Katten
Katten Muchin Rosenman LLP

575 Madison Avenue
New York, NY 10022-2585
212.940.8800 tel
www.kattenlaw.com

FRED M. SANTO

fred.santo@kattenlaw.com
212.940.8720 direct
212.940.8776 fax

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Via Electronic Submission (ebsa.fiduciaryruleexamination@dol.gov)

Office of Exemption Determinations, EBSA
(Attention: D-11933)
U.S. Department of Labor
200 Constitution Avenue, NW
Suite 400
Washington, DC 20210

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

Dear Sir or Madam:

In response to the U.S. Department of Labor's ("**DOL**") request for information about the Fiduciary Rule and related exemptions, Katten Muchin Rosenman LLP ("**we**") submitted a letter on July 21, 2017, recommending the extension of the transition period for the Fiduciary Rule to no earlier than the fourth quarter of 2018. A copy of that letter is enclosed herewith. As noted in that first letter, we are submitting this second comment letter to provide our views on the Best Interest Contract Exemption ("**BIC Exemption**") as it applies to certain types of investment managers that we represent and to explain their concerns about how the BIC Exemption requirements following the transition period would affect their ability to provide investment services to retirement investors.[1] We support the DOL's commitment to protecting retirement investors while permitting firms to effectively provide investment services, as well as the DOL's decision to seek public input in achieving this goal. We welcome this opportunity to submit comments.

As we advised you in our first submission, we represent many investment managers that are registered either as investment advisers under the Investment Advisers Act of 1940, as

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[1] The term "retirement investor" as used herein refers to both those that are "Retirement Investors" as defined in the BIC Exemption and those that are represented by "independent fiduciaries with financial expertise" under the Fiduciary Rule.

amended ("**IAA**"), as commodity pool operators and/or commodity trading advisors under the Commodity Exchange Act, as amended ("**CE Act**"), or both (collectively, "**Managers**"). These Managers manage privately offered investment funds and in many cases, also manage assets of clients on a discretionary basis through managed accounts. As compensation for its management services to a private fund or managed account client, a Manager normally receives a management fee (typically between 1% and 2% of the assets under management) and/or a performance allocation or fee (typically between 10% and 20% of net profits, as determined under a pre-established formula, over a specified period, whether monthly, quarterly, or annually). Consequently, a Manager that provides individualized advice to a retirement investor about its making a fund investment or opening a managed account, or about maintaining, adding to, or withdrawing that investment, would be making "recommendations" for compensation under the Fiduciary Rule. We note that, with respect to a retirement investor that is subject to ERISA, a Manager will already be a fiduciary under ERISA Section 3(21)(A)(i) for a separate account, and may be for a fund, if the fund's assets are deemed to include "plan assets" under ERISA Section 3(42) and Regulation § 2510.3-101.

Managers that make recommendations to retirement investors have taken steps to comply with the Fiduciary Rule, relying on the "independent fiduciary" safe harbor for retirement investors that are represented by "independent fiduciaries with financial expertise" within the meaning of the Fiduciary Rule and on the BIC Exemption for retirement investors—such as individual retirement accounts (IRAs), small retirement plans, and similar accounts—that are not so represented ("**BIC Clients**").

This letter addresses the concerns of Managers that have BIC Clients and wish to continue making recommendations to BIC Clients in the future. Presently, these Managers are comfortable relying on the BIC Exemption during the transition period, i.e., the ICS requirements. However, these Managers will face substantial burdens in complying with the BIC Exemption once the transition period expires as currently scheduled on December 31, 2017, and the full range of BIC Exemption requirements become applicable. Moreover, Managers that offer private investment funds, which are "Proprietary Products" as defined in the BIC Exemption, will be required to comply with a supplemental set of BIC Exemption requirements that apply specifically to firms limiting their recommendations, in whole or in part, to Proprietary Products. While the DOL has provided a streamlined BIC Exemption for "level fee fiduciaries" (commonly known as "**BIC Lite**"), it is unavailable to Managers offering Proprietary Products as a result of FAQ Number 19 in the Conflict of Interest FAQs (Part I – Exemptions) issued by the DOL on October 27, 2016.

