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*Submitted Electronically to EBSA.FiduciaryRuleExamination@dol.gov*

Office of Exemption Determinations
Employee Benefits Security Administration
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**Subject: RIN 1210-AB82 – Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions**

Greetings:

On behalf of the American Council of Life Insurers ("ACLI")[1], we appreciate the opportunity to provide comments in response to the Department of Labor's (the "Department") July 6, 2017 Request for Information ("RFI") regarding the final Fiduciary Regulation (the "Regulation") and related Prohibited Transaction Exemptions ("PTEs"). Our comments focus on: (1) the impact of the Regulation on consumers; (2) the need for a more rational rule; and (3) a call for exemptive relief for retail transactions that leverages the consumer protections imposed by prudential regulators, avoids bias for particular products and service arrangements, and provides certainty to market participants. Our letter includes necessary changes to the Regulation as well as PTE 84-24 and PTE 2016-01 (also known as the "Best Interest Contract Exemption" or "BICE").

[1] The American Council of Life Insurers (ACLI) is a Washington, D.C.-based trade association with approximately 290 member companies operating in the United States and abroad. ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 95 percent of industry assets, 93 percent of life insurance premiums, and 98 percent of annuity considerations in the United States. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

First, we must note that ACLI maintains, and has contended in litigation (and continues to contend), that the Regulation (including the PTE 2016-01 and the amendments to PTE 84-24), as promulgated, exceeds the Department's statutory authority, is unconstitutional, and is arbitrary and capricious under the Administrative Procedure Act. The Regulation -- through a highly burdensome and paternalistic approach to regulation -- effectively substitutes the judgment (and biases) of the Department for those of individual investors and qualified plan sponsors alike. Rather than empowering plan fiduciaries, plan participants and beneficiaries, and IRA investors, the Regulation limits ordinary sales speech and marketing activities generally and, in particular, with small businesses; constrains education and information about retirement planning options; and limits the choices of products and services, especially for IRA investors. As such, the Regulation is inconsistent with this Administration's presumption that "Americans can be trusted to decide for themselves what is best for them."[2] ACLI supports the application of the Employee Retirement Income Security Act's ("ERISA's") sole interest and other fiduciary standards to those engaged as fiduciaries acting in mutually agreed upon relationships of trust and confidence. ACLI supports reasonable and appropriately tailored rules that require all sales professionals to act in the best interest of their customers regardless of whether they also serve as fiduciaries under ERISA. However, this Regulation does not accomplish these goals. Based on both the observed and further anticipated effects of this Regulation on consumers as described in this letter, the Regulation must be revoked and replaced. Nonetheless, ACLI is providing these comments, in response to the RFI, to assist the Department in its review and evaluation of the Regulation and PTEs.[3]

## Executive Summary

On February 3, 2017, President Trump issued a Memorandum directing the Secretary of Labor to review the Fiduciary Regulation.[4] The President's directive is straightforward. The Department is required to "examine the Regulation to determine whether it may adversely affect the ability of Americans to gain access to retirement information and advice." It is clear, based on evidence and data provided to the Department, that the answer to this question is yes – the Regulation is already restricting the ability of Americans to gain access to retirement information and advice. Accordingly, the Department must act as quickly as possible to reverse course and correct the Regulation to prevent further harm.

The Regulation has resulted in significant market changes that now deny consumers access to advice. While these disruptive actions may not meet the definition of an "innovation" as that term is used in the RFI, these actions are clearly logical reactions by rational actors in response to an ill-conceived regulation, its application to ordinary sales speech and marketing activities, and the risks inherent under its both insufficiently clear and proscriptive exemptive relief. The Department's focus in this RFI on prohibited transaction exemptive relief and "innovations", while important, misses the

[2] *See* Alexander Acosta, Editorial, *Deregulators Must Follow the Law, So Regulators Will Too*, The Wall Street Journal, May 22, 2017.
[3] ACLI provided comments to RFI question 1 by separate letter dated July 21, 2017. ACLI incorporates by references its comment letters submitted to EBSA associated with this rulemaking project, dated July 21,2015, September 24, 2015, March 13, 2017, April 17, 2017, and July 21, 2017, as many of the issues raised by the Department in the RFI are addressed in these letters.
[4] *See* 82 Fed. Reg. 9675 (Feb. 7, 2017).

main issue, namely, the inappropriately broad scope of the Department's revised definition of "fiduciary." Simply put, the fact that complex and prescriptive exemptions are needed to enable financial professionals to be compensated for selling products illustrates how inappropriately broad the revised definition is. The extent of the definition's overbroad nature is further illustrated by question 14 in the RFI. The fact that the Department is even considering whether an amendment to the Regulation or an exemption is needed for situations involving recommendations to make or increase contributions to a plan or IRA demonstrates the unduly and impermissibly broad nature of the Department's view of fiduciary "investment advice" under ERISA.

The Department's position on sales versus advice has been clear – and incorrect. The Department, with no evidence or substantiation, states in the preamble to the final Regulation that it "rejects the purported dichotomy between a mere 'sales' recommendation, on the one hand, and advice, on the other in the context of the retail market for investment products."[5] Accordingly, in promulgating the Regulation and exemptions, the Department has inappropriately, incorrectly, and unlawfully conflated routine sales speech and marketing activities with fiduciary relationships of trust and confidence – and has based the necessity of utilizing the exemptive process on this incorrect, unsubstantiated, and paternalistic conclusion. Significantly, Securities and Exchange Commissioner Piwowar, in a July 25, 2017 comment letter to the Department, stated that

> The Fiduciary Rule fails to distinguish the securities *selling* activities that have traditionally been the province of broker-dealers under the U.S. system of market regulation and the *advice* activities in which regulated investors engage. This distinction was created by Congress over 70 years ago when it enacted distinct regulatory frameworks for selling activities (*i.e.*, in the Exchange Act) and advice activities (*i.e.*, in the Advisers Act).[6]

