ACLI
Financial Security...for Life.

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July 21, 2017

Submitted Electronically to EBSA.FiduciaryRuleExamination@dol.gov

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

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

Greetings:

On behalf of the American Council of Life Insurers ("ACLI")[1], we appreciate the opportunity to provide comments in response to question 1 of the Department of Labor's (the "Department") July 6, 2017 Request for Information ("RFI") regarding the final Fiduciary Regulation (the "Regulation") and related Prohibited Transaction Exemptions ("PTEs"). Question 1 focuses on the advisability of the Department extending the January 1, 2018 applicability date of certain provisions of PTE 2016-01 (also known as the Best Interest Contract Exemption, or "BICE"), the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, and PTE 84-24.

<u>We recommend that the Department delay the January 1, 2018, applicability date for one year</u>. While we do not know the status of the Department's examination being undertaken as a result of the President's February 3, 2017 Memorandum ("Presidential Memorandum"), we expect a

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[1] The American Council of Life Insurers (ACLI) is a Washington, D.C.-based trade association with approximately 290 member companies operating in the United States and abroad. ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 95 percent of industry assets, 93 percent of life insurance premiums, and 98 percent of annuity considerations in the United States. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

delay of one year, through a single regulatory action (as opposed to a series of shorter delays), would provide sufficient time for the Department to complete its examination, determine next steps, and communicate the results of the examination, and the Department's future plans, to stakeholders. If, as a result of its examination, the Department reaches the unfortunate conclusion that it will maintain the Regulation and PTEs as finalized, it should provide stakeholders with a period of not less than nine months to prepare for full application of the PTEs' provisions. If the Department agrees that revisions and modifications are in order to ensure that the Regulation and PTEs are appropriately tailored and do not restrict consumer access to retirement products and services, the Department should solicit feedback on the time necessary to implement the proposed changes in a timely, efficient, and effective manner.

Consumers and financial service providers need certainty regarding the ultimate Regulation and PTEs. A series of short-term delays will not provide this certainty. ACLI plans to offer suggested changes to the Regulation and PTEs that are intended to facilitate savings and access to information and advice for all Americans.

Both the questions raised by the RFI and the potential for changes to the Regulation and related PTEs in response to the information gathered and the ongoing examination under the Presidential Memorandum leave ACLI members with deep concerns about the resources, additional time, effort, and expense that must be expended on preparations for compliance with the conditions scheduled to apply on January 1, 2018 that may be revised or rescinded. The continuing cost associated with these preparations will result in upward pressure on insurance product pricing. Accordingly, the Department must announce a delay as soon as possible following the conclusion of the comment period associated with RFI question 1.

Moreover, a delay is prudent and necessary to prevent further harm to retirement savers. The Regulation and PTEs are already adversely affecting the ability of Americans to save and obtain retirement information and financial advice.

Finally, a delay will allow time for the Department to consider and make key changes to the Regulation and related PTEs while coordinating with other regulators, such as the SEC, FINRA, and state insurance regulators, recognizing and benefiting from market and prudential regulatory developments since the issuance of the Regulation.

ACLI maintains that the Regulation (including the BICE and the amendments to PTE 84-24), as promulgated, exceeds the Department's statutory authority, is unconstitutional, and is arbitrary and capricious under the Administrative Procedure Act. The Regulation -- through a highly burdensome and paternalistic approach to regulation -- effectively substitutes the judgment (and biases) of the Department for the judgment of individual investors and qualified plan sponsors. Rather than empowering plan fiduciaries, plan participants and beneficiaries, and IRA investors, the Regulation limits ordinary sales and marketing activities generally and, in particular, with small businesses; constrains education and information about retirement planning options; and limits the choices of products and services, especially for IRA investors. ACLI supports the application of the Employee Retirement Income Security Act's ("ERISA's") sole interest and other fiduciary standards to those engaged as fiduciaries acting in mutually agreed upon relationships of trust and confidence.

