April 17, 2017

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

**Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Prohibited Transaction Exemption 84-24 RIN 1210-AB79**

Ladies and Gentlemen:

First Command Financial Services, Inc. ("First Command") appreciates this opportunity to provide comments to the Department of Labor (the "Department") regarding the now delayed final regulation defining the term "fiduciary" 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"). For the reasons explained below, First Command strongly supports the rescission of the Fiduciary Rule in favor of a more balanced, consistently applied fiduciary rule that the Securities and Exchange Commission ("SEC") may soon adopt.

First, President Trump issued a presidential memorandum on February 3, 2017 directing the Department to examine the Fiduciary Rule to "determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice." Among other things, the memorandum called for "an updated economic and legal analysis concerning the likely impact" of the Fiduciary Rule. In particular, the memorandum requires the Department to consider and evaluate three important factors:

1. Whether the Fiduciary Rule would adversely affect access to retirement investment services and products,



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2. Whether it would cause dislocations or disruptions in the retirement services industry, and
3. Whether it would increase litigation and thereby increase consumer cost of retirement investment products and services.

In addition to the factors prescribed in the President's memorandum, one fundamental overarching factor deserves the utmost consideration: The Fiduciary Rule infringes on the jurisdiction of the SEC, FINRA and state insurance regulators. The federal securities laws provide that the SEC (and by extension, FINRA) are responsible for regulating the conduct of financial professionals engaged in the sale of securities products. The Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") reiterated this point by expressly directing the SEC to undertake a study to determine whether changes should be made to the standards of conduct applicable to broker-dealers and registered representatives. Dodd-Frank also established parameters for any subsequent rulemaking based on the results of that study. Similarly, a broad network of state regulation governs the insurance industry and the distribution of annuities and other insurance products. In adopting the Fiduciary Rule, the Department disregarded these other established and effective regulatory regimes and assumed for itself jurisdiction properly delegated by Congress to the SEC, FINRA and state insurance regulators. The Department should defer to these other regulators, whose decades of regulatory experience in this area and longstanding views on the standards of conduct for financial advisors make them the appropriate regulators of financial advisors serving Americans investing for their retirement.

With regard to the first factor cited in the President's memorandum, the Fiduciary Rule would impact the investing public in a potentially devastating way; that is, by depriving retirement savers of access to affordable, holistic financial planning and education and a wide range of investment options, thereby making it harder for them to plan for retirement. The unnecessary risks associated with the BIC Exemption will undoubtedly cause many firms to either shift clients into fee-based accounts or opt not to service investors of modest wealth. (In fact, a number of firms have announced those very intentions in recent months.) For many retirement savers, commission-based accounts are the most appropriate or most desirable way to pay for valuable retirement planning services. The typical new First Command client, for example, does not have sufficient investable assets to qualify for customary fee-based accounts. Under the Fiduciary Rule, most firms would tell such a person to take the "do-it-yourself" approach. Without access to affordable advice, many retirement savers will be left to their own devices, where their chances of attaining their retirement goals will be greatly diminished. Numerous studies support these assertions, but the Department failed to consider them in adopting the Fiduciary Rule. This time, the Department should undertake the effort necessary to thoroughly review and analyze the relevant data on this subject. First Command believes that this review and analysis will, in all likelihood, yield an inescapable conclusion: The Department should rescind the Fiduciary Rule in favor of a more balanced, consistently applied fiduciary rule that the SEC may soon adopt pursuant to the clear intent expressed by Congress in Dodd-Frank.

On the subject of increased litigation, the BIC Exemption establishes class action lawsuits as the enforcement mechanism for the Fiduciary Rule. The following three aspects of the Fiduciary Rule make this intended result abundantly clear: (i) the uncertainty surrounding the expanded definition of "fiduciary" as it would be applied across a broad base of retirement saver clients, (ii) the contractual warranties that would not otherwise have arisen from the firm-client relationship, and (iii) the prohibitions against limitation of liability and non-participation in class action lawsuits. Together, these conditions would set up a veritable field day for class action lawyers. The proper enforcer of the fiduciary obligation of financial advisors is the SEC, which already regulates Registered Investment Advisers under the Investment Advisers Act of 1940 (the "1940 Act"). (Since 2005, First Command has served its clients as a Registered Investment Adviser fiduciary, as have its registered financial advisors, who are all Investment Adviser Representatives under the 1940 Act.)

As for disruption in the retirement planning advice industry, the aforementioned evidence of firms exiting this space together with the specter of class actions lawsuits will no doubt cause significant disruption. The reduced competition in the market for retirement planning services for the modestly wealthy would create scarcity of available products and services and increased costs for consumers. Also, the lawsuits would lead to varying interpretations of fiduciary standards by state courts across the country, thereby creating significant disruption for firms with advisors located in multiple states. The combination of lost jobs in the industry and the attendant harm to American retirement savers (discussed below) would outweigh the perceived benefits of the Fiduciary Rule.

Finally, the Department's previous regulatory impact analysis overstated the benefits of the regulation and ignored and underestimated the Fiduciary Rule's direct and indirect costs to the financial services industry and to retirement savers, including costs from class action lawsuits arising from the BIC Exemption and costs to retirement savers from lost access to retirement assistance or lost access to assistance with products providing guaranteed lifetime income (annuities). When all those costs—which the record shows will total tens of billions of dollars—are properly considered, it becomes clear that the Fiduciary Rule will not deliver the financial benefits described in the regulatory impact analysis. Therefore, First Command believes that it is inappropriate to rely on the existing economic impact analysis to assess the potential benefits and costs of the Fiduciary Rule. Instead, the Department should conduct a new and more balanced and thorough economic impact analysis pursuant to the President's directive. This should support the conclusion that the Fiduciary Rule should be rescinded in favor of a more balanced, consistently applied fiduciary rule that the SEC may soon adopt pursuant to the clear intent expressed by Congress in Dodd-Frank.

For the reasons set out above, First Command strongly endorses the President's decision to initiate a thoughtful and comprehensive review of the Fiduciary Rule. First Command further believes that the Department should take appropriate action to protect retirement savers from the Fiduciary Rule's negative consequences by rescinding the Fiduciary Rule in favor of a more balanced, consistently applied fiduciary rule that the SEC may soon adopt pursuant to the clear intent expressed by Congress in Dodd-Frank.

If you have questions about anything in this letter, or if we can be of any further assistance as the Department undertakes to review the Fiduciary Rule, please feel free to contact me or Hugh Simpson, First Command's Executive Vice President and General Counsel.

Sincerely,

J. Scott Spiker

J. Scott Spiker,
Chairman of the Board and Chief Executive Officer

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