Thus, while the PTEs are significantly problematic, the Department's examination must begin with the root of the problem – the definition of "fiduciary" itself. The Department must revise the Regulation to exclude from the definition routine sales and marketing. The Department must revise the PTEs to provide greater certainty and confidence without a preference for particular products and services. The Department must eliminate PTE 2016-01's contract requirement. The Department must eliminate from the PTE its clear bias against certain products, its clear support of others, and its support of a fee-for service compensation model versus a commission-based model. The Department should propose a simple, straightforward, disclosure-based exemption that permits fiduciaries to receive compensation under reasonable and definite conditions. ACLI supports reasonable and appropriately tailored rules that require all sales professionals to act in the best interest of their customers regardless of whether these professionals serve as fiduciaries under ERISA. Accordingly, the Department should engage and coordinate with the Securities and Exchange Commission and state insurance regulators. A coordinated and harmonized regulatory approach is necessary and in the best interest of retirement savers.

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[5] 81 Fed. Reg. 20946, 20981 (Apr. 8, 2016).

[6] See letter to from Michael S. Piwowar, Commissioner, U.S Securities and Exchange Commission to Timothy D. Hauser, Deputy Assistant Secretary for Program Operations, U.S. Department of Labor, EBSA, dated July 25, 2017.

## I. The Regulation Has Disrupted the Market and Harmed Consumers

In question 3, the Department asks if the Regulation and PTEs appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest. Question 3 also asks whether the Regulation and PTEs effectively allow advisers to provide a wide range of products that can meet each investor's particular needs. As discussed below, the answer to both of these questions is "no." The Regulation does significantly more than regulate "advice." It regulates and restricts the ability of financial professionals to provide guidance, information, and sales recommendations on a broad range of retirement products and services, because it (1) inappropriately sweeps in interactions that are not fiduciary in nature; (2) fails to distinguish between sales activity and fiduciary activity; (3) abridges consumers' rights to receive truthful, non-misleading information about annuities, and (4) maintains a bias against both insurance and investment commission-based arrangements.

Consequently, and not surprisingly, the Regulation is already having a harmful impact on consumers, especially those with small- and medium-sized accounts, and restricting their access to retirement guidance and products. In short, American investors are losing access to vital retirement information and guidance as a result of the Regulation, and this harm is supported by data and evidence. Due to the Regulation's bias against commission-based compensation arrangements, the Regulation has already resulted in restricted consumer access to annuities – the only products available in the marketplace providing guaranteed lifetime income – and has already restricted or completely eliminated IRA account owners' and qualified plan sponsors' access to financial assistance. The Department needs to act as quickly as it can to reverse course and correct this Regulation.

To mitigate risks, efforts to conform with the Regulation have led financial firms to take steps that, unfortunately but not unexpectedly to us, have an adverse impact on those with small- and medium-sized accounts. Savers and retirees now find financial firms such as broker-dealers and banks offering fewer products, with many firms eliminating entire categories of products, such as annuities, from their platforms regardless of whether the assets are held in qualified or non-qualified accounts.

Many financial firms now impose new or higher minimum account thresholds for savers and retirees to gain access to a financial professional. For example, several large financial firms have implemented account minimums ranging as high as $250,000 to obtain investment guidance. Further, it has been reported that some financial services providers are moving clients with advised individual retirement accounts to un-advised self-directed accounts, [7] while others are reportedly requiring retirement investors who are currently served by the firm through transaction, commission-based accounts either to go without any advice, or to enter into an agreement where the investor pays a typically more expensive asset-based fee to receive investment advice – without regard to the

[7] Crystal Kim, *BofA, JPMorgan, and the Regulation: Will they or Won't They*, BARRON'S (March 15, 2017), www.barrons.com/articles/bofa-jpmorgan-and-the-fiduciary-regulation-will-they-or-wont-they-1489588442. However, JP Morgan recently stated that it is delaying this move pending final action by the Department, resulting in even more investor confusion.

frequency of trading activity.[8] These shifts in approach – and restrictions on consumer access to investment guidance - appears to have been precipitated entirely by the Regulation. Attached as Exhibit A are letters received by employees of ACLI members. One informs the customer that, because of the Regulation, her retirement account is being transitioned to a self-directed brokerage account, with no further investment guidance. The second informs the customer that in order to receive the benefits of working with a financial consultant, she must maintain a balance of $250,000 in her account, or maintain a balance of $100,000 within the provider's investment management services offerings. The third informs the customer that unless services are provided on a (more expensive) fixed-fee basis, she may no longer purchase securities for his existing account.

The vast majority of Americans do not have sufficient funds to access these services. Even those who do meet these newly-imposed account minimums now find themselves faced with higher fees for the same level of services they received before the Department promulgated this Regulation. Indeed, a recent study conducted by the LIMRA-LOMA Secure Retirement Institute found that 54 percent of advisors will be forced to drop or turn away small investors.[9]

The Regulation also has had a direct and clear negative impact on consumer access to annuities. The vast majority of annuities today are sold through a transaction, commission-based compensation structure. The use of commissions to sell annuities also reflects the "buy and hold" nature of annuity products.[10] In a fee-for-advice arrangement, a consumer pays an adviser to manage his or her money on an ongoing basis pursuant to a pre-determined investment strategy. A fee-based arrangement therefore makes little sense for broker-dealers and insurance agents who market and sell annuities, as these products do not typically necessitate continual advice and investment management.[11] In addition, fee-based models generally carry account balance minimums (typically between $100,000 and $250,000) and are used with customers who maintain high balances and are engaged in active trading.[12] They are therefore more expensive and may be inappropriate for many investors with small- or mid-sized accounts who trade or rebalance infrequently.

