the value the plan is receiving and the individual needs of plan participants. Another concern is that giving state courts the power to interpret ERISA fiduciary standards of care is inconsistent with ERISA §502(e) (1) and Congressional intent to create uniform federal enforcement of the ERISA statute. Creating a contract requirement is bad public policy. We recommend this requirement be eliminated.

A contract requirement is also not necessary to protect IRA account holders. Investors not covered by Title I of ERISA currently receive protection under state and federal securities and insurance laws as well as protections provided by self-regulatory organizations (e.g. the Financial Industry Regulatory Authority (FINRA)), including a right to arbitrate and/or litigate disputes and mandated disclosures related to fees and services, making the contract requirement unnecessary to ensure that investors have the ability to enforce standards of care.

2. Eliminate the Warranty Requirements – The BIC contains multiple warranty requirements, all of which are redundant to other protections currently available to retirement investors, unclear in their meaning and application, or unnecessarily burdensome.

Investors covered by Title I of ERISA already receive the benefit of ERISA fiduciary standards of care and mechanisms to enforce those standards. They also receive disclosure of fees and services or investment performance[10] so they can readily assess whether they are receiving appropriate value for what they are paying. Requiring fiduciary service providers serving ERISA accounts under the BIC to warrant that they have adopted policies and procedures to comply with the Impartial Conduct Standards creates a trigger for litigation without providing any additional protections for investors.

Investors not covered by Title I of ERISA receive protections under state and federal securities and insurance laws so warranties are not necessary for this category of investors either.

One of the most problematic aspects of the warranty requirement is the statement requirement regarding internal compensation practices. The BIC requires a warranty that there will be no performance or personnel actions (including appraisals, bonuses, or other incentives) that would reasonably be expected to cause an employee to make a recommendation that is not in the best interest of a retirement investor. This language, which is vague in its application and which ignores the existence of other investor protections, is an unreasonable intrusion on the ability of businesses to align employee behavior with business objectives.

For example, we rely on the BIC when communicating with participants who are eligible to receive a distribution from their plan. We have a rigorous process in place to ensure we consider all relevant personal data and take into account participant preferences and objectives. We use objective tools for distribution recommendations and investment recommendations to ensure advice is in the best interest of the participant. We believe ERISA's existing best interest standard of care adequately aligns the interest of fiduciary advisors with advice recipients without infringing on the ability of organizations to establish compensation practices that reward employees for meeting business objectives and are consistent with a best interest standard of care.

3. Revise Conflict of Interest Policy Requirements – The warranty and disclosure requirements of the BIC mandate the development or written policies and procedures to ensure compliance with the impartial conduct

[10] ERISA §404(a)(5); 29 C.F.R. §2550.404a-5; ERISA §408(b)(2); 29 C.F.R. §2550.408b-2

standards. Included in these provisions is a requirement to identify and document material conflicts of interest and provide detailed disclosures around policies designed to prevent conflicts and compensation arrangements. Also included is a requirement to identify the person responsible for addressing potential conflicts of interest and monitoring compliance with the impartial conduct standards.

We agree with DOL that service providers have a responsibility to be aware of potential conflicts of interest in how they get paid and take reasonable steps to avoid having those conflicts negatively impact how customers are served. However, the BIC's current requirements to document and publicize conflicts of interest are overly prescriptive about how a firm should assess conflicts of interest. Section II(d)(1) of the BIC requires that there be reasonable policies and procedures in place to ensure compliance with the impartial conduct standards. While we do not support including this as a warranty, we do support maintaining it as a standard of care and eliminating the prescriptive requirements of Sections II(2)(2) and (e)(2).

To the extent DOL believes it necessary to provide additional guidance regarding the types of practices that would demonstrate compliance with impartial conduct standards; we encourage it to look at the FINRA model. FINRA has developed extensive rules designed to protect investors and monitor advisor activity. Most financial institutions have already incorporated these practices in their businesses. While the standard of care under FINRA may be different (although this may change in the future), the practices for monitoring compliance with a standard of care are applicable to the best interest standard of care. It makes no sense to incur the substantial cost of defining and building new policies and practices when an existing model effectively accomplishes the goal.

