April 17, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Attn: Fiduciary Rule Examination

VIA EMAIL: EBSA.FiduciaryRuleExamination@dol.gov

Re: RIN 1210-AB79
Comments on Existing Fiduciary Rule

Dear Sir or Madam:

This letter is written on behalf of Asset Marketing Systems Insurance Services, LLC (hereinafter "Asset Marketing"), an Insurance Intermediary ("IMO") based in San Diego, California. Asset Marketing is hereby providing its comments to the Department of Labor's ("DOL" or "Department") Conflicts of Interest Rule and its related exemptions ("Fiduciary Rule") as well as the Proposed Best Interest Contract Exemption for Insurance Intermediaries ("Proposed IMO Exemption"). The comments in this letter are in direct response to the Department's request for comment as was requested under the Department's proposed rule to extend the applicability date to June 9, 2017 ("Proposed Rule"), which proposed extension has now been issued as a final rule, effective April 10, 2017 ("Rule Extension").

As stated in its previous comment letters to the DOL, Asset Marketing fully supports the intent of the Fiduciary Rule—to act in the client's best interest when providing retirement advice. In fact, Asset believes that advisors should act in a client's best interest when providing investment advice of any kind, not just when discussing retirement assets, and it further believes that the vast majority of financial and insurance professionals already provide advice with their clients' best interest in mind.

Unfortunately, neither the current Fiduciary Rule with its related exemptions nor the Proposed IMO Exemption accomplishes the intent of the DOL. Accordingly, the Department should issue a further delay 1) to allow the time needed for an appropriate response to the Presidential Memorandum of February 3, 2017; 2) to respond to the comments to the Proposed IMO Exemption and to clarify the confusion this proposed rule has created; 3) to determine whether the Fiduciary Rule should be revised or rescinded; 4) to prevent confusion among consumers and

industry professionals alike; and 5) to prevent further damage to the retirement assets of consumers.
The Presidential Memorandum of February 3, 2017 raised the following three questions:

i. 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;

ii. 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

iii. 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.

In addressing the issues in the Presidential Memorandum, this letter will also provide context and answers to questions raised by the Department in its proposed Rule Extension, 82 FR 12319, 12324-12325 (March 2, 2017).

1. The Fiduciary Rule has already harmed investors and is likely to harm investors in the future.

The Fiduciary Rule has already harmed investors and is likely to continue to do so in the future. As an IMO, Asset Marketing, through its network of affiliated independent insurance producers, sells life insurance, fixed annuities, fixed index annuities (“FIAs”), and long-term care insurance. Asset Marketing represents over 45 insurance carriers and hundreds of products in all 50 states plus the District of Columbia. Furthermore, the vast majority of producers affiliated with Asset Marketing are also registered representatives affiliated with an independent Broker-Dealer (“BD”), investment adviser representatives affiliated with a Registered Investment Adviser (“RIA”) or both. As such, Asset Marketing works with insurance producers who cover the full spectrum of financial products and services available to Retirement Investors and understand the important role that these insurance products, and particularly FIAs, can play in generating income during retirement.

Since the Fiduciary Rule was released on April 6, 2016, Asset Marketing has seen a change in the product mix being sold: 1) sales of FIAs in the second half of 2016 and Q1 of 2017 have slowed; and 2) adviser-based assets under management (“AUM”) subject to annual fees have increased with RIAs.

Insurance carriers have already started to make changes to their product mix as a result of the Fiduciary Rule. In anticipation of the April 10 applicability date, some FIA products have been discontinued or are slated to be discontinued; others are undergoing changes that will make them less attractive for consumers; and the rate of innovation in new product design has slowed significantly. Since FIAs provide principal protection and can also provide guaranteed lifetime income, they serve a unique need for Retirement Investors who are looking to meet their income needs of retirement.

The Fiduciary Rule has completely upended the distribution and compensation structure of the FIA industry, thus limiting an insurance carrier's ability to manage risk and capital in accordance with state insurance department regulations. This, in turn, has created a significant amount of confusion for the insurance producers who sell these products to consumers, thus reducing the amount of FIA sales for the entire industry[1], which necessarily limits consumer access to guaranteed retirement income, an enormous need in the current environment.

Furthermore, carriers no longer have the ability to manage their risk profiles by changing sales compensation to accelerate or decelerate sales of a particular product. And while the Department may view this as a positive outcome of its Fiduciary Rule, the inability of carriers to manage the inflow of money completely changes the risk profile of every product such carriers sell, thus putting a strain on the entire system. In the end, the very Retirement Investor that the Department is seeking to protect will have fewer choices and lower returns as carriers adjust to this new reality in an effort to mitigate risk.

