CUSO FINANCIAL
SERVICES, LP
MEMBER FINRA/SIPC

VIA ELECTRONIC SUBMISSION

July 20, 2015

Mr. Thomas E. Perez, Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice (RIN 1210-AB32); Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25); Prohibited Transaction Exemption 84-24 (ZRIN 1210-ZA25)

Dear Secretary Perez:

We are contacting you on behalf of CUSO Financial Services, LP ("CFS"). We are pleased to have the opportunity to provide comments with respect to the Department of Labor's (the "DOL's") notice of proposed rulemaking concerning the Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice (the "Proposed Regulation") and the related proposed Best Interest Contract Exemption ("BICE").

CFS is a securities broker/dealer that is registered with the United States Securities and Exchange Commission (the "SEC"), the Financial Industry Regulatory Authority ("FINRA"), the Municipal Securities Rulemaking Board, all fifty (50) states, the District of Columbia, and Puerto Rico. CFS is also a Registered Investment Adviser with the SEC. Through financial networking arrangements, CFS provides non-deposit investment services to the members of approximately 180 credit unions located throughout the United States.

As a provider of investment services, our goal is to act in the best interest of all clients irrespective of our status as a fiduciary. Currently, we provide fees and expense information to clients at the point of sale for their review and acknowledgment. CFS fully supports regulations that protect and support investors. However, we believe that the Proposed Regulation makes it harder to provide retirement advice to all investors since it contains overly broad definitions making compliance with its terms unmanageable, imposes burdensome disclosures, significantly increases costs, restricts investment choices and potentially jeopardizes the relationship between clients and their financial advisor.

The Definition of "Fiduciary"

The Proposed Regulation would institute a broad new definition of the term "fiduciary" for the purposes of ERISA. Under this new proposed definition, an individual who provides investment advice or recommendations to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner would be treated as a fiduciary in a wider array of advice relationships than under current requirements.

CFS believes that the Proposed Regulation should cover only conduct that is reasonably characterized as fiduciary in nature, rather than extend to any investment-related activities in connection with which sales recommendations are made. Under the Proposed Regulation, fiduciary status results virtually any time there is a communication that might be viewed as merely suggesting an investment or investment management activity and is individualized, or specifically-directed, for consideration in making investment or management decisions. Financial services professionals engage in a variety of activities that we believe should not be considered "advice" under the rulemaking but that would be swept into the Proposed Regulation's broad definition of "fiduciary."

We understand that the Department intends to include in the definition of "fiduciary" genuine advisory relationships where the advice provider is in a position of trust as to the advice recipient. In the context of a relationship where there is a reasonable expectation that the adviser has assumed a duty to act impartially and provide advice solely in the interest of the advice recipient without regard to its own, CFS supports ascribing fiduciary status and standards of conduct. However, not all activities with respect to investments should be held to such a high standard when there is no reasonable expectation that a qualitative judgment has been given and received. We believe that the DOL's concerns with the current regulation can be satisfied with a more tailored definition of "investment recommendation."

Additionally, the broadened definition of investment advice includes "sales" communications, certain educational materials and other situations where no intention to provide individualized fiduciary advice has been expected. Moreover, the proposal carves out large plan advisors from this definition. If a plan has 100 or more participants, or $100 million or more in plan assets, the advisor to that large plan does not have to be a fiduciary, while an advisor to a small plan does. Because an advisor to a small plan is not carved out of the rule, the advisor who is trying to market retirement saving options to a small plan is considered to be providing investment advice and must determine how to comply with the rule.

The BIC Exemption Requirements

We support the DOL's efforts to develop an exemption based on principles that will accommodate the business practices of a dynamic marketplace. We believe, however, the BIC Exemption ("BICE") is unworkable as proposed, for the reasons stated below.

BICE requires that financial advisors obtain the client's signature on a contract prior to entering into a relationship with a potential client. Understandably, clients may be confused by this requirement and refuse to sign a contract, which means they cannot obtain the investment services or advice. CFS is concerned that the extensive data collection, recordkeeping and disclosures required by the BICE are overly burdensome and extremely challenging to obtain. The costs of adopting and enforcing policies

and procedures and tracking and organizing annual disclosure data for each of the categories of proposed disclosures would entail complex administrative and operational issues. For example, prior to the execution of an asset purchase, an investor must be provided an individualized chart that projects the total costs (in dollars) of the investment for one-, five-, and ten-year periods. This would require firms to make performance projections for the investment in order to make a projection of the costs. In addition to this disclosure, BICE also requires that an annual disclosure be provided to the investor. The annual disclosure must list: (1) each asset purchased or sold during the previous year with the corresponding transaction price; (2) the total amount of fees and expenses with respect to each asset; and (3) the total amount of all direct and indirect compensation received by the advisor and the firm as a result of each asset.

