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April 17, 2017

Luisa Grillo-Chope  
Office of Regulations & Interpretations  
Employee Benefits Security Administration  
United States Department of Labor  
200 Constitution Avenue NW, Room N-5655  
Washington, D.C. 20210

**Re: Definition of Term Fiduciary; Conflict of Interest Rule-Retirement Investment Advice;  
Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-1) (RIN  
1210-AB79)**

Dear Ms. Grillo-Chope:

On April 8, 2016, the Employee Benefits Security Administration of the U.S. Department of Labor (“DOL” or the “Department”) published in the Federal Register a final rule entitled: Definition of the Term “Fiduciary;” Conflict of Interest Rule—Retirement Investment Advice<sup>1</sup> (“Fiduciary Rule”). The Fiduciary Rule originally had an applicability date of April 10, 2017 but was extended by 60 days to June 9, 2017. The applicability date requires the final rule and accompanying exemptions to come into full force by that date, thereby imposing a significant regulatory burden on the channels utilized by certain members of the Small Business Investor Alliance (“SBIA”) to distribute their investment opportunities to retirement investors.

SBIA is the premier organization of investors in the lower middle market and middle market. SBIA represents and advocates on behalf of Business Development Companies (“BDCs”), Small Business Investment Companies (“SBICs”), traditional private equity funds, and investors in those funds. We currently are the primary trade association of BDCs, representing most of the industry, including the largest number of non-traded BDCs. SBIA advocates on behalf of these members to ensure a healthy market, balancing the need for investor protection and capital formation.

The implementation of the best interest contract (“BIC”) exemption from the Fiduciary Rule on June 9, 2017, and related broker-dealer processes surrounding the implementation of the BIC, will result in significant impacts on our members. In particular, a number of members of SBIA are the sponsors of non-traded BDCs, which are sold through an independent broker dealer network on a commission basis. The Fiduciary Rule and accompanying BIC exemption have

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<sup>1</sup> Definition of the Term “Fiduciary;” Conflict of Interest Rule – Retirement Investment Advice, 81 Fed. Reg. 20946-210002 (April 8, 2016).

made it much more difficult for these members to distribute this valuable investment to retirement investors. Non-traded BDCs are particularly attractive to retirement investors because of the dividend income they provide, the lack of market volatility impacting the investment, and the exposure to an alternative asset class. SBIA commented on the proposed BIC<sup>2</sup> in 2015, which resulted in some helpful changes for our members in the final rule (including allowing them to continue to sell their products in retirement accounts), but continued to include many harmful provisions that have resulted in limited investor choice. As a result of the Fiduciary Rule and BIC exemption, many broker-dealers have imposed more restrictive requirements on non-traded BDC sponsors, disrupting the traditional sales channels for these investments, as well as limited investor choice.

On February 3, 2017, President Trump issued a Memorandum directing the Department of Labor to conduct an examination of the rule to include an economic and legal analysis on the rule's impact. Specifically, the Memorandum directed the Department to investigate whether the rule has produced a reduction in access to retirement products and advice, whether the rule has produced disruptions in the industry that may harm investors, and whether the rule will cause an increase in litigation and a corresponding increase in prices investors pay for services.

Of specific concern to SBIA is the private right of action and the potential for increased litigation. While the threat of litigation has the intent of eliminating bad actors and advice from the market and providing an added layer of investor protection, the private right of action also makes it extremely difficult for advisers to sell products. When investment advice does not prove successful, advisers will be under an enormous burden to prove that the advice was given in their clients' best interest or face the threat of a lawsuit. We are concerned that this provision of the rule will lead to an increase in the costs of providing retirement advice, in addition to increased litigation. Advisers must also fear the threat of DOL enforcement and losing the protections of the BIC exemption for even the smallest violations.

In addition to these concerns, SBIA worries that the Securities and Exchange Commission (SEC) could propose further regulation that will be duplicative and, in some cases, contradictory to the rules from DOL. SBIA recommends that DOL work with the SEC to craft a larger rule that would provide clarity for broker dealers, address consumer protection concerns, and eliminate burdensome compliance costs and duplicative regulations.

We are pleased that the DOL included changes in its final rule that allowed our members to continue to sell their products. It is our hope that the BIC exemption can be further modified to expand investors' choices, while still providing them much needed protection.

Sincerely,



Brett Palmer  
President  
Small Business Investor Alliance (SBIA)

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<sup>2</sup> Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960 -21989 (April 20, 2015).