Asset Marketing has also felt the impact of producers shifting business from FIAs to fee-based AUM with an RIA. Because it appears that the Department has a bias toward fee-based AUM or even robo-adviser AUM, it is not surprising that this shift is occurring. Furthermore, due to the fact that the Department failed adequately to recognize the important role that IMOs play in the distribution of FIAs, it is highly likely that only a few "Super-IMOs" will survive if the Proposed IMO Exemption is implemented as written, thus decreasing competition and harming Retirement Investors even more.

Finally, Asset Marketing has already seen insurance producers decide to exit the business entirely rather than deal with the poorly crafted Fiduciary Rule and what appears to be a "throwaway" Proposed IMO Exemption. Had the Department been serious about its Proposed IMO Exemption, it would have provided ample time for comment, revision, and implementation—instead, the Department has been completely silent on the matter since the comment period closed. As such, we are left to conclude that the Department really does not care about the role that IMOs play in serving the needs of the Retirement Investors, and ultimately

[1] Although Asset Marketing is an IMO, it should be noted that BDs have also felt a significant shift in business, putting smaller BDs at risk of going out of business. BDs have seen a significant shift from commission products to AUM. In the short-term, the cash flow implications to both the registered representatives and the BD are significant; the long-term impact to consumers could actually be more costly than if the consumer had purchased a commissionable product. For example, if a $100,000 product held for 10 years generated a 5% commission to the representative as opposed to a 1% annual fee, the consumer would have been much better off paying the commission up front than paying the annual fee to the representative. In theory, of course, the representative in this example would sell the commission product. But that is not what we are seeing in practice, particularly where the projected holding period for the product at issue may be a long time period but is undetermined at the time of sale. For a detailed analysis on the impact the Fiduciary rule has on independent BDs, *See, Economic Consequences of the US Department of Labor's Proposed New Fiduciary Standard,* Oxford Economics (August 18, 2015) (http://www.oxfordeconomics.com/my-oxford/projects/311980).

does not care what amount of disruption this Fiduciary Rule is causing in the marketplace and the harm it is causing to investors. Losing a long-standing and trusted financial advisor is similar to being forced to change doctors or other professionals that a client has a long-standing relationship with. Ultimately, the consumer loses as a result of government regulatory overreach—and that is definitely the case with the Fiduciary Rule and its exemptions.[2]

2. The Fiduciary Rule has already resulted in significant dislocations and disruptions throughout the entire retirement and financial services industry, thus having a significant adverse impact on investors and retirees.

The Fiduciary Rule has created significant confusion and disruption in the marketplace, causing a significant adverse impact on Retirement Investors. It is obvious that the Department dramatically underestimated the importance that FIAs play in generating guaranteed income for Retirement Investors during their retirement years. Both the Fiduciary Rule and the Proposed IMO Exemption made it clear that the Department does not adequately understand the FIA industry, its regulation, its distribution, or the critical role that IMOs play in it. It is because of this lack of understanding that the Department stated that "Insurance intermediaries are not subject to the same regulatory oversight, and often have not played the same supervisory role with respect to advisers, as the Financial Institutions covered by [the Best Interest Contract Exemption]." Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 FR 7336, 7344 (January 19, 2017).

Although IMOs are not regulated by a single entity like BDs (FINRA) or RIAs (SEC or state securities commission), IMOs are subject to significant regulation and oversight. Each IMO must file with the state department of insurance in every state in which it seeks to sell life and health insurance products. The principal of each IMO has his/her license regulated by the state and must complete continuing education on a regular basis. In the event that an IMO or one of its affiliated independent producers runs afoul of a state insurance regulator, the IMO is subject to investigation by the state department of insurance, runs the risk of losing its ability to sell products, and can be subjected to fines and penalties from the state department of insurance. Furthermore, this regulatory action may cause the carriers to cancel the carrier appointment, thus making it impossible for the IMO to stay in business. Furthermore, because the Department failed to recognize IMOs as a Financial Institution in the Fiduciary Rule and then proposed an outrageous and arbitrary means of becoming a Financial Institution under the Proposed IMO

[2] The United Kingdom passed a similar fiduciary duty regulation that was implemented in 2013. Since that time, access to advice has decreased as advisors have left the marketplace and consumers have been hurt. *See, The DOL's Fiduciary Rule: What We Can Learn from the U.K.,* Joe Tomlinson, www.advisorperspectives.com (9/28/2015) (https://www.advisorperspectives.com/articles/2015/09/28/the-dol-s-fiduciary-rule-what-we-can-learn-from-the-u-k). *See also, Regulatory changes abroad hint at the DOL fiduciary rule's potential impact,* Evan Cooper, InvestmentNews (April 17, 2016) (http://www.investmentnews.com/article/20160417/FREE/160419944/regulatory-changes-abroad-hint-at-the-dol-fiduciary-rules-potential).

Exemption, the Department has made it impossible for virtually all IMOs to sell FIAs under any sort of reasonableness standard.

