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U.S. Department of Labor
Employee Benefits Security Administration
Office of Exemption Determinations
200 Constitution Avenue N.W.
Suite 400
Washington, DC 20210

Subject: ZRIN 1210-ZA27: 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)

Greetings:

On behalf of the American Council of Life Insurers (“ACLI”)¹, we appreciate the opportunity to provide comments in response to the proposal by the Department of Labor (the “Department”) to extend, through July 1, 2019, the special transition period under sections II and IX of the PTE 2016-01 (the “Best Interest Contract Exemption” or “BICE”) and section VII of the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, and to delay the applicability of certain amendments to Prohibited Transaction Exemption (“PTE”) 84-24 for the same period (the “Proposal”).²

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.

² 82 Fed. Reg. 41365 (Aug. 31, 2017).

ACLI strongly supports the proposed time-certain 18-month delay. Further, as the provisions at issue are scheduled to become effective in a little over 3 months, we urge the Department to move as quickly as possible to finalize the delay. We agree with the Department's concern that, without a delay in the applicability dates, regulated parties may incur undue expense to comply with conditions or requirements that the Department ultimately determines to revise or repeal, and further attendant investor confusion will ensue. We also agree with the Department's concern that a delay ending after a specified period following a certain action on the part of the Department "would provide insufficient certainty to financial institutions and other market participants who are working to comply with the full range of conditions under the relevant PTEs" and would "unnecessarily harm consumers by adding uncertainty and confusion to the market."³ Accordingly, a "tiered" approach, where the delay is set for the earlier of or the later of (a) a time certain and (b) the end of a specified period after the occurrence of a specific event, would raise these same concerns. Finally, although not specifically proposed, but referenced in the preamble, we strongly oppose a delay approach based on subjective criteria, such as a delay only for those firms that affirmatively show that they have already taken "concrete steps" to harness recent market developments for their compliance plans.⁴ A subjective delay approach, based on undefined and ambiguous factors, such as whether a firm has taken "concrete steps" to "harness" market developments, would require the Department to subjectively and inappropriately pick and choose among providers and products based on vague factors. We question the constitutionality and legality of such an approach.

A delay of the January 1, 2018 applicability date will provide sufficient time for the Department to complete the examination being undertaken as a result of the President's February 3, 2017 Memorandum⁵, determine next steps, and communicate the results of the examination, and the Department's future plans, to stakeholders. The Department has sought, and has now obtained, data and evidence illustrating that the Fiduciary Regulation (the "Regulation") is harming those it was intended to benefit. Accordingly, the Department must revoke this misguided Regulation and replace it with a rule that imposes reasonably tailored standards upon those engaged as fiduciaries acting in mutually agreed upon relationships of trust and confidence.

First, we must note that ACLI maintains, and has contended in litigation (and continues to contend), that the Regulation (including 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 the judgment 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, when directed at small plans and retail retirement savers; it constrains education and information about retirement planning options; and it 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

³ 82 Fed. Reg. 41371.

⁴ See *Id.*

⁵ 82 Fed. Reg. 9675 (Feb. 7, 2017).

trusted to decide for themselves what is best for them.”⁶ 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. It is essential that the Department engage and coordinate with the Securities and Exchange Commission, FINRA and state insurance regulators. Prudential regulators, not state courts and the plaintiffs’ bar, are best positioned to apply and enforce a uniform best interest standard of care. Nonetheless, ACLI is providing these comments, in response to the Proposal, to assist the Department in its review and evaluation of the Regulation and PTEs.⁷

I. An 18-Month Delay Is Necessary to Enable the Department to Complete Its Examination as Directed by The President

In the preamble to the Proposal, the Department acknowledges that it has not yet completed the reexamination of the Regulation as directed by the President in his February 3, 2017 Memorandum, and “more time is needed to carefully and thoughtfully review the substantial commentary received in response to the March 2, 2017 solicitation for comments and to honor the President’s directive to take a hard look at any potential undue burden.”⁸ The Presidential Memorandum directs the Secretary of Labor to review the Fiduciary Regulation to determine whether it may adversely affect the ability of Americans to gain access to retirement information and advice.”

It is imperative that the Department delay the January 1, 2018 applicability date to provide time for it to conduct the reexamination as directed by the President and fully evaluate the magnitude of evidence and data it has received illustrating the significant harm to retirement investors caused by the Regulation and the adverse effects of the Regulation on the ability of Americans to gain access to retirement information and advice. Further, in order to comply with the Presidential Memorandum, the Department, during the 18-month delay period, must examine the entire Regulation and all related PTEs – including the Impartial Conduct Standards required by the BICE, PTE 84-24, and the Principal Transactions Exemption. The Department’s approach to the examination of the Impartial Conduct Standards while requiring compliance with them is significantly problematic.⁹

⁶ See, Alexander Acosta, Editorial, *Deregulators Must Follow the Law, So Regulators Will Too*, The Wall Street Journal, May 22, 2017.

