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August 7, 2018

Email: *rule-comments@sec.gov*
Subject: File Numbers: S7-07-18, S7-08-18 and S7-09-18

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20529-1090

Re: (1) Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisors; Request for Comment on Enhancing Investment Adviser Regulation, RIN: 3235-AM36; (2) Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosure in Retail Communications and Restrictions on the use of Certain names or Titles, RIN: 3235-AL27; and (3) Regulation Best Interest, RIN: 3235-AM35; hereinafter, collectively referred to as the "Fiduciary" rule

How Automatic Data Processing, Inc. ("ADP") and Paychex Sell Retirement Plan Investments Using Unlicensed Employees Benefiting their Wholly-Owned Broker-Dealers to the Detriment of Retirement Plan Investors

Dear Mr. Fields:

The purpose of this letter is to comment how the Securities and Exchange Commission's ("SEC" or "Commission") proposed fiduciary rule significantly harms retirement plan investors because it condones the illegal sales activity of the two major "platform providers," ADP and Paychex, that already dominate the industry: (i) to use their armies of unlicensed employees to sell the same mutual funds to retirement plans as licensed advisers, (ii) generate "excessive" income for their broker-dealers that is significantly more than licensed advisers, and (iii) without any fiduciary liability. This was the same major flaw with the U.S. Department of Labor's ("DOL") fiduciary rule that was eventually vacated and now reappears in the SEC's proposed fiduciary rule.

Clearly, the SEC has failed to craft a regulation intended to protect retirement plan investors from "improper and/or conflicted advice." ADP's and Paychex's broker-dealer income stream consists of "revenue sharing" fees for marketing their investment platforms and 12b-1 trailing compensation, also referred to as "commissions," which up to now, has always been used to pay for professional advice from licensed advisers. As far as I know,

there are no SEC statutes, regulations or opinion letters justifying the sale of securities by unlicensed employees until now.

The other problem with the SEC's proposed fiduciary rule is that it creates a new "suitability" standard by requiring individuals that are licensed to act in their client's best interest, whether they are paid fees or commissions, and subjects them to fiduciary liability, but allows ADP and Paychex to continue their unlicensed sales practices and significantly profit by collecting both commissions and revenue sharing fees without any financial consequences to retirement plan investors based on their specious argument that their arrangement permits plan participants to "self-direct" their investments. How can the SEC justify ADP's and Paychex's excessive compensation and claim that somehow they are benefiting investors?

In practice, should the fiduciary regulation be finalized, the SEC would create a two-track system for selling retirement plan investments; one for licensed individuals and one for Paychex and ADP.

In my Whistleblower action filed in January 2012, I also pointed out how ADP and Paychex deceive retirement plan sponsors and participants because they do not adequately disclose their compensation (*e.g.* fees, revenue sharing or commissions); do not disclose to interested parties their services related to their compensation scheme, and involves significant conflicts of interest in the selection of the mutual funds available from their investment platforms.

My question to the Commission is why have you not pursued my Whistleblower cases against ADP and Paychex given the *prima facie* evidence I provided over six years ago? Moreover, why has the Commission failed to incorporate the needed platform provider protections and remedy the revenue sharing problems for investors that I outlined in my ADP and Paychex Whistleblower actions?

At footnote 260 of Release No. 34-83063; IA-4888; File No. S7-08-18, RIN: 3235-AL27, the Commission cites that it has pursued enforcement actions against firms that failed to disclose revenue sharing arrangements. In those cases, however, the broker-dealers utilized licensed individuals.

The footnote reads: "*In re Edward D. Jones & Co, Securities Act Release No. 8520* (Dec. 22, 2004) (broker-dealer violated antifraud provisions of Securities Act and Exchange Act by failing to disclose conflicts of interest arising from receipt of revenue sharing, directed brokerage payments and other payments from "preferred" fund families that were exclusively promoted by broker-dealer); *In re Morgan Stanley DW Inc., Securities Act Release No. 8339* (Nov. 17, 2003) ("Release 8339") (broker-dealer violated antifraud provisions of Securities Act by failing to disclose special promotion of funds from fund families that paid revenue sharing and portfolio brokerage); *In the Matter of KMS Financial Services, Inc., Investment Advisers Act Release No. 4730* (Jul. 19, 2017) (dually-registered investment adviser and broker-dealer that failed, in its capacity as an investment adviser, to disclose to its advisory clients compensation it received from a third

party broker-dealer for certain investments it selected for its advisory clients); *In the Matter of Voya Financial Advisors, Inc., Investment Advisers Act Release No. 4661* (Mar. 8, 2017) (registered investment adviser failed to disclose to its clients compensation it received through an arrangement with a third party broker-dealer and conflicts arising from that compensation)."

I have attached a flow chart developed in connection with the DOL's fiduciary rule that shows the sales cycle used by ADP and Paychex to sell mutual funds to retirement plans using their unlicensed sales staff (*see* Exhibit A). Exhibit B includes my letter dated December 28, 2015 to SEC Chair, Mary Jo White, regarding DOL's proposed fiduciary rule. Exhibit C includes my letter dated August 7, 2017 to Secretary of Labor, Alex Acosta, regarding DOL's open comment period about its fiduciary rule. In the letter, I noted that according to Paychex's SEC 10-K filings, for the period May 31, 2002 through May 31, 2017, they handled over $204 billion in retirement plan contributions and generated at least $1.02 billion from commissions and revenue sharing fees without any fiduciary liability or SEC oversight during that 16-year period.

The attached Exhibits also include my experience with Paychex's marketing scheme to financial advisers to "partner" with them on the basis that Paychex will refer 401(k) investment business to them when instead, as noted above, they sell the mutual funds directly to retirement plan prospects and keep all the revenue.

Given the information I have provided to the SEC over the last six years, the SEC should charge ADP and Paychex, along with their broker-dealers, with breaches of their fiduciary duties in connection with their 20+ year reign of deceptive and manipulative sales practices to sell mutual funds by their unlicensed employees.

As part of any litigation, the SEC should claw-back on behalf of the defrauded participants all the income and profits from ADP's and Paychex's illegal mutual fund sales and return them to the plan participants. And lastly, the SEC should impose a very significant fine against Paychex's broker-dealer, Paychex Securities Corporation, for their false and misleading advertising scheme to "partner" with financial advisers.

I appreciate the opportunity to present my views regarding the SEC's proposed fiduciary rule.

