MFS Investment Management
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Via Electronic Filing

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

Re: Response to Department's Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (RIN 1210–AB82)

Ladies and Gentlemen:

MFS Investment Management[1] appreciates the opportunity to respond to the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions ("RFI") by the Department of Labor (Labor ("DOL" or "Department"). Please consider this letter in conjunction with the comment letter MFS submitted on April 17, 2017 in response to the request of Department for comments on the questions raised in the Presidential Memorandum of February 3, 2017 (the "April Comment Letter").[2] That letter is available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01464.pdf.

We have reviewed the letters that will be submitted by the Investment Company Institute ("ICI"), the Investment Adviser Association and SIFMA and support their comments and analysis. While we maintain that the best course of action is rescission of the rule, we have the following comments in response to the RFI.

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[1] Massachusetts Financial Services Company and its subsidiaries, commonly known as MFS Investment Management or MFS, have a history of money management dating back to 1924, when it created the first open-end US mutual fund, Massachusetts Investors Trust (MIT). MFS offers a wide range of products and services to investors, including over 100 domestic mutual funds and institutional commingled and separately managed accounts services. MFS's products designed for retail investors — such as mutual funds and separately managed accounts — are distributed primarily through intermediaries such as financial advisors at major wire houses, regional brokerage firms, banks, insurance companies and registered investment advisors. MFS also manages assets for global institutional clients and discretionary managers, including corporate and public pension plans, defined contribution plans, multi-employer plans, investment authorities, sovereign wealth funds, endowments and foundations.

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

Streamlined Exemptions – Clean Shares (RFI Questions 7 and 9 and 11)

We appreciate the Department's interest in creating streamlined exemptions and in market developments, such as new uses of mutual fund "clean shares'".[3] The Department has issued the Best Interest Contract ("BIC") Exemption for use with IRAs and small plans. Firms that offer fee-based accounts to retirement investors that invest in mutual funds may use clean shares in such accounts and so can take advantage of the simplified compliance protocol available for "Level Fee Fiduciaries" under the BIC exemption. This simplified compliance option is not available for transaction based compensation. Yet, as the Department has recognized, a commission or other transaction fee structure may be more beneficial to some retirement investors, particularly those investors that employ a "buy and hold" strategy.

Firms that offer a brokerage platform with fees that do not vary by investment should be considered "Level Fee Fiduciaries". Clean shares may be used by firms to develop a mutual fund platform with fees that do not vary by fund family. The selling firm can impose its own transaction fee on the clean shares, which may be an asset based fee or a flat dollar fee. Accordingly, clean shares could be used to develop a brokerage platform with a uniform transaction fee or commission structure. As noted by the Investment Company Institute in its July 17, 2017 comment letter [https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00229.pdf], intermediaries that want to use this approach will need to make investments in their brokerage and recordkeeping systems to implement such a model. Providing a simple exemption for a level transaction fee platform will give firms an incentive to pursue this approach. Should the Department pursue an exemption for clean shares, we recommend that the Department work closely with the U.S. Securities and Exchange Commission ("SEC") to ensure that there is harmony in the SEC and DOL definition and permitted uses of clean shares.

The MFS family of mutual funds offers one or more classes that may be considered clean shares for most of its funds and recently expanded eligibility to purchase certain of these share classes to intermediaries that enter into an agreement with the MFS funds' distributor to offer a clean share class. However at present no intermediaries have entered into such agreements, perhaps because of the logistical issues noted by the ICI or because firms are waiting for final guidance from the Department. If the Department issues an exemption related to the use of clean shares, we suggest that it be accompanied by transitional relief that would extend the time period for compliance 24 months to enable intermediaries to make the technological changes needed, update agreements and to transition accounts to this model.

Although MFS would welcome a streamlined exemption for intermediaries that use clean shares, we suggest that the Department also provide relief for firms that develop other solutions to leveling compensation or eliminating conflicts of interest.

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[3] As described in a 2017 SEC staff interpretive letter, clean shares are a class of shares of a mutual fund without any front-end load, deferred sales charge, or other asset-based fee for sales or distributions. See Capital Group, SEC Staff Letter (Jan. 11, 2017), www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm.

Impact of the Fiduciary Rule on Investors (RFI Questions 3 and 16)

As we stated in the April Comment Letter, the Fiduciary Rule has resulted in many mutual fund investors – particularly, investors with small account sizes – losing access to advice from their broker-dealers. MFS distributes its mutual funds to retail investors (including small plans and IRAs) through intermediaries and generally requires that each newly opened account be associated with a broker-dealer. The broker-dealer may buy MFS fund shares for its client though a firm account (including omnibus accounts for which the broker-dealer maintains the underlying records) or create an individual account for the investor at the mutual fund transfer agent ("direct at fund" account). Direct at fund accounts are often smaller investor accounts. Please see the discussion in our April Comment Letter, in which we noted that MFS has seen a large increase in the number of dealer resignations from MFS direct at fund accounts since August 2016.[4] Since our April Comment Letter, the number of dealer resignations from direct at fund accounts has continued to grow. From comments we have received from intermediaries, MFS's understanding is that firms resigning from these accounts are either changing their business model in response to the Fiduciary Rule or are concerned that they would not be able to adequately supervise the requirements of the grandfather rule with respect to direct at fund accounts. Accordingly, they have instead chosen to abandon these accounts. The end result has been to reduce access to advice for smaller individual investors.

