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Via Electronic Mail
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July 21, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule Hearing, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Re: Proposed Fiduciary Rule (RIN 1210-AB32; 1210-ZA25)

Dear Sir or Madam:

RCS Capital Corporation ("RCS Capital") submits the following comments with respect to the Department's proposed rule defining who is a "fiduciary" by reason of providing investment advice for a fee or other compensation to retirement savers and retirement accounts (herein, the "Fiduciary Rule"), as well as the related "Best Interest Contract" Exemption ("BICE" or "BIC Exemption" and, together with the Fiduciary Rule, the "Proposal").

Background

RCS Capital is a NYSE-listed financial services company that operates a number of critical financial and advisory businesses. Among the businesses operated by RCS Capital are Cetera Financial Group, one of the country's largest independent retail brokerage firms, Realty Capital Securities, the largest distributor of non-exchange listed alternative investment programs, and Hatteras Funds, a registered investment adviser for SEC-registered investment funds and a pioneer in the "liquid alternatives" space.

Proposed Fiduciary Rule and "Best Interests Contract" Exemption

The Department of Labor ("DOL") recently re-published an updated Fiduciary Rule proposal, which if adopted would expand the definition of "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Under the proposed Fiduciary Rule, fiduciaries with respect to employee benefit plans and individual retirement accounts ("IRAs"), would be prohibited from receiving compensation from third parties in connection with transactions involving plans and IRAs. The DOL released its draft BIC Exemption on the same day. Under the BICE, financial advisers that are fiduciaries under the proposed Fiduciary Rule could receive compensation when

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IRA owners and others purchase, hold or sell certain investment products in accordance with their advice, but only if the financial adviser complies with the requirements found in the Exemption.

Summary

We believe that the Proposal is fundamentally flawed, and as such should be withdrawn by the DOL.

The Proposal improperly targets financial advisers who receive variable compensation, and would eliminate the ability of financial advisers and their clients to choose the service model most appropriate to their needs. The Proposal represents a piece-meal approach to regulating financial advisers, which will only create confusion and differential treatment of savers and investors generally. Finally, the BIC Exemption would limit the types of products and programs available to retirement accounts and their owners, and potentially negatively impact their ability to meet their savings and retirement goals. Each of these points is discussed in more detail below.

A. The Proposal will limit Investor Choice

Financial advisers play an important role in assisting all manner of Americans meet their financial goals, including planning and saving for retirement. As an industry, financial advisers are subject to significant federal, state and self-regulatory organization regulation. They work in large and small firms located across the country, and focus their efforts on working directly with their clients to help them achieve their goals through a variety of investment strategies and products.

Financial advisers are generally free to choose the business model that allows them to best deliver their services to clients. Some advisers have adopted the "fee-based" model, wherein clients are assessed a single all-in fee for advisory services based on the value of the assets placed with the adviser. Others are compensated on the basis of commissions or other payments tied to specific investments made by or for clients (referred to as "transaction-based compensation"). Clients receive advice and guidance based on their circumstances, including their objectives, assets, education and risk tolerance, and financial advisers tailor their business model(s) so as to best serve their clients. Financial advisers do not typically employ different models depending solely on whether the client holds assets in tax advantaged retirement savings accounts such as an IRA or in taxable accounts (including trusts and other vehicles).

The BICE as proposed is unworkable for financial advisory firms, creating additional liability and imposing an extraordinary level of compliance, operational and other costs on advisers and their clients without providing commensurate benefits. Because the proposed Exemption is so unwieldy, costly and cumbersome, it is unlikely that advisers will seek or even be able to comply with its terms. The DOL's Proposal would, if adopted, therefore, impose an unsustainable level of regulation on the transaction-fee model, and lead to its disappearance from the retirement savings context (and perhaps altogether).

Abandonment of the transaction-based business model would have real consequences. There is a large part of the retirement saver population that cannot be economically served under the fee- based

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model. Savers with lower balances, in particular, are not well served by a fee-based model, and it is not economic for advisers to provide services to them under the fee-based approach. It is highly likely, therefore, that financial advisers will stop serving such savers, leaving them without the kind of professional advice that they currently need and can access. This is particularly likely to impact younger savers, who have not built up substantial retirement assets, as well as the large population of older savers who have not amassed a significant portfolio.[1]

In response to this point, DOL staffers have suggested that retirement savers with smaller balances can access advisory firms that rely on computer driven model advice programs to serve clients. While these advisers may ultimately play in important part in helping investors achieve their goals, their business models and investment acumen is far from proven. Retirement savers may pay a high price when the element of human interaction is removed from the advice equation. By giving preference to algorithm-based allocation and rebalancing tools, thereby displacing personal investment advice delivered by a professional, the Proposal denies investors a choice regarding how they want to receive and pay for financial advice.

