



FINANCIAL PLANNING COALITION

September 15, 2017

Office of Exemption Determinations
Employee Benefits Security Administration (EBSA)
Attention: D-11712, 11713, 11850
EBSA.FiduciaryRuleExamination@dol.gov

United States Department of Labor
200 Constitution Avenue, NW
Suite 400
Washington, D.C. 20210

RE: Request for Information Regarding Extension of Transition Period and Delay of Applicability Dates, Document Number 2017-18520

Ladies and Gentlemen:

The Financial Planning Coalition (Coalition)¹ – comprised of Certified Financial Planner Board of Standards (CFP Board),² the Financial Planning Association® (FPA®),³ and the National Association of Personal Financial Advisors (NAPFA)⁴ – appreciates the opportunity to comment on the proposed 18-month delay⁵ of certain exemptions to the final fiduciary rule (Final Rule)⁶ promulgated by the Department of Labor, Employee Benefits Security Administration

¹ The Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession.

² CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for over 80,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country. CFP® professionals voluntarily agree to comply with CFP Board's rigorous standards including education, examination, experience and ethics, and subject themselves to disciplinary oversight of CFP Board.

³ FPA® is the largest membership organization for CFP® professionals and those who support the financial planning process in the U.S. with over 23,000 members nationwide. With a national network of 88 chapters and state councils, FPA® represents tens of thousands of financial planners, educators and allied professionals involved in all facets of providing financial planning services. FPA® works in alliance with academic leaders, legislative and regulatory bodies, financial services firms and consumer interest organizations to represent its members.

⁴ NAPFA is the nation's leading organization of fee-only comprehensive financial planning advisors with more than 3,000 members nationwide. NAPFA members are highly trained professionals who adhere to high professional standards. Each NAPFA advisor annually must sign and renew a Fiduciary Oath and subscribe to NAPFA's Code of Ethics.

⁵ Department of Labor, Employee Benefits Security Administration, Notice of proposed amendments to PTE 2016-01, PTE 2016-02, and PTE 84-24

⁶ See Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20945 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550), *available at* <https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>; See also 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, 82 Fed. Reg. 16902 (Apr. 7, 2017) (to be codified at 29 C.F.R. pt. 2510), *available at* <https://www.federalregister.gov/documents/2017/04/07/2017-06914/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice-best>.

(Department) in April 2016. The Coalition opposes any modification, elimination, or delay of the provisions of the Final Rule or PTEs⁷ pursuant to the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC). Timely implementation of the Rule's enforcement mechanisms is necessary to protect America's retirement investors and should not extend past the originally scheduled applicability date of January 1, 2018.

The Coalition believes that a strengthened fiduciary standard under ERISA and IRC is essential for America's retirement investors and is workable for advisers.⁸ As the Coalition previously commented,⁹ a meaningful, legally enforceable fiduciary standard that puts investors' interests first is the best way to strengthen Americans' retirement security. It takes decades for people to save for a comfortable and secure retirement; these savers deserve advice on growing their hard-earned assets under a fiduciary obligation that is subject to strong enforcement mechanisms. The Final Rule, including all of its exemptions, is fully consistent with the principles of a true fiduciary standard under ERISA and IRC. Modifying, eliminating, or delaying the Final Rule and PTEs is unnecessary, unwarranted and will only serve to derail this long overdue reform necessary to protect and preserve Americans' retirement savings.

I. Delaying Key Enforcement Provisions Contradicts the Department's Prior Well-Reasoned and Thorough Economic Analysis

The Department's proposal, if adopted, would extend the transition period for compliance to July 1, 2019. While the Impartial Conduct Standards (ICS) became applicable under the PTEs on June 9, 2017, additional conditions—including contracts warranties, policies and procedures, and disclosure requirements—would be deferred to July 1, 2019 (rather than becoming applicable on January 1, 2018). The Department acknowledged that in light of its need to complete the ongoing reexamination of the fiduciary rule (and accompanying exemptions) and its desire to coordinate its approach with the Securities and Exchange Commission (SEC), January 1, 2018 may not be a realistic date for the full conditions of the PTEs to become applicable.