ACLI supports reasonable and appropriately tailored rules that require all sales professionals to act in the best interest of their customers regardless of whether they serve as fiduciaries under ERISA. However, this Regulation does not accomplish these goals. Based on both the observed and further anticipated effects of this Regulation on consumers as described in this letter, the Regulation must be revoked and replaced. ACLI is providing these comments to assist the Department in its review and evaluation of the Regulation and PTEs.[2]

I. The January 1, 2018 Applicability Date Should Be Delayed Until the Department Completes Its Examination as Directed By The President

The Department should delay the January 1, 2018 applicability date until the Department has thoroughly completed its examination to the satisfaction of the President, in accordance with the Presidential Memorandum.[3] The Department has already acknowledged the need to delay the provisions scheduled to be applicable on January 1, 2018 while it completes the examination required by the Presidential Memorandum. In its final rule implementing a 60-day delay of the Regulation's April 10, 2017 applicability date, the Department notes that the rulemaking project's "more controversial' requirements, such as requirements to execute enforceable written contracts under the BICE and changes to PTE-84-24, are not applicable until January 1, 2018, "while the Department is honoring the President's directive to take a hard look at any potential undue burdens and decides whether to make significant revisions."[4]

The Presidential Memorandum states that one of the priorities of this Administration is to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies. The Memorandum further states that the Department's final Fiduciary Regulation may significantly alter the manner in which Americans can receive financial advice, and may not be consistent with the policies of the current Administration.

Accordingly, the Presidential Memorandum directs the Secretary of Labor to examine the Fiduciary Regulation to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of this examination, the Department is to prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Regulation, which shall consider, among other things, the following:

> (i) Whether the anticipated applicability of the Fiduciary Regulation 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;

[2] ACLI will, by separate letter, provide comments in response to the remaining questions in the RFI, consistent with the August 7, 2017 due date for such comments.
[3] 82 Fed. Reg. 9675 (Feb. 7. 2017).
[4] 82 Fed. Reg. 16902, 16906 (Apr. 7, 2017).

(ii) Whether the anticipated applicability of the Fiduciary Regulation has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

(iii) Whether the Fiduciary Regulation 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.

To comply with the Presidential Memorandum, the Department should examine the entire Regulation and all related PTEs – including the Impartial Conduct Standards required by the BICE, PTE 84-24, and the Principal Transactions Exemption. ACLI remains deeply concerned that the current process undertaken by the Department (involving an examination of the Impartial Conduct Standards while requiring compliance with them) is significantly problematic. By implementing a bifurcated approach to the required examination, it appears the Department has already concluded that maintaining these standards is consistent with the Presidential Memorandum. Accordingly, a determination not to delay the January 1, 2018 compliance date would result in the appearance that the Department is pre-judging the outcome of the examination. The Department should postpone the January 1, 2018 applicability date while it completes its review of the Regulation and PTEs and entertains a revocation or revision of the Regulation and PTEs.

We are encouraged that the Department has issued the RFI in connection with this examination. The RFI contains a series of questions -- including specific questions addressing (i) the impact of elimination or alteration of the BICE's liability-laden contract requirement, (ii) potential new PTEs, and (iii) potential changes to the Regulation's disclosure requirements. It is likely, given the Regulation's harmful impact on retirement savers, that upon evaluating the RFI responses, the Department will conclude that it must make changes to the Regulation or PTEs. Indeed, the RFI solicits information on the propriety of a number of potential substantive changes. Accordingly, it is illogical -- and, as described further below, it would be harmful and confusing to consumers and significantly problematic, from an implementation and compliance perspective – for the financial services industry to prepare to conform with the requirements effective on January 1, 2018, and then be required to make additional, and potentially conflicting, conforming changes based upon further Departmental action. Delaying the January 1, 2018 applicability date will provide the time necessary for the Department to review and evaluate the July 6, 2017 RFI responses, the over 1,500 comments received by the Department in response to its March 2, 2017 Proposed Rule and request for comments responsive to the questions raised in the Presidential Memorandum,[5] and the questions of law and policy concerning the Regulation and PTEs.