B. <u>Partial Regulation Will Create Inequities and Other Differences</u>

The DOL does not have jurisdiction over broker-dealers except where the conduct pertains to retirement accounts. Its proposed expanded definition of "fiduciary" would sweep financial advisory firms advising or otherwise serving retirement savers into that status, however, such that advisers proposing to utilize a commission-based approach to serving their retirement saver clients would be required to adhere to the requirements of the BICE in doing so. This would be an unfortunate result, as the service model required to comply with the Exemption differs greatly from that in use across the client base by nearly all financial advisers employing the commission-based model. In addition, the Proposal would likely ensure that a similarly situated client account will have different portfolios. Thus, the experience of a retirement saver and a non-retirement saver would be very different, notwithstanding the fact that the same advisory firm is serving them.

If there is cause to impose an explicit fiduciary standard on broker-dealers, a uniform fiduciary standard would better serve the financial adviser and its clients. Having a separate standard applicable to the provision of services to retirement accounts will at a minimum create confusion and undue cost. In our view, the DOL should defer its rulemaking activities in order to work in concert with the Securities and Exchange Commission and/or the Financial Industry Regulatory Authority to create universal, workable standards that are business model neutral and that serve all investors equally.

C. <u>Limiting the BICE to a List of Approved Assets is Not Appropriate</u>

Under the Proposal, products would not be available to retirement savers where sold subject to a commission or other variable compensation arrangement unless sold in compliance with the BIC

[1] To understand this point, one simply needs to know that a 1% fee would yield revenue to the adviser of approximately $300 using an average IRA balance of approximately $30,000.

Exemption. As proposed, the Exemption employs a definitional concept that limits eligible products and programs to those that meet the definition of "Assets."[2] In our view, a static listing or category of variable compensation investments that may be sold pursuant to the BICE represents poor regulatory policy. Creating a universe of approved products means that the government rather than the most creative and expert financial system in the world will determine the investment options for retirement savers and accounts. Employing a list will no doubt exclude important and useful new products from use by financial advisers, and will create an unnecessary and artificial distinction between retirement saver portfolios and other portfolios, and potentially reduce returns and increase risk.

If the DOL goes forward with a defined list of Assets eligible for use under the BIC Exemption, however, it is important that this list include all manner of investment products and programs to ensure that advisers employing the commission-based business model can build appropriate investment portfolios for retirement savers and accounts. Financial advisers use a wide variety of investment products and programs. They can and do utilize various alternative products, including real estate investment trusts (REITs), business development companies (BDCs), oil & gas programs and other "direct participation" programs ("DPPs"). Many of these products and programs are sold subject to a commission or other payment that compensates selling firms and their representatives for their work in reviewing and recommending them to their clients; thus, if the Proposal is adopted, they could only be sold to a retirement account in accordance with the BIC Exemption.

As noted above, the Exemption excludes almost all non-listed and illiquid investment products and programs, both alternative and otherwise, from its use. If this approach is adopted, a host of effective, diversifying and widely employed investments will be kept outside of the Exemption and will therefore be unavailable to retirement savers. The DOL specifically asked that commenters who believe that additional investments should be included in the scope of the Exemption provide the DOL with descriptions of those products, as well as information supporting the position that the products are a "common investment for retail investors."

We submit that the list of Assets eligible for use under the BIC Exemption should include at a minimum: (i) non-listed REITs, (ii) non-listed BDCs and (iii) public oil & gas programs and other DPPs. For each such product, we are submitting information regarding its role in a diversified portfolio as well as its current use both inside and outside of retirement savings accounts. As a general matter, though, these investment products share the following characteristics:

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[2] Assets eligible for use under the proposed BIC Exemption include only the following: "bank deposits, CDs, shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(l) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts (both securities and non-securities), guaranteed investment contracts, and equity securities within the meaning of 17 CFR 230.405 that are exchange traded securities within the meaning of 17 CFR 242.600."

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- They already are widely-used components for the portfolios of millions of retirement savers – shares of non-listed REITs and BDCs are held in over 1.2 million accounts, with 2014 purchases exceeding $9.1 billion.[3]

- They generally provide income and inflation protection, as well as capital growth.

