BLACKROCK®

August 7, 2017

The Honorable Jay Clayton
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisors and Broker-Dealers

Dear Chairman Clayton:

BlackRock, Inc. (together with its affiliates, "**BlackRock**") respectfully responds to the Securities and Exchange Commission's ("**SEC**") invitation to address questions regarding the standards of conduct applicable to investment advisers and broker-dealers, and related matters. BlackRock manages money for millions of individuals from all walks of life, including teachers, nurses, firefighters, and factory workers, who need to save for education, retirement and other long-term goals. We embrace our role as a fiduciary to our asset management clients and continually strive to evolve our investment products and solutions in response to client needs. As an asset manager, BlackRock distributes its investment products and solutions to the public indirectly through many different broker-dealers, investment advisers, and other financial services firms. As such, we have a significant interest in the standards of conduct that apply to financial professionals. We appreciate the SEC's engagement in these issues and its recognition of the importance of clear, consistent, and coordinated regulation.

The Department of Labor's ("**DoL**") Conflict of Interest Rule (29 C.F.R. 2510.3-21) and its related exemptions (collectively, the "**Fiduciary Rule**") is premised on the broad assumption that financial services firms and individuals do not act in the best interests of their clients and regularly provide conflicted advice. We do not accept that premise. According to BlackRock's 2017 Global Investor Pulse Survey,[1] Americans who use financial advisors hold their advisors in high regard – 71% of respondents reported that they are highly satisfied with their advisors. Even so, BlackRock is supportive of changes to the financial ecosystem that enhance confidence in markets and investing. We support regulatory reform that advances investor choice and facilitates savings and outcome-oriented investment programs.

We are concerned that the DoL's Fiduciary Rule has not advanced these goals, which is particularly problematic because investors need investment guidance now more than ever. According to BlackRock Investor Pulse, investors are increasingly concerned about fundamental issues, such as the cost of living (57% of respondents vs. 52% in late 2016), healthcare costs (54% vs. 46%), and the domestic economy (41% vs. 36%) and confidence that they are making the right savings and investment decisions has declined to 39% (from 46% in late 2016). Our survey also tells us that investing for retirement and saving money generally are important financial priorities (43% and 58%, respectively). Yet, four in 10 Americans have not started saving for retirement. This savings gap also seems to be weighing on retirement confidence,

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1 BlackRock, Global Investor Pulse Survey (2017), available at https://www.blackrock.com/investing/insights/investor-pulse. The survey polled 28,000 respondents across 18 countries, including more than 4,000 respondents from the U.S. ("**BlackRock Investor Pulse**").

because more than half of Americans think they either aren't on track to reach their retirement income goals or simply don't know where they stand.

We urge the SEC to adopt a uniform best interest standard that applies to all types of retail accounts, regardless of whether they are plans or IRAs or non-qualified investment accounts. Given the SEC's mandates of investor protection and efficient markets, the SEC is in the best position as a regulator to oversee investment accounts, promoting efficiencies and reducing confusion and unnecessary complexity. A uniform SEC best interest standard could advance investor choice and encourage saving and investing in a way that would optimize investment outcomes. To do so, we believe a uniform best interest standard should:

1. **Promote investor choice in account type**. By providing a streamlined exemption for "level-fee fiduciaries"[2], the Fiduciary Rule encourages and accelerates the continued shift from brokerage to advisory accounts. While advisory accounts offer benefits to many investors and limit potential conflicts of interest, they are not right for everyone. As we discuss below, one size does not fit all. For example, investors who trade infrequently are severely penalized if only advisory accounts are available. The DoL identified this issue by making a recommendation as to account arrangement investment advice,[3] but by having different compliance frameworks for advisory and brokerage accounts, it created a strong incentive for advisory over brokerage accounts. The SEC understands that advisory accounts may not always be the answer.[4] The SEC is better positioned to create a consistent compliance regime for brokerage and advisory accounts, which would result in greater choice for investors based on their individual needs and objectives.

2. **Advance outcome oriented investing**. The Fiduciary Rule's over-emphasis on advisor fees and product costs fails to account for the many other factors that advisers and broker dealers consider in providing advice that is in the best interests of the client. In our view, it does not serve investors if cost is the sole or predominant driver in long-term investing. This focus on fees disproportionately favors index investing without regard for the overall investment outcome. Individual retail investors should be allowed to build a diversified portfolio incorporating their various account holdings. In many cases, this might include a combination of index and active products. Compliance with a uniform SEC best interest standard could be structured to more readily support various product types with different fee structures.

3. **Embrace the rise of digital advice and regulate such advice appropriately.** The recent rapid growth of digital advisors emphasizes the need for appropriate regulatory supervision. Digital advice, without regulation, is not a solution to fiduciary issues. As the SEC noted in its February 2017 Guidance Update on Robo Advisers, digital advice is not all the same, with many digital advisors pursuing different business models and investment philosophies, as well as offering varying degrees of sophistication in the

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2 81 Fed. Reg. 68 at 21079.

3 81 Fed. Reg. 68 at 20961.

4 Reverse churning has been an examination priority for the SEC for several years. *See* SEC, National Exam Program: Office of Compliance Inspections and Examinations, Examination Priorities for 2015, available at https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf.

services provided.[5] The role of human involvement within digital advisors varies based on the business model and the precise services provided. The SEC's guidance is an important step towards ensuring regulation is appropriately applied to digital advisors and providing guidance for digital advisors as they seek to meet their regulatory obligations under the Investment Advisers Act.

