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July 21, 2015

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

Office of Exemption Determinations
Employee Benefits Security Administration
(Attention: D—11217)
U.S. Department of Labor
122 C St. NW
Suite 400
Washington, DC 20001

Re: RIN 1210-AB32
ZRIN: 1210-ZA25

Ladies and Gentlemen:

PlanMember Financial Corporation ("PlanMember Financial") and its affiliates welcome the opportunity to comment on rulemaking proposals RIN 121—AB32 (the "Fiduciary Rule") and ZRIN 1210-ZA25 (the "Best Interest Contract Exemption" or "BICE")(together, the "Proposals"). PlanMember Securities Corporation ("PlanMember"), a subsidiary of PlanMember Financial, is a broker-dealer and investment adviser registered with the U.S. Securities and Exchange Commission. PlanMember offers programs primarily intended to assist citizens, particularly employees of school systems and non-profit organizations, in investing their retirement savings. We offer our programs through a nationwide network of nearly 500 independent financial advisors; we have approximately 140,000 customer accounts, who have invested approximately $8 billion through PlanMember.

PlanMember is a member of both the Financial Services Institute, Inc., and the National Tax-deferred Savings Association, which in turn is part of the American Retirement Association. PlanMember concurs with the comments filed or to be filed by both of those organizations.

We begin by acknowledging the efforts and good intentions of the Department of Labor in formulating the Fiduciary Rule and BICE. The encouragement, growth, protection, and access to retirement savings of individuals are of paramount importance to the economy and well being of the United States. As a participant of the financial services industry that assists individuals in their efforts to save for retirement, we understand the importance of providing these services in a cost effective, ethical and efficient manner. However, we also believe that it is of paramount importance that individuals be able to seek, choose, and obtain competent and individualized advice with respect to the investment programs and products that best serve them and their unique retirement goals and objectives.

Unfortunately, after much study and consideration, we have reached the conclusion that the Fiduciary Rule and BICE, as proposed, will hinder the ability of independent financial advisors to provide much needed personalized advice and assistance to individuals ("investors") in their efforts to accumulate, invest, and access their retirement savings. We believe strongly that this would do a great disservice to many investors who prefer to obtain these services from an independent business person in their community, rather than from an internet website that does not know these investors personally. Some of these investors prefer—and are willing to pay a premium for—the personal attention of a human being who has worked with them for years and who has substantive knowledge of the investors' personal and financial interests.

The PlanMember Approach

Many PlanMember financial advisors work with education professionals and employees of non-profit organizations to establish and use retirement savings accounts pursuant to Sections 403(b) and 457(b) of the Internal Revenue Code ("savings accounts"). While most of these accounts are not covered by ERISA—and are not, therefore, affected by the Proposals, many investors approaching retirement must decide whether to rollover their savings accounts into Individual Retirement Accounts ("IRAs"). At that time, these investors often seek the help of the PlanMember financial advisor who assisted them in establishing their savings account and who is familiar with the investments in the savings account. Typically, the initial conversation concerning a rollover will include a discussion of the current investments in the savings account and the type of investments that are likely to be desirable in an IRA. Such a discussion may not be concluded in a single conversation, but may extend over several weeks or months.

During this discussion, the PlanMember financial advisor will explore not only the investor's investment objectives, but also the investor's financial and personal needs—which factors may affect the investment objectives in ways not immediately understood by the investor. The PlanMember financial advisor will guide the investor through a planning and budgeting process; as part of this process, the advisor and the investor will assess the investor's likely expenditures during retirement—defining expenditures as essential, important, or discretionary. This is a detailed, complex process, which may involve facing up to some unpleasant truths. It is difficult to envision this process being guided by a software program instead of a human being.

Some investors may desire to establish an IRA in which they can actively manage their retirement savings, with occasional investment advice from their advisor. Other investors may seek to establish an investment program from which they receive a periodic distribution of a guaranteed amount without further participation by the investor or his advisor. Some investors may wish to establish an investment program that preserves substantial capital for the care of his or her dependents or heirs; others are more interested in maximizing their income without the need to preserve capital. Many PlanMember investors find that their financial advisor is an invaluable assistant in determining their financial goals as well as the investments best suited to reach those goals. Furthermore, most investors understand that it is more costly to obtain this individual level of attention and assistance; they find these services to be worth the premium that they may pay to obtain this assistance. Metaphorically, it is like individuals who join a health club for their physical health. Some are satisfied merely to have access to the equipment and resources of the club—they feel comfortable mapping out their own work-out program; others desire or need a personal trainer to determine their needs, map out a program, teach them to use the equipment, <u>and provide ongoing motivation</u> to pursue the program. At PlanMember, we believe that investors should be able to pursue the level of service with which they feel comfortable.