The Fiduciary Rule has forced Asset Marketing and all other IMOs to try to work with outside entities who are defined Financial Institutions—namely BDs, RIAs, and to a limited extent, Banks—so as to distribute their products. In the case of Asset Marketing, this means trying to work with over 40 BDs and RIAs, each of whom have different policies, product shelves, costs, and requirements. And in some cases, a transaction could be considered to be subject to oversight by both a BD and an RIA—a scenario that creates mass confusion. In other cases, where the producer holds no securities license, there may be no Financial Institution available, which would greatly reduce consumer access to guaranteed income and greatly reduce Asset Marketing's business. Some IMOs are considering contracting with BDs and/or RIAs to provide oversight to insurance products sold by insurance only producers, but it is far from clear that FINRA can or should oversee an insurance only producer who has no securities license, and the same goes for the SEC when overseeing RIAs, particularly since such entities have no necessary expertise or experience in this area.

Insurance companies who are also a defined Financial Institution under the Fiduciary Rule are not in a position to act as such when working with IMOs—the simple requirement of creating a level compensation structure puts the insurance companies at risk of violating antitrust laws should they discuss compensation with each other. Furthermore, it is impossible for an insurance company to know whether the product that only they sell is actually in the best interest of a client when an insurance producer can sell products from other carriers that might be a better solution for that particular client. The Fiduciary Rule simply did not take into account the needs of independent financial advisors who represent a wide array of insurance carriers.

IMOs, on the other hand, are uniquely positioned to act as the Financial Institution for insurance products, but the Department has currently made it impossible for IMOs to act in that capacity, making the Proposed IMO Exemption is completely unworkable. And as noted above, the complete lack of an exemption addressing the needs of IMOs and their insurance carrier partners has put the entire FIA industry at risk, ultimately putting consumers who rely upon safe income-generating assets at risk as well.

Asset Marketing currently has contracts with over 45 insurance carriers. Such relationships cover the sales of traditional life insurance, term life insurance, long-term care insurance, indexed universal life insurance, fixed annuities, and fixed index annuities. Given the changes to both the 84-24 Exemption and the Best Interest Contract Exemption, all of the current relationships Asset Marketing has with its carriers will be impacted. Processes will change significantly—both at the carrier level and within Asset Marketing. Each carrier has created and maintains its own policies, procedures, and processes. Asset Marketing has focused on working with its top 10 carriers in an attempt to align its processes on issues such as applications, data maintenance and transfer, producer contracting, product features, compensation and payout structure, selling agreements, producer monitoring, marketing, and policies and procedures development. But that forced business decision may not be best for consumers, particularly where a non-leading carrier has a product or products that fill a niche consumer need.

In order for Asset Marketing to comply with the Fiduciary Rule and whatever form the final Proposed IMO Exemption may take, Asset Marketing must work with each of the carriers it is contracted with to ensure that policies, procedures, processes, systems, etc., are aligned. There simply is not enough time to align with all carriers and all products before June 9 since the carriers are still waiting on the Department for clarity around the Proposed IMO Exemption.

Finally, it should be noted that the Fiduciary Rule with its corresponding timeline for compliance and implementation has created a major disruption to the entire retirement industry, but to FIAs in particular. Assuming that an IMO could even become a Financial Institution, the requirements for increased oversight by the IMO of its insurance producers requires systems to be built and maintained that do not currently exist. This is true not only for the FIA industry but also the entire financial industry at large. No aspect of an IMOs business that is left untouched by the Fiduciary Rule, so every policy, procedure, process, and system must be reviewed and revised in order for an IMO to operate as a Financial Institution who is looking to mitigate litigation risk (as discussed below). To date, Asset Marketing has spent hundreds of thousands of dollars in system design and development, producer training programs, and process review and redesign. And despite our best efforts, the work is far from done and the likelihood of getting everything accomplished in time for a June 9 implementation is highly unlikely.

Suffice it to say, everything about the Fiduciary Rule and its exemptions, the Proposed IMO Exemption, and now the delay in applicability date to June 9, 2017, has created chaos and confusion, which ultimately hurts the Retirement Investors the Department is seeking to protect.

3. The Fiduciary Duty Rule is highly likely to cause an increase in litigation, and, as a result, will cause Retirement Investors to pay higher prices for access to retirement services and advice.

Asset Marketing believes that the Fiduciary Rule and it exemptions (especially the BIC) will cause a major increase in litigation. The DOL has delegated its enforcement of this rule to class action attorneys, and given the vagueness of the Fiduciary Rule, litigation is inevitable.