Prior to the Regulation, banks distributed annuities to low- and middle-income investors. ACLI members report that low- and middle-income bank channel sales have significantly decreased due to the new risks and compliance costs associated with the Regulation and PTEs. A recent study found that 29 percent of banks and credit unions already plan to drop some guaranteed income products in response to the Regulation.[13] Other ACLI members have reported that broker-dealers are dropping variable annuities from their offerings due to the increased liability associated with distributing these products as a result of the Regulation. The Regulation also has impacted traditional fixed annuities, as well as the distribution of non-qualified annuity and long-term care

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[8] Mason Braswell, *Merrill Early Mover Gaffe? DOL Policy Prompts 11 NY-Area Departures*, AdvisorHub (March 6, 2017), www.investmentnews.com/article/20150624/FREE/150629958/perez-calls-out-variable-annuities-in-argument-for-dol-fiduciary-regulation.

[9] *See* DOL Viewpoints, LIMRA Secure Retirement Institute, 2016.

[10] *See, e.g.*, ACLI comment letter dated July 21, 2015.

[11] See National Association of Insurance and Financial Advisors ("NAIFA") July 21, 2015.

[12] *Id.*

[13] *See* DOL Viewpoints, LIMRA Secure Retirement Institute, 2016.

combination products. These combination products not only provide retirement security but enable consumers to financially prepare for their life insurance and long-term care needs later in life.

The disruption and dislocation due to the Regulation are particularly concentrated in the retail advisor community. Retail advisors are losing their jobs and shuttering their businesses due to the Regulation. One ACLI member reports that it has laid off 95 call center employees as a result of the liabilities associated with the Regulation and PTEs.

Additionally, as the Department has acknowledged, the majority of fixed index annuities are sold by independent insurance agents.[14] Many are supported by independent marketing organizations ("IMOs"), specialized firms that provide assistance to distributors of life insurance company products, including fixed indexed annuities, through independent agents. As a result of the Regulation, IMOs and the independent agents that work with IMOs will, in most cases, no longer be able to distribute fixed indexed annuity products. In fact, the proposed exemption to cover the sale of fixed indexed products imposes financial barriers to entry that are simply too steep and too costly for most IMOs. The contract, disclosure, and warranty requirements of the BICE and the amendments to PTE 84-24 will effectively shut down the IMO distribution channel, severely curtaining consumer access to, and choice of, fixed annuity products.

Independent insurance agents serve an important role in the sale of group variable annuities, which are a widely-utilized product solution offered by insurance companies to employers that sponsor a workplace retirement plan for their employees. Independent agents serve an essential role with respect to these products by encouraging those employers without plans to sponsor one, and by working with employers to maintain and improve existing plans. One of our members will no longer accept sales of group variable annuities by independent agents.

The Regulation has already significantly restricted consumer choice. In response to the Regulation, financial service providers have significantly limited share classes available for investment by retirement savers and the number of insurance products available to retirement investors. One ACLI member informed us that it has reduced its proprietary insurance product offerings by 54 percent and its non-proprietary variable annuity offerings available through its broker-dealers by 76 percent. This is just one factual example of the consumer product choice limitations resulting from the Regulation, and comment letters and data previously provided to the Department are replete with other examples of consumer choice limitations caused by the Regulation.

Specifically, our members have informed us of the following consequences of the Regulation that have already occurred, and that will restrict consumer choice and significantly limit consumer access to lifetime income products:

- Some banks are no longer offering access to fixed and indexed annuities, even when they are used outside the context of an employee benefit plan or IRA.

[14] *See Proposed Best Interest Contract Exemption for Insurance Intermediaries*, 82 Fed. Reg. 7335, 7354 (Jan. 19, 2017). "In 2015, approximately 63% of FIAs, $34.1 billion, were sold through the independent agent distribution channel."

- Some broker-dealers are no longer offering variable annuities even to savers and retirees with non-qualified assets not subject to the Regulation.

- Some broker dealers are reducing the number of insurers and annuity products available on their platforms.

- Some firms are no longer offering annuity products that pay a commission on qualified assets.

- Some firms are seeking limits on up-front compensation and moving to fee-based compensation.

- Some firms are inquiring how quickly they can be removed as the broker dealer of record from existing annuity business.

Given the disruption in distribution channels and restrictions in product choice, it is not surprising that variable annuity sales declined 21 percent in 2016 (from $133 billion in 2015 to $104.7 billion). Further, in the first quarter of 2017 alone, variable annuity sales declined 8 percent, year-over-year, to $24.4 billion, and indexed annuity sales were off 13 percent, to $13.6 billion. These significant decreases in the sale of annuities illustrates the harmful effect of the Regulation on lifetime income products.[15]

Further, and as predicted, the Regulation has already resulted in a dramatic increase of "orphaned" accounts. Several ACLI member companies have already been notified by distribution partners that they will resign as agent of record to IRA and ERISA plan annuity holders. For example, one ACLI member has informed us that, since the Regulation's June 9, 2017 applicability date, it has received "disassociation" requests for 84 annuity contracts, and the reason provided for each action was the Regulation. By comparison, this member received only 3 disassociation notices during 2016, none of which included the Regulation as the basis for the disassociation. Our members anticipate that this trend will continue and accelerate. Member companies provide basic services to orphan account holders, including the provision of factual responses to customer information requests, but not the personal level of support formerly provided by the resigning agents. Further, it appears unlikely, given the liabilities associated with the Regulation and the PTEs, that other agents or advisors would be willing to take on large blocks of orphan accounts, leaving the account holder with no financial advice or guidance and effectively resulting in a "do it yourself" model.

Moreover, the Regulation has already resulted in restricted access by retirement plans to advice and guidance. One ACLI member has reported that it has no choice but to sever relationships with commission-based plan advisers. Another member has reported that it has identified over 250 small retirement plans that have lost access to guidance and advice as a result of the Regulation.

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[15] *See* U.S. Individual Annuities, 1st Quarter 2017, LIMRA Secure Retirement Institute.