Moreover, BICE contains a requirement that firms maintain a publically- accessible website that is updated on at least a quarterly basis. This website must include: (1) the direct and indirect compensation payable to the firm, each individual advisor, and each individual affiliate of the firm for each asset available within the last year; and (2) the source of any and all compensation and its variations among assets. CFS is concerned about its ability to comply with these BICE disclosure requirements due to the impractical timing of the contract delivery, the cost, and complexity, as well as the ability to obtain and update the required disclosure information.

The disclosures will require enormous effort and at a great expense. Conceivably, this could force all but the largest financial institutions to leave the retirement plan and IRA business, inhibiting the ability of average investors to obtain the advice they require. Moreover, key elements of the information required by BICE are already provided to plan participants through the participant-level fee disclosures currently required under section 404(a)(5) of ERISA, to plan sponsors through the ERISA section 408(b)(2) disclosure requirements, and to all retirement investors under other bodies of law. A feasible and comparably cost-effective alternative to the separate disclosures required by BICE would be to allow the disclosures required under section 404(a)(5) and/or section 408(b)(2), together with any disclosures required by securities or insurance laws, to satisfy some or all of its conditions.

CFS is also concerned that certain conditions of BICE would conflict with established securities and insurance industry rules, particularly the disclosure standards. For the sake of consistency and to avoid confusion among investors, we recommend conforming these requirements to other Federal laws and applicable State insurance laws. For example, the Web page which must be maintained and be "freely accessible to the public" as a condition of exemptive relief could be interpreted as advertising material under state insurance laws and possibly a "prospectus" under federal securities laws, and subject to additional regulation. In addition, for fixed annuity products, we are concerned that any material considered to be advertising would have to comply with state insurance regulations on advertising. Similarly, the transaction disclosures required under BICE prior to the execution of an annuity contract raise questions of whether approval from financial services regulators would be required. We urge the DOL to undertake a careful review of the well-developed body of federal and state laws governing securities and insurance before it promulgates a final rule and revise BICE to provide a viable method for ERISA fiduciaries to continue receiving variable compensation.

Another concern with BICE is the limits imposed on approved products. In order to qualify for the protections of BICE, the exemption contains a list of approved investment options available to plans and IRAs. The list of approved investments does not include managed accounts, commodities futures, or non-traded products such certain REITs and BDCs. The approved list may conflict with our requirement to offer a broad range of investment options to enable us to serve an investor's best interest.

Clear Standards for Reasonable Compensation

CFS is concerned about the multiple articulations of "reasonable compensation" among the conditions for exemptive relief under BICE and the amendments to existing exemptions. The absence of a uniform standard or set of criteria for evaluating reasonableness creates potential for confusion and encourages litigation. We believe that investors will be better protected by exemptions that include clear conditions designed to safeguard their interests, rather than subjective standards subject to multiple interpretations.

Further, as it is structured, as a condition of exemptive relief, BICE places the service providers in the position of evaluating the reasonableness of their own compensation. As an example, the impartial conduct standard provides that the adviser and financial institution must affirmatively agree that unless the total compensation to be received is reasonable, an asset will not be recommended. This would, in effect, require the advice professional or institution to benchmark its own compensation. In addition, under BICE, a financial institution also now has the burden of determining the reasonableness of its compensation as a condition of being able to offer a limited range of investment options. While the "reasonableness" of compensation is a familiar condition under many ERISA statutory and class exemptions, assigning the service provider the responsibility for determining the reasonableness of its own compensation is not. We are concerned that providers will be unable or unwilling to make contractual warranties regarding reasonable compensation, particularly prior to making an investment recommendation, as it would require an accurate on-the-spot market value analysis. This would have a particularly negative effect on small plans and accounts, for which individualized level fee investment advice is often uneconomical or even unavailable. We strongly encourage the DOL to consider dropping the contractual reasonable compensation warranty from the conditions of BICE.

More complex regulations mean more hurdles and compliance costs, and a greater likelihood of regulatory violations and/or lawsuits. Investment firms will have to review how they do business, and likely will decrease services, increase costs, or both. Under the Proposed Regulation, the smaller investor will become more expensive to serve, meaning that small investor may ultimately lose access to their advisors and disproportionately bear the costs of excessive regulation. Consequently, the DOL's Proposed Regulation risks hurting the small investor and retired persons they are intending to protect.

We urge the DOL to revise the Proposed Regulation, clarify its terms, rely on existing disclosure requirements and draft an exemption to provide a viable method for ERISA fiduciaries to continue

receiving variable compensation. Saving for retirement is already difficult enough. Imposing a burdensome and complex regulation will not benefit investors. We propose that DOL work with the financial industry to make changes to the Proposed Regulation so that it will protect an investor's right to choose how and from whom they receive critical retirement advice and services.

On behalf of CUSO Financial Services, LP, we thank you for considering these comments.

Sincerely,

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Peter K. Vonk
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