As discussed in our comments below, BlackRock believes that a uniform SEC best interest standard could provide a solid basis for addressing concerns the DoL has identified with existing market practices while preserving investor choice around the range of products and services, and how to pay for them. The DoL and the SEC should work in concert to determine whether a uniform SEC standard would leave any remaining gaps specific to retirement assets that the DoL could separately address.

I. Multiple Standards of Conduct Governing the Same Assets Harm Retail Investors (Response to Questions 1 and 6)

Individuals saving for retirement are likely to have more than one type of account (as well as other sources of income, such as home equity and social security). They think of their "nest egg" as a whole and do not focus on whether their accounts are regulated by the SEC or the DoL. A great many investors simply do not plan for their retirement by segregating tax-advantaged vehicles from their other investment strategies. Financial advisers can better serve their clients' needs if they can provide advice with respect to all of their clients' assets, without the avoidable burden of complex, conflicting, or overlapping regulatory requirements for different accounts.

When different agencies regulate similar issues and take divergent or inconsistent paths, it creates a complicated, confused regulatory environment that operates to the detriment of both plan and individual investors. Absent a uniform standard, individual investors with plan and non-plan accounts will simply be baffled by different and/or conflicting standards and investment limitations. In addition to this confusion, investors may not get the information they need to make informed investment decisions, or they may get so many disclosures that they do not know where to start to make appropriate decisions regarding their retirement resources and planning. Overlapping, inconsistent and/or duplicative rules are difficult for financial advisers to navigate and to explain to their clients. In short, the absence of a harmonized and integrated regime among different federal regulators will exacerbate confusion, increase costs, limit choice, and ultimately create an environment that discourages retirement savings and investing generally, as individuals will lack the confidence in the system needed to encourage investment.

In our view, a uniform SEC standard should apply across all sales practices and investment recommendations made to individual retail customers in all accounts, not just their IRA or plan accounts. The SEC already has well-understood and widely respected powers and authority. A uniform standard by the SEC would not require the imposition of a new regime, such as the Fiduciary Rule, to provide new regulatory authority for certain account types. The SEC, in concert with FINRA, is best positioned to adopt a uniform standard, because it can already set conduct standards for its registrants across all of their interactions with retail investors, regardless of the account type.

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[5] SEC, Division of Investment Management, Guidance Update on Robo Advisers (Feb. 2017), available at https://www.sec.gov/investment/im-guidance-2017-02.pdf ("**SEC Guidance Update on Robo Advisers**").

II. Standards of Conduct Should Advance Investor Outcomes (Response to Question 2)

Because the Fiduciary Rule targets conflicts of interest, firms are incentivized to focus exclusively on choosing products for plan and IRA platforms based on whether the product facilitates compensation neutrality within and across fund families, rather than whether the product will deliver the client's desired investment outcome. The overly heavy emphasis on cost and compensation structure, to the exclusion of other factors, threatens to work against the best interests of individual clients and could result in less assets available for retirement and other savings goals. Large institutional pension portfolios regularly incorporate a diverse set of investment strategies as part of their overall asset allocation process. Likewise, well run, large institutional defined contribution plans offer participants a diverse set of investment options under their plan, including equity and fixed income, index, active, and multi-asset products. Indeed, this type of diversified plan menu is required for a plan fiduciary to have the protections afforded by Section 404(c) of ERISA. Individual retail investors should be allowed to build a diversified portfolio incorporating their various account holdings.

The approach that maximizes the potential for a secure financial future will likely vary from individual to individual and will depend on a variety of factors, including the individual's age and expected retirement date, whether the individual has a defined benefit plan or only an IRA, and the individual's overall financial situation, obligations, investment goals, and risk tolerance. For one investor, the goal may be low volatility and a smoother, more predictable, income stream. For another, it may be growth needed to fill a potential income gap in retirement. And another may want diversification that cannot be provided by returns that are strictly correlated to the market. Since individuals are differently situated and have different goals, the portfolios in which they invest should likewise have different strategies and different risk and return profiles. For some, an asset allocation to low cost index products may be appropriate. Index products, however, can be single dimensional and may not serve all investors' needs, as they only provide returns that are correlated to the market. Actively managed products may have higher fees, but these products also have the ability to deliver outcomes that cannot be delivered by pure beta products (i.e., index funds) and may have return patterns that are not always correlated with traditional markets. Some products can also be used to lower volatility while still providing an above money-market rate of return. A good example of products that could benefit retail investors who want to build a diversified portfolio is multidimensional asset allocation products, which combine active and index management across multiple asset classes, including non-traditional asset classes. While such an asset allocation product may have a higher fee than a simple index fund, it offers a professionally managed and diversified portfolio that may be the best alternative for certain retirement investors to achieve their goals. This is just one example of many where "low cost" may not lead to the most desirable outcome.

