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September 12, 2017

Via e-mail to EBSA.FiduciaryRuleExamination@dol.gov

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712, 11713, 11850
U.S. Department of Labor
200 Constitution Avenue, N.W.
Suite 400
Washington, DC 20210

**Re: Extension of Transition Period and
Delay of Applicability Dates (RIN 1210-AB82)**

Dear Sir or Madam:

Wells Fargo & Company and its affiliates (“Wells Fargo”) welcome the opportunity to respond to the U.S. Department of Labor’s (the “Department”) proposal to amend exemptions related to its definition of “fiduciary” (the “Rule”). This includes an extension until July 1, 2019 of the transition period for the Best Interest Contract (“BIC”) Exemption and the Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (“Principal Transactions Exemption”), as well as a commensurate delay of the application of certain amendments to Prohibited Transaction Exemption (“PTE”) 84-24 (collectively, the “Proposal”).

Wells Fargo Supports a Delay

We believe an extension of the applicability date for the BIC Exemption, Principal Transactions Exemption and PTE 84-24 will benefit retirement investors. A July 1, 2019 applicability date will provide the Department time to analyze the Rule and its effect on the market for retirement services, including the ways in which the Rule is limiting retirement investors’ access to retirement investment information and financial advice. Furthermore, a delay will allow the Department to work with the Securities and Exchange Commission (the “Commission”) to address these harms on a coordinated basis. In particular, a delay provides the Department and the Commission with the opportunity to resolve the market dynamics already adversely affecting retirement investors by establishing a harmonized standard of conduct for retirement and non-retirement brokerage accounts.

As a result of the Department’s review of the Rule, the Department is likely to propose revisions to the Rule or to existing exemptive relief, or entirely new exemptions. These changes would be in addition to those provisions from the Rule and related exemptions that went into effect on June 9, 2017 and, potentially, those that are currently scheduled to go into effect on January 1, 2018. We agree with the statement in the Proposal that “the proposed delay avoids

obligating financial services providers to incur costs to comply with conditions, which may be revised, repealed, or replaced, as well as attendant investor confusion.”¹

Since the Rule has become effective, many financial services providers, faced with significant technology and business changes, have reduced products and availability of services to ensure they can comply with the Rule and avoid taking on unacceptable levels of risk.² We are hopeful that once the Department’s reexamination of the Rule is complete, financial services providers will resume offering a fuller range of products and services that offer meaningful value to retirement investors. Should changes to the Rule and its related exemptions occur that can lead to this positive outcome, we believe that a reasonable time period for implementation is essential.

Further, under the Proposal, retirement investors will continue to receive the protections of the exemptions’ Impartial Conduct Standards through July 1, 2019. As the Department has noted, the Impartial Conduct Standards generally provide retirement investors with “the full gains due to the fiduciary rulemaking”³ and require that “Financial Institutions and Advisers must give prudent advice that is in retirement investors’ best interest, charge no more than reasonable compensation, and avoid misleading statements.”⁴ Thus, imposing additional compliance conditions in connection with any extension is unnecessary.

How a Delay Should Be Structured

For the reasons stated above, we support, at a minimum, the proposed eighteen-month delay and request the Department finalize the Proposal as promptly as possible. In response to the Department’s specific requests for comment on how a delay should be structured, we offer the following additional recommendations:

- Should the Department propose amendments to any existing exemption or entirely new exemptive relief, we recommend, as we have in the past, that the Department’s proposal include an implementation time period of at least *three years* and appropriate transition relief.⁵
- If the Department’s review of the Rule is not completed within *six months* of July 1, 2019 (or by January 1, 2019), we recommend that the Department extend the transition period again so that retirement investors, investment professionals, financial services providers and other stakeholders are not faced with unwarranted uncertainty.
- In the unlikely event the Department concludes that no changes to the Rule or to existing exemptive relief are required, we recommend that the applicability date for the BIC Exemption, the Principal Transactions Exemption and PTE 84-24 be established for no earlier than *eighteen months* from the date of the Department’s public statement to that effect.
- The Department should also extend the temporary enforcement policy announced in Field Assistance Bulletin No. 2017-02 (“FAB”) for at least *twelve months* beyond the delayed applicability date.⁶ In the FAB, the Department stated, “[t]o the extent that circumstances surrounding the applicability date of the fiduciary duty rule and exemptions give rise to the need for other temporary relief, EBSA

will consider taking such additional steps as necessary.”⁷ Any delay of the applicability date is such a change in circumstances, particularly given the likelihood that there will be significant changes to the Rule and related exemptive relief.⁸

We note the Proposal focuses on changes to the BIC Exemption, Principal Transactions Exemption and PTE 84-24 or the creation of “a new and more streamlined exemption.”⁹ We continue to recommend that the Department also consider changes to the Rule itself, including narrowing the definition of “investment advice” and broadening the exceptions from the definition to allow investor access to investment education and research as well as to permit sales and marketing activities in the ERISA marketplace.