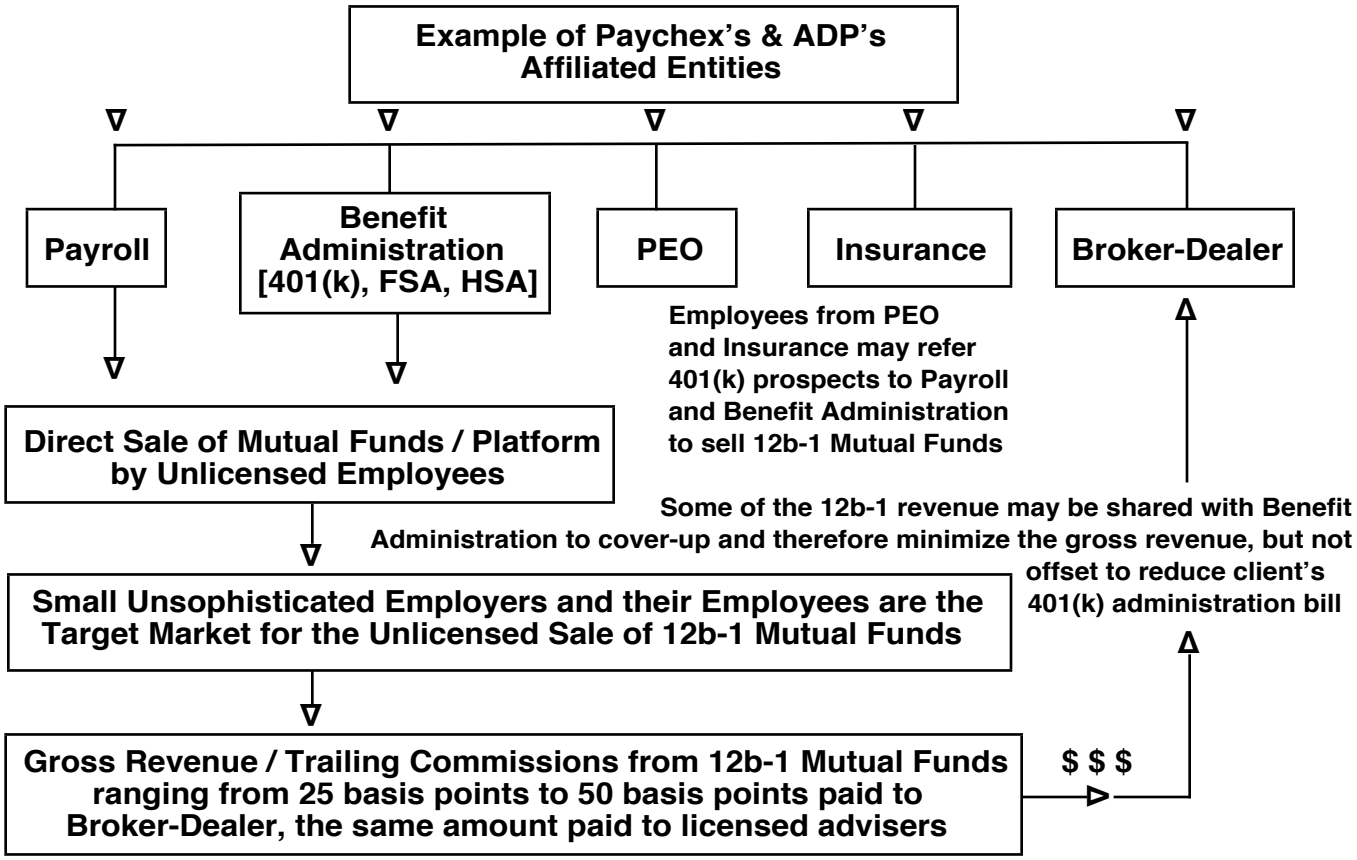
Very truly yours,

Royce A. Charney, J.D.
President

cc. w/encls

Exhibit A

Paychex's & ADP's Illegal Revenue From The Sale of 12b-1 Mutual Funds By Unlicensed Corporate Employees - Legalized By DOL's Fiduciary Regulation



1. The above Flow Chart represents how Paychex and ADP use their unlicensed corporate employees to illegally sell 12b-1 mutual funds at the same commission rates as licensed advisers, but without access for plan sponsors and participants to professional advice and would, under DOL's fiduciary regulation, make such activity legal under the "Platform Provider/Selection and Monitoring Safe Harbor" and the "Education Safe Harbor" without any fiduciary liability to the plan or its participants. These provisions will significantly harm low and middle income families trying to save for retirement. I reported to the SEC's Whistleblower office that over the last 20 years the financial loss to retirement investors from this scheme amounts to over $1 billion, involves at least 80,000 retirement plans and over 700,000 participants. As a result, not only will DOL's fiduciary regulation create a greater barrier to individualized financial advice by institutionalizing a two-track system for selling mutual funds, but it usurps the powers of Congress and the jurisdiction of the SEC, FINRA and the individual states to regulate what constitutes "investment advice."

2. Broker-dealers are regulated under the Securities Exchange Act of 1934 and licensed by FINRA. They are required to deal fairly with clients and offer investment products that are suitable. A 12b-1 fee is an annual marketing fee, more commonly referred to as a "commission," paid to licensed advisers for their ongoing investment service and the only legal way for broker-dealers to generate 12b-1 revenue from the sale of mutual funds. As of 4/5/16, there were no SEC, FINRA or DOL statutes, regulations or agency opinion letters allowing the direct or indirect sale of mutual funds by unlicensed individuals. DOL's regulation amending PTE 84-24 published on 4/6/16 redefines mutual fund commissions as a commission or sales load paid either by the plan or the investment company for the service of effecting or executing the purchase of investment company securities and does not include a 12b-1 fee, revenue sharing, administrative fee, or a marketing fee. The redefinition allows Paychex and ADP to continue their scheme of selling mutual funds by unlicensed employees and collect the same compensation as licensed advisers, but without the required disclosures regarding compensation and the services provided that licensed advisers would be subject to. Clearly, this "loophole" does not benefit 401(k) investors in any way.

3. Paychex and ADP argue that their investment platform operates just like Vanguard, but that is completely false because investor questions are answered by licensed employees that do not receive commissions. They also argue that they are merely selling 401(k) administrative services and that the mutual funds are "incidental" to the administration, but the fact is without the mutual funds, there are no retirement plans to administer. More significantly, their unlicensed employees frequently make unmonitored recommendations to plan sponsors about the funds that should be available for investment and advise participants about the funds they should select.

4. Paychex's Advertising to Financial Advisers: In April 2010 I received a flyer from Paychex stating: "Paychex representatives are not licensed and do not recommend funds and when we uncover interest in a retirement plan we can refer the employer to a broker partner." When I started marketing to Paychex's 401(k) plans that were sold by their unlicensed employees based on public data from DOL's Annual Reports Form 5500, Paychex's Senior Corporate Counsel, Brian Madrazo, by letters dated November 10, 2010 and October 27, 2011, demanded that I cease and desist from contacting them. I wrote to Mr. Madrazo on November 4, 2011 stating I had permission from Debbi Godwin to use Paychex's cobranded "Partner" letter and its marketing material. I also advised him that during the course of my marketing efforts I learned that many 401(k) plans were sold and implemented by unlicensed employees. To date, there has been no further correspondence from Mr. Madrazo. Based on this experience, on January 19, 2012, I filed a SEC Whistleblower complaint.

From Royce A. Charney, J.D. / 4.26.16

Exhibit B

Royce A. Charney
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December 28, 2015

The Honorable Mary Jo White
Chair
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Fax: 202-772-9295
10 pages

Re: (1) Paychex – TCR# 1327016791685 Dated January 19, 2012 and Closed on August 27, 2015; (2) Automatic Data Processing, Inc. ("ADP") - TCR# 1445702029456 Dated October 24, 2015; and (3) RIN 1210-AB32: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice

Dear Chair White:

By this letter I am requesting that my Whistleblower case against Paychex be re-opened and that my ADP case be joined with it because each of them, through their affiliated broker-dealers, are using an unlicensed sales force to sell mutual funds to retirement plans in violation of the securities laws under the jurisdiction of the Securities and Exchange Commission ("SEC"). From the start, I want to emphasize that there are no SEC statutes, regulations or agency opinion letters that allow broker-dealers to use unlicensed employees to sell securities.