Finally, the significant liabilities associated with the PTE compliance requirements applicable on January 1, 2018, and the controversial nature of such requirements, provide a strong basis for the Department to delay their applicability date while undertaking its review. Indeed, in issuing its final regulation extending the Regulation's applicability date for 60 days, the Department states that

[5] 82 Fed. Reg. 12319 (Mar. 2, 2017).

> As compared to the contract, disclosure and warranty requirements of the BIC Exemption and Principal Transactions Exemption, the Fiduciary Rule and the Impartial Conduct Standards are among the least controversial aspects of the rulemaking project (although not free from controversy or unchallenged in litigation).[6]

Although, as stated in our April 17, 2017 comment letter, ACLI disagrees with the Department's unsubstantiated conclusion that the Impartial Conduct Standards are among the "least controversial" aspects of the rulemaking, we agree that the contract, disclosure, and warranty requirements of the exemptions are highly controversial. Following the Department's logic, as the Department justified its determination to impose the Impartial Conduct Standards effective June 9, 2017, due to their "uncontroversial" nature, so too the Department should further delay the January 1, 2018 applicability date of the contract, disclosure and warranty requirements of the BICE, Principal Transactions Exemption, and amendments to PTE 84-24, due to the high level of controversy surrounding the increased liabilities associated with these requirements -- particularly when their incremental benefits are weighed against their harm to the retirement savings product marketplace.

II. The January 1, 2018 Applicability Date Should Be Delayed to Avoid Additional Harm to Retirement Investors

The contract, disclosure and warranty requirements of the BICE and the amendments to PTE 84-24 impose significant liabilities on insurance product manufacturers and distributors. Although these provisions are not yet applicable, the Regulation and PTEs have already had a negative and harmful impact on retirement savers. ACLI's April 17, 2017 comment letter, as well as the comment letters provided to DOL on behalf of several financial services organizations and related entities, includes detailed data and information illustrating the harm to investors resulting from the dislocation and disruption of the retirement product and services marketplace caused by the Regulation. ACLI's April 17, 2017 comment letter also clearly demonstrates that the Regulation adversely affects the ability of Americans to gain access to retirement information, financial advice, and longevity risk protection through annuities. Failure to delay the January 1, 2018 applicability date will further exacerbate the harms already being experienced by retirement savers.

A. Financial Service Providers Have Already Implemented Minimum Account Balances and/or Eliminated Commission-Based Fee Arrangements to the Detriment of Savers

The ongoing harm to retirement investors as a result of this rulemaking project is not speculative – it is very real and supported by data and evidence. Due to the Regulation's bias against commission-based compensation arrangements, the Regulation has already resulted in restricted consumer access to annuities – the only products available in the marketplace providing guaranteed lifetime income – and has already restricted or completely eliminated IRA account owners' and qualified plan sponsors' access to financial assistance.

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[6] 82 Fed. Reg. at 16906.

The Regulation is already having a harmful impact on small and medium retirement account holders. Several large financial firms have implemented account minimums ranging as high as $250,000 to obtain investment guidance, while others have eliminated commission-based arrangements altogether, in favor of more expensive, actively managed, fee-based arrangements. Attached as Exhibit A is a letter received by an employee of one of ACLI's members, informing her that, because of the Regulation, her retirement account is being transitioned to a self-directed brokerage account, with no further investment guidance.

