Dechert
LLP

1095 Avenue of the Americas
New York, NY 10036-6797
+1 212 698 3500 Main
+1 212 698 3599 Fax
www.dechert.com

ANDREW L. ORINGER

andrew.oringer@dechert.com
+1 212 698 3571 Direct
+1 212 314 0061 Fax

October 26, 2017

VIA EMAIL (EBSA.FiduciaryRuleExamination@dol.gov)

Office of Exemption Determinations
Employee Benefits Security Administration (Attention: D-11933)
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

To Whom It May Concern:

This comment addresses concerns arising under the exception (the "IFE") for "independent fiduciaries" ("IFs") under the new fiduciary regulation (the "Regulation") of the U.S. Department of Labor (the "DOL") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). We have several straightforward suggestions that we believe would dramatically increase the utility, practicality and benefits of the IFE.

We write not on behalf of any client, but rather because we believe in the policy benefits of the proposed changes we describe below. While we have more fundamental questions about the need for the Regulation, we believe that certain aspects of the existing Regulation can be improved with several simple changes, so that it can be made more workable and less cumbersome if it is to stay in effect.

We have observed, in representing both providers and plan fiduciaries, the wasteful and burdensome proliferation of new contractual provisions and even new types of documentation, to address the potential need for and availability of the IFE. Unfortunately, when the DOL delayed the effectiveness of a wide range of documentary and other requirements in the "best interest contract" exemption (and other requirements), it did not (and did not propose to) give additional time to the market to react to documentary issues arising in connection with the IFE - nor did the DOL give itself time to consider such matters further before the Regulation became applicable on June 9, 2017.

Two guiding principles inform our suggestions below. First, there is the principle that, in safeguarding retirement assets, protections afforded to a decision-making fiduciary should not be broader than necessary because (i) by hypothesis the fiduciary does not need the additional protection and (ii) the additional protection could frustrate the fiduciary's efforts to engage in behavior deemed by the fiduciary to be beneficial for the plan. Second, the investor-protection

regime that at least for now exists under the ERISA rules should, like the securities regulatory regime, recognize that certain classes of investors are sufficiently sophisticated to look after their own interests.

In light of that background, we have the following suggestions:

- Reliance on the IFE should expressly be extended to those circumstances in which there is in fact an IF. Presently, the IFE by its terms applies where there is a reasonable belief that there is an IF. However, regardless of whether there is a reasonable belief, the IFE should apply where there actually is an acting IF. We would further suggest that the IFE should apply where the surrounding facts and circumstances indicate that there is a "substantial likelihood" that an IF is present, at least in cases in which reliance by a provider on a substantial-likelihood standard is not intended as a device for avoiding ERISA's requirements. These changes should give providers an increased practical level of comfort and allow them to streamline documentary procedures, which would increase the likelihood that they would be more willing to provide needed services to retirement investors.

- The present inability to use the IFE in the case of self-managed individual retirement accounts ("IRAs") and "401(k)"-type accounts is having a strangely distortive effect. For example, those financial-services organizations that have decided no longer to sell certain interests to IRAs will still sell them to personal non-retirement accounts. Thus, if one is concerned (and we are not suggesting that such concern is reasonable) that the IRA owner is at risk from self-dealing activity by the provider, then (i) the owner will continue to be at risk, because the provider will still deal with the owner personally (i.e., outside of the IRA), and (ii) the owner will have no alternative but to effect the desired purchase in a tax-inefficient way. This perverse result arises solely from the DOL's attempt to effect an investor-protection regime, even though its authority is limited to retirement accounts. In addition, the DOL's regulatory regime attempts to protect a wide range of sophisticated investors even though the SEC has long recognized that certain types of sophisticated investors are able to look after themselves when making decisions about securities transactions. For example, the SEC has developed, refined and time-tested a set of exemptions from the provisions of the Securities Act of 1933 and the Investment Company Act of 1940 based on the premise that accredited investors are sufficiently sophisticated to look after their own interests. While there is already a chorus of commentary in favor of allowing self-managed accounts to use the IFE where the IRA owner is sufficiently sophisticated, we wanted to add our voice to that chorus.* We

* We recognize that the DOL has considered this issue and, in the Regulation and the preamble to the final version thereof, and in Q&A 26 of the January 2017 FAQs regarding the Regulation, expressly rejected the approach we outline (although the Q&A 26 of the FAQs are unclear as to whether the DOL's decision to restrict the application of the IFE in the case of self-managed IRAs (and self-managed 401(k)-type accounts) applies to the $50,000,000 prong of the IF
(footnote continued)

respectfully submit that the issues we note immediately above can be addressed with two changes to the Regulation: (i) the rule pursuant to which a self-managed IRA or 401(k)-type account cannot fit within the IFE should be rescinded, and (ii) the definition of IF should be expanded - at least in the case of self-managed IRAs and 401(k)-type accounts - to include persons who are "accredited investors" as defined under SEC rules.

We recognize that the Regulation presents a number of other fundamental and significant issues, including some more basic than those we discuss in this letter. Nevertheless, we are identifying the issues noted above because we believe that these are aspects of the Regulation for which relatively minor refinements can lead to significant practical improvement.

Please do not hesitate to contact me (1-212-698-3571) if there is anything you wish to discuss.

Very truly yours,

Andrew L. Oringer

(footnote continued)
definition or applies to the IFE generally). Regardless, we make our suggestions regarding self-managed IRAs (and such other self-managed accounts) both because of the post-adoption experiences in the market, some of which are alluded to in text, and because we believe that the DOL should reconsider this point as a general matter.