At the same time, the Dodd-Frank Act requires the SEC to "examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors." What better example could there be than my Whistleblower cases for such rule making? Moreover, these cases present an opportunity for the SEC to create a uniform fiduciary rule that would truly be in the best interest of investors.

While the SEC has primary jurisdiction, the U.S. Department of Labor ("DOL"), Internal Revenue Service ("IRS"), and the Financial Industry Regulatory Authority ("FINRA") would share jurisdiction because the unlawful activity involves retirement plans, plan investments, and the licensing laws for selling mutual funds to those plans. And since the matter may be criminal due to the willfulness of their actions, the U.S. Department of Justice ("DOJ") would also have jurisdiction. For SEC purposes, a willful violation of the securities laws means merely "that the person charged with the duty

knows what he is doing."[1]

The purpose of this letter is to also highlight some of the issues I raised in my Whistleblower submissions as well as comment about the DOL's proposed fiduciary rule that legitimizes a broker-dealer's sale of mutual funds using unlicensed employees as outlined in its "Platform Provider/Selection and Monitoring Carve-Out" and the "Investment Education Carve-Out."

Together, these carve-outs amount to a major shift to the DOL, and away from the SEC, to control broker-dealers and investment advisers that will not benefit retirement plan investors in any way, and more likely, will leave them more confused, at greater risk of failing to invest properly, pay higher fees, and without access to professional advice. In particular, the platform provider carve-out will expose plan sponsors to greater litigation from participants because they would not be required to reveal how they developed their investment platforms or the compensation received. And since the platform providers' staff would not be monitored with regard to sales presentations or discussions with participants, they could easily transition into providing investment advice for which the plan and its participants would have no recourse under the proposal.

I. Introduction

By way of background, using a dedicated unlicensed sales force, both Paychex and ADP sell a "platform" of mutual funds to 401(k) and other employer-sponsored retirement plans (*e.g.* Simple IRAs, Simplified Employee Pension Plans) to the small retail market under a 12b-1 arrangement in which revenue sharing, commissions and other fees are paid to their broker-dealer subsidiaries (Paychex Securities Corporation and ADP Broker-Dealer, Inc., respectively) for so-called "marketing" purposes without proper disclosure of the total compensation received from the funds to the interested parties as required by SEC rules and the licensing requirements that investment advisers are subject to, all of which are intended to protect investors.

Further, in an effort to hide their compensation for selling the mutual funds, their contracts for administrative services state: (i) they are not fiduciaries; (ii) they only provide ministerial services; and (iii) the selection of the mutual funds is done by the employer. *See Zang v. Paychex, Inc.,* Case No. 6:08-cv-06046-DGL-MWP.

Based on Paychex's 10-K filings, I reported that from 2002 through 2011, as many as 400,000 participants may have been impacted by Paychex's unlicensed sales. During that period, Paychex handled over $73.5 billion in retirement contributions and collected over $225 million in revenue sharing fees. I estimate that commissions could be significantly higher, as much as an additional $400 million during that timeframe. Paychex also generated at least $25 million in "float" from their unlawful activity by holding participant contributions in their custodial bank account prior to remitting them

[1] *Wonsover v. SEC,* 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC,* 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the person "'also be aware that he is violating one of the Rules or Acts.'" *Id.* (quoting *Gearhart & Otis, Inc. v. SEC,* 348 F2d. 798, 803 (D.C. Cir. 1965)).

to the mutual funds. I argued that Paychex should be required to disgorge all income and profits from such illegal sales and return them to the plan participants. I also noted that Paychex does not offset revenue sharing fees or commissions from administrative fees. The same fact pattern applies to ADP.

The information I presented to the SEC's Whistleblower office is extremely important because the combined financial loss to retirement plan participants resulting from Paychex's and ADP's direct sales of 12b-1 mutual funds is likely over $1 billion and may cover as many as 80,000 retirement plans with 700,000 or more participants.

Keep in mind that Paychex received approval from the SEC and FINRA for their retail broker-dealer operation on June 7, 1996 and ADP received its approvals on March 29, 1995 so their scheme of profiting from the use of unlicensed employees selling mutual funds to retirement plans has been going on for two decades.

II. Paychex's Advertising Partnership To Financial Advisers "Paychex representatives are not licensed and do not recommend funds"

As part of my Paychex case, I provided the SEC's Whistleblower office with documents showing Paychex's marketing campaign to financial advisors wherein they state: "Paychex representatives are not licensed and do not recommend funds and when we uncover interest in a retirement plan we can refer the employer to a broker partner." Given this sales pitch to the financial industry, every retirement plan sold by Paychex should have a licensed broker onboard because Paychex does not sell securities or render investment advice and yet receives the same compensation that would ordinarily be paid to licensed brokers for their investment services to the plan.

Instead of "partnering" with me as promised when I used Paychex's marketing material for prospecting to the 401(k) plans that were directly sold by their unlicensed employees, based on public information from DOL's Annual Reports Form 5500, Paychex's Senior Corporate Counsel, Brian Madrazo, by letters dated November 17, 2010 and October 27, 2011, demanded that I cease and desist from using Paychex's marketing material. I wrote to Mr. Madrazo on November 4, 2011 and explained that I had permission from Debbie Godwin, Retirement Plan Consultant – Financial Advisor Support Team, to use Paychex's cobranded partner letter and its related marketing material. I also advised him that during the course of my marketing efforts, I learned that many 401(k) plans were sold and implemented by unlicensed representatives. As of this date, there has been no further correspondence from Mr. Madrazo.

In my view, Paychex and their supervisory personnel should have been brought to task for their false and misleading advertising to the financial community. You would think the SEC and FINRA, given their mandate to protect investors and enforce the licensing laws, at the very least, would have fined Paychex and enjoined them from such unscrupulous and brazen conduct. If my broker-dealer, American Investors Company, engaged in such advertising [and was selling securities using unlicensed employees], not only would they have been assessed a fine, but probably barred from the securities

industry.

III. The SEC's "Study on Investment Advisers and Broker-Dealers" As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act - January 2011

According to the SEC's "Study on Investment Advisors and Broker-Dealers" ("SEC Study"): "The regulation of broker-dealers governs how broker-dealers operate, for the most part, through the Commission's antifraud authority in the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), specific Exchange Act rules, and SRO rules based on Exchange Act principles, including (among others) principles of fairness and transparency." *See* SEC Study, p. iii (emphasis added).

As to the regulation of broker-dealers, the SEC Study also provides: "The antifraud provisions of the Exchange Act also broadly prohibit misstatements or misleading omissions of material facts, and fraudulent or manipulative acts and practices, in connection with the purchase or sale of securities." *Id.* at p. 53. It continues: "Generally, courts have held that broker-dealers that exercise discretion or control over customer assets, or have a relationship of trust and confidence with their customers, owe customers a fiduciary duty." *Id.* at p. 54.