As the above illustrates, the Regulation and PTEs fail to balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest, and fail to effectively allow financial professionals to provide a wide range of products that can meet a customer's particular needs. A reasonable and appropriately tailored rule would both protect consumers' interests and support consumer access to a broad array of products and services.

## II. The Definition of "Fiduciary" Must Be Reasonably and Appropriately Tailored

The approach taken by the prior Administration in defining who is a "fiduciary," in which virtually every engagement with a plan, plan fiduciary, plan participant or beneficiary, or IRA investor raises the possibility of fiduciary status, is dramatically different from the approach taken in 1975 or, for that matter, the approach taken by the prior Administration in 2010, in which the Department prescribed a clear set of criteria – heavily reliant on the existence of an agreement among the parties as to the capacity in which one is providing services - for determining fiduciary status, without the need for burdensome and costly new or amended PTEs. The breadth of the rule and its attendant ambiguity, while clearly shifting burdens to state courts and benefiting the plaintiffs' bar, is disrupting the marketplace and consumers' access to the products and services on which they have relied for a secure retirement.

ACLI's previous comment letters detail the key changes required to correct and bring clarity to the scope of the rule. Required revisions include, but are not limited to the following:

Mutual Agreements, Arrangements and Understandings. Parties must be free – without government interference – to determine, by agreement or arrangement or other mutual understanding, the capacity in which services will be performed. A written or verbal agreement or arrangement is, by its nature, mutual. However, an "understanding" may not necessarily be "mutual." "Mutual" must be a condition under the rule of any understanding that the person will serve as a fiduciary.

Routine Sales Speech and Marketing Activities. The Department must revise the Regulation's counterparty exception to cover routine sales speech and marketing activities. These activities should not raise issues of "fiduciary" status. The Department must reject the prior Administration's premise that conflates "sales" and "advice" and make clear that routine sales and marketing activity, without regard to the parties involved (e.g., plan, plan fiduciary, participant or beneficiary, or IRA investor) do not constitute "advice for a fee" giving rise to fiduciary status and litigation exposure. The effect of the Regulation is to impose fiduciary obligations on non-fiduciary relationships. In that way, the Regulation banishes non-fiduciary commercial information from the retail IRA marketplace. The Department based this extraordinary expansion of the scope of fiduciary status on an express and categorical rejection of "the purported dichotomy between a mere 'sales' recommendation … and advice."[16] The Department has, arbitrarily and without empirical evidence, concluded that investors and plan sponsors cannot distinguish routine sales and marketing activities from investment advice.

[16] 81 Fed. Reg. at 20981.

Consumers depend on access to truthful, non-misleading information about their suitable retirement options. The Regulation's application to truthful, non-misleading speech violates the First Amendment of the U.S. Constitution, as explained in ACLI's prior comment letters and ACLI's litigation papers. As part of its review of the law and policy, the Department must ensure the Regulation conforms with the Administration's policy and applicable precedent on protected commercial speech.

In keeping with this First Amendment principle, Congress has long codified a distinction between sales communications and fiduciary advice. The Investment Advisers Act imposes fiduciary obligations only on an "investment adviser" who is paid specifically for investment advice, and exempts from those obligations a "broker or dealer" who provides advice "solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor."[17] In imposing fiduciary obligations on those who "render investment advice for a fee or other compensation" with respect to ERISA plans or IRAs,[18] Congress likewise intended to regulate those who are hired for their trusted investment advice, not to over-regulate or interfere with ordinary sales relationships and the valuable information that might be communicated in such relationships.

The sales and marketing of insurance products and services are currently subject to an extensive set of regulations issued and enforced by the SEC, FINRA, and the state insurance regulators. These rules were described in detail in ACLI's July 21, 2015 letter to the Department in response to its proposed regulation. As described in that letter, for retail transactions involving annuities, all persons, including those acting as fiduciaries, are subject to these rules.

<u>Education.</u> To encourage and promote educational efforts designed to assist plan participants, beneficiaries, and IRA owners to better understand investment principles and retirement options and strategies, we strongly encourage the Department to permit, consistent with the well-established principles of Interpretive Bulletin 96-1, the population of asset allocation models with specific plan investments selected by the plan's fiduciaries. As has been noted in prior submissions, IB 96-1 worked to the benefit of plan participants and beneficiaries for over 20 years and was narrowed without any empirical support for the change as part of the Department's 2016 final rule. We encourage the Department to reinstate the principles of Interpretive Bulletin 96-1. Further, in order to encourage retirement savings, the Department should specifically state that discussions regarding making or increasing contributions to a plan or IRA are not fiduciary in nature.

Correcting the scope of the rule will permit a clearer understanding of its application to recommendations that are not ERISA fiduciary investment advice. In addition, the Department should include in its review a reconsideration of its FAQ guidance and withdraw guidance that does not comport with ERISA, the Regulation, or any future revisions to the Regulation. For example:

<u>A Recommendation to Contribute is not Fiduciary Investment Advice.</u> The Department asked if the Regulation should be revised to include a safe harbor permitting advisors to recommend that a plan participant make additional contributions without becoming a fiduciary investment advice

[17] 15 U.S.C. § 80b-2(a)(11)(C).
[18] 29 U.S.C. §1002(21)(A); 26 U.S.C. §4975(e)(3)(B)

provider. The Department created unnecessary confusion when it issued FAQ #9 of its "Conflict of Interest FAQ's (Part II - Rule).[19] In FAQ #9, as to whether the education carve-out covers a recommendation to increase contributions to a 401(k) plan, the Department states that it would so long as the person was simply providing factual information related to, for example, not taking full advantage of the matching contribution. This FAQ leaves an erroneous impression that, absent the education carve-out, such recommendations would be fiduciary advice under the Regulation. This simply can't be the case. The Department should immediately withdraw FAQ #9.