III. The SEC Should Regulate Digital Advice (Response to Question 3)

As discussed in more detail in our 2016 *ViewPoint* on digital advice,[6] various types of entities provide digital advisory tools and/or services, including asset managers, banks, broker-dealers, and technology firms. In determining the scope and substance of regulations governing digital advisors and supervising and examining the provision of digital advisory services, policy makers should recognize that digital advisory technologies typically fall into two categories: (i) advisory tools that are used by financial professionals to support client-facing discussions and

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[6] BlackRock *ViewPoint*, Digital Investment Advice: Robo Advisors Come of Age (Sep. 2016), available at https://www.blackrock.com/corporate/en-us/literature/whitepaper/viewpoint-digital-investment-advice-september-2016.pdf.

discretionary advisory or client services activities; and (ii) investment educational tools or digital advisory services offered to retail investors directly.[7] In both of these service models being used today, digital advice tools and services have the potential to provide advice or investor education at a lower cost than through historic means. For discretionary advisory services, there is often little or no minimum account balance required, allowing individuals to start investing without a large nest egg. These services and tools also allow investors to get advice conveniently via mobile or desktop and allow advisors to communicate quickly and effectively with clients. In addition, digital advisory tools have the potential to allow greater auditability of client service processes, including the collection of suitability and know your client information.

Given the growth of digital advice and its potential benefits for investors, we believe the application of existing regulations and principles governing the provision of advice should be thought through in the context of digital advice, in order to ensure that appropriate protections for investors are in place, while ensuring that regulatory regimes encourage innovation. The SEC's Guidance Update on Robo-Advisers[8] was an important step in this direction.

We appreciate the SEC's clarification on how digital advisors are governed under existing regulations. In general, we agree with the SEC that digital advisors should provide full and fair disclosures to clients that are easy to understand, including reliance on algorithms. For example, this disclosure should include a plain English disclosure concerning the dependence on and use of algorithmic investment strategies and methods. We encourage the SEC to recognize that short form disclosures in digital advice user interfaces that refer to more extensive disclosures (e.g., Form ADV brochure disclosures and explanatory pages) should be sufficient to ensure investor protection and inform investors of investment methods, strategies, and risks.

In addition, digital advisors should consider how client information is gathered and ensure that the questions asked to clients provide sufficient information to ensure that the advice provided is appropriate for the client based on his/her financial situation and investment objectives. We agree with the SEC's recommendation that digital advisors should consider whether to adopt and implement policies addressing the development and testing of algorithms, the sufficiency of client questionnaires, disclosures to clients regarding changes to algorithms used, oversight of any third parties, cybersecurity threats, the use of electronic media, and the protection of client accounts.

We hope the SEC will continue its endeavor to provide education to digital advisors on how the existing regulatory regime for investment advisors applies to their business models. The SEC could provide additional clarification on how existing regulation applies to ensure that investors using digital advisors are protected under the same standard of care provided by traditional advisors, for example regarding trading practices. Like traditional advisors, digital advisors generally manage client assets on a discretionary basis and buy or sell equity securities, ETFs, and other broad-based securities. As part of these services, digital advisors should have reasonably designed trading procedures that include controls to mitigate risks associated with trading and order handling. Trading and portfolio management capabilities should be supervised by skilled investment professionals. We appreciate the SEC's ongoing efforts to ensure that end investors receive appropriate financial advice from digital advisors as well as traditional advisors.

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7 FINRA, Report on Digital Investment Advice (Mar. 2016), available at https://www.finra.org/sites/default/files/digital-investment-advice-report.pdf.

8 SEC Guidance Update on Robo Advisers.

IV. Trend toward Fee-Based Advice Accelerated by the Fiduciary Rule (Response to Question 4)

In 2015, fee-based assets totaled $7.3 trillion, which represents a 38% share of the $19.2 trillion retail wealth market.[9] Fee-based assets are expected to climb to a 60% share of market by 2020.[10] According to a report by Cerulli Associates, managed account platforms have contributed significantly to growth in the financial services industry, with managed account assets have grown an average of 17% over each of the last five years.[11] According to the report, this growth is largely due to the strong movement of assets into managed account platforms from existing commission-based relationships. The report indicates that this trend will continue due to the benefits of stable recurring revenue, the alignment of incentives between the advisors and investors, *and the finalization of the DoL's Fiduciary Rule.*

Further, some financial services firms have indicated that they would not offer IRA brokerage platforms or may limit their IRA brokerage platforms because of the compliance complexities under the Best Interest Contract Exemption ("**BIC**") of the Fiduciary Rule that are currently required by January 1, 2018, as well as the risk of class action litigation under the BIC. This shift would negatively impact choice for retail investors and may lead to worse, not better, outcomes for many clients. In particular, moving from a commission-based account to an advisory account may not be in the best interests of a client who trades infrequently. And, if the client does not move to an advisory platform, he or she may be left with no support at all. To avoid the potential negative impact on smaller accounts, which may be left with self-directed platforms or call centers that do not provide any information or responses to questions that may come even close to advice, the SEC should adopt a uniform best interest standard that does not preference one account type over another.

V. Existing Enforcement Mechanisms Adequately Protect Investors (Response to Question 11)

The threat (and fear) of class action lawsuits has had a material impact on how financial intermediaries have designed, and in many cases it has reduced or eliminated products and services for IRAs and plans. The litigation risk, in particular the risk of overly zealous plaintiffs' class action litigation designed to induce settlement, motivates financial institutions to take extremely cautious and restrictive approaches that may not be in the best interests of retirement investors. Enforcement should be left subject to FINRA rules governing disputes between its registrants and their clients and other regulators, as applicable. FINRA rules and disciplinary procedures offer a well-established, efficient enforcement mechanism for federal securities laws and SEC rules and regulations. This approach could be readily extended to enforcement of a best interest conduct standard for retirement investment advice.