We do not believe that individual investors or participants in small retirement plans will be well served by so-called "roboadvisers" that are willing to services millions of small accounts, so long as they can fit themselves into one of a limited number of investment shoeboxes. Nor do we believe that these investors will be well served by mega-investment firms that can spread the cost of compliance and regulatory disclosure over many accounts, so long as the accounts can meet the multi-hundred-thousand-dollar minimums. However, to the extent that the Proposals:

- institute prohibitively costly compliance regimens, or
- make it extremely difficult to carry on sensitive discussions without first dealing with mountains of paperwork—much of it confusingly similar to (or different from) that currently required by other regulators, or
- require “mom-and-pop” investment shops to engage in a major information technology effort well beyond their means, or
- effectively prohibit the use of investment vehicles that are appropriate and suitable for many investors,

We believe that the Proposals should be reconsidered in light of the many comments that have been and will be filed to ensure that the unexpected results of the regulatory regime will not adversely affect the very investors that they were intended to protect.

Specific Comments

Recognition of existing standards of conduct

The tone of the Proposals implies a conclusion that financial advisors are not currently subject to stringent standards of conduct. The Proposals would impose the Best Interest and Impartial Conduct Standards on financial advisors already subject to standards of conduct adopted by their primary regulators, such as the fiduciary standard under the Investment Advisers Act of 1940 and the suitability standard under the rules of the Financial Industry Regulatory Authority (“FINRA”). Although these standards have been much maligned, a strong argument can be made that they protect investors as thoroughly as the standards in the Proposals.[1]

While the intent of the Proposals to promulgate a standard of conduct particularly applicable to investors saving for their retirement, the imposition of such new standards will also have unintended adverse consequences. Among these are:

- the uncertainties of interpretation of a novel set of rules;
- the likelihood of litigation until such interpretations are fully developed; and
- the possible conflict between the standards set by the primary regulators and those contained in the Proposals.

While these factors may not appear to have any direct effect on investors, they will have a direct effect on financial advisors that currently provide services in this sector—with an inordinate adverse effect on small advisors. To the extent that small advisors are disadvantaged in the retirement savings market, they may decide to withdraw from the market altogether. In the aggregate, the withdrawal of independent advisors will reduce the choices available to investors—both in terms of sources of advice, and in terms of the type and depth of service available. Once again, we would urge that the Department not take actions that will serve primarily to reduce the choices available to investors without providing a substantive increase in benefits.

Reconsideration of Disclosure Requirements

The financial advisors who provide services to retirement investors are currently subject to extensive disclosure regimes, covering both their

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[1] Steven W. Stone, et al., "Department of Labor Retirement Initiative Fails to Consider Current Regulatory Regime…" Morgan, Lewis & Bockius LLP, March 2015.

services[2] and the managed investment products that they offer.[3] Furthermore, the existing disclosure requirements have been developed over many years of trial and tribulation. While there may be a need for certain retirement-oriented disclosures to be made to investors upon establishing a retirement account, much of the disclosure envisioned by the Proposals is substantially duplicative and confusingly similar to that already required by other financial regulators.

For example, Section III(a)(1) of the BICE calls for the Total Cost of an Asset for 1-, 5-, and 10-year periods expressed as a dollar amount. This disclosure is substantially the same as the fee table required by Item 3 of Form N-1A, the SEC registration statement for mutual funds, with two significant differences. First, the BICE disclosure must be expressed as a dollar amount, rather than as a percentage of offering price or assets. While the Department may feel that this provides potential investors with information that they would not otherwise be able to discern from the prospectus fee table, we would submit that this gives investors too little credit—after all, investors are bombarded hourly with advertisements for retail products that trumpet "10% off" without any obvious deleterious effects.