There is no need to provide an express exclusion from the Regulation for recommendations to make or increase contributions to a plan or IRA because, as written, such recommendations are clearly excluded from the definition. The Regulation is limited to the following types of recommendations:

(i) A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;

(ii) A recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (*e.g.,* brokerage versus advisory); or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made;

There is simply no way to interpret either of these two provisions of the Regulation to encompass recommendations to make or cease making contributions to a retirement plan or IRA as such recommendations do not relate to the assets of or investments held in a plan or IRA. Nor can one interpret ERISA to include such a recommendation. Section 3(21)(A)(ii) of ERISA states that a person is a fiduciary to a plan to the extent that "he renders investment advice for a fee or other compensation, direct or indirect, *with respect to moneys or other property of such plan,* or has any responsibility to do so" (emphasis added). In other words, the investment advice must relate to moneys or other property held within a plan. A recommendation to stop making contributions to a plan or to increase contributions to a plan does not relate in any way to money or other property held by such plan and therefore cannot be defined as investment advice under the statute. A recommendation to make or stop making contributions to a plan relates to money not yet deducted from participant earnings. Amounts not yet deducted from earnings to be transmitted to a plan or IRA clearly cannot be "money or other property" of the plan or IRA.

[19] *See* Conflict of Interest FAQs, (Part II – Rule) U.S. Department of Labor, Employee Benefits Security Administration (January 2017).

Recommendations Only Regarding Distribution Proceeds are not Fiduciary Investment Advice. In FAQ #4 of its "Conflict of Interest FAQ's (Part II - Rule)," the Department apparently views a recommendation on how to invest the proceeds of a distribution as fiduciary investment advice under the Regulation even when there is no recommendation to take the distribution from the plan. This appears to be based upon the fact that, when the plan participant requests or is to receive the distribution, the money has not yet been distributed from the plan and therefore is still "money or other property of the plan." Absent advice to take a distribution from the plan, recommendations regarding the proceeds of a distribution from the plan should not be treated as a recommendation that relates to money or property of the plan or IRA regardless of whether the proceeds have yet to be effectively distributed. The Department should immediately withdraw FAQ #4.

The Department's interpretation set forth in FAQ #4 greatly expands the scope of the Regulation to encompass any person who recommends a use for the proceeds of a distribution. For example, under this interpretation of the Regulation, a retired IRA owner or plan participant, who may take a distribution at any time, would inadvertently instigate the application of the fiduciary status under the Regulation upon a real estate agent by seeking the agent's advice about the purchase of small house with money she plans to withdraw from a plan or IRA. With the Department's interpretation, the real estate agent becomes a fiduciary to the plan participant or IRA owner when the agent recommends a particular house and earn a commission upon its purchase. This would be the case even if the Agent never encouraged or suggested the possibility of a withdrawal from the Plan or IRA.

## III. The Prohibited Transaction Exemptions Must Be Revised

Regarding the June 9, 2017 application of the Impartial Conduct Standards, the Regulation imposes a fiduciary duty on sales professionals who, under the Impartial Conduct Standards, must act "without regard to" the fact that they are compensated to sell financial products and services. The imposition of this sole interest standard is not, despite the Department's statements to the contrary, without controversy. We believe the rule and the imposition of this sole interest standard on non-misleading sales and marketing communications are violative of First Amendment commercial speech protections. The cost of imposing the sole interest standard on persons engaged in commercial sales and marketing activities far outweighs the benefits to consumers who now have less access to financial professionals, services, and products - especially annuities.

### A. Harmonize the Standard of Care for Retail Transactions

For those transactions not subject to DOL enforcement, exemptive relief should be conditioned on compliance with the applicable standard of care imposed by the appropriate prudential regulator. As we outlined in great detail in our July 21, 2015 comment letter, the states, SEC, and FINRA impose, oversee, and enforce a robust and protective standard of care on financial professionals engaged in the sale of annuities. ACLI encourages the Department to work with the SEC, FINRA, and the state insurance regulators on reasonable and appropriately tailored rules that require all sales professionals to act in the best interest of their customers regardless of whether these professionals serve as fiduciaries under the ERISA definition. A significant flaw in the

Department's rulemaking was its lack of meaningful coordination with other regulators[20] and its unsubstantiated discounting of existing federal and state laws that directly protect retirement savers. The goal should be a harmonized best interest standard of care for retail sales. Consumers of retail products should have the same protections regardless of whether the financial professional meets the definition of an ERISA fiduciary or whether the sale involves an IRA or other savings. Enforcement of a harmonized standard by the applicable prudential regulator is rational, effective, and cost efficient.

A workable best interest standard would require financial professionals to put a consumer's interest first (i) by acting with reasonable care, skill, prudence, and diligence in gathering and evaluating information regarding the consumer that is used to make the recommendation; (ii) by making no misleading statements; (iii) by providing full and fair disclosure of the recommended product's features, fees, and charges; (iv) by fairly disclosing how and by whom the financial professional is compensated; and (v) by avoiding, disclosing, or otherwise reasonably managing material conflicts of interest.

Thus, regarding the Impartial Conduct Standards, ACLI recommends that the Department defer to the standards of conduct imposed by the appropriate prudential regulator for non-ERISA retail transactions while working with those regulators on a harmonized standard. Should the Department determine that it will continue to impose a standard of conduct on non-ERISA retail transactions, ACLI recommends that the Impartial Conduct Standards be revised as follows to reflect a more rational standard on those compensated for the sale of an investment product:

> *When providing investment advice to the Retirement Investor, …… such advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the information obtained from the Retirement Investor regarding the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, ~~without regard to~~ placing the interest of the Retirement Investor before the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party;*

### B. Eliminate the Contract Requirement in PTE 2016-01

In questions 5 and 6, the Department seeks information on PTE 2016-01's contract requirement and the impact of the Department's potential substantial alteration or elimination of this requirement. According to the Department, the contract requirement is "the cornerstone intended to "support and provide accountability" for adherence to the Impartial Conduct Standards.[21] Deferring compliance to state courts and the trial bar is unwarranted and runs counter

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[20] *See* THE LABOR DEPARTMENT'S FIDUCIARY RULE: HOW A FLAWED PROCESS COULD HURT RETIREMENT SAVERS, A Majority Staff Report of the Committee on Homeland Security and Governmental Affairs, United States Senate Senator Ron Johnson, Chairman February 24, 2016.