[9] State of Wealth Management, Digital Advice and Investor Preferences by Karen Lanzetta, Director of Market Research, Envestnet (Jul. 11, 2016).

[10] *Id.*

[11] The Cerulli Report, U.S. Managed Accounts 2016, Leveraging Digital Advice to Maximize Scale.

VI. Financial Services Regulation in the UK Offers Warning of Potential Unintended Consequences (Response to Question 16)

The UK's Retail Distribution Review ("**RDR**") was enacted in 2012 with the goal of designing a "resilient, effective, and attractive retail investment market that consumers can have confidence in and trust at a time when they need more help and advice than ever with their retirement and investment planning."[12] Specific measures in the RDR included a ban on commissions for certain types of products and the introduction of stronger professional standards for advisers. The intention was to provide transparency around fees and drive advisers to adopt a more relationship-based, rather than transactional service model with clients.

Although there has been progress on these objectives, several unintended consequences have been documented. Most significantly, advice is expensive and not cost-effective for investors with smaller accounts or simpler needs.[13] In 2016, 69% of advisers turned away clients and 43% of those advisers did so because the services they offered would not have been economical given those individuals' circumstances.[14] In addition, in connection with RDR, advisers have had to review their business models, particularly in light of rising infrastructure costs, the need to demonstrate robust internal processes and a much less forgiving financial review of their client book.

All of these changes have led to an "advice gap" for individuals in the UK, in particular those with lower assets. Under the old commission-based system, it was possible for an adviser or firm to cross-subsidize less affluent clients. With advisers now scrutinizing the business cost of every client interaction, many have sought to cull less profitable clients. Firms that can't see a way to profitability from providing advice simply stop offering it. This happened with banks, which historically targeted the lower end of the market but have largely withdrawn from the space.

While UK regulators acknowledged these issues and have moved to address them through the Financial Advice Market Review initiative completed in March 2016, we should learn from these challenges in the UK and avoid creating regulation that limits access to investment guidance in the US.

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BlackRock is supportive of changes to financial regulation that enhance investor confidence, protect investor choice, and facilitate savings and outcome-oriented investing. We strongly support coordination between the DoL and SEC on investment advice regulation that seeks to meet these goals. We believe that a best interest standard adopted by the SEC applicable to investment advisers and broker-dealers would provide a solid basis for addressing both the SEC's and the DoL's concerns with existing market practices.

Please note that we are also submitting a letter to the DoL in response to their request for information regarding the Fiduciary Rule and Prohibited Transaction Exemptions. A copy of this letter is attached.

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[12] Written evidence submitted by the Financial Services Authority to the UK Parliament, Retail Distribution Review (Feb. 17, 2011), available at https://publications.parliament.uk/pa/cm201011/cmselect/cmtreasy/writev/rdr/m128.htm.

[13] FCA: Financial Advice Market Review, Final Report. (March 2016) available at https://www.fca.org.uk/publication/corporate/famr-final-report.pdf.

[14] *Id.* at 6.

Please contact the undersigned if you have any questions or comments regarding BlackRock's views.

Sincerely,

Barbara Novick
Vice Chairman

Nicole Rosser
Vice President

BLACKROCK®

August 7, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210
Attn: D-11933, RIN 1210-AB82

Submitted via email to: EBSA.FiduciaryRuleExamination@dol.gov; RIN 1210-AB82

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

BlackRock, Inc. (together with its affiliates, "**BlackRock**") respectfully responds to the Department of Labor's ("**DoL**") request for information ("**RFI**") related to its examination of its Conflict of Interest Rule (29 C.F.R. 2510.3-21) (the "**Fiduciary Rule**" or "**Rule**"); Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01) (the "**BIC**"); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 84-24 and 86-128 (collectively, the "**Exemptions**").

It is critically important to create an environment that permits individuals to get the advice they need to build a nest egg for a secure retirement. It is imperative that the DoL, Securities Exchange Commission ("**SEC**") and financial services industry work together to enhance confidence in markets and investing, advance investor choice, and facilitate (a) increasing levels of individual savings, starting at an early age, through a retirement plan or individual retirement account ("**IRA**"); and (b) well-designed, outcome-oriented investment programs for individuals planning to retire and those in retirement.

We are concerned that the Fiduciary Rule has not advanced these goals, which is particularly problematic because retail investors need access to affordable investment guidance now more than ever. According to BlackRock's 2017 Global Investor Pulse survey,[15] investors are increasingly concerned about fundamental issues, such as the cost of living (57% of respondents vs. 52% in late 2016), healthcare costs (54% vs. 46%), and the domestic economy (41% vs. 36%). Further, investors' confidence that they are making the right savings and investment decisions has declined to 39%, down from 46% in late 2016. Our survey also tells us that investing for retirement and saving money generally are important financial priorities (43% and 58%, respectively). Yet, four in 10 Americans have not started saving for retirement. This savings gap seems to be weighing on retirement confidence, as more than half of Americans think they either aren't on track to reach their retirement income goals or simply don't know where they stand.

