



July 21, 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 84-24.  
RIN 1210-AB82**

Ladies and Gentlemen:

Cetera Financial Group, Inc. (“Cetera”) is the corporate parent of a complex of seven broker-dealers and five registered investment advisors, with more than 8,500 affiliated representatives. Our firms collectively serve more than 2 million retail investors, the majority of whom are middle-class families with a vital interest in saving for retirement. In most cases, our customers are household units who have both tax-qualified and non-qualified investment assets. They seek holistic advice and solutions designed to address their entire financial circumstances, without regard to whether their investments are in tax-qualified or non-qualified accounts.

On July 6, 2017, the Employee Benefits Security Administration of the Department of Labor (the “Department”) published a request for information (the “RFI”) in connection with its examination of the final rule defining who is a “fiduciary” of an employee benefit plan for purposes of the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code (“IRC”), and related prohibited transaction exemptions (the “Fiduciary Rule”).<sup>1</sup> We are submitting this letter in specific response to Question No. 1 in the RFI, regarding a potential delay of the January 1, 2018 applicability date (the “Applicability Date”) for certain provisions of the Best Interest Contract Exemption (“BICE”). We will respond to the other questions in the RFI in a future comment letter.

Cetera strongly supports the implementation of a uniform standard of care in connection with the provision of financial advice to all retail investors. However, we have significant concerns with the Fiduciary Rule in its present form. We believe that in many cases it will harm the very individuals it hopes to protect by increasing the cost and reducing their access to retirement advice,

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<sup>1</sup> U.S. Department of Labor, Request for Information, and Definition of the Term Fiduciary (July 6, 2017) *available at*: <https://www.dol.gov/sites/default/files/ebsa/temporary-postings/definition-of-the-term-fiduciary-request-for-information.pdf>.

disrupting the retirement services industry, and causing a surge in unnecessary litigation. For the reasons outlined below, we recommend that the Department delay the Applicability Date until the later of January 1, 2020 or the date that is one year after the Department takes final action on the Fiduciary Rule.

### **Summary of Comments**

- If the Department adopts changes to the Fiduciary Rule in response to comments on the RFI, financial institutions will need adequate time to interpret and implement those changes.
- Even if the Department makes no changes to the Fiduciary Rule, the current timeline for implementation is not realistic and should be delayed. The Impartial Conduct Standards in the BICE and the existing regulatory scheme provided by SEC and FINRA rules provide sufficient protection for retirement investors during any interim period.
- The Department should actively pursue coordination with the SEC, FINRA, and other regulatory agencies in developing and implementing any standard of care applicable to retail investors. Delaying the Applicability Date will provide time for the Department to constructively engage with other regulators to ensure consistency and provide effective protection for all investors.
- The RFI seeks comments on 18 individual questions. Many of them are complicated and will require time for all interested parties, financial institutions and otherwise, to evaluate and formulate responses. In many cases, commenters will wish to assemble new information with which to illustrate their views. The Department should extend the period for submission of comments with respect to questions 2 through 18 of the RFI until September 5, 2017, which is 60 days after publication in the Federal Register.

### **Discussion**

#### **1. If the Department Adopts Changes to the Fiduciary Rule, Additional Time will be Needed to Allow Financial Institutions to Implement Them**

##### **A. The review directed by the President has yet to be completed**

On February 3, 2017, President Trump sent a memorandum (the “Memorandum”) to the Department directing it to undertake a review of the Fiduciary Rule. The Memorandum posed several specific questions about whether or not the Fiduciary Rule would accomplish its intended aims, with or without undesirable collateral

consequences. On April 4, 2017, the Department published a notice delaying the applicability date of the Fiduciary Rule to June 9, 2017, in part to allow time to conduct a study of the Rule's impact as the President directed. The Department was prudent to delay implementation of the Fiduciary Rule, but the 60-day delay was an insufficient amount of time to conduct the required study. We understand that the Department is still in the process of reviewing and analyzing comments received in response to its request for comments on issues raised in the Presidential Memorandum.<sup>2</sup> As many commenters have noted, and as the Department appears to realize, innovations in investment products and services are underway that will create new methods to meet the requirements of the Fiduciary Rule and better accomplish its stated goals. With respect to mutual funds – the investment vehicle most frequently purchased by retail retirement investors – the rule requires drastically different compensation paradigms than those that have existed for decades, and there is no efficient or effective product solution that would preserve clients' continued ability to acquire them under a transaction-based compensation arrangement. We are concerned that full implementation of the Fiduciary Rule without giving these innovations sufficient time to be developed and put in place will greatly reduce investor choice and access to retirement planning services, and that it is necessary to delay implementation of the Applicability Date to allow an appropriate review to occur.