[21] *See* 82 Fed. Reg. 16902, 16909 (Apr. 7, 2017).

to the Congressional goal of uniform standards for employee benefit plans.[22] As described further below, this requirement is unnecessary, burdensome, and costly and must be eliminated. The contract requirement is unnecessary, given current prudential regulatory oversight and enforcement, clearly circumvents Congressional intent, and is inconsistent with applicable law.

While some providing comments to the Department may incorrectly allege that elimination of the contract requirement creates a "gap" with respect to appropriate oversight and enforcement of customer protections, such as those included in the Impartial Conduct Standards, these allegations demonstrate little more than a lack of understanding and knowledge of the robust regulatory regime currently in place. We maintain, as we have in our prior comment letters, that such oversight and enforcement already exists – and rests with applicable prudential regulators. SEC, FINRA, and state insurance departments are significantly more experienced, and significantly better positioned, than the Department to oversee and enforce customer protection standards – because they do so today. State laws provide annuity owners with important consumer protections, including unfair state practice laws that protect annuity owners from false claims and misleading statements. State insurance regulators have the authority to enforce these protections, and can revoke agent and company licenses, deny an agent the right to sell insurance products in the state, or deny an insurance company the right to do business in the state. We refer the Department to the 269-page appendix accompanying ACLI's July 21, 2015 comment letter on the proposed Regulation, which details this robust and effective current regulatory regime. The Department provided no meaningful basis for its incorrect conclusion that such oversight and enforcement was insufficient.

Moreover, PTE 2016-01's contract requirement clearly circumvents Congressional intent. There is no dispute that the Department lacks authority to enforce ERISA's prohibited transaction and fiduciary duty provisions with respect to IRAs.[23] That fact does not justify the Department's imposition, through the contract requirement, of a private right of action, with enforcement by class action lawsuits and state courts.

Congress chose to confer on the Internal Revenue Service the authority to enforce Regulations against certain prohibited transactions in the statute governing IRAs and specifically elected not to authorize enforcement through a private right of action. Unlike Title I of ERISA, which creates a right of action for participants in employer-sponsored plans, the Internal Revenue Code establishes no such private right of action. Instead, Congress created an onerous excise tax regime that requires the payment of the prohibited amount back to the party affected and a payment to the Treasury that may be as much as 100% of that amount, an extremely powerful incentive for compliance with exemptive conditions. The Department, however, disagreed with Congress's judgment and concluded such enforcement mechanisms were insufficient, concluding that without a

[22] While a contract is not required for transactions, including rollover recommendations, involving ERISA plans, it is rational for persons engaged in IRA transactions to utilize a contract to address the all but certain potential that there will be affected communications regarding the IRA besides that of the initial rollover recommendation.

[23] *See* 80 Fed. Reg. 21972 "The Department would be able to enforce ERISA's prohibited transaction and fiduciary duty provisions with respect to employee benefit plans, but not IRAs, in the event that the Adviser or Financial Institution received compensation in a prohibited transaction but failed to comply with the Exemption or the Impartial Conduct Standards."

contract "the possible imposition of an excise tax provides an additional, but inadequate incentive to ensure compliance with the exemption's standards-based approach."[24] Not surprisingly, the Department offered no basis for this conclusion, because no such basis exists. Also, the Department failed to provide evidence that the excise tax regime has failed to incentivize compliance. Finally, the contract requirement is inconsistent with current law. As the Supreme Court has held, an agency may not create a right that Congress has not.[25] By including the contract requirement and imposing a private right of action, the Department blatantly ignored applicable Supreme Court precedent.

And yet, despite its fervent desire to include an enforcement mechanism for IRAs within PTE 2016-01, the Department wholly failed to quantify the potential costs associated with such a requirement.[26] Indeed, Section 5.3 of the Final Regulatory Impact Analysis ("RIA") states that "the costs of litigation are discussed separately in Section 5.4"[27] Yet, section 5.4 focuses solely on increased insurance premiums and wholly fails to address or consider increased litigation costs associated with the BICE.[28] Apparently, the Department simplistically assumes that all of the compliance and litigation costs associated with the BICE will be addressed by liability insurance. This ignores several facts. First, many current errors and omissions policies contain an exclusion for ERISA-related claims. Second, our members have informed us that such policies and/or policy riders on existing policies are not yet available in the marketplace. Third, it is impossible to know the cost of the insurance coverage alone, and this coverage is only one measure of the additional costs that the Regulation will trigger.

The impermissible imposition of this private right of action, through PTE 2016-01's contract requirement, is yet another reason why it must be eliminated.

### C. Eliminate the Clear Bias Against Certain Products and Preference for Fee-Based Services

In questions 7, 8, 9 and 10, the Department seeks input on possible additional and more streamlined exemption approaches to address marketplace innovations that may mitigate or even eliminate potential advisory conflicts associated with recommendations of particular financial products. Regarding "clean shares" and "fee-based annuities" to foster innovation and consumer choice, the Department must abandon its experiment with picking winners and losers and instead provide clear rules that apply to any and all fiduciaries seeking exemptive relief for the receipt of otherwise prohibited compensation. The Department should eliminate from the prohibited transaction exemption regime its clear bias against particular products and its preference for the fee for service advice model over a commission-based model. This query regarding clean shares and fee-based annuities is yet another indication that the Department remains interested in providing special rules for products that fit the fee for service advice model and other à la carte type service arrangements under which customers are presented with specific fees for each and every service.

