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July 17, 2017

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

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

To Whom it May Concern:

The Insured Retirement Institute ("IRI")[1] appreciates the opportunity to provide these comments to the Department of Labor (the "Department") in response to the Department's request for information ("RFI") regarding the final regulation defining the term "fiduciary" (the "Regulation") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the Best Interest Contract Exemption (the "BIC Exemption"), and the amendments to prohibited transaction exemption 84-24 (the "Amended PTE 84-24") issued by the Department on April 8, 2016 (collectively, the "Fiduciary Rule"). This letter is being provided in response to Question 1 in the RFI, regarding the potential delay of the January 1, 2018 applicability date (the "Applicability Date") for certain provisions of the BIC Exemption and Amended PTE 84-24

[1] IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95 percent of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country.

(the "Covered Provisions"). IRI will respond to the remainder of the RFI in a future comment letter.

For the reasons outlined below, IRI respectfully recommends that the Department delay the Applicability Date for the Covered Provisions until the later of January 1, 2020 or the date that is eighteen (18) months after the Department takes final action on the Fiduciary Rule. Moreover, we urge the Department to publicly announce its decision with respect to the possible delay of the Applicability Date as soon as practicable. Prompt action will enable our members and other industry participants to appropriately align their compliance efforts with the Department's intent and expectations.

Executive Summary

1. If the Department adopts changes to the Fiduciary Rule, the industry will need adequate time to implement those changes.
2. Even if the Department makes no changes to the Fiduciary Rule, the implementation timeline is unworkable and should be delayed.
3. Delaying the applicability date will provide time for the Department to constructively engage with the SEC and other regulators to ensure regulatory clarity and consistency.
4. Delaying the applicability date will allow the Department to assess the impact of the expanded definition of fiduciary and the impartial conduct standards with minimal risk of consumer harm.
5. A delay is appropriate in light of the pending litigation regarding the Fiduciary Rule.

IRI's views regarding a possible delay in the Applicability Date are explained in greater detail below.

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1. If the Department Adopts Changes to the Fiduciary Rule, the Industry Will Need Adequate Time to Implement Those Changes.

   The preamble to the RFI clearly states that, concurrent with the ongoing review of the Fiduciary Rule pursuant to the presidential memorandum issued by President Donald J. Trump on February 3, 2017, the Department is "seek[ing] public input that could form the basis for new exemptions or changes/revisions" to the Fiduciary Rule. Once the Department makes a final decision on the Fiduciary Rule – and regardless of whether that decision is to make extensive changes, minor modifications, or no changes at all – firms will need a reasonable amount of time to assess the final rule and prepare for compliance. Even if the regulatory process moves at an aggressive pace, the Department will be hard-pressed to issue a revised final rule before November 2017,[2] less than 60 days before the Applicability Date. Such a short implementation period will inevitably lead to unnecessary market disruptions and consumer confusion.

Our members are committed to fully complying with all laws, rules and regulations applicable to them, and will work in good faith to achieve compliance when required. However, an unreasonably short implementation period will force many institutions to implement sub-optimal compliance procedures, while others may be unable to achieve compliance within such a short time frame and would therefore be forced to suspend the delivery of services to retirement savers.

Delaying the Applicability Date will give firms and advisers adequate time to develop and implement appropriate, effective and efficient processes and procedures to comply with the final version of the Covered Provisions (including any changes made by the Department based on public comments on the questions raised in the RFI). A delay will also allow time for the Department to provide additional guidance regarding various aspects of the Covered Provisions, and for the industry to implement such additional guidance. If the end goal is to help Americans save and have a secure retirement, we firmly believe it is in all of our best interest to get the rule and implementation done correctly to minimize disruption and confusion across the supply chain.

2. Even if the Department Makes No Changes to the Fiduciary Rule, the Implementation Timeline is Unworkable and Should be Delayed.

   As we noted in previous comment letters, the timeline for implementation of the Fiduciary Rule significantly underestimated the amount of time annuity providers and distributors would need to come into compliance. The Fiduciary Rule is the most significant change to the investment advice delivery system in 40 years, yet the Department provided a far shorter implementation period than it has typically provided for new regulations.[3] A delay in the Applicability Date for the Covered Provisions, along with adoption of a more orderly process going forward for ultimate disposition of the Fiduciary Rule, will help to avoid detrimental market disruptions resulting from the impracticable implementation timeline.