IV. Platform Provider/Selection and Monitoring Carve-Out

The DOL's proposal carves-out from fiduciary status those who market and make available investment platforms for the employer to select and monitor. Platform providers receive a variety of payments from mutual funds as an incentive to include on their investment platforms. The Department of Labor's Regulatory Impact Analysis refers to such incentive arrangements as "revenue sharing payments."[2]

Both the Regulatory Impact Analysis and the January 2011 Government Accountability Office ("GAO") Report on 401(k) Plans noted the conflicts of interest that arise from the receipt of revenue sharing payments. As documented in the GAO Report, revenue sharing is widespread, with payments ranging from 5 to 125 basis points a year. Platform providers have clear financial incentives to design platforms to include investment options (mutual funds and mutual fund share classes) that pay higher revenue sharing fees and exclude investment options that pay lower or no revenue sharing. This is but one of the many issues that I pointed out in my Paychex Whistleblower case filed in January 2012.

The DOL, GAO, and other researchers have concluded that the universe of investment options available on a platform is often tainted by bias and self-interest to

[2] "Payments can take several forms, for example 12b-1 fees, sub-transfer agency fees that reimburse the plan's recordkeeper for services that otherwise would be provided by a mutual fund, or payment of the mutual fund investment adviser's compensation to the financial adviser, its firm or an affiliated firm for promotion, marketing, or distribution." *Regulatory Impact Analysis,* Footnote 257 at p. 142.

maximize profits. The carve-out provision would clearly sanctify that problem.

As proposed, platform providers would only be required to disclose to the plan's fiduciary ("employer") that the provider (1) is not giving advice in a fiduciary capacity and (2) is not providing impartial investment advice.

In other words, employers would be required to know, and acknowledge that they know, the information they would be receiving from the platform provider is biased and its investment platform was for their self-interest, not the plan. How could such a proposed rule be of any benefit to the plan and the participants? As plan fiduciaries, employers are seeking honest and unbiased information because under ERISA, they must discharge their duties solely in the interest of the participants and beneficiaries or face financial liability.

As a result of this ill conceived provision, employers would be "thrown under the bus" in the event of any participant litigation because it does not require the platform provider to inform the employer about the provider's conflicts of interest or the total compensation received from the platform which, based on the government's own data, influences the available investment choices. Can you imagine the excessive fee lawsuits that this rule would produce and yet platform providers would have no financial responsibility to the plan and could charge whatever fees they want.

In addition, there is no requirement under the proposal to disclose the criteria used by the platform provider in selecting its investment platform.

As part of its rationale for initiating the fiduciary rule, the DOL states at page 21952 of the proposal that disclosure alone [as to an adviser's conflicts of interest] have proven ineffective to mitigate conflicted advice, but as summarized above, plan sponsors and plan participants will actually get less disclosure with the carve-out along with a guarantee of conflicted advice.

The United States Senate Committee on Finance wrote to Secretary of Labor Thomas Perez on August 7, 2015 stating the importance of developing a rule that protects Americans against conflicted advice and helps families prepare for a financially secure retirement, while preserving access to investment education and professional guidance. (Emphasis added). The letter cites that in 2013, the GAO testified before Congress about the shortage of retirement plans among small businesses, and the reasons why some small employers are reluctant to sponsor plans. GAO's research found that one-third of all private employees work for employers with fewer than 100 employees. Among these small employers, only 14 percent sponsor a retirement plan for their employees. The GAO noted that many small employers report that they feel overwhelmed by the number of plan options, plan administration requirements, and fiduciary responsibilities.

The most telling part of the Finance Committee's letter is at page 3, paragraph 6: "The reality is that retirement plans for small businesses are sold, not bought – and it is important that any rule take this factor into account. We appreciate the Department's

willingness to critically examine your proposed rule to ensure that it does not result in fewer new plans being created and it allows financial professionals the ability to help small businesses set up plans and select investment options."

Another major flaw with the platform provider carve-out involves the selection and monitoring process of the mutual funds that would be available for investment. The DOL believes that a platform provider's mere discussion with the plan sponsor about expense ratios, fund size, or asset type should not be considered investment advice and would be more than sufficient to educate the employer select the funds for investment and also fulfill their fiduciary duties.[3]

Under current securities laws, broker-dealer employees that are not licensed to sell securities can only provide administrative services to prospects and clients. They can distribute preprinted material such as prospectuses, but they cannot comment as to its contents or whether such an investment would be appropriate for them.

The DOL, in effect, diminishes the important role of the investment adviser which is to probe, discuss and suggest various investment solutions that arise when dealing with plan sponsors and participants; it is the fundamental rule that every financial adviser "know their client." With 36 years in the insurance and financial services industry, and having met with hundreds of employers and thousands of employees over that time, I can assure you that each and every one of them always seeks specific advice based on their individual needs.

Licensing has always been a prerequisite to sell mutual funds and the starting point for investor protection. According to SEC rules, 12b-1 fees are used to compensate licensed investment advisors for their investment advice service when selling mutual funds. That service typically includes: employer meetings, discussion about and the selection of mutual funds available for investment (*e.g.* asset classes, fund objectives, expense ratios, turnover rates, historical fund performance, detailed asset allocation models), disclosure of the adviser's compensation and the services to be provided, participant meetings, and reviewing investment strategies with participants to assist them in selecting investments. These important services cannot be relegated to handouts and the internet.

Former SEC Chairman Arthur Levitt Jr. wrote in *InvestmentNews* on December 8, 2015 "As a former broker, I cannot accept the argument that brokers are simply order-takers rather than advisers. Responding to customers' directions and anxieties invariably involves a dialogue that veers into the area of advice and counsel."

As outlined above, there are numerous unintended consequences that would arise with the platform provider carve-out. However, the most impactful to the financial services industry and retirement plan investors in the future would be the question of whether insurance companies such as Aetna, Guardian, Hartford, John Hancock, Nationwide, Principal, and Transamerica, that already sell 401(k) investment platforms

[3] 80 Fed. Reg. 21943 (April 20, 2015).

and have broker-dealer subsidiaries, could terminate their licensed (insurance and securities) staff and sell their platforms just like Paychex and ADP? If so, would not the major banks along with Charles Schwab, E-Trade, Merrill Lynch, and Morgan Stanley do the same? Can you imagine the chaos that this would create for the financial services industry and the harm it would cause retirement plan investors?

V. Investment Education Carve-Out

If the proposal were adopted, this provision would supersede the DOL's Interpretive Bulletin 96-1 ("IB 96-1"), which distinguishes "investment advice" from "investment education." For "investment education" purposes that would not be considered a "recommendation" for any investment, IB 96-1 allows plan sponsors and service providers to provide participants and beneficiaries with: (1) plan information, (2) general financial and investment information, (3) asset allocation models, and (4) interactive investment materials.

The proposed regulation includes the following differences: (1) the carve-out specifically permits the furnishing of information that relates to retirement needs that extend beyond the date of retirement. In other words, education may include certain information about how to spend down assets after retirement, not just information on the accumulation of assets in anticipation of retirement, (2) the carve-out specifically requires that information and materials provided to plans not include advice or recommendations regarding specific investment products, specific investment managers, or the value of particular securities or other property, (3) while the carve-out continues to allow for the use of allocation models as part of an education program, the models may not be populated with specific investment products available under the plan or IRA.

In drafting the proposal, however, the DOL recognized that platform providers could easily shift from "investment education" to "investment advice" so the fiduciary definition is intended to apply broadly to all persons who engage in the activities set forth in the regulation, regardless of job title or position, or whether the advice is rendered in person, in writing or by phone.

