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Email: *EBSA.FiduciaryRuleExamination@dol.gov*

The Honorable Alexander Acosta, Secretary of Labor
Office of Exemption Determinations, EBSA (Attention: D-11933)
U.S. Department of Labor
200 Constitution Avenue NW., Suite 400
Washington, D.C. 20210

**Re: Request for Information (“RFI”) Regarding the Fiduciary Rule and Prohibited Transaction Exemptions RIN 1210-AB82
How Automatic Data Processing, Inc. (“ADP”) and Paychex Abuse the Current and Revised Platform Provider Exemption**

Dear Mr. Acosta:

The purpose of this letter is to comment how the DOL Fiduciary rule significantly harms low and middle-class retirement plan investors because it allows the two major “platform providers,” ADP and Paychex, that already dominate the industry: (i) to use their armies of unlicensed employees to sell the same mutual funds to retirement plans as licensed advisers, (ii) generate “excessive” income for their broker-dealers that is significantly more than professionals, and (iii) without any fiduciary responsibility. This is the DOL’s “key” flaw in crafting a regulation intended to protect retirement plan investors from “improper and conflicted advice.” Their broker-dealer income stream consists of “revenue sharing” fees for marketing their investment platforms and 12b-1 trailing compensation, also referred to as “commissions,” which up until now, has always been used to pay for professional advice. *See* Footnote 1 at page 2.

Also included is information about my experience with Paychex’s marketing scheme to financial advisers to “partner” with them on the basis that Paychex will refer 401(k) investment business to them when instead, as noted above, they sell the mutual funds directly to retirement plan prospects and keep all the revenue. This is the same information I provided to the Securities and Exchange Commission’s (“SEC”) Office of the Whistleblower under Dodd-Frank in January 2012.

I. Overview – ADP’s and Paychex’s Abuse of the Platform Provider Exemption, Past, Present and Future with the DOL’s Approval

In effect, the Fiduciary rule has institutionalized a two-track system to sell mutual funds to employer-sponsored retirement plans; one for licensed advisers that must act in

the best interest of investors (and execute a “Best Interest Contract”) along with extensive disclosure about compensation and provided services, and most significantly, on-going fiduciary responsibility. And then there’s one for ADP and Paychex under a marketing scheme to sell their mutual fund platforms based on the specious argument that the mutual funds are merely “incidental” to the sale of their administrative service. Of course, but for the sale of the mutual funds there would be no retirement plans to administer.

The larger issue is that the DOL has ignored, for example, all of the SEC rules governing broker-dealers and financial advisers that many legal scholars said before the rule was finalized . . . “the DOL overstepped its regulatory power.”

From the start, it must be emphasized that the DOL, SEC and the Financial Industry Regulatory Authority (“FINRA”) have issued numerous legal opinions to banks, broker-dealers and insurance companies selling a platform of mutual funds and none of them have ever approved the sale of securities by unlicensed employees.

Both ADP and Paychex intentionally target small and mid-size employers [and their employees] that are unsophisticated about retirement plan investing on the basis that said employers can bundle payroll and retirement plan administration under one system. However, employers are not told about the mutual funds’ revenue sharing or commissions sold by their unlicensed employees nor are they told that they have production quotas and are paid a bonus/commission based on the value of the plan’s assets just like licensed advisers. In operation, it’s a deceptive and manipulative sales practice by ADP and Paychex to use their unlicensed staff to act as a front to sell mutual funds for their broker-dealers and bypass all of the government’s controls to protect retirement plan investors. Certainly, the DOL could not have intended such a loophole in drafting its Fiduciary rule. The result is abundantly clear, the rule has created two classes for retirement advice; one class that gets mandated best-interest advice from licensed professionals and the other from ADP and Paychex that escape regulatory oversight and fiduciary responsibility and yet charge customers as if they were getting that advice. Such a proposition is bizarre.

Compounding the problem, the Fiduciary rule grandfathers ADP’s and Paychex’s illegal mutual fund sales retroactive to the mid-1990s when they first received approval for their broker-dealers from the SEC and FINRA.¹

The DOL diminishes the important role of licensed advisers which is to probe, discuss and recommend investment solutions when dealing with plan sponsors and participants; it is the fundamental rule that every financial adviser “know their client.”