   The requirements and conditions included in the Covered Provisions are exceedingly complex and will require development of new policies and procedures to ensure

[2] This assumes that (i) comments on questions 2 through 18 in the RFI are submitted to the Department in early August, (ii) the Department takes 30 days to review the comments and develop a proposal to revise the Covered Provisions, (iii) the Department opens up a 30 day comment period on the proposal, and (iv) the Department takes 30 days to review the comments on the proposal and develop a final rule.

[3] For example, the Department provided a two year implementation period for service providers to implement the section 408(b)(2) regulations.

compliance, as well as massive and expensive information technology system re-designs and build outs to support. This is further complicated by the fact that many distributors work with retirement and non-retirement accounts. These distributors must determine whether to (a) only apply the Fiduciary Rule to retirement accounts and make no changes to non-retirement accounts, or (b) follow the same standards for both types of accounts, bearing in mind that another regulator (e.g., the SEC or state insurance regulators) could soon adopt potentially inconsistent standard of conduct rules for non-retirement accounts. Regardless of how each distributor decides to proceed, they will need to implement complex changes to update their existing infrastructure, while concurrently working on updates to products and services offered, build requirements for managing grandfathered assets, establish new policies and procedures tied to different exemptions, provide adequate training to their advisors and minimize client confusion.

As noted above, our members are fully committed to complying with the Fiduciary Rule, and have been working in good faith to be ready for implementation on the Applicability Date. However, the Department's ongoing review of the Fiduciary Rule has reasonably led many firms to scale back, slow down or completely pause their efforts to implement the Covered Provisions. Many firms have halted or slowed efforts to develop or adopt innovative new solutions designed to comply with the Fiduciary Rule, such as fee-based indexed annuities. Recent public comments by senior Department officials[4] and the issuance of the RFI have confirmed that the Department is contemplating significant modifications to the Covered Provisions, further supporting the decision to put implementation efforts on hold until the Department concludes its review of the Fiduciary Rule.

For professional insurance agents who are not affiliated with a broker-dealer, many of whom are small businesses or sole proprietorships, the situation is even more dire. As we have noted in previous comment letters, for many retirement savers, professional insurance agents are an important source of financial advice and assistance and access to annuities and other products that provide financial security in retirement. This is particularly the case with regard to fixed indexed annuities ("FIAs"). In 2015, about 63 percent of FIAs were sold by professional insurance agents.

[4] *See, e.g.,* Rebecca Moore, *PSNC 2017: An Inside View of the DOL*, PlanSponsor.com (June 12, 2017), available at http://www.plansponsor.com/PSNC-2017-An-Inside-View-of-the-DOL/?fullstory=true; Kristen Ricaurte Knebel, *Fiduciary Rule Could See Delays Past January*, BNA Pension & Benefits Daily (June 8, 2017), available at https://www.bna.com/fiduciary-rule-delays-n73014453060/.

This also applies to group annuities, particularly group variable annuities, which serve as a widely-utilized product solution offered by insurance companies for employers seeking to sponsor a 401(k) or other workplace retirement savings plan for their employees.[5] Group variable annuities provide access to separate account investment vehicles representing a broad array of asset classes from which a plan sponsor may choose to make available in their workplace retirement plan. Professional insurance agents serve an important role today in helping small employers form and maintain retirement plans, and in educating plan sponsors and employees about the importance of planning for retirement.

During the transition period, these agents can rely on PTE 84-24, but after the Applicability Date, Amended PTE 84-24 will no longer be available for FIAs and many group annuities, severely limiting the ability of professional insurance agents to continue serving their clients. These agents will be unable to satisfy the BIC Exemption unless they join a broker-dealer or other "Financial Institution" willing to assume the associated fiduciary liability. This option is not viable for most insurance-only licensed agents who offer FIAs or group annuities. The Department has proposed to adopt a new version of the BIC Exemption specifically designed for insurance intermediaries that provide various support services for insurance agents, such as independent marketing organizations and field marketing organizations. However, this proposed exemption has serious flaws (as we explained in our comment letter on the proposal), and the Department has not given any indication as to whether or when it intends to take action on the proposal. Unless the Department delays the Applicability Date, there is simply no way for the Department to address those concerns and finalize the exemption in time to avoid a disruption in services to clients of affected agents.