[15] BlackRock, Global Investor Pulse Survey (2017), available at https://www.blackrock.com/investing/insights/investor-pulse. The survey polled 28,000 respondents across 18 countries, including more than 4,000 respondents from the U.S. ("**BlackRock Investor Pulse**").

In our view, each of the following changes to the Fiduciary Rule and the Exemptions are necessary to advance the goals of improving confidence in the markets, promoting investor choice, encouraging saving, and facilitating better outcomes:

1. **Uniform Best Interest Standard**: There should be a uniform standard of conduct for providing investment advice, adopted by the SEC, which is applicable to all types of retail accounts, regardless of whether they are plans or IRAs or non-qualified investment accounts. We appreciate the dual commitment of the SEC and DoL to coordinate on fiduciary standards, as demonstrated by SEC Chairman Clayton's request for public comment on standards of conduct[16] and statements by both SEC Chair Clayton and DoL Secretary Acosta emphasizing their commitment to working together on investment advice regulation.[17] This commitment is a promising step toward a coordinated standard that improves confidence, promotes efficiencies, and reduces confusion and unnecessary complexity.

2. **Tailor the Definition of Investment Advice:** The definition of investment advice in the Fiduciary Rule should be narrowed and tailored to address perceived abuses without constraining choice, innovation, or market participants' ability to work in the best interests' of their clients. Concerns remain about the current broad definition, which may cause financial institutions to limit valuable information, investment education and services because of fear that fiduciary status may inadvertently attach.

3. **Improve Sophisticated Independent Fiduciary Exception**: Sophisticated investment professionals should be able to engage in sales activities and other arms' length transactions with each other without the risk of fiduciary status inadvertently attaching or burdensome paperwork requirements to ensure compliance. Initial efforts to utilize the Sophisticated Independent Fiduciary ("**SIF**") exception have been unnecessarily burdensome and complex and have created significant, yet needless confusion.

4. **Limit Additional BIC Conditions**: The burdensome requirements of the BIC coupled with the threat of class action lawsuits will have a material impact on how financial intermediaries design and will, in many cases, reduce or eliminate products and services available for retirement investors, which is contrary to President Trump's stated priority of empowering Americans to make their own financial decisions.[18] It is unclear if any of the requirements of BIC that are scheduled to become applicable on January 1, 2018 will provide any incremental benefit to retirement investors. Until the DoL has conducted a revised regulatory impact analysis taking into account the impact of Impartial Conduct Standards on its perceived abuses, additional compliance burdens should not be imposed on the financial services industry.

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[16] SEC Chairman Jay Clayton, Request for Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers (Jun. 1, 2017), available at https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31 ("**SEC Request for Comment**").

[17] See e.g., SEC Request for Comment; DoL Secretary Alexander Acosta, *Wall Street Journal*, "Deregulators Must Follow the Law, So Regulators Will Too" (May 22, 2017), available at https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029; ThinkAdvisor, SEC Moving Forward on Fiduciary Rule, Clayton Says (Jun. 27, 2017), available at http://www.thinkadvisor.com/2017/06/27/sec-moving-forward-on-fiduciary-rule-clayton-says.

[18] Presidential Memorandum on Fiduciary Duty Rule (Feb. 3, 2017), available at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule (the "**Presidential Memorandum**")

BlackRock appreciates the opportunity to provide additional input to the Fiduciary Rule and the Exemptions. Importantly, however, we are concerned that the DoL's RFI questions are focused primarily on potential modifications to exemptive relief, rather than on the Rule itself. We understand that the DoL is focused on its examination of the considerations articulated in the Presidential Memorandum. We hope that the DoL will find our comments about the Rule, including the exceptions, useful as it conducts this review.

DOL Should Support SEC Adoption of a Uniform Best Interest Standard

BlackRock strongly supports coordination between the DoL and SEC on investment advice regulation that enhances investor confidence, promotes investor choice and facilitates outcome-oriented investing. We believe that investment professionals servicing retail clients can better serve their clients' needs when they can provide advice with respect to all of their clients' assets, without the burden of complex, conflicting, or overlapping regulatory requirements. As the primary regulator of broker-dealers and investment advisers, the SEC has broad regulatory authority over *all* investment accounts (including plans, IRAs and non-qualified investment accounts). The SEC has demonstrated that it is engaged and focused on determining the appropriate standards of conduct for investment advisers and broker-dealers.[19] We support and appreciate Secretary Acosta's and Chairman Clayton's commitment to collaborate on this issue,[20] and we urge these agencies to work together on developing a best interest standard that maintains choice and is focused on outcomes for investors.

The existing structure of the Fiduciary Rule places a disproportionately heavy emphasis on an adviser's conflicts of interest, instead of on whether a recommended product will deliver the client's desired investment outcome. Because the Fiduciary Rule targets conflicts, many firms are focusing on choosing products for plan and IRA platforms based on whether the product facilitates compensation neutrality within and across fund families and, thus, BIC compliance, rather than whether the product is aligned with the client's goals or even outcomes that would otherwise be determined to be objectively in the best interest of the client. The overly heavy emphasis on cost and compensation structure, to the exclusion of other factors, threatens to work *against* the best interests of individual clients and could result in fewer assets available for retirement and other savings goals.