4. Simplify Disclosure Requirements – We support DOL's efforts to ensure that, when making purchasing decisions, plan fiduciaries and retirement savers have enough information about fees and services to permit informed decision making. We also support DOL's conclusion that participants considering a rollover or other distribution decision should be similarly informed. The disclosure rules put into place in 2012 were designed to accomplish that objective. There are also disclosure rules under state and federal securities laws designed to accomplish this objective. We believe the BIC disclosure rules should be revised to coordinate with current ERISA and SEC or FINRA-based disclosure rules and should take into account what has been learned about providing effective communication to retirement savers.

The BIC contains numerous extremely burdensome disclosure requirements. These include point of sale disclosures, additional disclosures required when proprietary products are being sold, information that must be available to the investor on a website, and information that must be made available to the general public on a website. The cost to develop and maintain these disclosures is very significant, and there is no reason to believe they will be any more effective than current disclosures in ensuring informed decision making.

The most concerning of these requirements is the public website disclosures. The rule requires a public website containing a description of conflicts of interest, a schedule of typical fees, a model contract, a list of product manufacturers providing third-party payments and a description of those arrangements, and a disclosure of compensation practices with advisers. Building a public website will be extremely expensive and burdensome. We have arrangements with hundreds of product manufacturers, many of whom provide sub-transfer agent fees or other forms of revenue sharing that could be in scope for display on the website. Additionally, the website may require disclosure of proprietary information such as compensation practices. This could give companies who are not subject to this requirement an unfair competitive advantage. This disclosure is also completely unnecessary to the goal of ensuring that retirement savers make informed decisions after taking into account the possibility of a conflict because it duplicates information contained in point of sale and other disclosures that are more targeted to the specific consumer. The only change in behavior this disclosure is likely to prompt is an enhancement of the ability of plaintiffs' lawyers to target companies for litigation.

We have learned from our experience in implementing the 404(a)(5) disclosure rules as well as other disclosure requirements that "less is more" when attempting to communicate with individuals. Providing multiple page documents with dense text and/or numbers is overwhelming and may steer participants toward other, less accurate means of getting help. We consistently receive feedback from our customer satisfaction surveys requesting that the forms and disclosures we send be shorter and simpler. This preference for shorter and simpler communication, and the lack of effectiveness of longer and/or more complex communication, has also been documented in other sources:

- A 2013 report of the ERISA Advisory Council to the DOL stated, "Witnesses noted that behavioral studies show that individuals are overwhelmed by too much information and would benefit from streamlined communication."
- The EBSA website includes a conclusion from research conducted by the Center for American Progress that providing more concise disclosures would result in better decisions for investment of retirement assets.
- A 2011 study reported in The Guardian, "Terms and Conditions: Not Reading the Small Print can Mean Big Problems" found that only 7% of people read the full terms and conditions when buying a product or service online.

The most effective disclosures are short (ideally one page or less), clear and concise in the core messaging, and familiar in style. These types of disclosures are also the least burdensome to create and maintain and therefore have the least impact on increasing the cost of retirement services to retirement savers. We recommend that the current BIC disclosure rules be eliminated and replaced with simple, model disclosures that individuals are likely to actually read and convey the core message that there are or may be conflicts of interest in providing investment advice. We would be happy to work with DOL in developing model disclosures to use with plan sponsor fiduciaries, plan participants or IRA account holders receiving investment or distribution advice.