American investors are losing access to advice. One need only read the daily financial headlines over the past six months to have observed this concerning trend. For example, it has been reported that JPMorgan Chase wealth management clients with individual retirement accounts were moved from advised to self-directed products on April 7, 2017.[7] That shift in approach appears to have been precipitated entirely by the Regulation's anticipated applicability. Similarly, Merrill Lynch is reportedly requiring retirement investors who are currently served by the firm through transaction, commission-based accounts to either go without any advice, or enter into an agreement where the investor pays an asset-based fee to receive investment advice -- whether or not any transactions occur.[8] A recent study conducted by the LIMRA-LOMA Secure Retirement Institute found that 54 percent of advisors will be forced to drop or turn away small investors.[9]

The vast majority of annuities today are sold through a transaction, commission-based compensation structure. The use of commissions to sell annuities also reflects the "buy and hold" nature of annuity products.[10] In a fee-for-advice arrangement, a consumer pays an adviser to manage his or her money on an ongoing basis pursuant to a pre-determined investment strategy. A fee-based arrangement therefore makes little sense for broker-dealers and insurance agents who market and sell fixed and fixed-index annuities, as these products do not typically necessitate continual advice and investment management.[11] In addition, fee-based models generally carry account balance minimums (typically between $100,000 and $250,000), and are used with customers who maintain high balances and are engaged in active trading.[12] They are therefore more expensive and may be inappropriate for many investors with small or mid-sized accounts who trade or rebalance infrequently.

Citing a study[13] finding that advisors earn 0.54 percent on commission-based accounts versus 1.18 percent on fee-based accounts, the American Action Forum recently estimated that the Regulation has the potential to increase consumer costs by $46.6 billion, or $813 per IRA account

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[7] Crystal Kim, *BofA, JPMorgan, and the Regulation: Will they or Won't They*, BARRON'S (March 15, 2017), www.barrons.com/articles/bofa-jpmorgan-and-the-fiduciary-regulation-will-they-or-wont-they-1489588442. However, JP Morgan recently stated that it is delaying this move pending final action by the Department, resulting in even more investor confusion.
[8] Mason Braswell, *Merrill Early Mover Gaffe? DOL Policy Prompts 11 NY-Area Departures*, ADVISORHUB (March 6, 2017), www.investmentnews.com/article/20150624/FREE/150629958/perez-calls-out-variable-annuities-in-argument-for-dol-fiduciary-regulation.
[9] *See* DOL Viewpoints, LIMRA Secure Retirement Institute, 2016.
[10] *See, e.g.*, ACLI Comment letter dated July 21, 2015.
[11] See National Association of Insurance and Financial Advisors ("NAIFA") July 21, 2015.
[12] *Id.*
[13] PriceMetrix: *Transitioning to Fee,* Insights Volume 6, August 2012.

holder.[14] Indeed, the SEC and FINRA recognize that transitioning clients to fee-based arrangements is suitable only under certain circumstances. In recent years, those regulators have increasingly scrutinized broker-dealers' placement of investors into accounts that require payment of a fixed fee but generate little or no activity to justify that fee.

B. The Regulation Has Already Disrupted Lifetime Income Product Distribution Channels

Given the Regulation's bias against commission-based products, it is not surprising that it is already disrupting and limiting lifetime income product distribution channels.

Prior to the Regulation, banks distributed annuities to low- and middle-income investors. ACLI members report that low- and middle-income bank channel sales have significantly decreased due to the risks and compliance costs associated with the Regulation and PTEs. A recent study found that 29 percent of banks and credit unions will drop some guaranteed income products, in response to the Regulation.[15] Other ACLI members have reported that broker-dealers are dropping variable annuities from their offerings due to the increased liability associated with distributing these products as a result of the Regulation. The Regulation also has impacted traditional fixed annuities, as well as the distribution of non-qualified annuity and long-term care combination products. These combination products not only provide retirement security, but enable consumers to financially prepare for their life insurance and long-term care needs later in life.

Further, it is clear that the disruption and dislocation due to the Regulation is particularly concentrated in the retail advisor community. Retail advisors are losing their jobs and are shuttering their businesses as a result of the Regulation. One ACLI member reports that it has laid off 95 call center employees as a result of the liabilities associated with the Regulation and PTEs.