However, the Department's proposed 18-month delay is antithetical to its well-reasoned position in favor of the PTEs, as previously described in the Preamble to the Final Rule and the 2016 Regulatory Impact Analysis (RIA).¹⁰ Only 17 months ago the Department stated that the Best Interest Contract Exemption (BICE), for example, is key to protecting consumers because "[t]he contract creates a mechanism for [Individual Retirement Account] IRA investors to enforce their

⁷ The PTEs are 1. Best Interest Contract Exemption (PTE 2016-01); 2. Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02); and 3. Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (PTE 84-24)

⁸ The term "adviser" as used herein is defined in the Final Rule and includes any individual or entity who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance representative and company, or a registered representative of a broker-dealer and broker-dealer. Accordingly, the term "adviser" is not limited to investment advisers registered under the Investment Advisers Act of 1940 or under applicable state law.

⁹ See generally Letter from Coalition to Office of Regulations and Interpretations, Employee Benefit Security Administration (EBSA), U.S. Dep't of Labor (July 21, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00233.pdf>; See also Letter from Coalition to Office of Regulations and Interpretations, EBSA, U.S. Dep't of Labor (Apr. 17, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01324.pdf>.

¹⁰ See generally U.S. Dep't of Labor, "Fiduciary Investment Advice: Regulatory Impact Analysis" (April 2016), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf> (2016 RIA).

rights and ensures that they will have a remedy for advice that does not honor their best interest.”¹¹ The Department indicated that creating an enforceable contract between advisers and consumers will bring additional accountability to the fiduciary standard, since “the contract gives both the individual adviser and the financial institution a powerful incentive to ensure advice is provided in accordance with fiduciary norms, or risk litigation ... and liability and associated reputational risk.”¹²

In drafting the Final Rule, the Department explained that some revisions were made with the specific purpose of investor protection, while simultaneously balancing firms’ needs. PTE 84-24 “was narrowed further from the proposed amendment to exclude advice on insurance products known as fixed-indexed annuities” because “public comments and other evidence demonstrate that these products are particularly complex, beset by adviser conflicts, and vulnerable to abuse.”¹³ Even though, “[i]n the Department’s view, the critical aspect of the requirement for IRAs and non-ERISA plans is that all instances of advice be covered by an enforceable contract,” the exemptions *were adjusted* to allow the contract to be entered into at or before the time of a specific transaction, and “to be incorporated into other documents *to the extent desired by the financial institution*.”¹⁴

These and other concessions were made to protect investors and retain flexibility for firms.¹⁵ The Department worked for several years to tailor the exemptions and incorporate into the Final Rule public input from hundreds of commenters, after many public forums and hearings. Reversing course now, especially without providing comparably rigorous analysis, runs counter to the economically sound analysis garnered from the long and thorough process leading up to the drafting of the Final Rule.

II. The 18-Month Delay Threatens Billions of Dollars in Retirement Savings

The Coalition opposes any further delay of the Final Rule and PTEs. If promulgated, the 18-month delay will only hurt American retirement savers. The White House Council of Economic Advisers estimated that the cost of conflicted advice already costs retirement investors approximately \$17 billion per year.¹⁶ In its regulatory impact analysis of the Final Rule, the Department found that underperformance associated with conflicts of interest – in the mutual fund segment alone – could cost IRA investors between \$95 billion and \$189 billion over the next 10 years and between \$202 billion and \$404 billion over the next 20 years.¹⁷ The Department also indicated that retirement

¹¹ Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20945, 20947 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550), *available at* <https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>

¹² *Id.*

¹³ 2016, RIA, at p. 8.

¹⁴ *Id.*, at p. 230 (emphasis added).

¹⁵ *Id.*, at p. 289 (“The Department remains convinced of the critical importance of the core requirements of the exemption, including an up-front commitment to act as a fiduciary, enforceable adherence to the impartial conduct standards, the adoption of policies and procedures reasonably designed to assure compliance with the impartial conduct standards, a prohibition on incentives to violate the best interest standard, and fair disclosure of fees, conflicts of interest, and material conflicts of interest.”).

¹⁶ White House Council of Economic Advisers, “The Effects of Conflicted Investment Advice on Retirement Savings” (February 2015), *available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf (“[T]he aggregate annual cost of conflicted advice is [estimated at] about \$17 billion each year.”); See also Heidi Shierholz and Ben Zipperer, “Here is what’s at stake with the conflict of interest (“fiduciary”) rule,” Economic Policy Institute (May 30, 2017), *available at* <http://www.epi.org/publication/here-is-whats-at-stake-with-the-conflict-of-interest-fiduciary-rule/>.