The preamble to the RFI states that, concurrent with the ongoing review of the Fiduciary Rule pursuant to the Memorandum, the Department is “seek[ing] public input that could form the basis for new exemptions or changes/revisions” to the Fiduciary Rule. Once the Department makes a final decision on the Fiduciary Rule – and regardless of whether that decision is to make extensive changes, minor modifications, or no changes at all – financial institutions will need a reasonable amount of time to prepare for compliance. The Department will be hard-pressed to issue a revised final rule in time to give financial institutions and their representatives sufficient time to adopt necessary changes before the Applicability Date. Such a short time period will inevitably lead to unnecessary market disruptions.

Cetera is committed to fully complying with all laws, rules and regulations applicable to our business, and will work in good faith to achieve compliance. However, an unreasonably short implementation period will force us and many similar institutions to rush changes into effect and in some cases, force us to suspend the delivery of services to retirement savers. Delaying the Applicability Date will give firms and advisers adequate time to develop and implement appropriate, effective and efficient processes and procedures to comply with the final version of the Fiduciary Rule, including any changes made by the Department based on public comments on the questions raised in the RFI. A delay will also allow time for the Department to provide additional guidance regarding any changes that are incorporated in the final rule, and for the industry to implement such additional guidance.

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<sup>2</sup> U.S. Department of Labor, Request for Information, and Definition of the Term Fiduciary (July 6, 2017) *available at*: <https://www.dol.gov/sites/default/files/ebsa/temporary-postings/definition-of-the-term-fiduciary-request-for-information.pdf>.

**B. If the Department delays implementation or makes other substantive changes to the Fiduciary Rule, investors are sufficiently protected by the application of the Impartial Conduct Standards**

During the transition period from June 9, 2017, through January 1, 2018, financial institutions and advisors relying on the BICE must adhere to Impartial Conduct Standards which it contains. The Impartial Conduct Standards require financial institutions and advisors to provide advice in the retirement investors' best interest, charge no more than reasonable compensation for their services and to avoid misleading statements. We are informed and believe that the large majority of financial institutions are relying on the BICE as a primary prohibited transaction exemption ("PTE"). Firms that are relying on the BICE have implemented procedures to ensure that they are meeting their new obligations, and are continuing to review and adopt additional measures. These new procedures may include changes to compensation structures, restrictions on the availability of certain investment products, changes to due diligence review of products and service providers, enhancements to efforts to monitor the sales practices of their affiliated financial advisors, and creation and maintenance of books and records to demonstrate compliance with the Impartial Conduct Standards. Thus, investors are already benefitting from stronger protections since the Fiduciary Rule became partly applicable on June 9, 2017. As a result, we believe that any harm to investors caused by further delay of the additional requirements is largely mitigated by the application of the Impartial Conduct Standards. In addition, many of the provisions in the BICE will require more extensive efforts in order to achieve compliance. For example, many firms will be required to create and distribute large volumes of information in connection with all customer transactions. We do not believe that these mechanisms can be implemented effectively by January 1, 2018. The cost of forcing financial institutions to rush untested enhancements into production should be weighed against the incremental value that they provide. In this instance, we submit that the balance leans heavily toward a delay in the Applicability Date.

**C. In addition to the Impartial Conduct Standards, investors are well protected by existing regulatory structures**

The sale of retirement savings products through financial institutions is already heavily regulated. Broker-dealers and financial advisors are subject to comprehensive regulation and legal obligations under federal and state securities laws, rules, and regulations. The SEC regulates broker-dealers through its antifraud authority in the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act), and certain Exchange Act rules. It similarly regulates investment advisers through the Investment Advisers Act of 1940 and related regulations. Under these rules, broker-dealers are required to deal fairly with their customers while investment advisers are subject to a fiduciary duty and extensive disclosure obligations.

Broker-dealers and individual financial advisers are also subject to self-regulatory organization (SRO) rules, oversight, and frequent examinations. A broker-dealer may

transact business only after it satisfies the membership requirements of an SRO, which is typically the Financial Industry Regulatory Authority, Inc. (FINRA). SRO rules require broker-dealers to commit to observe just and equitable principles of trade and high standards of commercial honor. In addition, broker-dealers are obligated to disclose certain material conflicts of interest to their customers, and federal securities laws and FINRA rules strictly prohibit broker-dealers from participating in certain transactions that may present acute potential conflicts of interest.

FINRA member firms are required by FINRA Rule 3110 to develop and enforce written supervisory procedures reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. They must also establish, maintain, and enforce a system of supervisory control policies and procedures that test and verify that the member's supervisory procedures are reasonably designed. FINRA members are also required to create additional or amend existing supervisory procedures where the need is identified by testing and verification. Both the SEC and FINRA diligently pursue non-compliance through vigorous enforcement efforts and the industry is further held accountable by an active plaintiff's bar.