Former SEC Chairman Arthur Levitt Jr. wrote in *InvestmentNews* on December 8,

¹ Paychex received approval from the SEC and FINRA for its broker-dealer, Paychex Securities Corporation (“PSC”), on June 7, 1996. ADP received approval for its broker-dealer, ADP Broker-Dealer, Inc., on March 29, 1995. At the time of my Whistleblower complaints, FINRA’s records indicated that each are owned by at least 75% or more by their parent corporations and that their broker-dealers are mutual fund retailers that do not hold or maintain funds or securities, do not provide clearing services for other broker-dealers, and do not refer or introduce customers to other brokers and dealers.

2015: “As a former broker, I cannot accept the argument that brokers are simply order-takers rather than advisers. Responding to customers’ directions and anxieties invariably involves a dialogue that veers into the area of advice and counsel.”

Additionally, the January 2011 Government Accountability Office (“GAO”) Report on 401(k) Plans noted the conflicts of interest that arise from the receipt of revenue sharing payments. As documented in the GAO Report, revenue sharing is widespread, with payments ranging from 5 to 125 basis points a year. Platform providers have clear financial incentives to design platforms to include investment options (mutual funds and mutual fund share classes) that pay higher revenue sharing fees and exclude options that pay lower or no revenue sharing fees. The GAO report concluded that the universe of investment options available on a platform is often tainted by bias and self-interest to maximize profits.

The platform provider exemption, together with its exemption for the selection and monitoring of investments and the so-called “investment education” provision that allows a platform provider’s non-securities licensed employees to discuss with plan sponsors and participants, among other things, the platform’s mutual funds’ expenses, asset types, model portfolios and the historical performance of the asset classes, amounts to a seismic shift to the DOL and away from the SEC and FINRA to control broker-dealers and investment advisers that will not benefit retirement plan investors in any way. More likely than not, it will leave plan sponsors and participants with the impression that they are receiving investment advice, but in fact, they will be more confused, at greater risk of failing to invest properly, pay higher fees, and without access to professional advice which defeats the rule’s purpose. Does the DOL seriously believe that investor education can be relegated to a few handouts and the internet? *See* 29 CFR 2510.3-21(b)2(i) through (iv)(B).

And, in the case of ADP and Paychex, their unlicensed sales staff and call centers are not monitored to ensure compliance with the rule if they cross the line by recommending investments nor are there any penalties if they do. In this regard, the Fiduciary rule is a complete failure to protect retirement investors.

As outlined above, the platform provider exemption creates a host of problems, especially the way ADP and Paychex sell theirs. However, the most impactful to the financial industry and to retirement plan investors in general is the question of whether insurance companies such as Aetna, Guardian, Hartford, John Hancock, Nationwide, Principal and Transamerica, that already sell 401(k) investment platforms and have broker-dealer subsidiaries, would terminate their licensed staff and sell their platforms just like ADP and Paychex. If so, would not the major banks join in the fray to escape fiduciary responsibility? Can you imagine the chaos this would create for the financial industry and the harm it would cause retirement plan investors?

II. Paychex’s Partnership with Financial Advisers – My Experience “Paychex representatives are not licensed and do not recommend funds”

In April 2010 I received a flyer from Paychex soliciting financial advisers to “partner” with them on the basis that they would refer 401(k) investment business in connection with selling their platform of 12b-1 and fee-based mutual funds. The flyer stated:

“Paychex representatives are not licensed and do not recommend funds. Their aim is to help you grow your 401(k) business and are available to help answer client questions and to assist in closing your 401(k) sales. Our sales force talks to hundreds of thousands of business owners every year. When we uncover interest in a retirement plan we can refer the employer to an adviser partner. When investment professionals counsel their business clients, Paychex adds value as an expert payroll and 401(k) recordkeeping partner.”