As an example of the possible shift to providing fiduciary investment advice, the proposal states that if in the performance of their jobs, call center employees make specific investment recommendations to plan participants or IRA owners under the circumstances described in the proposal, it is appropriate to treat them, and possibly their employers, as fiduciaries.[4] Arguably, this situation would apply to all of the platform provider's unlicensed staff. The problem is that the Education Carve-Out lacks enforcement capability since (1) there are no penalties to be assessed in the event a platform provider's employee falls within the regulation's investment advice definition, (2) call center conversations, in-person meetings and spontaneous written material is not monitored, and (3) there are no reports required to be filed with the DOL or any other responsible agency to ensure compliance.

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[4] 80 Fed. Reg. 21945, 21946 (April 20, 2015).

VI. Securities and Exchange Commission Division of Enforcement Enforcement Manual – Office of Chief Counsel – March 9, 2012

The SEC's Enforcement Manual at Section 2.1.1 provides information as to factors for ranking an investigation. In designating an investigation a National Priority Matter, the Director or his designee may consider one or more criteria, including but not limited to:

- Whether the matter presents an opportunity to send a particularly strong and effective message of deterrence, including with respect to markets, products and transactions that are newly developing, or that are long established but which by their nature present limited opportunities to detect wrongdoing and thus deter misconduct.
- Whether the matter involves particularly egregious or extensive misconduct.
- Whether the matter involves widespread and extensive harm to investors.
- Whether the matter involves misconduct by persons occupying positions of substantial authority or responsibility, or who owe fiduciary or other enhanced duties and obligations to a broad group of investors or others.
- Whether the matter involves potential wrongdoing as prohibited under newly enacted legislation or regulatory rules.
- Whether the potential misconduct occurred in connection with products, markets, transactions or practices that pose particularly significant risks for investors or a systemically important sector of the market.
- Whether the matter involves a substantial number of potential victims and/or particularly vulnerable victims.
- Whether the matter involves products, markets, transactions or practices that the Division has identified as priority areas.
- Whether the matter provides an opportunity to pursue priority interests shared by other law enforcement agencies on a coordinated basis.

In my view, my Paychex and ADP Whistleblower cases meet the entire criterion to justify a National Priority Matter.

As a former DOL ERISA investigator with first hand experience in dealing with complex fiduciary and prohibited transaction cases, obtaining financial information regarding Paychex's and ADP's unlawful income from mutual fund sales generated by their unlicensed staff would be straight forward because (1) the financial records are available from each of their corporate headquarters thereby eliminating extensive travel and the need to locate witnesses and (2) company auditors can produce historical records showing income from each of their respective divisions (*e.g.* administration, insurance, mutual funds, etc.). Further, the auditors would also be able to produce a breakdown of the various income categories received from the mutual funds such as revenue sharing, commissions and float.

VII. Conclusion

As you can see, the Platform Provider Carve-Out and its companion Investment Education Carve-Out, would create an unlevel playing field for financial advisors by institutionalizing a "two-track system" for the sale of mutual funds: those that would be subject to the fiduciary rule and those that would not. It means that some participants would receive professional investment advice that is not conflicted while others would receive biased advice from the platform providers. Licensed individuals would be monitored by their broker-dealer and heavily regulated by various government agencies while platform providers would operate unfettered.

Clearly, this two-track system would greatly harm retirement plan investors because platform providers would be able to sell their mutual funds, receive various forms of revenue sharing payments absent full disclosure to the plan sponsor and participants that in many cases is greater than an adviser's compensation, but provide no meaningful investment information other than distributing very basic and generic investment material leaving the participants in the dark about their specific retirement needs and risk level.

Unchecked, platform providers would be able to sell high priced mutual fund share classes to the small retirement plan market without any accountability of the inherent conflicts of interest involved in such sales and bypass all of the intended fiduciary protections outlined in the proposal.

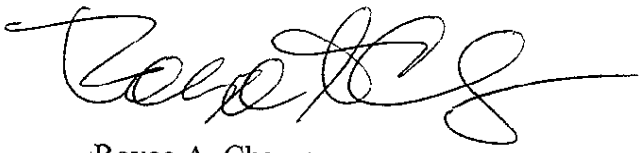
It has not escaped me that, to date, Paychex and ADP have not provided any written comments concerning DOL's proposed fiduciary rule. Why would they? They have the goose that lays the golden egg since they can collect a variety of fees with little, if any, government oversight.

In analyzing DOL's proposed fiduciary rule, it is as if it was specifically drafted around the facts of my Paychex and ADP Whistleblower cases to create what amounts to a "cover-up" for platform providers to sell mutual funds in direct competition with licensed professionals. However, there is the remaining question of how the SEC, FINRA, DOL, IRS and DOJ will handle the 20 years of Paychex's and ADP's unlawful sales of mutual funds.

Given the information presented here, my Paychex Whistleblower case deserves to be reopened and be joined with my current ADP case. More importantly, the plan sponsors and participants that were subject to these illegal sales deserve the consumer protections that the above-mentioned government agencies were intended for.

Since I am not represented by legal counsel at this time, in the event you have questions, please direct them to me. I am also more than willing to sit for an interview.

Very truly yours,



Royce A. Charney

cc: The Honorable Thomas E. Perez, Secretary of Labor
Sean McKessy, Chief, SEC's Office of the Whistleblower

Exhibit C

Trust Administrators, Inc.
Royce A. Charney, J.D., President
1300 Clay Street, Suite 600
Oakland, CA 94612
Tel: 888-951-5556 / Fax: 888-951-1116

August 7, 2017

Email: *EBSA.FiduciaryRuleExamination@dol.gov*

The Honorable Alexander Acosta, Secretary of Labor
Office of Exemption Determinations, EBSA (Attention: D-11933)
U.S. Department of Labor
200 Constitution Avenue NW., Suite 400
Washington, D.C. 20210

Re: Request for Information ("RFI") Regarding the Fiduciary Rule and Prohibited Transaction Exemptions RIN 1210-AB82
How Automatic Data Processing, Inc. ("ADP") and Paychex Abuse the Current and Revised Platform Provider Exemption

Dear Mr. Acosta:

The purpose of this letter is to comment how the DOL Fiduciary rule significantly harms low and middle-class retirement plan investors because it allows the two major "platform providers," ADP and Paychex, that already dominate the industry: (i) to use their armies of unlicensed employees to sell the same mutual funds to retirement plans as licensed advisers, (ii) generate "excessive" income for their broker-dealers that is significantly more than professionals, and (iii) without any fiduciary responsibility. This is the DOL's "key" flaw in crafting a regulation intended to protect retirement plan investors from "improper and conflicted advice." Their broker-dealer income stream consists of "revenue sharing" fees for marketing their investment platforms and 12b-1 trailing compensation, also referred to as "commissions," which up until now, has always been used to pay for professional advice. *See* Footnote 1 at page 2.

Also included is information about my experience with Paychex's marketing scheme to financial advisers to "partner" with them on the basis that Paychex will refer 401(k) investment business to them when instead, as noted above, they sell the mutual funds directly to retirement plan prospects and keep all the revenue. This is the same information I provided to the Securities and Exchange Commission's ("SEC") Office of the Whistleblower under Dodd-Frank in January 2012.

