



Via Email: [EBSA.FiduciaryRuleExamination@dol.gov](mailto:EBSA.FiduciaryRuleExamination@dol.gov)

September 15, 2017

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Room N-5655  
Washington, DC 20210  
Attention: Fiduciary Rule Examination

**Re: Extension of Transition Period and Delay of Applicability Dates: Best Interest Contract Exemption (PTE 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02); Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (PTE 84-24)**

**RIN 1210-AB82**

Ladies and Gentlemen:

On August 31, 2017, the Employee Benefits Security Administration of the Department of Labor (the "Department") published a notice of proposed amendments to PTE 2016-01, PTE 2016-02, and PTE 84-24 (the "Notice") in connection with its examination of the final rule defining who is a "fiduciary" of an employee benefit plan for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("IRC"), and related prohibited transaction exemptions (collectively, the "Fiduciary Rule"). The Notice seeks comments regarding extension of the transition period for Sections II and IX of the Best Interest Contract Exemption ("BICE"), Section VII of the Class Exemption for Principal Transactions, and PTE 84-24.

Cetera Financial Group, Inc. ("Cetera") is the corporate parent of a complex of seven broker-dealers and five Registered Investment Advisors, with more than 8,500 affiliated representatives. Our firms collectively serve more than 2 million retail investors, the majority of whom are middle-class families with a vital interest in saving for retirement. Most of our customers are households that maintain both qualified and non-qualified investment accounts. They seek holistic advice and solutions designed to address their financial well-being and long-term goals, without regard to whether or not their investments are in tax-qualified retirement accounts.

Our comments can be summarized as follows: We believe that the Department should extend the transition period for the remaining elements of the Fiduciary Rule until the later of January 1, 2020 or 18 months after the Department takes final action with respect to it. We believe that such a delay is necessary to insure that the Department has a sufficient opportunity to complete the review directed by the President and to consider the comments submitted by all interested parties in support of different approaches to this complicated subject. We believe that the Department should coordinate with the SEC on development and application of any best interest standard applicable to retail investors, in qualified accounts or otherwise. We support the development of additional PTEs, but believe that any such relief should be principles-based and not focused on any specific investment or asset class. Finally, we endorse continuation of the policy adopted by the Department and the IRS under which both agencies will not seek to commence enforcement action against financial advisers who are working in good faith to comply with the Fiduciary Rule in its current form.

### Discussion

**1. The Department should extend the transition period for all portions of the Fiduciary Rule that are not yet applicable until the later of January 1, 2020 or 18 months after the Department takes final action with respect to it.**

On February 3, 2017, the President directed the Department to undertake a review of the Fiduciary Rule to determine if it will adversely affect the ability of Americans to receive access to advice with respect to retirement savings or product offerings, create dislocations in the retirement services industry that may adversely affect investors or retirees, and whether or not it will cause an increase in litigation and increase the prices that investors must pay to gain access to retirement services.<sup>1</sup> In the Notice, the Department states that it will take time to complete this review and that to date, it has received nearly 200,000 comment letters on this subject.

200,000 letters is a great deal of material to review. Cetera has previously submitted comments regarding the Fiduciary Rule totaling more than 50 pages of text, and many others have made submissions considerably longer than that. We are certain that the Department wishes to undertake a thorough review of the comments submitted by all interested parties, and while we cannot predict how long it will take to complete this exercise, we do not believe that it can be done in a matter of a few months. The Fiduciary Rule represents the most significant change to the legal and regulatory landscape for provision of investment advice in more than 75 years. The stakes for financial advisers and retirement savers are incredibly high, and the consequences of mistakes, even if they are made with good intentions, are potentially enormous. It is in the interest of everyone that the Department whatever time is necessary to digest all of the information it has received,

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<sup>1</sup> 82 FR 9675.

conduct whatever other actions it feels necessary in response, and publish any proposed changes well in advance of their becoming effective. This process may involve additional notices and requests for comment, hearings, meetings with interested parties, or all of the above.

To date, we have not seen an estimate from the Department regarding the length of time it will require to complete the review directed by the President, but the remaining portions of the Fiduciary Rule are currently scheduled to take effect on January 1, 2018, which is just over three months from now. In proposing an 18 month extension of the current transition period, the Department appears to recognize the size and scope of the review project, which we believe is wise. However, a delay to July 1, 2019 or any other fixed date does not take into account at least three distinct issues:

- The possibility that the review itself takes more than 18 months;
- The additional time that it will take financial advisers to digest any amendments to the rule and incorporate changes to their own systems and processes after a final rule is published; and
- The likelihood of confusion on the part of investors as to what standards apply to advice they receive in connection with retirement investments prior to publication of any amendments to the Fiduciary Rule.