In spite of my numerous attempts to reach out to Paychex’s so-called “adviser referral” network to receive 401(k) leads, I never received a response. As a result, I used Paychex’s broker marketing material to prospect to the 401(k) plans that were administered by them based on public information from DOL’s Annual Reports Form 5500. Paychex’s Senior Corporate Counsel, Brian Madrazo, by letters dated November 17, 2010 and October 27, 2011, demanded that I cease and desist from using Paychex’s marketing material and threatened litigation should I fail to also furnish him with an accounting of each and every client and/or prospect to whom I provided the marketing material. I wrote to Mr. Madrazo on November 4, 2011 and explained that I had permission from Debbie Godwin, Retirement Plan Consultant – Financial Adviser Support Team, to use Paychex’s co-branded partner letter and its related marketing material. The co-branded letter allowed financial advisers to insert their company logo on the left side of Paychex’s and included language referencing the adviser and Paychex partnership. I also mentioned that during the course of my marketing effort, I learned that many 401(k) plans were sold and implemented by unlicensed employees. As of this date, there has been no further correspondence from Mr. Madrazo.

III. My SEC Whistleblower Complaint About ADP and Paychex

I filed a SEC Whistleblower complaint against Paychex on January 19, 2012 and against ADP on October 24, 2015 based on their unlicensed mutual fund sales. In the Paychex complaint, based on their SEC Annual Report Form 10-K filings, I reported that from 2002 through 2011, as many as 400,000 participants may have been impacted by Paychex’s unlicensed sales. During that period, Paychex handled over \$73.5 billion in retirement contributions and collected over \$225 million in revenue sharing fees. I estimate that commissions could amount to an additional \$225 million during that timeframe since financial information related to PSC is not reported in its 10-Ks. Paychex also generated at least \$25 million in “float” from their unlawful activity by holding participant contributions in their custodial bank account prior to remitting them to the mutual funds. I argued that Paychex should be required to disgorge all income and profits from those illegal sales and return them to the participants as well as pay a substantial fine

for their false and misleading scheme to “partner” with financial advisers.² Below is an updated listing from Paychex’s SEC 10-K filings for its fiscal years ending May 31, 2002 through May 31, 2017 relating to the number of plans administered, the asset value of participants’ funds externally managed, and the basis points received.³

Paychex’s Annual Report Form 10-K / FYE	Plans Administered	Plan Assets	Average Fee Basis Points
May 31, 2002	23,000	\$2.2 billion	30bps
May 31, 2003	26,000	\$2.7 billion	30bps
May 31, 2004	29,000	\$3.9 billion	30bps
May 31, 2005	33,000	\$5.1 billion	30bps
May 31, 2006	38,000	\$6.3 billion	40bps
May 31, 2007	44,000	\$8.5 billion	40bps
May 31, 2008	48,000	\$9.7 billion	35bps
May 31, 2009	50,000	\$8.5 billion	30bps
May 31, 2010	51,000	\$11.3 billion	25bps
May 31, 2011	57,000	\$15.3 billion	slightly < 25bps
May 31, 2012	59,000	\$15.7 billion	20-25bps
May 31, 2013	62,000	\$19.3 billion	20-25bps
May 31, 2014	65,000	\$21.9 billion	20-25bps
May 31, 2015	70,000	\$23.5 billion	Not disclosed
May 31, 2016	74,000	\$23.6 billion	Not disclosed
May 31, 2017	78,000	\$27.4 billion	Not disclosed