This litigation risk is perhaps broader in scope than initially thought. A recent article in InvestmentNews states that once the June 9, 2017, applicability date starts, "[a] greater number of advisers and firms servicing 401(k) plans and their participants could be at risk of litigation … when implementation of some provisions of the . . . fiduciary rule are set to kick in." *More 401(k) adviser face litigation risk in June under DOL fiduciary rule*, Greg Iacurci, InvestmentNews (April 11, 2017) (http://www.investmentnews.com/article/20170411/FREE/170419987/more-401-k-advisers-face-litigation-risk-in-june-under-dol-fiduciary). *See also, Lawsuit Risk Ahead for 401(k) Advisors,* Barron's (April 12, 2017)(http://www.barrons.com/articles/lawsuit-risk-ahead-for-401-k-advisors-1492032458).

This litigation risk under the Fiduciary Rule has also been noted by the American Bar Association. In their article, *The Impact of the Department of Labor's Fiduciary Rule,* authors

Michael P. Kreps and George M. Sepsakos, attorneys with the Groom Law Group, note: "[T]he BIC Exemption expressly prohibits contractual exculpatory language … It is very likely that the plaintiffs' bar will play a primary role in enforcing the new rules in the IRA space. And it is possible if not likely, that the Fiduciary Rule will result in a spate of class action litigation in the not-too-distant future." *The Impact of the Department of Labor's Fiduciary Rule,* Michael Kreps, George M. Sepsakos, American Bar Association (November 17, 2016) (http://www.americanbar.org/publications/blt/2016/11/keeping_current.html).

This litigation risk is also significant in that both the advisor and the firm who is acting as the Financial Institution face the risk of a class action lawsuit under the Fiduciary Rule. The risk of class action litigation is "one of the single most feared (or even loathed) provisions of the Department of Labor's fiduciary rule for a large financial institution, because it dramatically raises the stakes of a potential systemic failure to fulfill the firm's fiduciary duty to clients…." *The DOL Fiduciary Class Action Lawsuit That Will Really Transform Financial Advice*, Michael Kitces, Kitces.com (January 16, 2017) (https://www.kitces.com/blog/dol-fiduciary-class-action-lawsuit-risk-competency-duty-of-care/). Kitces goes on to note: "[F]or the first time ever, Financial Institutions can be sued in a class action lawsuit for the lack of technical competency of their entire base of brokers." Id.

An article on InvestmentNews.com has estimated that class action litigation could cost the industry $150 million per year. *DOL fiduciary rule class-actions costs could top $150M a year,* Jeff Benjamin, InvestmentNews (February 9, 2017) (http://www.investmentnews.com/article/20170209/FREE/170209902/dol-fiduciary-rule-class-actions-costs-could-top-150m-a-year).

Law360.com interviewed several attorneys to get their perspective on the litigation risk associated with the Fiduciary Rule. As Seth Schwartz, a partner at Skadden Arps Slate Meagher & Flom LLP notes: "I would expect this to be a fertile area for litigation." *Why Plaintiffs Firms Will Love DOL's New Fiduciary Rules,* Carmen Germaine, Law360.com (April 6, 2016) (https://www.law360.com/articles/781160/why-plaintiffs-firms-will-love-dol-s-new-fiduciary-rules).

It is obvious to anyone who has been following the Fiduciary Rule that the risk of litigation increasing is substantial and costly. For entities that have been working continuously to mitigate that risk, a significant amount of money on has already been spent on legal fees, but the magnitude of this particular risk will not be fully appreciated until the litigation starts. As the articles referenced above predict, the likelihood of that occurring is extremely high.

CONCLUSION

Asset Marketing appreciates the opportunity to comment on the Fiduciary Rule, its related exemptions, and the Proposed IMO Exemption. We believe that a best-interest standard for retirement advice is a desirable objective, but we do not believe that the Fiduciary Rule as it stands today accomplishes that objective. Rather, we believe, that the Fiduciary Rule harms investors, causes major disruption in the retirement industry, and significantly increases the likelihood of expensive litigation.

We also believe that the DOL is the wrong regulatory body to establish a fiduciary standard for investment advice. We fully support the development of a uniform fiduciary standard promulgated by the SEC and state departments of insurance, the subject matter experts in securities and insurance regulation.

Finally, we believe that the June 9, 2017, applicability date should be delayed until the Department can fulfill its obligation to respond to the Presidential Memorandum of February 3, 2017. Implementing a rule whereby Impartial Conduct Standards, and the definitions of Best Interest and Material Conflicts of Interest apply will effectively implement the rule while the ongoing analysis is conducted. Should the Department revise or rescind the Fiduciary Rule, there will be more disruption and confusion in the marketplace, and firms will have unnecessarily spend countless millions of dollars.

For these reasons, we respectfully request that the Department delay the June applicability date indefinitely and that the Fiduciary Rule itself be revised and/or rescinded.

Sincerely,

ASSET MARKETING SYSTEMS INSURANCE SERVICES, LLC

Jennifer K. Schendel
President & CEO