A best interest standard applicable to investment advisers and broker-dealers adopted by the SEC should provide a solid basis for addressing both the SEC's and the DoL's concerns with existing market practices. The DoL and the SEC should work in concert to determine a common approach. To the extent that there are specific abuses not capable of being addressed by such a common approach, the DoL could then separately consider addressing them. Specifically, the DoL should, as part of its review of the Fiduciary Rule and updated regulatory impact analysis, evaluate the impact of applying a uniform best interest standard to investment advisers and broker-dealers. The President has set as a core principle for regulation of our financial system that regulations be efficient, effective, and appropriately tailored.[21] By working together on a uniform best interest standard, the SEC and the DoL can meet this core principle and avoid a complicated and confusing regulatory environment that would increase costs, limit

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[19] SEC Request for Comment.

[20] *See* footnote 3.

[21] Presidential Executive Order on Core Principles for Regulating the United States Financial System (Feb. 3, 2017), available at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states ("**Executive Order**").

investor choice, and ultimately create an environment that discourages retirement savings and investing generally, as individuals will lack the confidence in the system needed to encourage action.

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Set forth below are BlackRock's specific comments on critical changes that should be made to improve the Fiduciary Rule. In each case, these improvements protect investors, while preserving choice and facilitating individuals in achieving the goal of having sufficient savings for a secure retirement.

Appropriately Tailor the Definition of Investment Advice

We continue to believe that the definition of fiduciary investment advice remains overly broad, harming investors. The results of our 2017 Global Investor Pulse Survey show that 40% percent of Americans have not started saving for retirement. Of those that are saving, less than 40% are confident that they are making the right savings and investment decisions.[22] As such, investment education and tools are more valuable to investors than ever. We are concerned that firms are starting to restrict information provided to investors and will continue to do so unless the Rule is changed. As previously noted in our April 2017 comment letter,[23] we believe the Rule itself should be modified in the following ways:

1. <u>Narrow the definition of "recommendation" to ensure that fiduciary status will not inadvertently attach</u> to information or communications made available or delivered to retirement investors that could be considered advisory, even though it is not based on any particular individual's needs. For example, we are not sure how the DoL would characterize explanations of the benefits of investing in more fixed income as a person approaches retirement, or explanations of how a target date fund works and the provision of information on target date funds available for investment. Uncertainty around these types of useful communications creates implementation issues that ultimately harm investors. Firms are led to adopt overly restrictive positions out of fear that fiduciary status may inadvertently attach. To address this overbreadth, we suggest, as previously noted in our April 2017 comment letter, that the DoL combine and revise sections (a)(2)(ii) and (iii) of the Rule to provide that for a person to be a fiduciary, the recommendation must be (a) specifically directed to a specific retail advice recipient in respect to a participant-directed retirement account, (b) based on such advice recipient's individualized needs, *and* (c) made pursuant to a mutual written agreement or arrangement stating that the recommendation is intended as investment advice.

2. <u>Broaden the definition of "general communication" to include web-based tools and model portfolios that are available to the general public for free</u>. These tools are often interactive and may generate information that could include asset allocations or investment portfolios based on individual inputs, which may or may not reflect an

[22] BlackRock Investor Pulse.

[23] BlackRock, Comment Letter to the DoL – Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24, and 86-128 (Apr. 13, 2017), available at https://www.blackrock.com/corporate/en-us/literature/publication/dol-definition-of-fiduciary-conflict-of-interest-rule-update-041317.pdf.

individual's actual financial situation. Tools like these are designed to provide investment education and to sort through investments that may meet certain needs or goals, not to provide an individualized solution. Where an individual uses and inputs data (e.g., answering complete or incomplete, or true or false, to certain questions) into a free website, he or she should reasonably be aware that the output is not individualized investment advice. To remove all doubt, however, and to assure any concerns that the DoL may have, we believe it would be reasonable to have such materials be accompanied by a clear statement or disclosure that the communication is not intended to be advice.

3. <u>Provide a seller's exception for sales of products and services to all retail investors</u>. Rather than discouraging marketing activities targeted to small plan sponsors and IRAs by requiring that the market participant effectively assume fiduciary status (whether or not the BIC exemption is used) for all substantive interactions, the DoL should be encouraging and facilitating increased marketing, education, and outreach to plan sponsors and IRAs. Investors should be given access to a breadth of information so they can make a well informed decision about the nature of the services they wish to receive. We understand that the DoL may be concerned about broker-dealers or others disclaiming fiduciary responsibility, but this concern could be addressed with very clear disclosures (e.g., that the materials are intended to be marketing, do not purport to be fiduciary advice, and are not individualized and may not be appropriate for a particular individual) or a written mutual understanding about the nature of the interaction.

4. <u>Permit the definition of investment education for purposes of the education exception to the Fiduciary Rule to include identification on specific investment alternatives for all investors</u>. Savers are more likely to save when saving is easier.[24] We believe that the ability to include investment alternatives in educational materials is critical to making saving easier. Without the additional information, investing will be significantly more time consuming and complicated. It is likely still too early to quantify the impact of this shift away from DoL Bulletin IB 96-1,[25] but we expect that many investors will be discouraged from saving and investing for retirement because it is too hard. The DoL has not demonstrated that IB 96-1 has resulted in any misinformation or harmed investors in any way, and we believe that this bulletin should be expanded to expressly permit use by IRA owners.