I. Overview – ADP's and Paychex's Abuse of the Platform Provider Exemption, Past, Present and Future with the DOL's Approval

In effect, the Fiduciary rule has institutionalized a two-track system to sell mutual funds to employer-sponsored retirement plans; one for licensed advisers that must act in

the best interest of investors (and execute a "Best Interest Contract") along with extensive disclosure about compensation and provided services, and most significantly, on-going fiduciary responsibility. And then there's one for ADP and Paychex under a marketing scheme to sell their mutual fund platforms based on the specious argument that the mutual funds are merely "incidental" to the sale of their administrative service. Of course, but for the sale of the mutual funds there would be no retirement plans to administer.

The larger issue is that the DOL has ignored, for example, all of the SEC rules governing broker-dealers and financial advisers that many legal scholars said before the rule was finalized . . . "the DOL overstepped its regulatory power."

From the start, it must be emphasized that the DOL, SEC and the Financial Industry Regulatory Authority ("FINRA") have issued numerous legal opinions to banks, broker-dealers and insurance companies selling a platform of mutual funds and none of them have ever approved the sale of securities by unlicensed employees.

Both ADP and Paychex intentionally target small and mid-size employers [and their employees] that are unsophisticated about retirement plan investing on the basis that said employers can bundle payroll and retirement plan administration under one system. However, employers are not told about the mutual funds' revenue sharing or commissions sold by their unlicensed employees nor are they told that they have production quotas and are paid a bonus/commission based on the value of the plan's assets just like licensed advisers. In operation, it's a deceptive and manipulative sales practice by ADP and Paychex to use their unlicensed staff to act as a front to sell mutual funds for their broker-dealers and bypass all of the government's controls to protect retirement plan investors. Certainly, the DOL could not have intended such a loophole in drafting its Fiduciary rule. The result is abundantly clear, the rule has created two classes for retirement advice; one class that gets mandated best-interest advice from licensed professionals and the other from ADP and Paychex that escape regulatory oversight and fiduciary responsibility and yet charge customers as if they were getting that advice. Such a proposition is bizarre.

Compounding the problem, the Fiduciary rule grandfathers ADP's and Paychex's illegal mutual fund sales retroactive to the mid-1990s when they first received approval for their broker-dealers from the SEC and FINRA.[1]

The DOL diminishes the important role of licensed advisers which is to probe, discuss and recommend investment solutions when dealing with plan sponsors and participants; it is the fundamental rule that every financial adviser "know their client."

Former SEC Chairman Arthur Levitt Jr. wrote in *InvestmentNews* on December 8,

[1] Paychex received approval from the SEC and FINRA for its broker-dealer, Paychex Securities Corporation ("PSC"), on June 7, 1996. ADP received approval for its broker-dealer, ADP Broker-Dealer, Inc., on March 29, 1995. At the time of my Whistleblower complaints, FINRA's records indicated that each are owned by at least 75% or more by their parent corporations and that their broker-dealers are mutual fund retailers that do not hold or maintain funds or securities, do not provide clearing services for other broker-dealers, and do not refer or introduce customers to other brokers and dealers.

2015: "As a former broker, I cannot accept the argument that brokers are simply order-takers rather than advisers. Responding to customers' directions and anxieties invariably involves a dialogue that veers into the area of advice and counsel."

Additionally, the January 2011 Government Accountability Office ("GAO") Report on 401(k) Plans noted the conflicts of interest that arise from the receipt of revenue sharing payments. As documented in the GAO Report, revenue sharing is widespread, with payments ranging from 5 to 125 basis points a year. Platform providers have clear financial incentives to design platforms to include investment options (mutual funds and mutual fund share classes) that pay higher revenue sharing fees and exclude options that pay lower or no revenue sharing fees. The GAO report concluded that the universe of investment options available on a platform is often tainted by bias and self-interest to maximize profits.

The platform provider exemption, together with its exemption for the selection and monitoring of investments and the so-called "investment education" provision that allows a platform provider's non-securities licensed employees to discuss with plan sponsors and participants, among other things, the platform's mutual funds' expenses, asset types, model portfolios and the historical performance of the asset classes, amounts to a seismic shift to the DOL and away from the SEC and FINRA to control broker-dealers and investment advisers that will not benefit retirement plan investors in any way. More likely than not, it will leave plan sponsors and participants with the impression that they are receiving investment advice, but in fact, they will be more confused, at greater risk of failing to invest properly, pay higher fees, and without access to professional advice which defeats the rule's purpose. Does the DOL seriously believe that investor education can be relegated to a few handouts and the internet? *See* 29 CFR 2510.3-21(b)2(i) through (iv)(B).

And, in the case of ADP and Paychex, their unlicensed sales staff and call centers are not monitored to ensure compliance with the rule if they cross the line by recommending investments nor are there any penalties if they do. In this regard, the Fiduciary rule is a complete failure to protect retirement investors.

As outlined above, the platform provider exemption creates a host of problems, especially the way ADP and Paychex sell theirs. However, the most impactful to the financial industry and to retirement plan investors in general is the question of whether insurance companies such as Aetna, Guardian, Hartford, John Hancock, Nationwide, Principal and Transamerica, that already sell 401(k) investment platforms and have broker-dealer subsidiaries, would terminate their licensed staff and sell their platforms just like ADP and Paychex. If so, would not the major banks join in the fray to escape fiduciary responsibility? Can you imagine the chaos this would create for the financial industry and the harm it would cause retirement plan investors?

II. Paychex's Partnership with Financial Advisers – My Experience "Paychex representatives are not licensed and do not recommend funds"

In April 2010 I received a flyer from Paychex soliciting financial advisers to "partner" with them on the basis that they would refer 401(k) investment business in connection with selling their platform of 12b-1 and fee-based mutual funds. The flyer stated:

> "Paychex representatives are not licensed and do not recommend funds. Their aim is to help you grow your 401(k) business and are available to help answer client questions and to assist in closing your 401(k) sales. Our sales force talks to hundreds of thousands of business owners every year. When we uncover interest in a retirement plan we can refer the employer to an adviser partner. When investment professionals counsel their business clients, Paychex adds value as an expert payroll and 401(k) recordkeeping partner."

In spite of my numerous attempts to reach out to Paychex's so-called "adviser referral" network to receive 401(k) leads, I never received a response. As a result, I used Paychex's broker marketing material to prospect to the 401(k) plans that were administered by them based on public information from DOL's Annual Reports Form 5500. Paychex's Senior Corporate Counsel, Brian Madrazo, by letters dated November 17, 2010 and October 27, 2011, demanded that I cease and desist from using Paychex's marketing material and threatened litigation should I fail to also furnish him with an accounting of each and every client and/or prospect to whom I provided the marketing material. I wrote to Mr. Madrazo on November 4, 2011 and explained that I had permission from Debbie Godwin, Retirement Plan Consultant – Financial Adviser Support Team, to use Paychex's co-branded partner letter and its related marketing material. The co-branded letter allowed financial advisers to insert their company logo on the left side of Paychex's and included language referencing the adviser and Paychex partnership. I also mentioned that during the course of my marketing effort, I learned that many 401(k) plans were sold and implemented by unlicensed employees. As of this date, there has been no further correspondence from Mr. Madrazo.