- They give retirement savers the opportunity to diversify their portfolios and improve their risk/return profile by investing in real assets or portfolios of private debt and equity instruments.

- They increasingly provide liquidity and valuation transparency, and in many cases offer enhanced governance and professional management.

- They are subject to extensive regulation at the federal and state level.

- They offer investors the opportunity to capture the so-called "illiquidity premium" (see below).

1. Non-listed REITs

A non-listed REIT is an investment vehicle that directly invests in real estate. Investors receive periodic cash distributions constituting a return of capital and a percentage of the REIT's taxable income. Many non-listed REITs own, manage and lease investment-grade, income-producing commercial real estate in many different property sectors. They are also subject to the same IRS requirements that exchange-listed REITs must meet, including distributing at least 90% of taxable income to shareholders annually.

Offers and sales of interests in publicly-offered REITs are registered under the 1933 Act, and must comply with corollary state requirements. In addition, REITs are subject to the reporting and disclosure requirements of the 1934 Act, including the filing of quarterly, annual and current reports, proxy statements and other required items, all of which are publicly available through the SEC's EDGAR database.

2. Non-listed BDCs

A non-listed BDC is an investment vehicle that invests in the equity or debt of private companies and small public companies and is typically organized as a corporation or trust. BDCs generally make investments in private or thinly-traded public companies in the form of long-term debt and/or

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[3] Data compiled by DST Systems, a leading transfer agency organization serving the industry, shows that the value of shares of non-listed REITs acquired by retirement accounts in 2014 exceeded $6.5B, and that the value of shares of non-listed BDCs acquired by in retirement accounts in that same year amounted to more than $2.5B. DST has calculated that there are over 1.2 million retirement accounts holding interests in non-listed REITs and BDCs.,

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equity capital, with the goal of generating current income or capital growth. Investors typically receive periodic cash distributions that may include dividends. A non-listed BDC may choose to list, merge, sell its assets, or simply liquidate.

BDCs are designed to generate capital for private companies and small public companies that do not have access to public capital markets. BDCs are closed-end funds that elect to be regulated as such under the Investment Company Act of 1940 (the "1940 Act"). As such, BDCs are subject to only certain provisions of the 1940 Act, and if publicly offered are also subject to the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act"), as well as corollary state regulation. BDCs may qualify to elect to be taxed as a regulated investment company for federal tax purposes.

3. Direct Participation Programs, Including Oil & Gas Partnerships

Direct Participation Programs, as defined in FINRA Rule 2310, include publicly registered products that focus on a variety of asset-based and business lending areas. Currently, these other DPPs include approximately programs focusing on oil and gas, equipment leasing, and impact lending. All of these products are regulated by the SEC and FINRA as well as being subject to state securities regulations.

In particular, public non-listed oil & gas/energy partnerships provide individual investors with the opportunity to own interests in companies that own oil and gas reserves or producing or non-producing properties. Investors receive cash distributions from income generated through the sale of oil and gas. These partnerships are designed to mitigate the volatility of traded energy securities markets while providing the potential benefits of energy asset ownership and diversification. Over the years, the magnitude of oil and gas partnership fundraising has varied in part with market expectations and supply/demand fundamentals in oil and gas markets. The interests in OG&Ps are registered under the 1933 Act.

There is one final point to be made in reference to the non-listed nature of the above-mentioned investments. The lack of liquidity allows these investment products and programs to make investments in or hold assets that are illiquid, including real estate, privately negotiated debt securities, oil and gas programs, and venture capital and private equity positions. Rather than constituting a negative element, this lack of liquidity often allows investors to capture the "illiquidity premium" associated with the asset or asset class (or strategy) in question.[4]

RCS Capital appreciates the opportunity to comment on the Proposal. We have significant objections to and concerns with the Proposal from a number of viewpoints. We believe that that important choices will be limited if the Proposal goes forth as planned, and the limiting impact will affect many categories of investors, particularly younger and less wealthy savers. We also believe

[4] See "The Hidden Cost of Liquidity: How Alternatives Can Reward Long-Term Investors" *Alternative Investment Quarterly,* January 2014.

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that the Proposal and Exemption will, if implemented, create confusion and uncertainty as well as hard-to-justify differentials in the types of securities that retirement savers can use to meet their goals. RCS Capital is willing to help in any way and to discuss our comments further at your convenience.

Sincerely,

Edward M. Weil Jr.
CEO, RCS Capital Corporation