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[24] Investors are more likely to save when saving is made easier. *See* David Laibson, Lecture at the American Economic Association, "The Psychology and Economics of The Psychology and Economics of Household Investment Decisions Household Investment Decisions" (Jan. 2010), available at http://scholar.harvard.edu/files/laibson/files/thepsychologyandeconomicsofdefaults_laibsonaealecture3.pdf (highlighting the impact of automatic enrollment on making investing easier); Sheena S. Iyengar, W. Jiang and Gur Huberman, "How Much Choice Is Too Much: Determinants of Individual Contributions to 401(k) Retirement Plans," Olivia S. Mitchell and Stephen P. Utkus, eds., Pension Design and Structure: New Lessons from Behavioral Finance. Oxford, UK: Oxford University Press, 2004: 83−95, working paper available at http://www.archetype-advisors.com/Images/Archetype/Participation/how%20much%20is%20too%20much.pdf (Study showing that if a plan offered more funds it depressed the probability of employee 401(k) participation at a rate of, for every ten funds added, a 1.5 to 2 percent drop in participation. Where only two funds were offered, participation rates peaked at 75 percent, but when 59 funds were offered, participation dipped to a low of approximately 60 percent.).

[25] DoL, Interpretive Bulletin 96-1; Participant Investment Education, 61 Fed. Reg. 29586, 29 C.F.R. § 2509.96-1 (Jun. 11, 1996), available at https://www.dol.gov/ebsa/regs/fedreg/final/96_14093.pdf.

Improve the SIF Exception

We appreciate the DoL's request for additional information about the SIF exception. Sophisticated investment professionals should be able to engage in sales activities and other arms' length transactions with each other, without the risk of fiduciary status inadvertently attaching or burdensome paperwork requirements to ensure compliance. While the SIF exception is helpful, it is subject to a number of conditions, including unnecessary disclosure requirements that do not benefit end investors. Notably, in the preamble to the Fiduciary Rule, the DoL made it clear that a person seeking to avoid fiduciary status under this exception has the burden of demonstrating compliance with all of the applicable requirements.[26] We recommend revising these requirements to avoid imposing additional compliance costs on investors without added benefits.

Since the DoL issued the Fiduciary Rule, the financial services industry has struggled with the scope and interpretation of this exception and how to best comply. Initial efforts to utilize the SIF exception have proven to be unnecessarily burdensome and have created significant, yet needless confusion. Specifically, the allocation of ownership between independent fiduciaries regarding the details of the reasonable belief requirements has led to wasteful business disruptions, tons of needless paperwork, and additional legal work, the costs of which may ultimately be borne by investors. Since different firms provide different services, there is no one document that fits all. This increases the burden for the senders and the recipients, who need to wade through different variations to ensure accuracy and address any concerns, often providing letters in response and/or further clarifications. All of this paper and effort is essentially to make clear that two sophisticated parties dealing with each other on an arms' length basis, who already know their respective roles, acknowledge and agree that one is not acting as a fiduciary to the other. We continue to believe there is a simpler and better way to accomplish the DoL's intention without hampering institution to institution interactions.

First and foremost, the SIF exception could be dramatically simplified without impeding the DoL's goal of protecting retail retirement investors by providing that any communication to an institution identified in the SIF exception is not investment advice under the Fiduciary Rule, unless the parties otherwise agree in writing. These are sophisticated entities that do not need the "protections" of the Fiduciary Rule simply because the recipient may otherwise be acting in a fiduciary capacity to its own clients. Indeed, the existing presumptions for communications between sophisticated parties are that neither party has an expectation, absent mutual written agreement, of reliance on the other's recommendations. We see no benefit in upending this well-established and eminently reasonable set of commercial expectations in the market. Where one of the parties to such an interaction is a fiduciary to one or more retirement investors, we submit that the investors are already sufficiently protected. Aside from the application of the Fiduciary Rule, any such fiduciary would be required to act solely in the best interests of its ERISA clients and certainly could not engage in a transaction that would result in a non-exempt prohibited transaction. The theoretical concerns associated with the SIF exception must be balanced against the costs associated with demonstrating compliance. These compliance burdens are continuing to grow and as they become increasingly material, they will likely increase costs to investors.

[26] 81 Fed. Reg. No 68, at 20984.

Focus on Improving BIC Exemption, Not Creating Alternative Streamlined Exemptions

BlackRock does not support the proposal for streamlined exemptions that expressly or implicitly advantage a particular business model, product/asset type, compensation structure or market innovation. On behalf of retirement investors, we worry about the incentives that may become associated with more streamlined, straight-forward exemption conditions for particular products or service models. We have already begun to see the impact of such an approach. By providing a streamlined exemption for "level-fee fiduciaries"[27] in the BIC exemption, the DoL encourages and accelerates the continued shift from brokerage to advisory accounts.[28] While advisory accounts offer benefits to many investors and limit potential conflicts of interest, they are not right for everyone. One size definitely does not fit all. For example, investors who trade infrequently are penalized if only advisory accounts are available. The DoL identified this issue,[29] but by having different compliance frameworks for advisory and brokerage accounts, it created a preference toward the former. Rather than focusing on the introduction of new exemptions with streamlined conditions, the DoL should strive to coordinate the requirements of the BIC exemption with any SEC rulemaking after giving effect to the harmonization envisioned by SEC Chairman Clayton with respect to the Fiduciary Rule. In any event, it is important to make the BIC workable for a much broader set of product types with the goal of promoting investor choice among products, business models, and compensation structures.