5. Eliminate the "Reasonable Compensation" Requirement from the Impartial Conduct Standards – ERISA §408(b)(2) places the responsibility for determining the reasonableness of compensation on the hiring fiduciary taking into account the services or other value they are receiving. Similarly, outside of the ERISA context, it is the buyer who must determine whether the price offered for a product or service is fair and competitive. Retirement savers and plan fiduciaries make significant financial decisions (such as buying a house or car or selecting a bank to work with) and understand that it is their responsibility to compare prices charged and value received. Section II(c) (2) of the BIC is in conflict with both the allocation of fiduciary responsibility under ERISA and general commercial principles.

Marketplace forces operate as a control on fees in the retirement saving industry as well as in any other industry, and it is the individual consumer who is best positioned to determine whether the price is reasonable to them. For example, a consultant may offer participant education services and charge fees in the 90th percentile as compared to others offering similar services due to the fact that they have an unusually positive record of success in increasing participation and savings rates. A fiduciary to a plan where employees are already participating at

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robust rates would find that fee unreasonable, while a fiduciary who has struggled to get participants to take advantage of their retirement plan might find it reasonable. The successful consultant is put in the position of either lowering his or her fee, which is likely to lead to a reduction in the services that produced the positive results, or risking being sued as an outlier. One likely effect of shifting responsibility for reasonableness to the seller rather than the consumer is the elimination of service offerings that may be more expensive but are very valuable to some consumers and that enhance retirement income security for American workers.

6. Create a Single BIC, Not Transaction or Product Specific Versions – The BIC rules currently include multiple variations based on type of account (IRA or other), type of entity using it (bank or other) and type of transaction (rollover or switch from commission to level fee or other). In the RFI, DOL is seeking input on whether additional variations should be developed based on specific product types (such as clean shares or fee-based annuities) or account types (such as HSAs) or other factors (such as compliance with updated SEC rules). We believe this approach is confusing to the market and does not take into account the pace at which new products and services are introduced into the plan and IRA markets or the amount of time it takes for new products to become fully integrated. For example, while clean shares are currently being developed, it is still uncertain what the take up rate will be for them as they are not the only method available for leveling compensation and, even if the interest level were high, it would be years before recordkeeping platforms could be changed to accommodate broad utilization. Creating an exemption specific to that product type is therefore both premature and an inappropriate in favoring of one product solution over others. This “product or transaction or entity” specific approach to the exemption process also guarantees DOL will need to constantly create new exemptions as the marketplace changes and evolves.

We recommend that a single BIC exemption be created that is flexible enough to accommodate existing marketplace realities as well as future innovations. We also advocate that a future version of the BIC cover a broader scope of advisory engagements, including those excluded under the current BIC such as robo-advice and discretionary advice engagements. Having a disclosure based exemption for conflicts of interest would align ERISA exemptions with prevalent practices in other areas of law, such as federal securities laws. The components of the BIC should include:

1. Acknowledgment of fiduciary status (can be included as part of 408(b)(2) disclosures)
2. A requirement to act in the best interest of the customer and to avoid misleading statements
3. A requirement to have in place policies and procedures designed to mitigate conflicts of interest
4. Model disclosures that are clear and concise and that coordinate with SEC required disclosures as well as disclosures already required under ERISA

The BIC should not include:

1. Contract or warranty requirements that trigger litigation without adding consumer protections
2. Prescriptive conditions regarding conflict of interest policies and procedures
3. Shifting the burden to sellers of determining the reasonableness of their compensation
4. Complex, expensive, duplicative and unhelpful disclosures

We believe these changes would result in a more workable rule, but reiterate that the best result of the review process would be a new rule making process that is centered on collaboration between DOL and the SEC.

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. We measure our success by how effective we are in accomplishing that goal. It seems reasonable and appropriate that a rule, while ensuring that a best interest standard is adhered to with simple and understandable disclosure of fees and potential conflicts, allows 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, consistency and clarity. I look forward to DOL's reconsideration of the Fiduciary Rule and welcome the opportunity to discuss alternatives.

Sincerely,

Edmund F. Murphy, III | President
Empower Retirement

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