As the Department has acknowledged, the majority of fixed index annuities are sold by independent insurance agents.[16] Many are supported by independent marketing organizations ("IMOs"), specialized marketing organizations that lend assistance to distributors of life insurance company products, including fixed indexed annuities, through independent agents. As a result of the Regulation, IMOs and the independent agents that work with IMOs will in most cases no longer be able to distribute fixed indexed annuity products. In fact, the proposed exemption to cover the sale of fixed indexed products imposes financial barriers to entry that are simply too steep and too costly for most IMOs to take advantage of. If the Department does not delay the January 1, 2018 applicability date of the contract, disclosure, and warranty requirements of the BICE and the amendments to PTE 84-24, the IMO distribution channel will be effectively shut down, severely curtaining consumer access to, and choice of, fixed annuity products.

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[14] Meghan Milloy, American Action Forum, *The Consequences of the Fiduciary Rule for Consumers*, April 10, 2017.
[15] *See* DOL Viewpoints, LIMRA Secure Retirement Institute, 2016.
[16] *See Proposed Best Interest Contract Exemption for Insurance Intermediaries*, 82 Fed. Reg. 7335, 7354 (Jan. 19, 2017). "In 2015, approximately 63% of FIAs, $34.1 billion, were sold through the independent agent distribution channel."

Further, independent insurance agents serve an important role in the sale of group variable annuities, which are a widely-utilized product solution offered by insurance companies to employers that sponsor a workplace retirement plan for their employees. Independent agents serve an essential role with respect to these products by encouraging those employers without plans to sponsor one, and by working with employers to maintain and improve existing plans.

C. The Regulation Has Already Restricted Consumer Choice

In response to the Regulation, financial service providers have significantly limited share classes available for investment by retirement savers and the number of insurance products available to retirement investors. One ACLI member informed us that it has reduced its proprietary insurance product offerings by 54 percent and its nonproprietary variable annuity offerings available through its broker-dealers by 76 percent. This is just one factual example of the consumer product choice limitations resulting from the Regulation, and comment letters and data previously provided to the Department are replete with other examples of consumer choice limitations caused by the Regulation.

Given the disruption in distribution channels and restrictions in product choice, it is not surprising that variable annuity sales declined 21 percent in 2016 (from $133 billion in 2015 to $104.7 billion). Further, in the first quarter of 2017, variable annuity sales declined 8 percent, year-over-year, to $24.4 billion, and indexed annuity sales were off 13 percent, to $13.6 billion. These significant decreases in the sale of annuities illustrates the harmful effect of the Regulation on lifetime income products.[17]

D. The Regulation Has Already Resulted in "Orphaned" Plans and Accounts

The Regulation has resulted in more "orphaned" accounts. A number of ACLI member companies have already been notified by certain of their distribution partners of the distributors' intention to resign as agent of record to IRA and ERISA plan annuity holders in anticipation of the Regulation's applicability. Our members anticipate that this trend is likely to continue and to accelerate as the applicability date approaches, resulting in a significant increase in the number of "orphaned" accounts. The existence of orphan accounts is not, in and of itself, a new phenomenon. Insurance companies often have a number of orphan, or unassigned, accounts on their books. In the past, these were typically smaller customer accounts that were transferred to the home office in the event of an agent departing the business and leaving the client behind or the death or incapacity of an agent. As the Regulation's applicability date approaches, the numbers of orphaned accounts and the average size of those accounts have both increased dramatically. ACLI member companies report that resigning distribution firms typically cite an unwillingness to assume the litigation risks inherent in the BICE as the primary basis for their resignation. While member companies will provide basic services to orphaned account holders, including the provision of factual responses to customer information requests, most companies are not equipped to replace the levels of personal advisory support formerly provided by the resigning agents. Further, it appears unlikely, given the liabilities associated with the Regulation and PTEs, that other agents or advisors would be willing to take on

[17] *See* U.S. Individual Annuities, 1st Quarter 2017, LIMRA Secure Retirement Institute.

large blocks of orphan accounts, leaving the account holder with no financial advice or guidance, and effectively resulting in a “do it yourself” model.