Conclusion

We thank the Department for this opportunity to comment on the Proposal. We restate our desire to stay engaged with the Department on the Rule and stand ready to work with the Department to achieve a workable outcome for retirement investors. If you would like to further discuss any of Wells Fargo’s comments, please contact Robert J. McCarthy, Director of Regulatory Policy for Wells Fargo Advisors, at robert.j.mccarthy@wellsfargoadvisors.com or (314) 242-3193, or Kenneth L. Pardue, Managing Director, Retirement Plans for Wells Fargo Advisors, at kenneth.pardue@wellsfargoadvisors.com or (314) 875-2927.

Sincerely,



David Kowach
Head of Wells Fargo Advisors
Wells Fargo & Company

¹ 82 Fed. Reg. 41,365, at 41,367 (Aug. 31, 2017).

² See Correspondence from Lisa Bleier, Managing Director & Associate General Counsel, Securities Industry and Financial Markets Association to the Dep't of Labor ("DOL"), *regarding* RIN 1210-AB82 (Aug. 9, 2017), at App. I, Deloitte & Touche, "The DOL Fiduciary Rule: A Study on How Financial Institutions Have Responded and the Resulting Impacts on Investors," at 13 ("95% of study participants reduced access to or choice within the products offered to retirement investors regardless of the level of sophistication of the retirement investor."), *available at*: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00599.pdf>; *see also* Correspondence from David Kowach, Head of Wells Fargo Advisors, Wells Fargo, to Office of Exemption Determinations ("OED"), Employee Benefits Securities Admin. ("EBSA"), DOL, *regarding* Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions – Questions 2 through 18 (RIN 1210-AB82) (Aug. 7, 2017) ("Wells Fargo Aug. 2017 Letter to DOL"), at 3-5, *available at*: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00525.pdf>; Correspondence from David M. Carroll, Head of Wealth and Investment Management, Wells Fargo, to Office of Regulations and Interpretations ("ORI"), EBSA, DOL, *regarding* Reexamination of Definition of the Term "Fiduciary" and Related Exemptions (RIN 1210-AB79) (April 17, 2017), at 3-4, *available at*: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01378.pdf>.

³ 82 Fed. Reg. 16,902, at 16,906 (April 7, 2017).

⁴ 82 Fed. Reg. at 41,367. The strength of the protections conferred on investors by the Impartial Conduct Standards is why we have urged that they form the basis of exemptive relief from Employee Retirement Income Security Act's ("ERISA") prohibited transaction provisions. We stated as much in our recent comments to the Department, which recommend a harmonized standard of conduct for broker-dealers across retirement and non-retirement brokerage accounts that is based on a modified version of the Impartial Conduct Standards and enhanced up-front disclosures. *See* Wells Fargo Aug. 2017 Letter to DOL, at 6-10.

⁵ See Correspondence from David M. Carroll, Senior Executive Vice President, Wealth, Brokerage & Retirement, Wells Fargo, to John J. Canary, Director, ORI, OED, EBSA, DOL, *regarding* Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25] (Sept. 24, 2015), at 6-7, *available at*: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/03063.pdf>; Correspondence from David M. Carroll, Senior Executive Vice President, Wealth, Brokerage & Retirement, Wells Fargo, to John J. Canary, Director, ORI, OED, EBSA, DOL, *regarding* Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25] (July 21, 2015), at 5, *available at*: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00647.pdf>.

⁶ See Field Assistance Bulletin 2017-02 (May 22, 2017).

⁷ *Id.*

⁸ The Department should also coordinate with the Treasury Department and the Internal Revenue Service ("IRS") to confirm that, for purposes of applying IRS Announcement 2017-4, any extension of the Department's temporary enforcement policy will constitute "other subsequent related enforcement guidance."

⁹ 82 Fed. Reg. at 41,371.