⁷ 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.

⁸ 82 Fed. Reg. 41371.

⁹ ACLI’s July 21, 2015, September 25, 2015, April 17, 2017, July 21, 2017, and August 7, 2017 comment letters provide a comprehensive discussion of the problems raised by, and the significant liabilities associated with, the Department’s formulation of the Impartial Conduct Standards. As part of its examination of the

The Department has already acknowledged the need to delay the provisions scheduled to be applicable on January 1, 2018 while it completes the examination required by the Presidential Memorandum. In its final rule implementing a 60-day delay of the Regulation's April 10, 2017 applicability date, the Department notes that the rulemaking project's "more controversial" requirements, such as requirements to execute enforceable written contracts under the BICE and changes to PTE-84-24, are not applicable until January 1, 2018, "while the Department is honoring the President's directive to take a hard look at any potential undue burdens and decides whether to make significant revisions."¹⁰

The Department states that its objective is to complete its review pursuant to the President's Memorandum, analyze comments received in response to the July 6, 2017 Request For Information, and propose and finalize any changes to the Regulation and/or PTE's sufficiently before July 1, 2019, to provide firms with ample time to design and implement an orderly transition process. The amount of time required by firms to "design and implement" an orderly transition process will depend upon the nature and extent of the revisions the Department proposes to the Regulation and/or PTEs. As such, the Department should, concurrent with its proposed changes to the Regulation and PTEs, solicit stakeholder feedback on the time necessary to implement the proposed changes in an efficient and effective manner.

II. An 18-Month Delay Will Limit the Harm to Retirement Investors

An 18-month delay will limit the harm this Regulation is imposing on retirement investors. ACLI's April 17, 2017, July 21, 2017, and August 7, 2017 comment letters, as well as comment letters provided to the Department on behalf of many financial services organizations and related entities, include detailed data and evidence illustrating the harm to investors resulting from the dislocation and disruption of the retirement product and services marketplace caused by the partial implementation of the Regulation. Further, the administrative record clearly demonstrates the crippling effects of the Regulation on consumers' access to guaranteed lifetime income products.

The exemptive requirements scheduled to become applicable on January 1, 2018, including the contract, disclosure, and warranty requirements of PTE 2016-01, and the amendments to PTE 84-24, impose additional and significant liabilities on financial service providers. In an effort to mitigate risk, efforts to conform with the Regulation have led financial firms to take steps that, unfortunately but not unexpectedly, have an adverse impact on retirement investors with small- and medium-sized accounts. The Department has been provided evidence of such harm, including new or increased minimum account balance requirements, elimination of commission-based fee structures, and decreased product offerings. Failure to delay the January 1, 2018 applicability date will further exacerbate the Regulation's harmful impact.

In addition, there is no evidence that delaying the January 1, 2018 applicability date for an additional 18 months will harm retirement investors. Because the Regulation inflicts on consumers

Regulation and Exemptions, the Department must evaluate the Impartial Conduct Standards to determine if they impede the ability of retirement savers to access retirement information and advice.

¹⁰ 82 Fed. Reg. 16902, 16906 (Apr. 7, 2017).

the loss of crucial investment information and advice, delaying full implementation will help to mitigate some of this harm. Moreover, a delay would provide time for the Department to examine and address the Regulation's application to truthful, non-misleading speech, in violation of the First Amendment of the U.S. Constitution. In any event, even crediting the Department's own flawed analysis, the Department has conceded that investor losses from the proposed transition period could be "relatively small" as firms have already made efforts to adhere to the provisions that became applicable on June 9, 2017.¹¹ In fact, the Department previously concluded that there would be no retirement saver losses associated with its implementation of the initial special transition period for the provisions at issue here.¹² Accordingly, while there is evidence of harm to retirement savers due to the imposition of the Regulation, there is no evidence that an extension of the special transition period will harm consumers.

III. An 18-Month Delay Will Provide Time for the Department to Review the Substantial Evidence and Data It Has Regarding the Regulation's Harmful Impact on Retirement Savers

The Regulation is already harming consumers, especially those with small- and medium-sized accounts, by restricting their access to retirement guidance and products. With a bias against commission-based compensation arrangements, the Regulation is restricting consumer access to annuities – the only products available in the marketplace providing guaranteed lifetime income – and it has restricted or completely eliminated IRA account owners' and qualified plan sponsors' access to financial assistance.