If the requirements of the full BIC Exemption have applicability to investors whose financial advisers receive compensation in the form of commissions, trailing commissions, sales loads, 12b-1 fees and revenue sharing payments ("**Financial Advisers**"), a subject about which we express no view, they should not apply to Managers that do not receive commissions or other transaction-based compensation. We believe that this fundamental difference in the types of compensation received, as well as other differences from Financial Advisers, render many components of the full BIC Exemption requirements duplicative of the requirements already imposed on Managers and produce a significant compliance burden on them without meaningfully enhancing the protection BIC Clients have against conflicts of interests with respect to Managers. In addition, the Fiduciary Rule implicates various federal securities laws issues applicable to Managers, and there has not yet been an opportunity for the Securities and Exchange Commission ("**SEC**") and the DOL to coordinate on those issues. In light of the foregoing, if the DOL still believes that the BIC Exemption is in fact a potentially viable option for Managers, we respectfully request that, for the reasons set forth below, the DOL either (1) suspend application of the full BIC Exemption requirements to Managers until the DOL and the SEC have had the opportunity to consider and coordinate the effects of the Fiduciary Rule on Managers or (2) tailor the BIC Exemption requirements to the business of Managers by permitting them to rely on BIC Lite with certain clarifications, which would allow them to effectively provide investment services to BIC Clients without compromising BIC Clients' protection from conflicts of interests. Consequently, we request, as in our first letter, that the DOL extend the transition period for the Fiduciary Rule until no earlier than the fourth quarter of 2018, so as to provide adequate time for the issues raised below to be fully considered and addressed, as well as to provide the SEC with time to comment and to have those comments considered by the DOL.

Certain of the Full BIC Exemption Requirements Impose Burdens on Managers Without Substantively Enhancing Protections for Retirement Investors.

Managers employ a fundamentally different business model than Financial Advisers, because Managers are not compensated on a transactional basis. Instead, Managers generally receive a fixed management fee equal to a percentage of the fund's or managed account client's assets under management and/or a performance fee or allocation equal to a percentage of the net profits, as determined under a pre-established formula, of the fund's or managed account's investments on an aggregate basis over a specified time period (monthly, quarterly, or annually). While Managers may make "recommendations" in the course of communications with retirement investors about initiating, continuing (including adding to or withdrawing from), or terminating a fund or managed account investment, a Manager, unlike a Financial Adviser, is not engaged in ongoing recommendations of separate financial product investments. We note that Managers already are subject to substantial disclosure obligations under federal securities and/or commodities laws and regulations that require them to disclose all material information about their compensation structures, as well as their business and the services they provide, the conflicts of interests associated with their compensation (as well as material conflicts arising from any other aspects of their operations), any other costs and expenses, and related risks associated with the investment. The foregoing requirements are set forth in the various federal securities laws and the CE Act, as well as the rules of self-regulatory organizations appointed under these statutes, i.e., the Financial Industry Regulatory Authority, Inc. (FINRA) and the National Futures Association (NFA). Taking this into account, certain of the full BIC Exemption requirements, discussed below, appear to be superfluous as applied to Managers.

Disclosure Obligations

The full BIC Exemption requirements would create multiple, overlapping disclosure obligations: an initial disclosure, a "transaction-based disclosure," and a "web disclosure."

Initial and Transaction-Based Disclosure

A Manager would be required, on or before the execution of a recommendation, to provide the retirement investor with an initial written disclosure that, among other things:

- informs the retirement investor of the services provided by the Manager and how the retirement investor will pay for them;
- describes material conflicts of interests and discloses any fees or charges imposed by the Manager on the retirement investor's account;
- specifically discloses costs, fees, and compensation, including third party payments, with respect to recommendations, "described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, and nature in sufficient detail" to allow the retirement investor to make an informed judgment about "the costs of the transaction and about the significance and severity" of the conflicts of interests; and
- provides contact information for a Manager's representative with whom the retirement investor can discuss any concerns about the advice or services received.

Managers must also, pursuant to the "transaction-based disclosure" requirement, provide a subset of the foregoing information on an annual basis or earlier if there are material changes.

As noted above, Managers already are required by various federal securities laws and/or the CE Act to provide materially accurate disclosures of the foregoing items, which would be included in the offering documents provided to private fund investors and in the account documentation provided to managed account clients (and, in the case of Managers that are registered investment advisers, included in their Form ADV-related disclosures that are made available to all clients). Consequently, these additional disclosures would not add substantively to the information that Managers affirmatively provide to their fund investors and managed account clients. They would in fact constitute duplicative information of no additional value to retirement investors. Managers do not provide retirement investors with a stream of financial product recommendations, so such additional disclosures would not, in this context, seem to advance the purposes of the Fiduciary Rule.