MFS supports maintaining investment choice and access to investment advice for all investors, regardless of their account size. We urge the Department to carefully examine the impact of the Fiduciary Rule and related exemptions on this market and make changes that will encourage intermediary firms to develop options for all investors.

Independent Fiduciary Exception Improvements (Question 18).

As noted in our April Comment Letter, MFS appreciates that transactions with independent fiduciaries with financial expertise are excluded from the Fiduciary Rule ("IFE exception" or "IFE"), but finds the requirements to implement the IFE exception to be unnecessarily complex and burdensome. While MFS appreciated the Department's guidance indicating that negative consent could be used to obtain representations to establish the IFE, financial firms' attempts to implement this exception for the June 9, 2017 effective date of the Fiduciary Rule resulted in millions of written communications between financial services firms and between firms and their plan clients. This exercise required both time and expense in producing and sending the communications and additional time and expense to review the communications received, as well as ongoing recordkeeping. Out of an abundance of caution, some firms took an expansive view of their contacts and sent communications to recipients whose business relationship with the firm did not require a communication, adding to the costs of both sender and recipient. These costs and, if the IFE is not modified, the costs to continue such notices, may ultimately be passed on to the retirement investors.

[4] Since August 2016, MFS has received resignation instructions affecting over 20,000 IRA and retail accounts with an average balance by broker dealer ranging from $1,700 to $29,000. Pending resignations would impact over 12,000 additional such accounts; the average balance of the accounts by broker dealer for these pending requests range from $ 23,000 to $37,000. (As a comparison, in 2015 MFS was instructed by broker dealers to remove broker dealers from 1,525 IRA and retail accounts and in 2014, from 615 such accounts.) Although firms have indicated to MFS that these resignations are in response to the Fiduciary Rule, firms have included non-IRA retail accounts in their requests, perhaps indicating that they are applying the business changes made to comply with the Fiduciary Rule to similar sized retail accounts.

In promulgating the Fiduciary Rule, the Department did not cite any findings of confusion about fiduciary status in dealings between financial services firms servicing plans or IRAs. We recommend that the IFE be simplified to provide that any "investment advice" provided in the context of a transaction on behalf of a plan or IRA that is conducted among regulated financial services firms be excluded from coverage by the Fiduciary Rule, without the need for representations and disclosures. In particular, we strongly urge the Department to revise the IFE to make clear that it applies to the activities of regulated investment management companies and investment advisers in connection with their distribution and sales efforts without any preconditions.

For the same reasons, MFS also suggests that the IFE be simplified for interactions with sophisticated plan fiduciaries that are not regulated financial services firms. When interacting with such a fiduciary, financial services firms should be able to rely on the IFE without any representations from the advice recipient as to its status. As noted in our April Comment Letter, many interactions with plan fiduciaries do not involve a written contract in which such representations might be handled. At most, requirements should be limited to providing notice that the firm is not undertaking to provide impartial investment advice or give investment advice in a fiduciary capacity and that the firm has a financial interest in the transaction. Please see our April Comment Letter for further discussion of other individual components of the exception.

<u>Streamlined Exemptions – Incorporation of Securities Regulation of Fiduciary Investment Advice (RFI Question 11)</u>

The Department asked whether a streamlined exemption would be appropriate if the SEC or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors. The SEC recently issued a statement requesting comment on standards of conduct for investment advisers and broker-dealers and we urge the DOL to coordinate with the SEC to ensure that investment professionals are not subject to different and conflicting standards depending on whether they are discussing an investment in an individual's IRA vs. the individual's taxable account. A simple and streamlined approach for the DOL would be an exemption for investment advice provided in accordance with the standards of conduct required by the advice provider's primary regulator. Such an exemption would not become stale as regulations change as the advising party would be required to maintain the then-current standards of its regulator. We encourage the DOL to work closely with the SEC in this area.

Thank you for the opportunity to comment. We have touched on only a few of the issues with the Fiduciary Rule and related exemptions. We encourage the Department to carefully review the Fiduciary Rule and related exemptions as required by the President's Memorandum and to rescind or revise the Rule.

Sincerely,

Heidi Hardin

Heidi W. Hardin
Executive Vice President and
General Counsel