American investors are losing access to vital retirement information and guidance. The harm to consumers caused by the Regulation is not speculation – it is very real and is supported by substantial evidence provided to the Department via comment letters and survey data submitted in response to its March 2, 2017 Proposed Rule and request for comments and its July 6, 2017 Request for Information. Evidence and data provided to the Department clearly demonstrate such harm, and includes, but is not limited to:

- Financial firms have imposed minimum account thresholds ranging as high as \$250,000 to obtain investment guidance.
- Financial firms are moving clients with advised individual retirement accounts to un-advised self-directed accounts.
- Financial firms are requiring investors who are currently served 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 ongoing investment advice – regardless of the frequency of trading activity.
- Financial professionals are orphaning accounts at alarming rates, leaving account holders with no financial advice or guidance, and effectively resulting in a "do it yourself" model.

¹¹ See, 82 Fed. Reg. at 41372.

¹² See, 82 Fed. Reg. at 16910.

ACLI's August 7, 2017 comment letter includes three actual letters (redacted to remove recipient names) received by employees of ACLI members. One (from J.P. Morgan) 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 (from TD Ameritrade) 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 (From Merrill Lynch) informs the customer that unless services are provided on a (more expensive) fixed-fee basis, she may no longer purchase securities for her existing account. These letters are among the evidence and data provided to the Department illustrating the actual harm to consumers resulting from the Regulation.

The Regulation also has significantly reduced consumer choice. Retirement savers have lost access to retirement products. As a result of the Regulation's bias against commission-based compensation arrangements, the Regulation has resulted in restricted access to annuities. Evidence and data provided to the Department clearly demonstrate that:

- Broker-dealers, banks, and credit unions are reducing or completely eliminating annuities from their offerings. A recent LIMRA study found that 29 percent of banks and credit unions already plan to drop some guaranteed income products. One ACLI member reports that it has reduced its proprietary insurance product offerings by 54 percent and its non-proprietary variable annuity offerings available through its broker-dealer by 76 percent.
- 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.
- Financial firms are no longer offering annuity products that pay a commission on qualified assets.

Additionally, the Regulation has 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.

The significant liabilities associated with the PTE compliance requirements applicable on January 1, 2018, and the controversial nature of such requirements, provide a strong basis for the Department to delay their applicability date while undertaking its review. Indeed, in issuing its final regulation extending the Regulation's applicability date for 60 days, the Department states that

As compared to the contract, disclosure and warranty requirements of the BIC Exemption and Principal Transactions Exemption, the Fiduciary Rule and the Impartial Conduct Standards are among the least controversial aspects of the rulemaking project (although not free from controversy or unchallenged in litigation).¹³

¹³ 82 Fed. Reg. at 16906.

As stated in our April 17, 2017 comment letter, ACLI disagrees with the Department's unsubstantiated conclusion that the Impartial Conduct Standards are among the "least controversial" aspects of the rulemaking. However, we agree that the contract, disclosure, and warranty requirements of the exemptions are highly controversial. It would be both logical and prudent for the Department to further delay the January 1, 2018 applicability date of the contract, disclosure and warranty requirements of the BICE, Principal Transactions Exemption, and amendments to PTE 84-24, due to the high level of controversy surrounding the increased liabilities associated with these requirements – particularly when their incremental benefits are weighed against their harm to the retirement savings product marketplace.

Finally, delaying the January 1, 2018 applicability date will provide the time necessary for the Department to review and evaluate the July 6, 2017 RFI responses, the over 1,500 comments received by the Department in response to its March 2, 2017 Proposed Rule and request for comments responsive to the questions raised in the Presidential Memorandum,¹⁴ and the questions of law and policy concerning the Regulation and PTEs.

IV. An 18-Month Delay Will Provide Time for the Department to Complete a New Regulatory Impact Analysis

As discussed in ACLI's July 21, 2015 and April 17, 2017 comment letters, the Department's Regulatory Impact Analysis ("RIA") supporting the Regulation was deficient and deeply flawed. Given the volume of new data presented to the Department illustrating that the RIA both overstated the Regulation's benefits and underestimated its costs, the Department must complete a new RIA. As detailed by ACLI and many others in comment letters and testimony, the final RIA is based on conjecture, is significantly flawed, and should not be relied on for any estimations of consumer gains and losses associated with the Regulation and PTEs. The sole basis for the final RIA's estimated investor gains was the Department's inappropriate and flawed examination and analysis of mutual fund retail class shares and its theoretical application of this analysis across the entire retirement product market. Further, although raised by ACLI in both comment letters and testimony, the final RIA fails to adequately or meaningfully address the impact of the Regulation on retirement investors' access to lifetime income products. Further, the Presidential Memorandum specifically directs the Department to prepare an updated economic analysis, and the Department has acknowledged this direction, stating that it will "review the 2016 Final RIA's conclusions as part of its review of the Fiduciary Regulation and PTEs directed by the Presidential Memorandum."¹⁵

¹⁴ 82 Fed. Reg. 12319 (Mar. 2, 2017).