¹⁷ U.S. Dep’t of Labor, *Regulating Advice Markets: Definition of the Term “Fiduciary” Conflicts of Interest – Retirement Investment Advice; Regulatory Impact Analysis for Final Rule and Exemptions*, at p. 9 (April 2016), *available at* <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210->

investors “could lose 6 to 12 and as much as 23 percent of the value of their savings by accepting conflicted advice.”¹⁸

Every day that the full implementation of the Final Rule is delayed results in losses to American workers and retirees. The Final Rule was slated for implementation in April 2017, but was delayed by 60 days and most of its provisions went into partial effect on June 9, 2017. Studies estimated that this 60-day delay cost retirement investors billions of dollars over the life of their investments. The Economic Policy Institute concluded that for “every seven days that the fiduciary rule’s applicability [was] delayed, it...cost retirement savers \$431 million over the next 30 years. Thus, the costs of a 60-day delay to retirement savers is \$3.7 billion.”¹⁹

After partial implementation, DOL issued RFI 1210-AB82, seeking comments on whether or not to delay the January 1, 2018 applicability date of certain exemptions. These exemptions originally were scheduled to be implemented on June 9, 2017. The cost to retirement savers of nearly seven-month delay between June 2017 and January 2018 is estimated to be \$3.9 billion dollars over the next 30 years.²⁰ Each additional year of delay would lead to \$7.3 billion lost over the next 30 years.²¹ As AARP testified in Congress this summer, “[c]onflicted advice is not free.”²²

III. Any Delay or Revision to the PTEs will Strip Investors of Much-Needed Enforceable Contract Provisions

Delaying the transition period, or eliminating or altering the PTEs will deprive retirement investors of crucial protections and enforcement mechanisms. The PTEs, as written, are necessary because they provide much-needed teeth to the new definition of “fiduciary” and the ICS. Without the PTEs, consumers do not have access to legally binding contracts on which they can rely to uphold their right to conflict-free advice in their best interest. An 18-month delay is dangerously close to the length of a time recently deemed by the judiciary to be a death knell for a regulation in its entirety.²³

The Department assumes that all the benefits of the rule will redound to investors without the full protections of the rule, but this assumption is belied not only by the 2016 RIA and the Preamble to the Final Rule, but also by current market practices. It’s clear that a segment of market participants is waiting on the sidelines and failing to come into compliance with the rule, expecting that the DOL will modify the rule so that they won’t be held accountable.

[AB32-2/conflict-of-interest-ria.pdf](#).

¹⁸ See n. 11, *supra*, at p. 20949.

¹⁹ Letter from Heidi Shierholz, Director of Policy at the Economic Policy Institute, to Office of Regulations and Interpretations, EBSA, U.S. Dep’t of Labor (Mar. 17, 2017), *available at* <http://www.epi.org/publication/epi-comment-on-the-proposal-to-extend-the-applicability-date-to-the-fiduciary-rule/>.

²⁰ Economic Policy Institute, “EPI comment on extending the applicability date of portions of the fiduciary rule” (July 21, 2017), *available at* <http://www.epi.org/publication/epi-comment-on-extending-the-applicability-date-of-portions-of-the-fiduciary-rule/>.

²¹ Economic Policy Institute, “Further delay of full applicability of the fiduciary rule would cost retirement savers in every state” (July 21, 2017), *available at* <http://www.epi.org/publication/further-delay-of-full-applicability-of-the-fiduciary-rule-would-cost-retirement-savers-in-every-state/>.

²² U.S. House of Representatives, Financial Services Committee, Capital Markets, Securities, and Investment Subcommittee Hearing entitled, “Impact of the DOL Fiduciary Rule on the Capital Markets” (July 13, 2017), *available at* <https://democrats-financialservices.house.gov/calendar/eventsingle.aspx?EventID=400645>.

²³ *Clean Air Council v. Pruitt*, No. 17-1145, at p. 6, D.C. Cir. (July 3, 2017), *available at* [https://www.cadc.uscourts.gov/internet/opinions.nsf/A86B20D79BEB893E85258152005CA1B2/\\$file/17-1145-1682465.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/A86B20D79BEB893E85258152005CA1B2/$file/17-1145-1682465.pdf) (A lengthy delay or stay of an administrative regulation, such as two years, would be “tantamount to amending or revoking a rule.”).