In order to design products, systems, and processes to deal with regulatory changes of the magnitude that the Fiduciary Rule has created, financial institutions will need a significant amount of time to implement the necessary adjustments. This is complicated by the fact that many of the necessary changes are sequential in nature. Product sponsors need time to design new products that will comply with any new regulations. They must draft new offering documents and ancillary agreements and have them reviewed and approved by various regulatory agencies, including the SEC. Providers of investment platforms such as clearing brokers must create systems to accommodate new products, and retail distributors must design processes to assure that they are providing advice and services that will accommodate new product and platform specifications. Each of these steps is sequential and will often require “downstream” firms such as retail distributors to wait until the preceding step is completed before implementing changes of their own.

A number of commenters have suggested that financial advisors either have or should have already done the majority of the work required to comply with the Fiduciary Rule, and that they should not require additional time in order to adjust to any changes that the Department may adopt after it completes its own review. This is at best overly simplistic. Until providers of financial advice have clarity about the final version of any regulation, they cannot effectively begin to develop approaches to comply with it. Cetera alone has more than 1 million IRA accounts. They contain tens of thousands of different securities in numerous different asset classes including equities, fixed income investments, mutual funds, variable annuities, hedge funds and other alternative investments, and fixed life insurance products. We have selling or distribution agreements with hundreds of investment product providers. Each product has its own unique aspects and compensation

arrangements, and each product sponsor has its own terms and agreements. Until any version of the Fiduciary Rule is final, financial institutions cannot adopt necessary changes with any degree of certainty. This creates a risk that they will incur a substantial amount of unnecessary cost, all of which will ultimately be borne by investors. This will not benefit anyone, including investors.

The Department has also taken specific notice of developments that have occurred since the Fiduciary Rule became effective in 2016. For example, the Notice and earlier Requests for Information regarding the Fiduciary Rule have discussed development of new investment vehicles, such as “clean” mutual fund shares and fee-based annuity products. We believe that both of these may represent effective means to facilitate compliance with the Fiduciary Rule, but neither of them is currently available to any significant degree. The Fiduciary Rule became effective in April, 2016, nearly 18 months ago. Product sponsors, platform providers, and retail distributors began assessing development of new products and delivery methods at that time. The fact that products such as clean shares are just starting to become available illustrates how long it takes for the participants in the distribution chain (product sponsors, platform providers, and retail advisers) to respond to changes even after they are finalized and published. Adapting to change of this magnitude requires certainty. The only effective way to assure that this happens is to adopt what the Department refers to as a “tiered” approach to extension of the transition period: The remaining portions of the Fiduciary rule should not become effective until at least 18 months after they are adopted.

In the Notice, the Department notes that many commenters have opposed any extension to the transition period on the grounds that retirement investors may suffer harm if the remaining portions of the Fiduciary Rule do not go into effect as currently scheduled. As we have discussed at enough in our earlier comments, sufficient protections for investors are already in place. The Impartial Conduct Standards in the BICE became effective on June 9, 2017. Cetera and many other firms have already taken specific actions to levelize compensation arrangements for financial advisers who recommend the purchase of investment products. The fundamental purpose of the Fiduciary Rule is to eliminate or mitigate conflicts of interest that may occur when the compensation that a financial adviser receives varies according to the investment product that they recommend, and the actions that Cetera and other financial institutions have already taken action are sufficient to address this concern. In addition, there is already an existing regulatory framework that protects investors who receive advice from all financial advisers. The SEC, FINRA, and state insurance regulators have robust regulation and enforcement programs that are designed to insure that investors are treated fairly. In combination with the Impartial Conduct Standards, these protections are more than sufficient to safeguard the interest of investors during any extension of the transition period.

In the Notice, the Department requested comments about whether an extension of the transition period should be conditioned upon “...A Financial Institution’s showing that it has, or a promise that it will, take steps to harness recent innovations in investment products and services...” This is not a viable approach, for several reasons. First, it

would require firms to promise to take actions (e.g., offer certain investment products) that may never become available or may not prove feasible to implement. As discussed above, financial institutions require certainty in order to effectively deal with any regulation. A condition which is premised on events that may never occur puts financial institutions in a very difficult position. Even if they intend to take actions in good faith, they may not be able to complete them due to events beyond their control. In addition, monitoring of compliance with such actions is not administratively feasible for either the Department of financial institutions. Creating a standard that cannot be effectively enforced is not in anyone's interest. Finally, as discussed in more detail below, the Department should avoid creating PTEs or other exemptions that are premised on the use of a given product or providing a service in particular way. This is antithetical to the provision of the holistic advice that most investors need and expect. Financial institutions are already required to act in the best interest of customers and comply with the Impartial Conduct Standards. Additional conditions are not warranted.

In summary, an extension of the transition period for a period of 18 months after the Department adopts a final rule is more than warranted.