Additional BIC Requirements are Not Necessary

The DoL has not shown that any of the conditions of the BIC that are scheduled to become applicable on January 1, 2018 are necessary to protect investors. In the Final Rule extending the applicability date of the Rule and Exemptions, the DoL "concluded that much of this harm [to investors] could be avoided through the imposition of fiduciary status and adherence to basic fiduciary norms, particularly including the Impartial Conduct Standards."[30] Before the DoL moves forward with imposing the burdensome additional requirements of the BIC, it should demonstrate that there are remaining harms that would be addressed by these additional conditions.

Certain of the conditions of the BIC exemption, including the contract requirement, warranties, and restriction on firms' ability to limit class action litigation, suggest that the DoL's intended enforcement mechanism is private litigation. This litigation risk motivates financial institutions to take extremely cautious and restrictive approaches that may not be in the best interests of retirement investors. By including conditions that encourage enforcement through private litigation, the DoL is implying that the Internal Revenue Service ("**IRS**"), the SEC and FINRA, cannot adequately enforce the Fiduciary Rule, which we believe is not the case. The IRS has historically enforced prohibited transactions under the Code in the same manner it enforces income tax provisions – through a self-reporting regime. The DoL has provided no reason to believe that the IRS will be unable to continue effective enforcement of prohibited transactions.

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27 82 Fed. Reg. No 66 at 16917.

28 As stated in our April 2017 comment letter, any exemptive relief should be available for all business models, including "robo-advice." BIC is only available to robo-advisers who are level fee fiduciaries. The DoL's stated reason for not making the BIC broadly available is that this could adversely affect developments in the robo-advice market. 81 Fed. Reg. at 20158. However, limitations such as this, limit investor options and hinder market innovations.

29 81 Fed. Reg. No 68, at 20958.

30 82 Fed. Reg. No. 66 at 16905.

Further, SEC and FINRA rules and disciplinary procedures offer a well-established, efficient enforcement mechanism for federal securities laws and SEC rules and regulations. This approach could be readily extended to enforcement of a best interest standard for retirement investment advice. The SEC generally regulates registered investment advisers. The SEC and FINRA conduct examinations of broker-dealers to evaluate compliance with federal securities laws and with standards of integrity, competence, and financial soundness, and may discipline broker-dealers that fail to comply with applicable requirements. The SEC is authorized to bring injunctive actions to obtain monetary penalties as well as remedial action against individuals and firms, and it may impose remedial sanctions on a broker-dealer or investment adviser. In addition, broker-dealers are required to become members of FINRA. FINRA examines broker-dealers for compliance with the federal securities laws and their own rules.[31] On average, FINRA conducts 2,100 cycle exams each year. FINRA also conducts "cause" or "targeted" examinations based on customer complaints, anonymous tips, and referrals from the SEC, market surveillance staff, and arbitrations.[32] Broker-dealers must also comply with applicable state registration and qualification requirements. States coordinate with the SEC and FINRA for broker-dealer examinations. Again, the DoL has not shown that this enforcement mechanism is inadequate in any way. Further, the DoL has its own investigative powers; it can and does bring enforcement actions for violations of ERISA.[33]

<u>The additional requirements of the BIC exemption coupled with the threat of private litigation, including class action lawsuits,[34] will have a material impact on how financial intermediaries design and will, in many cases, reduce or eliminate products and services available for retirement investors, which is contrary to President Trump's stated priority of empowering Americans to make their own decisions</u>. Until the DoL has conducted a revised regulatory impact analysis taking into account the impact of Impartial Conduct Standards on its perceived abuses, additional burdens should not be placed on the financial services industry, especially when they will impact investors.

Conclusion

As stated above and in other comment letters, BlackRock is supportive of changes to financial regulation that enhance investor confidence, advance investor choice, and facilitate savings and outcome-oriented investing. We strongly support coordination between the DoL and SEC on investment advice regulation that seeks to meet these goals. We believe that a best interest standard adopted by the SEC applicable to investment advisers and broker-dealers would provide a solid basis for addressing both the SEC's and the DoL's concerns with existing market practices. To the extent that the DoL identifies remaining gaps, we have also identified a number of changes to the Fiduciary Rule and the Exemptions that we view as necessary to advance the goals of enhancing confidence in the markets, promoting investor choice, encouraging saving, and facilitating outcome-oriented investing.

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31 SEC Staff Study on Investment Advisers and Broker-Dealers (Jan. 2011), at A-13 and A-14, available at https://www.sec.gov/news/studies/2011/913studyfinal.pdf ("SEC Study").

32 SEC Study at A-11.

33 DoL, Employee Benefits Security Administration, Investigative Authority, available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/chapter-10.

34 We acknowledge and appreciate the DoL's recently stated position that it will no longer defend the BIC provision that prohibits limitations on bringing or participating in a class action lawsuit. See Brief for Appellees at p. 59, Chamber of Commerce v. U.S. Dept. of Labor, 5th Cir., No. 17-10238 (Jul. 3, 2017).

Please note that we are also submitting a letter to the SEC in response to their request for public comments on standards of conduct for investment advisers and broker dealers. A copy of this letter is attached.

Please contact the undersigned if you have any questions or comments regarding BlackRock's views.

Sincerely,

Barbara Novick
Vice Chairman

Nicole Rosser
Vice President