The initial disclosure under the full BIC Exemption requirements must also indicate whether the Manager will monitor the retirement investor's investments and alert it to any recommended changes (and, if monitoring will be implemented, the frequency of the monitoring and the reasons for which alerts will be given). Again, this disclosure is not necessary with respect to Managers: private fund investors and managed account clients that look to retain a Manager are seeking the Manager's discretionary investment services and intend to give the Manager responsibility and authority to make, monitor, and adjust their investments as the Manager deems appropriate (subject to agreed-upon investment guidelines and restrictions, any material changes to which Managers already are under a fiduciary obligation to disclose).

"Web Disclosure" Requirement

Managers would also be required establish "web disclosure" on a publicly accessible website that is updated at least quarterly and that contains, among other things, a description of the adviser's "business model," material conflicts of interests associated with it, a schedule of typical account or contract fees and service charges, a model contract or other model notice of the contractual terms (if applicable), a description of the policies and procedures relating to conflicts-mitigation and incentive practices, and a disclosure of the Manager's compensation and incentive arrangements. This requirement raises a potential legal concern. Managers that advise private investment funds maintain a very limited or even no online presence in order to rely on the private offering rules under Regulation D of the Securities Act of 1933, as amended ("**1933 Act**"), which exempts securities from registration thereunder if they do not involve a public offering. While Managers that provide solely managed account services do not face a similar restriction, a Manager that offers both managed accounts and private investment funds must limit its online presence for this same reason.

The substantive online presence that the web disclosure requirement demands of Managers could potentially cause their funds to be deemed to be engaged in public advertising or solicitation, which would compel Managers either to rely on Rule 506(c) under Regulation D which permits public advertising and solicitation (as to which there is limited guidance from the SEC and hence limited use by Managers) or to fully register their funds' securities under the 1933 Act, both of which would prohibit Managers from conducting their business as they currently do. While the BIC Exemption waives the website disclosure when it is "otherwise prohibited by law," this provides no relief for Managers, since they are not actually prohibited from providing web disclosure: instead, the securities laws framework under which Managers would be permitted to provide it would be so onerous as to be completely impractical.

In addition, like the initial and transaction-based disclosure requirements, the web disclosure requirement places a substantial administrative cost on Managers to reiterate information they currently provide in fund offering documents and managed account documentation (as well as Form ADV-related disclosures in the case of Managers that are registered investment advisers), which Managers are mandated to update promptly upon the occurrence of any material changes. These multiple disclosures on the same subjects are, at best, duplicative; at worst, they could make it less likely that BIC Clients will read important disclosures and give them proper consideration.

Application of BIC Exemption to Managers Offering Proprietary Products; Availability of BIC Lite

The full BIC Exemption requirements also impose supplemental obligations ("**Supplemental Obligations**") on those Managers that limit their recommendations partially or entirely to "Proprietary Products," which includes any product managed, issued, or sponsored by a Manager. The Supplemental Obligations would therefore apply to Managers that offer private investment funds (but not to Managers offering discretionary investment services through a managed account, where there is no investment "product" involved). Under the Supplemental Obligations, these Managers must not only comply with other full BIC Exemption requirements but also meet additional disclosure and documentation obligations to satisfy the "best interest" component of the ICS. Moreover, as a result of FAQ Number 19 issued by the DOL in October 2016, Managers offering private investment funds are prohibited from relying on the streamlined relief for "level fee fiduciaries" under BIC Lite because they offer Proprietary Products.