² An ERISA class action was previously brought against Paychex in the United States District Court for the Western District of New York titled, *Zang v. Paychex, Inc.*, Case No. 6:08-cv-06046-DGL-MWP (“*Zang*”). The core allegation in *Zang* was that Paychex’s “recei[pt] of ‘revenue-sharing payments’ from mutual funds (or mutual fund families) for, purportedly, providing record-keeping and related services to the mutual funds that make revenue-sharing payments to Paychex” were unlawful. (*Zang* Dkt. No. 26, Ex 2. ¶ 8). On August 2, 2010, the *Zang* court granted Paychex’s motion to dismiss plaintiff’s ERISA claims, finding that, as a threshold matter, Paychex was not a fiduciary of plaintiff’s 401(k) plan. However, unlike my SEC Whistleblower complaint, PSC was not a defendant in *Zang*, nor was it identified as being Paychex’s broker-dealer subsidiary through which Paychex sold mutual fund investments to employer-clients in connection with its 401(k) administrative services. This fact is critical because the fiduciary obligations under ERISA (and the breaches thereof) that were stated in my complaint arose from the relationship of Paychex and PSC, and in particular, from the deceptive sales and marketing activities jointly carried out by them. Finally, the plaintiff in *Zang* did not present core facts to the Court regarding the fiduciary status of Paychex and PSC, including facts related to these entities’: (a) control of the mutual funds and mutual fund share classes offered to plaintiffs, (b) the decision to offer higher cost mutual funds without the benefit of licensed advisers, (c) other control over determining their own compensation, and (d) its false “partner” marketing scheme to financial advisers.

³ 1. Commencing May 31, 2015, Paychex states it is the largest 401(k) administrator in the U.S.
2. Paychex does not disclose in any of its 10-K filings any information about its PSC subsidiary.
3. Paychex states that its selling efforts for these services [retirement administration and mutual fund sales by its unlicensed employees] are focused primarily on our existing payroll client base as the processed payroll information allows for data integration necessary to provide these services more efficiently.
4. Based on information and belief, references to basis points does not include the compensation for PSC.

An analysis of Paychex's SEC Annual Reports Form 10-Ks for the past 16 years noted above shows that they handled \$204.9 billion in retirement contributions. If they collected an average of 25 basis points from revenue sharing fees and 25 basis points from unreported PSC commissions, they would have generated over \$1.02 billion without having any fiduciary responsibility. Additionally, if they averaged during that period a conservative non-compounded 3% from that unlawful income, they would have received an extra \$6.147 billion; at 5% it would be \$10.245 billion.

In the case of ADP, they have never disclosed in any of their SEC Annual Report Form 10-Ks the number of plans it administers, their plan assets, or the number of participants until March 15, 2017 when they wrote to Acting Secretary of Labor, Timothy D. Hauser, about delaying the Fiduciary rule's applicability date. That letter states that as of December 31, 2016: "ADP Retirement Services, part of the Employer Services division, is one of the largest independent retirement plan recordkeepers in the United States. It provides non-discretionary recordkeeping and administrative services to over 38,000 tax-qualified defined contribution retirement plans. Of these plans, over 35,000 have fewer than 100 participants. ADP also separately markets and/or provides money movement services in connection with two IRA institutions for more than 27,000 SIMPLE IRA plans. In total, it provides comprehensive retirement services to over 66,000 clients and approximately 1.7 million plan participants in plans with over \$58 billion in assets. While ADP offers retirement plan products and services primarily to small employers, it does service a number of larger plans with up to tens of thousands of participants."

As to my Whistleblower complaints, without any SEC statutes or regulations allowing the direct or indirect sale of securities by unlicensed employees, I remain mystified as to why no legal action was taken. According to the many conversations I had with Nikkia Wharton of the SEC's Whistleblower's office, she told me: "There were a lot of people working on this and the lack of enforcement came down to prosecutorial discretion." Meanwhile, millions of retirement investors under the control of ADP and Paychex that are trying to save for retirement do not have access to a financial adviser in spite of paying as if they had one. Instead, they are getting ripped-off by ADP and Paychex while their millions of dollars from revenue sharing fees and commissions keep rolling-in; day after day, month after month, year after year. It makes you wonder, what justification can the DOL have in allowing ADP and Paychex to overcharge retirement plan investors? The DOL [and the SEC] should be reining in such financial abuse, not condoning it.

As I have mentioned in previous correspondence to the SEC, DOL and FINRA, this is not a trivial matter since it involves millions of retirement plan investors and billions of dollars that has essentially been confiscated by ADP and Paychex for more than 20 years stemming from the sale of mutual funds by their unlicensed employees. Simply stated, this is a case involving significant conflicts of interest, self-dealing, and excessive fees crossing the jurisdictions of the DOL, FINRA, SEC, Department of Justice, and the Internal Revenue Service.