Moreover, the Regulation has already resulted in restricted access by employer-sponsored retirement plans to advice and guidance. One ACLI member has reported that it has no choice but to sever relationships with commission-based plan advisers. Another member reported that it has identified over 250 small retirement plans that have lost access to guidance and advice as a result of the Regulation. This trend will likely continue and accelerate as the January 1, 2018 applicability date draws near.

III. The January 1, 2018 Applicability Date Should Be Delayed to Allow for Coordination Between the Department and Other Regulators

Full implementation of the Regulation must be delayed to allow the Department, the SEC, FINRA, and state insurance regulators to work in concert to develop harmonized, workable, and appropriately tailored standards. The Department acknowledges the potential and impact of SEC rulemaking in the RFI, and seeks information on how rulemaking by other regulations could impact the Department’s rulemaking.[18] During recent Senate Appropriations Subcommittee hearings, both Secretary of Labor Acosta and SEC Chairman Clayton acknowledged the necessity of coordination. Indeed, Chairman Clayton has initiated steps to examine the standards of conduct applicable to investment advisers and broker-dealers, stating that he believes that “clarity and consistency — and, in areas overseen by more than one regulatory body, coordination — are key elements of effective oversight and regulation.”[19] Further, the National Association of Insurance Commissioners (“NAIC”) has formed an Annuity Suitability Working Group charged with reviewing and revising, as necessary, the Suitability in Annuity Transactions Model Regulation.

A coordinated and harmonized regulatory approach is necessary and in the best interest of retirement savers. Prudential regulators, not state courts and the plaintiffs’ bar, are best positioned to apply and enforce a consistent and uniform best interest standard of care. The Department’s Regulatory Impact Analysis (“RIA”), without substantiation, ignored and/or discounted comprehensive federal and state laws that directly protect retirement savers against the very abuses it seeks to rectify. The Department was criticized for both its disregard of existing regulatory regimes and its lack of coordination with other regulators in its promulgation of the Regulation and PTEs.[20]

Given the complexity of these issues, this necessary coordination will take time. It is unlikely that the Department and other prudential regulators will be able to implement a coordinated and harmonized approach by January 1, 2018. The Department must acknowledge that circumstances have changed since it issued the Regulation and PTEs. Both the SEC and the NAIC have initiated

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[18] *See* RFI Question 11, 82 Fed. Reg. 31278, 31280 (July 6, 2017).

[19] *See,* Chairman Jay Clayton, Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers (June 1, 2017), available at https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.

[20] *See* THE LABOR DEPARTMENT’S FIDUCIARY RULE: HOW A FLAWED PROCESS COULD HURT RETIREMENT SAVERS, A Majority Staff Report of the Committee on Homeland Security and Governmental Affairs, United States Senate Senator Ron Johnson, Chairman February 24, 2016

steps to review the standard of care applicable to retail investors. The Department should delay the applicability date and carefully coordinate its rulemaking with other prudential regulators.

IV. The January 1, 2018 Applicability Date Should Be Delayed to Provide Financial Services Firms Sufficient Time to Efficiently Prepare for Compliance with the Regulation

From an operational perspective, attempted conformance with the Regulation and PTEs represents a sea change for our members. System changes must be implemented and new systems must be designed, built, and tested to conform with the BICE's significant disclosure requirements. Further, compensation structures must be reviewed and, if necessary, revised. This is an especially complex and daunting task for the insurance industry, which, as discussed above, has historically sold its products to retirement savers on a commission-based model. This is in addition to the significant investor communications that must be drafted and issued, the millions of contracts that must be issued in conformance with the BICE, and the significant staff training that must occur. Even one change – such as the Department's recent decision to remove from the BICE's ineligible contract provisions a provision under which a plan, IRA, or retirement investor waives or qualifies its right to bring or participate in class action – could require a change to millions of contracts.