For the same reasons we have set forth above in respect of the full BIC Exemption requirements, we respectfully submit that we see no benefit to a Manager's BIC Clients from imposing the Supplemental Obligations or prohibiting the use of BIC Lite by Managers. A private fund investor dealing with a Manager has the complete knowledge and expectation that the Manager is offering a Proprietary Product and if the investor is interested in the fund, it is precisely because the fund is a product maintained and advised by that specific Manager. It also would be an incongruous result if a Manager could offer discretionary investment advice through a managed account while relying on BIC Lite and without having to comply with the Supplemental Obligations, but would not be able to do so when offering the same through a private investment fund, as the potential conflicts of interests addressed by the Supplemental Obligations are not present in either situation. Moreover, all fund investors must be (i) "accredited investors" as defined in Regulation D except in limited circumstances *and* (ii) (1) either "qualified purchasers" under the Investment Companies Act of 1940, as amended ("**ICA**") (in the case of private investment funds exempt from registration under ICA Section 3(c)(7)), or "qualified clients" as defined in the IAA (in the case of private investment funds exempt under ICA Section 3(c)(1)) or (2) "qualified eligible persons" as defined in the regulations under the CE Act. While the DOL has concluded that it would be inappropriate to extend complete exemptive relief from the Fiduciary Rule to advisers solely because they make recommendations to persons that satisfy these eligibility criteria, we believe that where the potential conflicts addressed by the Supplemental Obligations are not present—as is the case in this context—this is a relevant consideration that weighs against imposing the Supplemental Obligations or prohibiting Managers offering private investment funds from relying on BIC Lite.

There is also some uncertainty as to whether a performance fee or allocation would constitute a "level fee" and therefore whether a Manager receiving performance-based compensation would qualify as a "level fee fiduciary" eligible to rely on BIC Lite. As noted above, performance-based compensation is calculated as a fixed percentage of a fund or managed account's net profits over a specified time period, and is fundamentally different from the commissions and other transaction-based compensation with which the DOL has expressed specific concern. By helping to ensure that Managers have "skin in the game," performance-based compensation in fact has the effect of aligning the interests of Managers with those of their fund investors and managed account clients. While such compensation could potentially incentivize Managers to take more risk with investments, this conflict, which is already comprehensively disclosed to fund investors and managed account clients, is one that arises in respect of the Manager's discretionary investment management and not its recommendations under the Fiduciary Rule. Further, we note that the DOL has previously analyzed performance fees and allocations in several Advisory Opinions,[2] and we would ask the DOL to clarify that a performance fee or allocation that is structured like those described in those Advisory Opinions would constitute a "level fee" for purposes of BIC Lite.

Requested Relief

In light of the foregoing considerations, if the DOL continues to believe that the BIC Exemption is a viable path for Managers, we respectfully request that the DOL permit Managers to rely on BIC Lite, which would require Managers to adopt and adhere to the ICS and also provide BIC Clients with a written statement of fiduciary status.[3] This exemptive relief would not only address the concerns of Managers while posing minimal modifications to the DOL's BIC Exemption regime, but would also help to ensure that BIC Clients continue to have a more complete array of investment options available to them. Without this relief, the significant administrative burdens and uncertainties associated with the full BIC Exemption requirements may cause Managers to cease accepting BIC Clients as fund investors and managed account

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[2] *See, e.g.*, DOL Adv. Op. 99-16A (Dec. 9, 1999).

[3] The third BIC Lite condition concerning recommendations with respect to rollovers to an IRA from a retirement plan or another IRA would be inapplicable to most Managers, who generally do not provide such recommendations. We express no view on whether this condition would be appropriate for Managers that do make such recommendations.

clients and to very well compel existing (including many longstanding) BIC Clients to terminate their fund investments or managed accounts. Without detailed consideration of the issues we have raised above and of any commentary from the SEC, which is the primary regulator of the vast majority of our Managers, we do not believe that effectively eliminating Managers as potential investment options for BIC Clients would serve the public interest. In order to ensure that there is ample time for the foregoing to be considered and resolved, we again respectfully request that the DOL extend the transition period for the Fiduciary Rule until no earlier than the fourth quarter of 2018.

We appreciate the DOL's consideration of our comments on the Fiduciary Rule and the BIC Exemption. We trust that you will not hesitate to contact us if we may provide any additional information or assistance to you during this process. Please contact Fred M. Santo at (212) 940-8720 or Wendy E. Cohen at (212) 940-3846 with any questions regarding these matters.

Respectfully Submitted,

KATTEN MUCHIN ROSENMAN LLP

By: ______________________
Fred M. Santo, a Partner

By: ______________________
Wendy E. Cohen, a Partner

Enclosure

Katten
KattenMuchinRosenman LLP

575 Madison Avenue
New York, NY 10022-2585
212.940.8800 tel
www.kattenlaw.com

FRED M. SANTO
fred.santo@kattenlaw.com
212.940.8720 direct
212.940.8776 fax

July 21, 2017

Via Email: EBSA.FiduciaryRuleExamination@dol.gov
Office of Exemption Determinations, EBSA
(Attention: D-11933)
U.S. Department of Labor
200 Constitution Avenue, NW
Suite 400
Washington DC 20210

Re: Request for Information (RIN 1210-AB82)

Dear Sirs:

This will respond to your request for information as set forth in the Federal Register Notice dated July 6, 2017 with respect to the recently adopted Fiduciary Rule.