III. My SEC Whistleblower Complaint About ADP and Paychex

I filed a SEC Whistleblower complaint against Paychex on January 19, 2012 and against ADP on October 24, 2015 based on their unlicensed mutual fund sales. In the Paychex complaint, based on their SEC Annual Report Form 10-K filings, I reported that from 2002 through 2011, as many as 400,000 participants may have been impacted by Paychex's unlicensed sales. During that period, Paychex handled over $73.5 billion in retirement contributions and collected over $225 million in revenue sharing fees. I estimate that commissions could amount to an additional $225 million during that timeframe since financial information related to PSC is not reported in its 10-Ks. Paychex also generated at least $25 million in "float" from their unlawful activity by holding participant contributions in their custodial bank account prior to remitting them to the mutual funds. I argued that Paychex should be required to disgorge all income and profits from those illegal sales and return them to the participants as well as pay a substantial fine

for their false and misleading scheme to "partner" with financial advisers.[2] Below is an updated listing from Paychex's SEC 10-K filings for its fiscal years ending May 31, 2002 through May 31, 2017 relating to the number of plans administered, the asset value of participants' funds externally managed, and the basis points received.[3]

Paychex's Annual Report Form 10-K / FYE	Plans Administered	Plan Assets	Average Fee Basis Points
May 31, 2002	23,000	$2.2 billion	30bps
May 31, 2003	26,000	$2.7 billion	30bps
May 31, 2004	29,000	$3.9 billion	30bps
May 31, 2005	33,000	$5.1 billion	30bps
May 31, 2006	38,000	$6.3 billion	40bps
May 31, 2007	44,000	$8.5 billion	40bps
May 31, 2008	48,000	$9.7 billion	35bps
May 31, 2009	50,000	$8.5 billion	30bps
May 31, 2010	51,000	$11.3 billion	25bps
May 31, 2011	57,000	$15.3 billion	slightly < 25bps
May 31, 2012	59,000	$15.7 billion	20-25bps
May 31, 2013	62,000	$19.3 billion	20-25bps
May 31, 2014	65,000	$21.9 billion	20-25bps
May 31, 2015	70,000	$23.5 billion	Not disclosed
May 31, 2016	74,000	$23.6 billion	Not disclosed
May 31, 2017	78,000	$27.4 billion	Not disclosed

[2] An ERISA class action was previously brought against Paychex in the United States District Court for the Western District of New York titled, *Zang v. Paychex, Inc*., Case No. 6:08-cv-06046-DGL-MWP ("*Zang*"). The core allegation in *Zang* was that Paychex's "recei[pt] of 'revenue-sharing payments' from mutual funds (or mutual fund families) for, purportedly, providing record-keeping and related services to the mutual funds that make revenue-sharing payments to Paychex" were unlawful. (*Zang* Dkt. No. 26, Ex 2. ¶ 8). On August 2, 2010, the *Zang* court granted Paychex's motion to dismiss plaintiff's ERISA claims, finding that, as a threshold matter, Paychex was not a fiduciary of plaintiff's 401(k) plan. However, unlike my SEC Whistleblower complaint, PSC was not a defendant in *Zang*, nor was it identified as being Paychex's broker-dealer subsidiary through which Paychex sold mutual fund investments to employer-clients in connection with its 401(k) administrative services. This fact is critical because the fiduciary obligations under ERISA (and the breaches thereof) that were stated in my complaint arose from the relationship of Paychex and PSC, and in particular, from the deceptive sales and marketing activities jointly carried out by them. Finally, the plaintiff in *Zang* did not present core facts to the Court regarding the fiduciary status of Paychex and PSC, including facts related to these entities': (a) control of the mutual funds and mutual fund share classes offered to plaintiffs, (b) the decision to offer higher cost mutual funds without the benefit of licensed advisers, (c) other control over determining their own compensation, and (d) its false "partner" marketing scheme to financial advisers.

[3] 1. Commencing May 31, 2015, Paychex states it is the largest 401(k) administrator in the U.S.
2. Paychex does not disclose in any of its 10-K filings any information about its PSC subsidiary.
3. Paychex states that its selling efforts for these services [retirement administration and mutual fund sales by its unlicensed employees] are focused primarily on our existing payroll client base as the processed payroll information allows for data integration necessary to provide these services more efficiently.
4. Based on information and belief, references to basis points does not include the compensation for PSC.

An analysis of Paychex's SEC Annual Reports Form 10-Ks for the past 16 years noted above shows that they handled $204.9 billion in retirement contributions. If they collected an average of 25 basis points from revenue sharing fees and 25 basis points from unreported PSC commissions, they would have generated over $1.02 billion without having any fiduciary responsibility. Additionally, if they averaged during that period a conservative non-compounded 3% from that unlawful income, they would have received an extra $6.147 billion; at 5% it would be $10.245 billion.

In the case of ADP, they have never disclosed in any of their SEC Annual Report Form 10-Ks the number of plans it administers, their plan assets, or the number of participants until March 15, 2017 when they wrote to Acting Secretary of Labor, Timothy D. Hauser, about delaying the Fiduciary rule's applicability date. That letter states that as of December 31, 2016: "ADP Retirement Services, part of the Employer Services division, is one of the largest independent retirement plan recordkeepers in the United States. It provides non-discretionary recordkeeping and administrative services to over 38,000 tax-qualified defined contribution retirement plans. Of these plans, over 35,000 have fewer than 100 participants. ADP also separately markets and/or provides money movement services in connection with two IRA institutions for more than 27,000 SIMPLE IRA plans. In total, it provides comprehensive retirement services to over 66,000 clients and approximately 1.7 million plan participants in plans with over $58 billion in assets. While ADP offers retirement plan products and services primarily to small employers, it does service a number of larger plans with up to tens of thousands of participants."

As to my Whistleblower complaints, without any SEC statutes or regulations allowing the direct or indirect sale of securities by unlicensed employees, I remain mystified as to why no legal action was taken. According to the many conversations I had with Nikkia Wharton of the SEC's Whistleblower's office, she told me: "There were a lot of people working on this and the lack of enforcement came down to prosecutorial discretion." Meanwhile, millions of retirement investors under the control of ADP and Paychex that are trying to save for retirement do not have access to a financial adviser in spite of paying as if they had one. Instead, they are getting ripped-off by ADP and Paychex while their millions of dollars from revenue sharing fees and commissions keep rolling-in; day after day, month after month, year after year. It makes you wonder, what justification can the DOL have in allowing ADP and Paychex to overcharge retirement plan investors? The DOL [and the SEC] should be reining in such financial abuse, not condoning it.

As I have mentioned in previous correspondence to the SEC, DOL and FINRA, this is not a trivial matter since it involves millions of retirement plan investors and billions of dollars that has essentially been confiscated by ADP and Paychex for more than 20 years stemming from the sale of mutual funds by their unlicensed employees. Simply stated, this is a case involving significant conflicts of interest, self-dealing, and excessive fees crossing the jurisdictions of the DOL, FINRA, SEC, Department of Justice, and the Internal Revenue Service.

In my view, one can only conclude that the DOL intentionally created its Fiduciary rule to exempt ADP and Paychex from all mutual fund sales; past, present and future in

spite of the rule's stated mission of protecting retirement plan investors from excessive fees and conflicted advice.