Our members have been working diligently, in an extremely short time frame, to design and implement such systems, protocols, and procedures. The continued expenditure of time and cost associated with these activities may be of questionable value, given the questions raised by the RFI and the potential for changes to the Regulation and related PTEs in response to the information gathered and the examination underway pursuant to the Presidential Memorandum.

ACLI maintains that the Department will reach the conclusion, after it completes its examination, that the Rule and PTEs require significant revisions to ensure that they do not adversely affect the ability of Americans to gain access to retirement information, financial advice, and longevity risk protection through annuities. It is unreasonable for the Department, on the one hand, to be seeking information regarding potential changes to the Regulation and PTEs, and, on the other, to expect service providers to continue to sink costs and expend additional efforts to meet the requirements presently slated to go into effect on January 1, 2018.

Additionally, concurrent with any delay of the January 1, 2018 applicability date, the Department should implement a corresponding extension of the temporary enforcement policy provided in Field Assistance Bulletin ("FAB") 2017-02. As the Impartial Conduct Standards remain in effect, any delay period is equivalent to the current "phased implementation period" addressed in the FAB. This action would be consistent with the Department's stated "good faith compliance" approach to implementation "marked by an emphasis on assisting (rather than citing violations and imposing penalties on) plans, plan fiduciaries, financial institutions and others who are working diligently and in good faith to understand and come into compliance with the fiduciary duty rule and exemptions."[21]

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[21] *See* EBSA Field Assistance Bulletin No. 2017-02, May 22, 2017.

V. Delaying the January 1, 2018 Applicability Date Will Not Harm Retirement Investors

There is no evidence that delaying the January 1, 2018 applicability date will harm retirement investors. Indeed, in implementing a delay of the applicability date of the PTEs' requirements, other than the Impartial Conduct Standards, from April 10, 2017 to January 1, 2018, the Department considered whether investor losses may result, and concluded that

> Under this final rule, beginning on June 9, 2017, advisers will be subject to the prohibited transaction rules and will generally be required to (1) make recommendations that are in their client's best interest (*i.e.,* IRA recommendations that are prudent and loyal), (2) avoid misleading statements, and (3) charge no more than reasonable compensation for their services. If advisers fully adhere to these requirements, affected investors will generally receive the full gains due to the fiduciary rulemaking.[22]

The Department also considered investor losses associated with the temporary absence (until January 1, 2018) of PTE requirements intended to provide accountability mechanisms and adherence with Impartial Conduct Standards, such as the written contract requirement applicable January 1, 2018. The Department concluded that it expects that "advisers' compliance with the Impartial Conduct Standards during the period between June 9, 2017 and January 1, 2018 will be substantial, even if there is some reduction in compliance relative to the baseline."[23] Accordingly, based on the Department's evaluation, as long as the Impartial Conduct Standards remain in place, there will be no retirement saver losses associated with an additional delay of the exemptive requirements.

Additionally, in measuring any potential gain or harm to retirement investors associated with delaying the January 1, 2018 applicability date, the Department should not continue to rely on its estimates of investor gains included in its final RIA. As detailed by ACLI and many others in comment letters and testimony, the RIA is based on conjecture, is significantly flawed, and should not be relied on for any estimations of consumer gains or losses associated with the Regulation or PTEs. The sole basis for the final RIA's estimated investor gains was the Department's inappropriate and flawed examination and analysis of mutual fund retail class shares and its theoretical application of this analysis across the entire retirement product market. Further, although raised by ACLI in both comment letters and testimony, the final RIA fails to adequately or meaningfully address the impact of the Regulation on retirement investor access to lifetime income products. Complicating this issue further is the fact that the Presidential Memorandum specifically directs the Department to prepare an updated economic analysis, and the Department has acknowledged this direction, stating that it will "review the 2016 Final RIA's conclusions as part of its review of the Fiduciary Regulation and PTEs directed by the Presidential Memorandum."[24]