At the very least, if the transition period is extended by 18 months, the Coalition encourages the Department to enforce a simple contract provision in the BICE requiring industry professionals to acknowledge their fiduciary status and abide by the ICS. The main condition of the BICE is to abide by the three-part ICS: 1) adopt the best interest standard of care; 2) collect no more than reasonable compensation; and 3) provide no materially misleading statements.²⁴ If the Department is unwilling to enforce the BICE in its entirety on the originally planned date of January 1, 2018, the Coalition respectfully requests that the Department, at a minimum, make enforceable a written acknowledgement of and agreement to the ICS.

The idea of committing to a fiduciary status correlates to the Department's original push to incentivize financial firms to follow a fiduciary standard. Once a firm pledges to abide by the ICS, it is very difficult to disclaim the accompanying fiduciary responsibilities under traditional tenets of promissory estoppel.²⁵ Becoming subject to an ICS contractual agreement allows at least limited accountability in any arbitration or judicial proceeding. It is this accountability and incentive that the Department was seeking in promulgating the BICE in the first place.²⁶

IV. Delaying the PTEs for any Amount of Time Only Extends Uncertainty for Industry and Derails Crucial Innovations

Any delay will derail many of the innovations firms have been developing to timely and successfully meet compliance goals set by the Final Rule. All firms knew in April 2016, when the Final Rule was promulgated, that they would have nearly two years to fully comply. Some in the industry took advantage of this period and planned ahead accordingly, while others failed to do so. Early adopters have already spent millions in upgrade costs and product development to ensure compliance. Prolonging full applicability by 18 months essentially punishes those firms that "did the right thing" by taking appropriate anticipatory steps, while rewarding those that did not.

The Department also indicated that it expects to delete or revise certain parts of the Final Rule, or introduce new streamlined exemptions, during the 18-month delay. However, this piecemeal approach introduces further unnecessary uncertainty. Part of the reason behind implementing the Final Rule quickly was to provide financial firms with certainty:

After careful consideration of the public comments, the Department has determined that it is important for the final rule to become effective on the earliest possible date. [...] Making the rule effective at the earliest possible date will provide certainty to plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners that the new protections afforded by the final rule are now officially part of the law and regulations governing their investment advice providers. Similarly, the financial services providers and other affected service providers will also have certainty that the rule is final and not subject to further amendment or modification without additional public notice and comment. The Department expects that this effective date will remove uncertainty as an obstacle to regulated firms allocating capital and

²⁴ Fred Reish, "Interesting Angles on the DOL's Fiduciary Rule #43" (Apr. 19, 2017), available at <http://fredreish.com/interesting-angles-on-the-dols-fiduciary-rule-43/>.

²⁵ A successful promissory estoppel claim prevents the defendant from denying the existence of a contract for lack of consideration and punishes the defendant for misleading the plaintiff to its detriment (*Bocksel v. DG3 North America, Inc.*, 2016 WL 873138, at *10 (E.D.N.Y. Feb. 12, 2016)), Promissory Estoppel, Practical Law Glossary Item 1-518-6318.

²⁶ See n. 12, *supra*.

other resources toward transition and longer term compliance adjustments to systems and business practices.²⁷

Rather than injecting uncertainty into the compliance process through an 18-month delay, the Department should embrace and encourage innovations that have emerged, such as T-shares and clean shares, on which companies have spent considerable time and money. The Department should also continue seeking firms' adoption of a written contract acknowledging their fiduciary status and fulfilling their obligations pursuant to the ICS. Conditioning any delay on completion of any particular innovation will prove to be insufficient. A legal enforcement mechanism in the form of this written contract is still necessary for consumer protection.

V. Conclusion

The Coalition urges the Department to implement and enforce the Final Rule and PTEs as currently written and according to the originally set deadline of January 1, 2018. Eliminating or modifying the Final Rule and PTEs would prevent the Department from taking critically needed steps to enhance protections for retirement investors, including much-needed enforcement mechanisms. The Coalition believes that requiring an adviser to work in the retirement investor's best interest, with proper enforcement and accountability regimes under the applicable exemptions, is an essential and long overdue reform. We urge the Department to move forward expeditiously with the timely implementation of the Final Rule and PTEs as written.

The Coalition appreciates the opportunity to comment on the Department's RFI, Document Number 2017-18520. We would be happy to meet with the Department to discuss these important issues further. If you have any questions regarding this comment letter or the Coalition, please contact Maureen Thompson, Vice President of Public Policy, CFP Board, at (202) 379-2281 or MThompson@cfpboard.org.


Sincerely,



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²⁷ See n. 11, *supra*, at pp. 20992-20993 (emphasis added).