We represent several private investment funds sponsored by firms registered as investment advisers under the Investment Advisers Act of 1940, as amended and as commodity pool operators and commodity trading advisors under the Commodity Exchange Act, as amended (collectively, our "Manager Clients"). These Manager Clients are the investment managers to their private investment funds and also in many instances manage the assets of clients on a discretionary basis through managed accounts. For the reasons set forth below, it is our view that the Transition Period (as defined in the Fiduciary Rule) should be extended beyond the December 31, 2017 date. It is our intention to comment in a subsequent letter on the substance of the BIC Exemption as it applies to these Manager Clients.

In order to comply with the Fiduciary Rule, our Manager Clients wishing to render "investment advice" (as contemplated in the Fiduciary Rule) to Retirement Investors have taken appropriate steps to avail themselves of either the "Independent Fiduciary Safe Harbor" or the so-called "BIC Exemption." This letter addresses the concerns of our Manager Clients that are unable to comply with the Independent Fiduciary Safe Harbor because many of their investors and clients are Individual Retirement Accounts (IRAs) or similar accounts which typically do not retain independent fiduciaries. These Manager Clients thus must rely on the BIC Exemption in order to be in compliance with the Fiduciary Rule.

Currently, our Manager Clients are comfortable with complying with the BIC Exemption during the Transition Period because, during the Transition Period, compliance with the BIC Exemption is satisfied by adoption of and adherence to the Impartial Conduct Standards (ICS). However, our Manager Clients will face difficulties beginning January 1, 2018, when the Transition Period currently is scheduled to expire because at that point they will be required to comply with the full panoply of requirements of the BIC Exemption in addition to the ICS.

The requirements of the full BIC Exemption may be appropriate for investors whose Financial Advisors receive compensation in the form of, among other things, commissions, trailing commissions, sales loads, 12b-1 fees and revenue-sharing payments. However, our Manager Clients' compensation generally is in the form of fixed management fees and/or performance-based compensation. In this context, the conflicts of interest considerations are very different, detailed descriptions of these conflicts are already regulatorily required, and the fee structures generally are clearly and completely described. In addition, while the ability to use the "level fee" fiduciary provisions (commonly known as "BIC Lite") in lieu of the full BIC Exemption would alleviate many of the burdens on our Manager Clients that the full BIC requirements would impose, according to FAQ No. 19 issued by the DOL on October 27, 2016, investment managers such as our Manager Clients that sponsor and/or manage private investment funds will not be eligible to rely upon BIC Lite because private investment funds are considered to be "proprietary investment products" for which BIC Lite is not eligible. In addition, it is not clear under current guidance whether a formula-based performance fee would constitute a "level fee."

It is our view that our comments and the comments of other industry participants and professionals will raise many substantive issues that the DOL will need to consider, that will require a substantial amount of time to analyze carefully and completely, and which may require further rulemaking proposals. We intend to submit a detailed comment letter by the August 7 deadline addressing our Manager Clients' concerns about the requirements of the full BIC Exemption and our view that BIC Lite, perhaps in some modified form, should be available to our Manager Clients. Accordingly, we suggest that the DOL extend the Transition Period from its current expiration of December 31, 2017, to a date to be determined by the DOL in the future, to ensure that the DOL has adequate time to consider all of the requisite issues. Moreover, extension of the Transition Period will avoid the potential necessity for our Manager Clients prematurely to mandatorily redeem retirement investors from their private investment funds because the Manager Clients are unable to comply with the full BIC Exemption (as well as to avoid the premature liquidation of managed accounts of retirement plan clients for the same reason). We believe that this extended effective date for the end of the Transition Period should be no earlier than the fourth quarter of 2018. The extension of the Transition Period would not be contrary to the public interest because of the large number of investment professionals and industry participants potentially affected by the issues that we, and no doubt many others, are raising.

Respectfully Submitted,

KATTEN MUCHIN ROSENMAN LLP

By: Fred M. Santo, a Partner

By: Wendy Cohen
Wendy E. Cohen, a Partner