The Final RIA provides no basis for concluding that a delay in the January 1, 2018 applicability date will harm retirement investors. To the contrary, data and evidence provided to the

[22] 82 Fed. Reg. at 16909.
[23] *Id.* at 16910.
[24] *Id.*

Department illustrate the harm that the Regulation is already having on investors – harm that will increase significantly if the most controversial and liability-laden provisions of the Regulation and PTEs become applicable on January 1, 2018.

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On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on its examination and next steps regarding a definition of fiduciary.

Respectfully,

James H. Szostek

Howard M. Bard

American Council of Life Insurers

July 21, 2017 Comment Letter

EXHIBIT A

March 7, 2017

J.P.Morgan

Important information regarding your investment retirement account(s) ending in:

Dear Valued Client:

As previously communicated, the U.S. Department of Labor announced a new set of industry-wide regulations for retirement and other qualified accounts that are scheduled to go into effect in April 2017. As a result, we are making changes to the way we service and provide investment guidance on your retirement account referenced above.

Please note that this letter reflects your account information as of 01/31/2017—your financial advisor may have already contacted you about these changes and discussed next steps.

What you need to know

- Beginning on or about April 7, 2017, we will transition your retirement account to a Self-Directed Investing Account; no action is required on your part.
- **After this date, your financial advisor will no longer be able to provide investment guidance on this account; however, you may still be able to receive personalized investment guidance from your financial advisor on other accounts you have with us.**
- We will notify you in the event these regulations are not implemented as currently planned, as we may not proceed with this transition.

About your Self-Directed Investing Account

- You will be able to access your account online, anytime at chase.com. If you need help enrolling in Chase Online℠, please call our Internet Service Center at 1-877-242-7372.
- You will also have access to a phone-based Self-Directed Investing Team for any account servicing needs you may have; however, they will not be able to provide investment guidance. After April 7, 2017, they can be reached at the phone number listed on your account statement.

Next steps

Please review the enclosed agreement, which amends your current agreement and will be effective after your account has transitioned to a Self-Directed Investing Account.

Over, please.

If you have any questions about these changes or would like to learn more about our other retirement options, please contact your financial advisor or call us at 1-800-469-1733.

Thank you for your continued trust and confidence.

Sincerely,

Barry Sommers
Chief Executive Officer
Wealth Management

Enclosure: J.P. Morgan Securities LLC Disclosures & Brokerage Account Agreement for Self-Directed Accounts

Summary of Changes

For your reference, we have provided the following overview of what is changing for your investment retirement account:

Account Feature/Service	Effective April 7, 2017	Details
Access to a financial advisor for investment guidance	**Changing**	Your financial advisor will no longer be able to provide investment guidance on this account. Please note: • You may still be able to receive personalized investment guidance from your advisor on other accounts you have with us. • If you have questions about any open orders, please contact the number listed on your account statement.
Service requests (e.g., placing trades or making updates to your account)	**Changing**	Service requests can be made online at chase.com or over the phone; you will no longer be able to contact your financial advisor.
Account agreement	**Changing**	An amended account agreement is enclosed. Please review this document and keep it for your records.
Transaction/commission fees	**Changing**	Your Self-Directed Investing Account may offer reduced trading pricing. Please visit chase.com/RetirementFees to view the updated commission schedule.
Account fees	Not Changing	Your account fees, which are listed in the enclosed agreement, will remain the same.
Account number	Not Changing	Your account number will remain the same.
Online access	Not Changing	Please visit chase.com to view detailed account information.
Statements	Not Changing	Please visit chase.com to view your account statements.