¹⁵ *Id.*

V. An 18-Month Delay Will Allow for Coordination Between the Department and Other Regulators

The Department states that the current timeframe will not accommodate the Department's desire to coordinate with the SEC. We agree. Full implementation of the Regulation must be delayed to allow the Department, the SEC, FINRA, and state insurance regulators to work in concert on harmonized, workable, and appropriately tailored standards. The Department acknowledges the potential impact of SEC rulemaking in the RFI, and seeks information on how rulemaking by other regulators could impact the Department's rulemaking.¹⁶ During recent Senate Appropriations Subcommittee hearings, both Secretary of Labor Acosta and SEC Chairman Clayton acknowledged the necessity of coordination. Indeed, Chairman Clayton has initiated steps to examine the standards of conduct applicable to investment advisers and broker-dealers, stating that he believes that "clarity and consistency – and, in areas overseen by more than one regulatory body, coordination – are key elements of effective oversight and regulation."¹⁷ Further, the National Association of Insurance Commissioners ("NAIC") has formed an Annuity Suitability Working Group charged with reviewing and revising, as necessary, the Suitability in Annuity Transactions Model Regulation.

A coordinated and harmonized regulatory approach is necessary and in the best interest of retirement savers. Prudential regulators, not state courts and the plaintiffs' bar, are best positioned to apply and enforce a consistent and uniform best interest standard of care. The Department's RIA, without substantiation, ignored and discounted comprehensive federal and state laws that directly protect retirement savers against the very abuses it seeks to rectify. The Department was criticized for both its disregard of existing regulatory regimes and its lack of coordination with other regulators in its promulgation of the Regulation and PTEs.¹⁸

Given the complexity of these issues, this necessary coordination will take time. Both the SEC and the NAIC have initiated steps to review the standard of care applicable to retail investors. The Department should delay the applicability date and carefully coordinate its rulemaking with other prudential regulators.

VI. The Department Should Concurrently Extend the Temporary Enforcement Policy Provided in Field Assistance Bulletin 2017-02

In footnote 32, the Department seeks comment on whether it should extend the temporary enforcement policy provided in Field Assistance Bulletin ("FAB") 2017-02, for the same period covered by the proposed extension of the Transition Period. We strongly support such an extension. As the Impartial Conduct Standards remain in effect, any delay period is equivalent to the current

¹⁶ See RFI Question 11, 82 Fed. Reg. 31278, 31280 (July 6, 2017).

¹⁷ See, Chairman Jay Clayton, Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers (June 1, 2017), available at <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31>.

¹⁸ 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.

“phased implementation period” addressed in the FAB. An extension of FAB 2017-02’s temporary enforcement policy is consistent with the Department’s stated “good faith compliance” approach to implementation “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 duty rule and exemptions.”¹⁹

VII. The Department Must Eliminate Its Clear Bias Against Certain Products and Abandon Its Preference for Fee-Based Services.

We remained concerned that the Department appears to be focused on the creation of a new and more streamlined class exemption “built in large part on recent innovations in the financial services industry.”²⁰ The Department does not have the authority or 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.

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. The Department’s continued focus on “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.

Class exemptive relief should be designed to permit the receipt of compensation, not in support of particular financial products and service arrangements. Further, class exemptive relief should be principles-based, and accommodate market innovation. 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 generally applicable rules are known to all, rather than under a “may I” process that singles out particular products and compensation practices for special treatment in light of the Department’s preferred models. The Department should therefore 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, this would provide the Department with

¹⁹ See EBSA Field Assistance Bulletin No. 2017-02, May 22, 2017.

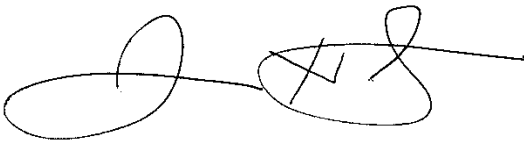
²⁰ 82 Fed. Reg. 41371 (Aug. 31, 2017).

additional discretion to pick its preferred and disfavored approaches. This would enable the Department to instill its current biases, which would stifle innovation and reduce consumer choice.

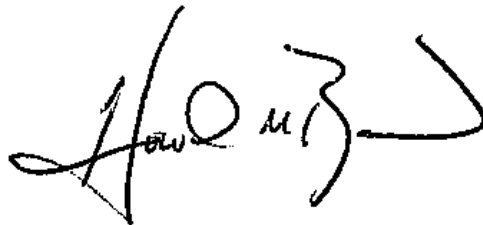
A proper class exemption facilitates the functioning of the market, rather than manipulating the market toward preferred outcomes. Exemptive relief should empower consumers with information and ensure they have access to any and all investment products and services in the marketplace. The Department 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.

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,

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James H. Szostek

A handwritten signature in black ink, appearing to read 'Howard M. Bard', with a large loop at the end.

Howard M. Bard