In my view, one can only conclude that the DOL intentionally created its Fiduciary rule to exempt ADP and Paychex from all mutual fund sales; past, present and future in

spite of the rule's stated mission of protecting retirement plan investors from excessive fees and conflicted advice.

IV. Conclusion - ADP and Paychex are Fiduciaries Irrespective of the Platform Provider Exemption

A. The SEC's Jurisdiction of Broker-Dealers

In support of my Paychex Whistleblower action, I referenced the SEC's 2011 January publication, "Study on Investment Advisors and Broker Dealers" ("SEC Study") stating: "The regulation of broker-dealers governs how broker-dealers operate, for the most part, through the Commission's antifraud authority in the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), specific Exchange Act rules, and SRO rules based on Exchange Act principles, including (among others) principles of fairness and transparency." *See* SEC Study, p. iii (emphasis added).

As to the regulation of broker-dealers [*i.e.* ADP Broker-Dealer, Inc. and PSC], the SEC Study also provides: "The antifraud provisions of the Exchange Act also broadly prohibit misstatements or misleading omissions of material facts, and fraudulent or manipulative acts and practices, in connection with the purchase or sale of securities." *Id.* at p. 53. It continues: "Generally, courts have held that broker-dealers that exercise discretion or control over customer assets, or have a relationship of trust and confidence with their customers, owe customers a fiduciary duty." *Id.* at p. 54.

While ADP and Paychex may assert that they are exempt from fiduciary responsibility under the rule's platform provider exemption, the fact that they own broker-dealers and receive direct compensation in the form of revenue sharing fees and/or commissions from the mutual funds sold on their platforms means that they are fiduciaries subject to the SEC's jurisdiction. The problem here is that the DOL is attempting to regulate the federal licensing laws governing the sale of securities.

Further, the DOL's ridiculous platform provision that their employees only have to say that they are not providing fiduciary advice to escape fiduciary liability makes absolutely no sense. How is that beneficial to plan participants? And it certainly should not be a turf war between government agencies with the common goal of protecting investors from the types of fraudulent practices I have described in this letter. Most importantly, if it's a balancing act between protecting the investor or ADP and Paychex, it seems to me the investor wins this one.

B. The DOL's Platform Provider Exemption is in Conflict with its Statutory Fiduciary Rule

Specifically, as it relates to ADP and Paychex, the Employee Retirement Security Act of 1974 ("ERISA") defines the term "fiduciary" at Title I, Section 3(21)(A)(ii). That section reads: "... a person is a fiduciary with respect to a plan to the extent ... (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect

to any moneys or other property of such plan, or has any authority or has any responsibility to do so ...”

When deemed a fiduciary, ERISA Sections 404(a)(1)(A) and (B) impose the following obligations:

(404)(a) Prudent man standard of care

- (1) ... a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
 - (A) for the exclusive purpose of:
 - (i) providing benefits to participants and their beneficiaries; and
 - (ii) defraying reasonable expenses of administering the plan;
 - (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims ...

ADP and Paychex are also “parties-in-interest.” ERISA Sections 3(14)(A) and (B) define a party in interest as: “(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such benefit plan; or (B) a person providing services to such plan.”

ERISA Section 406(a)(1)(D) prohibits a fiduciary from engaging in transactions with a plan that involves a transaction constituting a direct or indirect transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.

ERISA Sections 406(b)(1), (2) and (3) prohibit fiduciaries from: (1) dealing with the assets of the plan in his own interest or for his own account, (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interest of its participants or beneficiaries, or (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Third-party administrators (“TPAs”) that only sell their 401(k) plan administrative services are not fiduciaries because they do not make management decisions as to plan policies, rules or procedures. They only provide ministerial services (*eg.* calculation of benefits, processing claims, preparation of reports required by government agencies, etc.). *See* 29 CFR 2509.75-8, D-2.

Here, ADP and Paychex are not just TPAs, they are also broker-dealers with fiduciary responsibility and obligated to act solely in the interest of the participants and beneficiaries. Specifically, in dealing with plan sponsors and participants, ADP and

Paychex control the entire transaction, from the initial point of contact by their unlicensed employees to gain the trust and confidence of plan sponsors, to selling the investments from which they are obtaining commissions without having to provide investment advice, to performing ministerial functions.