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[24] *See* 81 Fed. Reg. 21002, 21022 (Apr. 8, 2016).
[25] *Alexander v. Sandoval*, 523 U.S. 275, 286 (2001).
[26] This is but one of the many of the RIA's significant deficiencies. ACLI's July 21, 2015, September 24, 2015, March 13, 2017 and April 17, 2017 comment letters detail such deficiencies.
[27] *See* Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest – Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions ("Final RIA") April 2016, at 222.
[28] *Id*. pages 239-243.

The Department of Labor does not have the authority, or the expertise, to select products and services it thinks are best for American retirement savers, and doing so represents the antithesis of the Administration's presumption that Americans must be trusted to decide for themselves what is best for them.

Class exemptive relief should be designed to permit the receipt of compensation, not in support of particular financial products and service arrangements. Exemptive relief should be available regardless of whether the compensation earned follows a recommendation regarding an annuity, a share of stock, a bond, a bank CD or mutual fund and regardless of whether the fiduciary provides services on a fee for service or commission basis.

As for a "streamlined" exemption, innovation will occur when the rules are known to all, rather than under a "may I" process. The Department should propose a simple, straightforward disclosure-based class exemption that permits fiduciaries to receive compensation under reasonable and definite conditions.

As for exemptions based on model policies and procedures, again, this would provide the Department with discretion to pick its preferred approach(es). This would permit the Department from time to time to instill its current biases, which would stifle innovation and reduce consumer choice.

A proper class exemption facilitates the functioning of the market, rather than manipulates the market toward preferred outcomes. Exemptive relief should empower consumers with information and ensure they have access to any and all investment products and services in the marketplace. The Department should abandon efforts to shield consumers from products and services it disfavors today, including the Department's unsubstantiated, biased treatment of proprietary products and affiliated distributors. Coupling the current excise tax regime with informed consumers will drive fiduciaries to adopt policies and procedures that align with the requirements of the law and consumer interests.

### D. The Department Must Partner with Prudential Regulators For More Efficient, Effective PTEs

In question 11, the Department queries whether exemptive relief could be streamlined or changed for fiduciaries subject to existing or updated regulatory regimes by the Securities and Exchange Commission, self-regulatory bodies (SROs), or other regulators that provide consumer protections for IRAs and which could serve as a basis for additional relief from the prohibited transaction rules.

ACLI agrees that fiduciaries seeking exemptive relief regarding retail transactions should be granted such relief when they meet the standards of conduct imposed by the prudential regulator with authority over the transaction (SEC, FINRA, state insurance regulators). Such a regulatory partnership approach would benefit consumers and provide the Department with a multifold enforcement capacity at no additional cost to the Department, the prudential regulators, or the marketplace, i.e., financial service providers, ERISA fiduciaries, and consumers. Such an approach would be most effective when coupled with a referral process that leads to the imposition by IRS and Treasury of the applicable excise tax under Internal Revenue Code §4975.

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ACLI supports the application of ERISA's sole interest and other fiduciary standards to those engaged as fiduciaries as well as reasonable and appropriately tailored rules that require all sales professionals to act in their customer's best interest, regardless of whether they serve as fiduciaries under ERISA. However, based on both the observed and further anticipated adverse effects of this Regulation on consumers as described in this letter, the Regulation must be revoked and replaced.

On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on its examination and next steps regarding a definition of fiduciary.

Respectfully,

James H. Szostek Howard M. Bard

American Council of Life Insurers

August 7, 2017 Comment Letter

EXHIBIT A

March 7, 2017

J.P.Morgan

**Important information regarding your investment retirement account(s) ending in:**

Dear Valued Client:

As previously communicated, the U.S. Department of Labor announced a new set of industry-wide regulations for retirement and other qualified accounts that are scheduled to go into effect in April 2017. As a result, we are making changes to the way we service and provide investment guidance on your retirement account referenced above.

Please note that this letter reflects your account information as of 01/31/2017—your financial advisor may have already contacted you about these changes and discussed next steps.

**What you need to know**

- Beginning on or about April 7, 2017, we will transition your retirement account to a Self-Directed Investing Account; no action is required on your part.
- **After this date, your financial advisor will no longer be able to provide investment guidance on this account; however, you may still be able to receive personalized investment guidance from your financial advisor on other accounts you have with us.**
- We will notify you in the event these regulations are not implemented as currently planned, as we may not proceed with this transition.

**About your Self-Directed Investing Account**

- You will be able to access your account online, anytime at chase.com. If you need help enrolling in Chase Online℠, please call our Internet Service Center at 1-877-242-7372.
- You will also have access to a phone-based Self-Directed Investing Team for any account servicing needs you may have; however, they will not be able to provide investment guidance. After April 7, 2017, they can be reached at the phone number listed on your account statement.

**Next steps**

Please review the enclosed agreement, which amends your current agreement and will be effective after your account has transitioned to a Self-Directed Investing Account.

Over, please.

If you have any questions about these changes or would like to learn more about our other retirement options, please contact your financial advisor or call us at 1-800-469-1733.

Thank you for your continued trust and confidence.