There has been considerable debate about the substantive differences between the level of investor protection provided by a standard such as that embodied in the Fiduciary Rule and the "suitability" standard dictated by FINRA and SEC rules. It is our view that the difference among the two standards is not practically significant, but even assuming that the standard embodied in the Fiduciary Rule produces a meaningful improvement, the Impartial Conduct Standards are already in place. The current combination of regulatory structures and access to the courts serves as an effective mechanism to protect retirement investors and will remain operative should the DOL choose to further delay the January 1, 2018 Applicability Date. This represents a sufficient level of investor protection during any interim period.

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

As we have noted in our previous comment letters, the timeline for implementation of the Fiduciary Rule significantly underestimated the amount of time that would be necessary for product sponsors and financial advisers to implement the changes necessary to achieve compliance. The Fiduciary Rule is the most significant change to the investment advice delivery system in the United States in 75 years, yet the Department provided a far shorter implementation period than it has typically provided for new regulations.<sup>3</sup> A delay in the Applicability Date, along with adoption of a more orderly process for final implementation of the Fiduciary Rule, will help to avoid detrimental market disruptions resulting from an impracticable implementation timeline. In particular, the timeline for implementation fails to properly account for the sequential nature of the adjustments that will be required. For

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

example, the RFI refers to development of “clean shares,” a new class of mutual fund share that both the Department and a number of commenters believe represents an effective way to resolve potential conflicts of interest that arise in connection with sales of mutual funds. However, although there is a general view of this new share class, there is not yet any form of industry consensus on all of the details regarding how clean shares would be structured and implemented. Even if all of these details had been decided, we are informed and believe that it will take at least several months for sponsors of mutual funds to draft, submit, and receive approval for clean shares. More importantly, even that resolves only one step in the distribution process. Providers of investment platforms such as clearing brokers must make large-scale changes to their systems and processes in order to accommodate clean shares, and work on this effort cannot really begin until clean shares are reviewed and declared effective by the applicable authorities. In addition, retail distributors of mutual funds will also be required to implement significant changes to their due diligence and product approval processes and commission payment systems, many of which cannot begin until the providers of investment platforms complete their own adjustments. This ripple effect cannot be ignored.

### **3. Delaying the Applicability Date Will Provide Time for the Department to Constructively Engage with the SEC and Other Regulators to Ensure Regulatory Clarity and Consistency**

Cetera has long advocated for adoption of a uniform standard of care. This standard should apply to all types of retail customers in all types of accounts, tax-qualified or otherwise. Adoption of a fiduciary standard that applies only to tax-qualified retirement accounts ignores the fact that retirement savers do not segregate their investment strategies in this manner. They seek financial advice that is holistic and takes into account all of their financial circumstances and objectives in a comprehensive way. We believe that the Department was sincere in its’ belief that adoption of a fiduciary standard applicable to tax-qualified retirement accounts would help safeguard the interests of retirement investors, but adopting regulations that cover only a part of the universe creates a significant risk of ignoring the comprehensive nature of the financial planning and advice that retail investors seek from financial advisers, and that firms such as Cetera provide.

In a Wall Street Journal op-ed on May 22, 2017, Secretary Acosta acknowledged that the SEC has “critical expertise” regarding the regulation of financial professionals, and encouraged the SEC to be a “full participant” as the Department considers possible revisions to the Fiduciary Rule. SEC Chairman Clayton subsequently issued a public statement in which he accepted the “invitation to engage constructively” with the Department on this regulatory initiative.<sup>4</sup> In the same statement, Chairman Clayton asked for public comments to help the SEC “evaluate the range of potential regulatory actions.”

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<sup>4</sup> Available at <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31>.

We believe that such coordination is critical to avoid unintended (though predictable) consequences for retirement investors and capital markets. The securities markets are much larger and more complex than they were 40 years ago when ERISA was enacted. The heightened complexity of the markets makes it highly likely that the Department's dramatic shift will result in significant unintended consequences. Indeed, the SEC's deliberate approach to the uniform fiduciary standard rulemaking under section 913 of the Dodd-Frank Act reflects the significant amount of time and work necessary to understand the impact and reduce unintended consequences. To avoid these potentially drastic consequences, the Department needs to leverage the SEC's experience, expertise, historical context, knowledge and resources to fashion conduct standards that will not cause significant disruption in the securities markets. This has not occurred to date.