**2. If the Department elects to adopt new PTEs, they should be principles-based and not specific to any product or asset class.**

The Notice includes a discussion about the possibility of developing new “streamlined” PTEs. The Department has not publicly stated its view with respect to any specific PTE or asset class that it may cover, although we understand that one example might involve “clean” mutual fund shares. Cetera has reviewed clean shares, and believe that they may offer significant benefits to investors and create a better path to address some of the issues that the Fiduciary Rule is designed to cover. However, we do not believe that developing PTEs that apply only to a specific asset class or practice are the best way to safeguard the interests of retirement investors. There are a number of reasons for this, including the following:

- Our approach to delivering financial advice to our clients focuses on a holistic, planning-based engagement. We believe that there are appropriate uses for multiple types of investment products and asset classes in a diversified portfolio. For example, variable annuities present an effective method to protect against “longevity” risk, or the possibility that an investor lives longer than their normal life expectancy. Creating PTEs that focus on a single asset class does not take into account the fact that clients are generally interested in an approach that addresses all of their financial goals, present and future. They seek broad solutions, not specific products. Unfortunately, the need to comply with regulatory mandates creates predictable effects. If recommending a given product is easier under a regulatory regime, financial advisers may have both a conscious and subconscious bias in favor of it over another investment that requires additional effort or creates additional exposure. Creating PTEs that focus on a

given investment type is not consistent with addressing the financial needs and goals of investors in their entirety, and should be avoided.

- PTEs that focus on a single product or asset class will tend to discourage innovation in the development of investment products. Similar to the bias that a financial adviser may have to recommend products that receive favorable regulatory treatment, product sponsors will tend to focus their efforts on products or services that are more likely to be sold. The American capital markets are the most efficient and highly-developed in the world. This is in large part due to the fact that the regulatory regime applicable to them is flexible and encourages product sponsors and advisers to create investments that provide solutions in an evolving marketplace. PTEs that are focused on a single product do not promote this.
- If the Department follows a policy based on narrow PTEs that focus on specific products or services, it will need to engage in an ongoing rulemaking process to develop new PTEs in response to evolving markets and solutions. Experience has shown that the time and effort involved in implementing new PTEs will make it very hard to address this efficiently. Broad, principles-based PTEs can be flexible enough to avoid this problem. Narrower ones that focus on a specific product cannot.
- The Impartial Conduct Standards have enhanced protections for investors by creating incentives for financial advisers to levelize compensation among products. The broad principles embodied in the Impartial Conduct Standards are sufficient to safeguard investors' interests.

New PTEs that cover only a narrow area of activity may sound appealing in the abstract. A closer examination reveals that they will create a bias in favor of certain products or business models. The ultimate effect will be to pick winners and losers among providers of financial services instead of letting the marketplace perform this critical function. This is not the correct approach.

3. **During any transition period and before adopting a final version of the Fiduciary Rule, the Department should engage with the SEC, FINRA, and state insurance regulators regarding the scope of a best interest standard applicable to retail investors to make certain that any regulation it adopts is consistent with other applicable regimes.**

A fundamental shortcoming of the Fiduciary Rule is that it ignores the fact that retirement investors seek comprehensive solutions for their financial goals and view their retirement assets as part of an overall picture. Cetera has consistently advocated for development of a best interest standard that would apply to all investors and all types of accounts, in recognition of the fact that retirement investments are only part of an overall financial plan.

The Fiduciary Rule seeks to regulate the same conduct (provision of financial advice) in a fundamentally different way than that embodied in the federal securities laws or state insurance regulations. Even assuming that there is a compelling need to provide additional protections for retirement assets, they are not separable from other financial assets and treating them differently is not logical.

In 2013, the SEC published a Request for Information regarding development of a best interest standard that would apply to all retail investors. In response to the comments it received, the Commission staff concluded that there was a great deal of confusion among investors regarding the standards that applied to provision of investment advice. This conclusion was reached long before the Fiduciary Rule was conceived or published. We submit that creating a standard that applies to only a single category of accounts will exacerbate this confusion in the minds of investors and make them less able to make prudent decisions about how to invest. A single standard that applies to all retail investors is in the interest of everyone. Secretary Acosta and Chairman Clayton of the SEC have both stated publicly that harmonization of the standards applicable to financial advice to retail investors is an important goal, and have expressed an intent to work together in this effort. We endorse this approach.

**4. The current position of the Department and the IRS regarding enforcement of the Fiduciary Rule should be continued until such time as the transition period ends.**

The Department recently announced a temporary enforcement policy with respect to the Fiduciary Rule,<sup>2</sup> stating that: "... (I)t's general approach to implementation [of the Fiduciary Rule] will be marked by an emphasis on assisting (rather than citing violations and imposing penalties on) plans, plan fiduciaries, financial institutions, and others who are working diligently and in good faith to understand and come into compliance with the fiduciary rule and exemptions." We believe it is the Department's intent that this policy would extend to cover any delays in the transition period. This is both necessary and appropriate given the review that the Department is conducting. We therefore request that, in connection with any extension of the transition period, the Department explicitly state that the temporary enforcement policy set forth in FAB 2017-02 will be extended until such time as the Department deems appropriate, but at least through the end of the transition period.

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We appreciate the opportunity to offer our comments and the continuing efforts of the Department to refine and enhance the Fiduciary Rule. If you have questions or we may provide

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<sup>2</sup> Field Assistance Bulletin 2017-02. (May 22, 2017)

any further assistance, please contact either me or Mark Quinn, the Director of Regulatory Affairs for Cetera.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Moore". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Moore  
Chief Executive Officer