Davenport & Company

SINCE 1863

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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

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

Ladies and Gentlemen:

Davenport & Company LLC is pleased to provide feedback in response to the Department of Labor's Request for Information Regarding the Fiduciary Rule and prohibited Transaction Exemptions published in the Federal Register on July 6, 2017. Like many of our peers, our firm believes that significant changes are necessary to make the Rule workable such that retirement investors continue to have access to advice and the products they need to ensure a successful retirement, as defined by the investor. Retirement investors must be allowed to choose the products and services they want under the fee or commission structure that works best for their needs and goals. It is imperative that the Rule be revised such that it is not so burdensome as to prevent firms like ours from providing products and services to retirement investors of all sizes. While we support the intent to increase transparency and place retirement investors interests' first, we believe major changes are needed to achieve these goals.

The first issue to be addressed is the delay of the January 1, 2018 full implementation date for the Rule. We are hopeful the delay will allow the Department to successfully complete the review directed by the President earlier this year. We need the Department to thoroughly assess the issues anticipated to cause the most disruption and disservice to retirement investors.

Since the release of the final Fiduciary Rule in 2016, there has been significant turmoil and confusion as financial services firms have endeavored to address the requirements of the Rule. Our firm has spent thousands of hours analyzing how to best meet technical requirements of the Rule that are clearly not in our clients' best interest. It is our understanding that some of the larger financial services firms have already changed the structure of their business without having the time for their clients to assess the impact of these changes. In some cases, we see firms have announced going to a fee-based only structure, which, at least for our clients, we are certain would levy significantly higher costs than assets purchased or held in a commission-based environment. Other firms announced they simply would not continue to service certain types and/or sizes of accounts. These limitations are often not in clients' best interest as the Rule attempted to ensure. We have already seen evidence from our own clients that their qualified retirement plan administrator has notified them they will no longer deliver investment advice within their plans.

Our firm has investigated a countless number of strategies to comply with the current and future requirements of the Rule, while balancing the wants of our client base, and our knowledge of their needs. Concerning the Department's question relating to market innovations and the advent of "clean" shares, T share mutual funds and fee-based annuity products, we do not believe the Rule should be structured around what is deemed to be innovative at this time. Importantly, there is a material lack of information to firms of our size on how these new share classes will be constructed, and which fund companies intend to offer them.

The financial services industry has changed over time in response to the products and services demanded by investors. To construct a rule around a handful of deemed innovations like fee-based annuity products or new share class options is shortsighted and counter-productive to the long-term success of investors. The Rule should not favor a particular product, share class or compensation structure. Instead, the Rule should be soundly based in the requirement to do what is best for clients and to disclose all information relevant for an investor to make an informed decision as to which products and services best fit their needs. The Rule in its current form could be construed to favor certain compensation structures or products, which could certainly limit choice inconsistent with the goals of the current Administration.

We are very concerned about the contract requirement under the Best Interest Contract (BIC) Exemption. The requirements under this exemption are unworkable and are a large threat to retirement investors' access to reasonably priced products and services. The enforcement of the Rule through private litigation will certainly limit the availability of products and services, and will increase costs for retirement investors. This provision is driving many financial services firms to consider altering their business models to avoid the use of the contract.

A simplified version of the Best Interest Contract Exemption as suggested in question 13 seems a more reasonable way to approach the issue. In lieu of a complicated legal contract that may further confuse retirement investors, firms could provide clients a simplified disclosure document outlining the fiduciary status of the account, basic information on the advisor's compensation structure and possible sources of conflicts.

Another concern within the BIC Exemption is the transaction disclosure requirement. This requirement places a significant burden on firms, especially small to mid-sized financial services firms, and could potentially cause transactions to be delayed. The operational challenges are immense due to the complexity of connecting the required systems and information to provide a disclosure of all fees, costs and compensation associated with a recommended transaction. This information often lives on multiple systems and it may be impossible for delivery in advance, in one uniform space. Some firms would inevitably be required to outsource pieces of this functionality, which would have a material lead-time and associated expense. This requirement creates a new cost for financial services firms, which in all likelihood will be passed on to the client.

The BIC Exemption also mandates financial services firms to maintain a web page with information pertaining to all "direct or indirect material compensation" that an advisor may receive for each asset or class of asset. This mandate presumably forces firms to detail an unimaginable number of mutual funds, insurance company contracts and subaccounts, etc., which would be extremely costly to build and maintain. Some firms, especially smaller ones, may be forced limit their offerings to meet this requirement, which would again reduce choice for investors.

We are also concerned about the requirements under Section IV of the BIC Exemption for firms that restrict recommendations to products that generate third party fees or proprietary products. This provision seems to discourage firms from selling proprietary products or funds that provide third party payments, even if the investment is the best choice for the client. The many requirements and standards that financial services firms must meet to adhere to in this section make it nearly impossible to comply. As such, some firms have elected not to offer these products in a commission-based environment, or have taken the drastic step to limit offerings only to products with identical third party payments. Additionally, we have been made aware that some firms are considering not offering proprietary products to retirement investors, which are often the very products for which investors specifically seek out a firm. This section of the BIC exemption will certainly impair the ability of financial services firms to offer an unrestricted platform of investments under the account structure that is best for each individual investor.

The Rule seeks to identify certain actions that we feel should not be considered fiduciary advice. For example, suggesting that clients transfer, rollover, contribute to a plan or IRA, or take distributions from retirement accounts is fiduciary investment advice is unreasonable. The exemptions available to fiduciaries should be simplified and work for any business model to allow clients to have continued control over how to structure their accounts.

Our firm continues to hope for changes that will provide a more practical approach to the fiduciary issue. We support the intent to create additional transparency and disclosure to ensure that retirement investors are completely informed before making decisions for their future. The complex and voluminous rule does not seem to be the answer as it has already created confusion, and will increase litigation risk, limit investment options, result in higher costs for retirement investors, and may reduce access to investment advice for many investors with smaller balance accounts.

We respectfully request that the Department work with us and industry groups like the Securities Industry and Financial Markets Association to create simplified exemptions and other needed changes to the Rule. We all share the mutual goal of doing what is right for retirement investors and need to find a reasonable balance of rules and implementation to ensure mutual success.

Once again, our firm appreciates the opportunity to provide a comment for review and consideration on this most important matter.

Sincerely,

DAVENPORT & COMPANY LLC