Congress enacted specific checks and balances to ensure that regulations affecting the securities markets and market participants do not impede efficiency, competition and capital formation. Section 23(a)(2) of the Securities Exchange Act of 1934 provides that:

The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this chapter, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this chapter, the reasons for the Commission's or the Secretary's determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this chapter.<sup>5</sup>

In granting the SEC authority to adopt rules governing product-specific disclosures for retail investors, Congress again included a requirement that "the Commission shall consider whether the rules will promote investor protection, efficiency, competition, and capital formation."<sup>6</sup> Congress was clearly concerned about the degree to which additional disclosure requirements could impair operation of the securities markets. This is a critical consideration given

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<sup>5</sup> 15 U.S.C. § 78w(a)(2); *see also id.* § 78c(f) ("Whenever pursuant to this chapter the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.") (emphasis added).

<sup>6</sup> *Id.* § 78o(n)(2).

the extensive degree to which the Fiduciary Rule mandates specific and highly burdensome disclosures regarding securities products and services.

The Department's rulemaking process effectively circumvented the statutory requirements that apply to SEC rulemaking, and the result, while well intentioned, represents risky experimentation with a significant portion of the U.S. economy. At a minimum, the Fiduciary Rule establishes a radically different regulatory regime for retirement and non-retirement investors. At worst, it will be extremely disruptive to competition and access to capital. It is important to keep in mind that the Department's proposed requirements are **in addition to, not in place of**, the already complicated, costly and often redundant and/or contradictory regulations imposed by a myriad of federal, state and self-regulatory securities and banking regulators. There can be no doubt that the Department's approach would benefit from the review mandated by the President's Memorandum, and applying the considerations and safeguards Congress intended to apply to regulations impacting the securities markets.

We believe it is critical that the Department and the SEC engage constructively with each other to ensure regulatory clarity and consistency. Absent such engagement, financial professionals will find themselves subject to multiple different and potentially incompatible sets of rules. We commend the Department and Secretary Acosta for expressing an interest in engaging with the SEC, and we strongly encourage the Department to pursue this in connection with its review of the Fiduciary Rule and possible delay in the Applicability Date. However, such engagement will take time and should not be approached with any artificial deadlines looming. As such, we believe the Department should delay the Applicability Date to allow adequate time to effectively engage with the SEC and other interested regulators on this important subject.

**4. Delaying the Applicability Date Will Allow the Department to Assess the Impact of the Expanded Definition of Fiduciary and the Impartial Conduct Standards.**

As of the date of this letter, the expanded definition of fiduciary investment advice and the Impartial Conduct Standards have been in effect for just over one month. In allowing those provisions to take effect on June 9, the Department concluded that "much of the consumer harm caused by conflicted advice could be avoided through the imposition of fiduciary status and adherence to basic fiduciary norms, particularly including the Impartial Conduct Standards." With this in mind, the Department should be confident that there is little risk that consumers will be harmed by a delay in the Applicability Date. We believe that the Department is correct in this view, and that the additional costs associated with implementing the remaining provisions of the Fiduciary Rule would far outweigh the potential benefits of those requirements.

On the contrary, there will be significant negative consequences for investors if the Applicability Date is not delayed. Among other things, the Fiduciary Rule will negatively



impact investors by increasing barriers to entry in the retirement advice market and decreasing competition and consumer choice with respect to financial advisors and the products they can offer. Many firms have already announced that they intend to abandon longstanding commission-based business models that the Department explicitly stated it intended to preserve. Thus, it is already clear that the Fiduciary Rule is producing negative consequences for investors that the Department did not intend or anticipate. This alone warrants delaying the Applicability Date to allow further review.

These are important issues that require examination in accordance with the Memorandum. However, it is clear that the Department will not be able to fully assess the negative impact to consumers and the relative costs and benefits in a short period of time. As such, the Department should delay the Applicability Date to allow time for it to gather meaningful data on the effectiveness of the provisions of the Fiduciary Rule that are already in effect.

**5. The Department Should Extend the Time Period for Submission of Comments on the Other Questions in the RFI through September 6, 2017**

The RFI seeks comments on 17 individual questions. As noted above, many of them are complicated and will require time for all interested parties to evaluate them. In many cases, interested parties will wish to assemble new empirical evidence with which to illustrate their comments. We therefore request that the Department extend the period for submission of comments on questions 2 through 18 of the RFI until September 5, 2017, which is 60 days after publication in the Federal Register

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We appreciate the opportunity to submit these comments on the RFI. If you have questions about anything in this letter, or if we can be of any further assistance as the Department undertakes its' review of the Fiduciary Rule, please feel free to contact me or Mark Quinn, Director of Regulatory Affairs at Cetera.

Sincerely,



Robert Moore  
Chief Executive Officer