3. <u>Delaying the Applicability Date for the Covered Provisions Will Provide Time for the Department to Constructively Engage with the SEC and Other Regulators to Ensure Regulatory Clarity and Consistency.</u>

In a Wall Street Journal op-ed on May 22, 2017, Secretary Acosta acknowledged that the Securities and Exchange Commission ("<u>SEC</u>") has "critical expertise" regarding the regulation of financial professionals, and encouraged the SEC to be a "full participant" as the Department considers possible revisions to the Fiduciary Rule. SEC Chairman Clayton subsequently issued a public statement[6] in which he accepted the "invitation to engage constructively" with the Department on this regulatory initiative. In the same statement, Chairman Clayton asked for public comments to help the SEC "evaluate the

[5] In 2015, 5.7% of 401(k) assets, or $251 billion, were held in group annuities. *See*, Cerulli Associates, *The Cerulli Report, U.S. Retirement Markets 2015*.
[6] Available at https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.

range of potential regulatory actions." In addition, the National Association of Insurance Commissioners (the "NAIC") has formed a working group to consider possible revisions to the NAIC Suitability in Annuity Transactions Model Regulation (the "NAIC Model"), including possible incorporation of a best interest standard into the NAIC Model.

We believe it is critical that these three regulatory bodies – the Department, the SEC and the NAIC – engage constructively with each other to ensure regulatory clarity and consistency. Absent such engagement, financial professionals could easily find themselves subject to three very different and incompatible sets of rules, continuing the very same consumer confusion over standards of care we are all trying to address. We commend the Department and Secretary Acosta for expressing an interest in engaging with the SEC, and we strongly encourage similar engagement with the NAIC and state insurance regulators.

Such engagement will, however, take time and should not be approached with any artificial deadlines looming. As such, we believe the Department should delay the Applicability Date for the Covered Provisions to allow adequate time to effectively engage with the SEC, the NAIC, and other interested regulators on this important subject.

4. Delaying the Applicability Date Will Allow the Department to Assess the Impact of the Expanded Definition of Fiduciary and the Impartial Conduct Standards with Minimal Risk of Consumer Harm.

As of the date of this letter, the expanded definition of fiduciary investment advice and the Impartial Conduct Standards (collectively, the "Applicable Provisions") have been applicable for approximately one month. In allowing the Applicable Provisions to take effect on June 9, 2017, the Department concluded that "much of [the consumer harm caused by conflicted advice] could be avoided through the imposition of fiduciary status and adherence to basic fiduciary norms, particularly including the Impartial Conduct Standards." With this in mind, the Department should be confident that there is little to no risk that consumers will be harmed by a delay in the Applicability Date.

Moreover, if this assertion proves to be correct, we believe the additional costs associated with the Covered Provisions would far outweigh the potential benefits of those requirements. However, neither the Department nor our members will be able to fully assess the relative costs and benefits of the Covered Provisions just a month or even six months after the Applicable Provisions became applicable. As such, we believe the Department should delay the Applicability Date for the Covered Provisions to allow time for it to gather meaningful data on the effectiveness of the Applicable Provisions.

5. <u>A Delay is Appropriate in Light of the Pending Litigation Regarding the Fiduciary Rule.</u>

   The Fiduciary Rule continues to be the subject of pending litigation. If any of the courts before which these legal challenges are being heard rules against the Department, all or significant portions of the Fiduciary Rule could be invalidated. Even a relatively small change – such as the Department's recent decision to concede that the prohibition on class action waivers in the BIC Exemption violates federal law and should be vacated – will require firms to make time-consuming and costly changes to their client agreement forms, information technology systems, and compliance policies and procedures. As such, IRI believes it would be entirely appropriate, beneficial and consistent with past precedent to delay the Applicability Date for the Covered Provisions pending full resolution of this litigation.

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If you have questions about anything in this letter, or if we can be of any further assistance as the Department reviews the Fiduciary Rule, please feel free to contact me or Lee Covington, IRI's Senior Vice President and General Counsel.

Sincerely,

Catherine J. Weatherford
President & CEO
Insured Retirement Institute