The second difference is that at least one of the requirements of BICE is directly opposite the disclosure philosophy of the SEC and FINRA. Section III(a)(1) of BICE call for disclosure of the Total Cost "of investing in the Asset for 1-, 5-, and 10-year periods…assuming…reasonable assumptions about

2 E.g., Form ADV for investment advisers and Form BD for broker-dealers. (Form BD is indirectly available to investors through the Broker-Check system offered by FINRA.)

3 Prospectuses required for both open-end investment companies (mutual funds) and variable annuities as prescribed by the Investment Company Act of 1940 and the rules thereunder promulgated by the U.S. Securities and Exchange Commission ("SEC").

investment performance that are disclosed." The SEC and FINRA have repeated expressed their opposition to the use of projected performance and cost, preferring only the disclosure of past, actual information. Item 3 of Form N-1A does not permit projected or future performance to be used for purposes of cost determination; rather, only past costs can be used. To the extent that a product has not been in existence for a 5-year period, costs since inception of the product are given. We strongly suggest that the Department withdraw this requirement.

Website Disclosure

Section III(c) of BICE requires that a Financial Institution maintain a Web page with substantial information regarding Assets that may be or have been offered to IRA investors. We would note that many small financial advisors—who may provide services to IRA investors—do not maintain a website; this requirement would force a hardship on such advisers, either requiring them to expend a substantial amount of time, effort and money to create a website solely for the purpose of providing this disclosure or abandon their IRA investors, current and prospective.

Furthermore, we believe that much of the disclosure called for by this section of BICE is duplicative of that required by the SEC and FINRA with respect to both services and investment products offered to IRA investors. We have reservations whether IRA investors would have interest in knowing this information with respect to products that they have no intention of purchasing or considering for purchase.

Finally, we believe that the cost of establishing and maintaining such a Web page would discourage many small and independent financial advisors from continuing their involvement with IRA investors—thereby leaving such investors to a choice between a substantially larger firm (if they have the requisite account size) or a roboadviser.

Increased Legal Risk

As noted above, the Proposals would impose a substantial number of new requirements on financial advisors, including duplicative and confusingly similar disclosures, expansive terms and concepts without proven definitions, and untested contractual terms. All of these requirements provide the opportunity for litigation by aggressive members of the plaintiffs' bar. Such litigation—whether or not genuine in intent—will have the aggregate effect of placing financial advisors at risk. For example, will a financial advisor who offhandedly answers an investor's question about a particular security be held to have violated the BICE because he did not have a contract in place—even though it is six months later when the investor calls to open an IRA? Even though Department staffers may assure advisors that this will not be the case, it will be in the hands of the courts to make the final decisions—and some will not follow the advice of the Department.

Large advisory and brokerage firms may be able to take such litigation in stride—and may be able to afford the increased costs of errors and omissions insurance resulting from such litigation. However, smaller independent advisors operating on a narrow profit margin will strongly consider the additional risk—and insurance costs—they may incur when working with IRA investors, and decide that the risks do not justify the benefits. These decisions are not generally due to a single large risk, but due to a large number of small, incremental risks.

In closing, we would note that Secretary Perez expressed his pleasure with the ability of Wealthfront, a roboadviser, to manage small accounts efficiently and inexpensively. But a founder of Wealthfront has stated that investors likely to choose his firm "aren't in the middle of the country and they don't need handholding."[4] In our experience, it is the small independent financial advisors who are in the middle of the country and do provide the handholding.

We strongly urge the Department to consider the impact that this requirement may have on smaller financial advisers, and whether the cost to provide this information in this format outweighs the foreseeable loss of many small financial advisors that currently service these markets.

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In closing, we again would like to express our appreciation for the opportunity to comment upon the Proposals. We acknowledge the effort and thought that the Department has expended in the development of the Proposals. However, we believe that the adoption and implementation of the Proposals in their current form would greatly and adversely affect the availability of financial advice to small investors as they seek to save for their retirement.

Respectfully submitted,
PLANMEMBER FINANCIAL CORPORATION

Byron F. Bowman

Byron F. Bowman
General Counsel

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4 "Wealthfront takes on Wall Street—Silicon Valley Style," Paul Sloan, CNET, December 1, 2011.