Sincerely,

Barry Sommers

Barry Sommers
Chief Executive Officer
Wealth Management

Enclosure: J.P. Morgan Securities LLC Disclosures & Brokerage Account Agreement for Self-Directed Accounts

**Summary of Changes**

For your reference, we have provided the following overview of what is changing for your investment retirement account:

| **Account Feature/Service** | **Effective April 7, 2017** | **Details** |
|---|---|---|
| Access to a financial advisor for investment guidance | **Changing** | Your financial advisor will no longer be able to provide investment guidance on this account. Please note:<br>• You may still be able to receive personalized investment guidance from your advisor on other accounts you have with us.<br>• If you have questions about any open orders, please contact the number listed on your account statement. |
| Service requests (e.g., placing trades or making updates to your account) | **Changing** | Service requests can be made online at chase.com or over the phone; you will no longer be able to contact your financial advisor. |
| Account agreement | **Changing** | An amended account agreement is enclosed. Please review this document and keep it for your records. |
| Transaction/commission fees | **Changing** | Your Self-Directed Investing Account may offer reduced trading pricing. Please visit chase.com/RetirementFees to view the updated commission schedule. |
| Account fees | Not Changing | Your account fees, which are listed in the enclosed agreement, will remain the same. |
| Account number | Not Changing | Your account number will remain the same. |
| Online access | Not Changing | Please visit chase.com to view detailed account information. |
| Statements | Not Changing | Please visit chase.com to view your account statements. |

TD Ameritrade

July 24, 2017

Dear

We consider it no small gesture when you trust us with your investment accounts, and we are committed to improving your investing experience. Because you're a valued client, we are happy to offer you a dedicated, complimentary Senior Financial Consultant. Your Senior Financial Consultant will work with you to answer your questions and help you find the solutions and resources that are right for you so you can pursue your goals.

— **One-on-one Attention**
Complimentary support from your Senior Financial Consultant, with ongoing reviews, goal planning, and check-ins, so you can get the most from your TD Ameritrade experience.

— **Personalized Guidance**
Work with your Senior Financial Consultant to develop an investing plan that helps you identify the right solutions for your unique goals.

— **Extensive Investing Resources**
Your Senior Financial Consultant can guide you to in-depth tools and education, so you can understand what's available to you to pursue your investing goals.

— **Access to Specialists**
Your Senior Financial Consultant can connect you to knowledgeable specialists, providing you with added insight in several areas—annuities, fixed income, trading, and professionally managed portfolios.

It's easy to continue receiving the benefits of working with a Senior Financial Consultant. Simply maintain a balance of $250,000 in your TD Ameritrade account or $100,000 within the Investment Management Services offerings.

It's important to have someone help you with your investment experience. No matter what your plans are, your Senior Financial Consultant is here when you need them so you can pursue your financial goals with confidence.

Ready to get in touch? Contact your Senior Financial Consultant today.

Meredith Witucki
(503) 203-2975
meredith.witucki@tdameritrade.com

Sincerely,

David Lynch
Managing Director, Head of Retail Sales

Merrill Lynch
Bank of America Corporation

**Date: May 2017**

# Review & Retain – Important Information regarding Changes to Merrill Lynch Retirement Accounts Not Enrolled in a Merrill Lynch Investment Advisory Program

We are writing to update you on planned changes to the services that Merrill Lynch and your advisor offer to certain types of brokerage retirement accounts as a result of the pending implementation of the new Department of Labor Fiduciary Rule (DoL Rule).

Since Merrill Lynch's founding more than 100 years ago, we have maintained a commitment to putting our clients' interest first. This is why we support the DoL Rule, which is scheduled to become applicable on June 9, 2017 (the Applicability Date). Please note, however, that the Applicability Date may be pushed out subject to DoL regulation. The DoL Rule requires advisors to apply a fiduciary standard of care when making a recommendation regarding clients' Retirement Accounts. We welcome this new standard and were, in fact, among the first in the industry to lend our support to this initiative.

The changes affect the following Retirement Account types enrolled in our brokerage platform:

- Individual Retirement Account (IRA)
- Roth IRA
- IRRA
- SEP IRA
- SIMPLE IRA
- BASIC
- Retirement Selector® Account (RSA®)
- RCMA Investment Only account
- Self-Direct Brokerage Advisor Advantage Account
- Self-Direct Brokerage Account through Ascensus and Ascensus Trust
- Institutional Trust & Custody Services Advised Brokerage Qualified Plan Account

**Preparing for the DoL rule**

Merrill Lynch already provides a fiduciary standard of care to those accounts serviced by your advisor that are enrolled in the Merrill Lynch Investment Advisory Program (MLIAP). In this investment advisory program, the advice and guidance is provided by your advisor on a fixed fee basis to remove potential conflicted advice regarding compensation earned. You also receive investment advisory services and ongoing monitoring of your investments. Your advisor stands ready to review your individual circumstances and provide information and guidance about these programs and their benefits and costs.

**What this means for your Retirement Accounts that are NOT enrolled in MLIAP or one of our other investment advisory programs**

Beginning on the Applicability Date, your existing brokerage Retirement Accounts that are not enrolled in Merrill Lynch's Investment Advisory Program or one of our other investment advisory programs will be subject to the following:

- Your Merrill Lynch account number will remain the same.
- Any existing securities and cash will remain in the account until you take action.
- Cash sweeps will continue according to your existing instructions.
- Cash contributions and withdrawals from and into the account will be allowed (other than for RSA which has been closed to new funds).
- No new securities purchases or transfers in of securities in your existing account will be allowed.
- Sell transactions and transfers of securities out of the account will be allowed.

In addition, we will offer a limited purpose brokerage Retirement Account to enable you, after the Applicability Date, to hold cash and conduct limited securities purchase and sell transactions in certain investment products we determine to make available from time to time.

**Working with your advisor**

The text of the amendments to the Retirement Account agreements that are related to the DoL Rule and other changes are set forth in the attached Amendment Notification. If you would like a copy of the revised agreement for your Retirement Account, please contact your Merrill Lynch advisor.

We encourage you to work with your Merrill Lynch advisor to better understand the impacts of these changes on your existing accounts and what choices are available to you for the ongoing management of your Retirement Accounts. Some of these changes impact your specific investments and investment choices, like mutual funds and annuities, and may require action within a certain time frame.

Thank you for allowing us to continue to serve you and help you work toward your financial goals. If you have any questions, please contact your Merrill Lynch advisor.