IV. Conclusion - ADP and Paychex are Fiduciaries Irrespective of the Platform Provider Exemption

A. The SEC's Jurisdiction of Broker-Dealers

In support of my Paychex Whistleblower action, I referenced the SEC's 2011 January publication, "Study on Investment Advisors and Broker Dealers" ("SEC Study") stating: "The regulation of broker-dealers governs how broker-dealers operate, for the most part, through the Commission's antifraud authority in the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), specific Exchange Act rules, and SRO rules based on Exchange Act principles, including (among others) principles of fairness and transparency." *See* SEC Study, p. iii (emphasis added).

As to the regulation of broker-dealers [*i.e*. ADP Broker-Dealer, Inc. and PSC], the SEC Study also provides: "The antifraud provisions of the Exchange Act also broadly prohibit misstatements or misleading omissions of material facts, and fraudulent or manipulative acts and practices, in connection with the purchase or sale of securities." *Id*. at p. 53. It continues: "Generally, courts have held that broker-dealers that exercise discretion or control over customer assets, or have a relationship of trust and confidence with their customers, owe customers a fiduciary duty." *Id*. at p. 54.

While ADP and Paychex may assert that they are exempt from fiduciary responsibility under the rule's platform provider exemption, the fact that they own broker-dealers and receive direct compensation in the form of revenue sharing fees and/or commissions from the mutual funds sold on their platforms means that they are fiduciaries subject to the SEC's jurisdiction. The problem here is that the DOL is attempting to regulate the federal licensing laws governing the sale of securities.

Further, the DOL's ridiculous platform provision that their employees only have to say that they are not providing fiduciary advice to escape fiduciary liability makes absolutely no sense. How is that beneficial to plan participants? And it certainly should not be a turf war between government agencies with the common goal of protecting investors from the types of fraudulent practices I have described in this letter. Most importantly, if it's a balancing act between protecting the investor or ADP and Paychex, it seems to me the investor wins this one.

B. The DOL's Platform Provider Exemption is in Conflict with its Statutory Fiduciary Rule

As it relates to ADP and Paychex, the Employee Retirement Income Security Act of 1974 ("ERISA") defines the term "fiduciary" at Title I, Section 3(21)(A)(ii). That section reads: "… a person is a fiduciary with respect to a plan to the extent … (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect

to any moneys or other property of such plan, or has any authority or has any responsibility to do so …"

When deemed a fiduciary, ERISA Sections 404(a)(1)(A) and (B) impose the following obligations:

> **(404)(a) Prudent man standard of care**
>
> (1) … a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims ...

ADP and Paychex are also "parties-in-interest." ERISA Sections 3(14)(A) and (B) define a party in interest as: "(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such benefit plan; or (B) a person providing services to such plan."

ERISA Section 406(a)(1)(D) prohibits a fiduciary from engaging in transactions with a plan that involves a transaction constituting a direct or indirect transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.

ERISA Sections 406(b)(1), (2) and (3) prohibit fiduciaries from: (1) dealing with the assets of the plan in his own interest or for his own account, (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interest of its participants or beneficiaries, or (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Third-party administrators ("TPAs") that only sell their 401(k) plan administrative services are not fiduciaries because they do not make management decisions as to plan policies, rules or procedures. They only provide ministerial services (*eg*. calculation of benefits, processing claims, preparation of reports required by government agencies, etc.). *See* 29 CFR 2509.75-8, D-2.

Here, ADP and Paychex are not just TPAs, they are also broker-dealers with fiduciary responsibility and obligated to act solely in the interest of the participants and beneficiaries. Specifically, in dealing with plan sponsors and participants, ADP and

Paychex control the entire transaction, from the initial point of contact by their unlicensed employees to gain the trust and confidence of plan sponsors, to selling the investments from which they are obtaining commissions without having to provide investment advice, to performing ministerial functions.

Worst yet, during the 401(k) enrollment meetings to present the list of funds available for investment from the platform, when asked by the plan sponsor's employees where they can get personalized investment advice, ADP's and Paychex's unlicensed employees have no legal way to respond because it is not available in spite of being charged for it. Does the DOL really want to perpetuate this deception? It's bad enough ADP and Paychex have been duping retirement plan participants for over 20 years.

One of the most important provisions outlined in the DOL Fiduciary rule justifying the receipt of commissions from mutual fund sales is that individuals [through their broker-dealers] must be licensed and render "best interest" investment advice. The notion of allowing ADP and Paychex to continue using their unlicensed staff in an attempt to mimic professional advice, and continue receiving commissions and revenue sharing fees, but escape ERISA's overarching fiduciary protections by providing cover for them under the platform provider exemption, would allow them to continue bilking retirement plan investors. Should the DOL actually implement the rule, it would be in complete contravention of all existing agency statutes and regulations created to protect investors.

Given all the problems referenced above about the DOL's platform provider exemption, it should be clear that the exemption is a step backwards in a veiled attempt to protect retirement plan investors. As I initially stated, the exemption creates a two-track system to sell mutual funds to retirement plans. The DOL is attempting to create a new "suitability" standard to sell mutual funds, but this time sanctioning the selling of securities by unlicensed employees and still receive commissions, while those that are licensed advisers and also receiving commissions, must act in the "best interest" of retirement plan investors. Was not the DOL's Fiduciary rule aimed at stopping the $17 billion a year it believed investors waste in exorbitant fees from conflicted advice?

V. Improving the Platform Provider Exemption

Since the RFI has asked for ways to improve the platform provider exemption, below is a list that will reduce managed mutual fund fees to align them much closer with low-cost index mutual funds. Many licensed advisers use index funds but add a fee for their investment advice service. That extra fee typically ranges from .010% to 1.00% of the assets under management depending on the amount of plan assets and the services to be provided. Below is the list to easily remedy the platform provider exemption.

- Eliminate all front-loaded mutual funds;
- Eliminate revenue sharing fees. Since ADP and Paychex already charge plan sponsors for setting up the plan and are obligated to transmit the participants' contributions to the mutual funds by way of an administrative contract, why should they get paid twice under a revenue sharing scheme to perform the same

service? It seems to me if you get paid twice to do the same thing you were already obligated to do, that's stealing. This would reduce mutual fund expenses from .025% to .050%; and

- Platform providers that do not provide investment advice should not be paid a commission or any other compensation. That would lower managed mutual fund expenses by another .025% to .050%.

All of the above suggestions must also be offset by the mutual funds themselves on a dollar-for-dollar basis so that they are not unjustly enriched. These suggestions can be easily implemented by January 2018.

Noted civil rights attorney Harry Philo said: "Never let us forget that the Law is never settled until it is settled right, and it is never settled right until it is just, and it is never just until it serves society to the fullest."

In my view, both the DOL and the SEC need to re-examine my Whistleblower complaints in which the above fiduciary violations by ADP and Paychex were clearly identified in 2012.

In closing, the DOL and the SEC should jointly charge ADP and Paychex with violations of their respective fiduciary rules in connection with their 20+ year reign of deceptive and manipulative sales practices to sell mutual funds by their unlicensed employees. As part of any litigation, they should also claw-back on behalf of the defrauded participants all the income and profits from those illegal sales and return them to the plan participants. And lastly, the SEC should impose a very significant fine against Paychex and PSC for their false and misleading advertising scheme to "partner" with financial advisers.

I appreciate the opportunity to present my views regarding the platform provider exemption.

Very truly yours,

Royce A. Charney, J.D.
President

cc: SEC Chairman Jay Clayton, chairmanoffice@sec.gov