Worst yet, during the 401(k) enrollment meetings to present the list of funds available for investment from the platform, when asked by the plan sponsor's employees where they can get personalized investment advice, ADP's and Paychex's unlicensed employees have no legal way to respond because it is not available in spite of being charged for it. Does the DOL really want to perpetuate this deception? It's bad enough ADP and Paychex have been duping retirement plan participants for over 20 years.

One of the most important provisions outlined in the DOL Fiduciary rule justifying the receipt of commissions from mutual fund sales is that individuals [through their broker-dealers] must be licensed and render "best interest" investment advice. The notion of allowing ADP and Paychex to continue using their unlicensed staff in an attempt to mimic professional advice, and continue receiving commissions and revenue sharing fees, but escape ERISA's overarching fiduciary protections by providing cover for them under the platform provider exemption, would allow them to continue bilking retirement plan investors. Should the DOL actually implement the rule, it would be in complete contravention of all existing agency statutes and regulations created to protect investors.

Given all the problems referenced above about the DOL's platform provider exemption, it should be clear that the exemption is a step backwards in a veiled attempt to protect retirement plan investors. As I initially stated, the exemption creates a two-track system to sell mutual funds to retirement plans. The DOL is attempting to create a new "suitability" standard to sell mutual funds, but this time sanctioning the selling of securities by unlicensed employees and still receive commissions, while those that are licensed advisers and also receiving commissions, must act in the "best interest" of retirement plan investors. Was not the DOL's Fiduciary rule aimed at stopping the \$17 billion a year it believed investors waste in exorbitant fees from conflicted advice?

V. Improving the Platform Provider Exemption

Since the RFI has asked for ways to improve the platform provider exemption, below is a list that will reduce managed mutual fund fees to align them much closer with low-cost index mutual funds. Many licensed advisers use index funds but add a fee for their investment advice service. That extra fee typically ranges from .010% to 1.00% of the assets under management depending on the amount of plan assets and the services to be provided. Below is the list to easily remedy the platform provider exemption.

- Eliminate all front-loaded mutual funds;
- Eliminate revenue sharing fees. Since ADP and Paychex already charge plan sponsors for setting up the plan and are obligated to transmit the participants' contributions to the mutual funds by way of an administrative contract, why should they get paid twice under a revenue sharing scheme to perform the same

service? It seems to me if you get paid twice to do the same thing you were already obligated to do, that's stealing. This would reduce mutual fund expenses from .025% to .050%; and

- Platform providers that do not provide investment advice should not be paid a commission or any other compensation. That would lower managed mutual fund expenses by another .025% to .050%.

All of the above suggestions must also be offset by the mutual funds themselves on a dollar-for-dollar basis so that they are not unjustly enriched. These suggestions can be easily implemented by January 2018.

Noted civil rights attorney Harry Philo said: "Never let us forget that the Law is never settled until it is settled right, and it is never settled right until it is just, and it is never just until it serves society to the fullest."

In my view, both the DOL and the SEC need to re-examine my Whistleblower complaints in which the above fiduciary violations by ADP and Paychex were clearly identified in 2012.

In closing, the DOL and the SEC should jointly charge ADP and Paychex with violations of their respective fiduciary rules in connection with their 20+ year reign of deceptive and manipulative sales practices to sell mutual funds by their unlicensed employees. As part of any litigation, they should also claw-back on behalf of the defrauded participants all the income and profits from those illegal sales and return them to the plan participants. And lastly, the SEC should impose a very significant fine against Paychex and PSC for their false and misleading advertising scheme to "partner" with financial advisers.

I appreciate the opportunity to present my views regarding the platform provider exemption.

Very truly yours,

A handwritten signature in black ink, appearing to read "Royce A. Charney". The signature is fluid and cursive, with a long horizontal stroke at the end.

Royce A. Charney, J.D.
President

cc: SEC Chairman Jay Clayton, chairmanoffice@sec.gov