



July 14, 2017

[EBSA.FiduciaryRuleExamination@dol.gov](mailto:EBSA.FiduciaryRuleExamination@dol.gov)

U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Re: RIN 1210-AB82

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> appreciates the opportunity to respond to the Department of Labor’s (“Department”) “Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions,” published in the Federal Register on July 6, 2017. We strongly urge the Department to delay the January 1, 2018 applicability date of the provisions in the Best Interest Contract Exemption, the Principal Transaction Class Exemption, and Prohibited Transaction Exemption 84-24 relating to the redefinition of the term “fiduciary” under section 3(21) of ERISA and section 4975(e) of the Code (the “Rule”) that are not now in effect, along with the other amended exemptions as part of this rulemaking. We believe the Rule has caused, and will continue to cause, significant disruption, loss of services and loss of choice for retirement investors. These negative consequences will be exacerbated if the exemptions, as finalized in April 2016, take effect on January 1, 2018.

As discussed more fully below, the Department must complete the reexamination of the Rule and the related exemptions mandated by the President’s February 3, 2017 Memo and allow for sufficient time to craft more sensible and workable rules that, at a minimum, do not reduce access to critical retirement services. These rules should not require financial institutions to create expensive manual and technological workarounds solely to meet the Department’s unique view of how individuals should save for retirement.

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<sup>1</sup> SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$18.5 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

Finally, the reexamination and resulting reproposals need to be considered in close coordination with the SEC in order to (i) take advantage of the SEC's vast expertise in this area; (ii) harmonize the standards for retail investors; and (iii) ensure that financial institutions (and investors) are not subject to substantially different regulatory mandates with respect to the same investment transaction.

### Executive Summary

The Department should issue a delay of the January 1, 2018 applicability date of the exemptions as soon as possible for the following reasons:

- To allow time for the Department to complete review of the entire Rule per the President's Memo (as defined below);
- To allow firms time to implement systems that will operationalize the Rule while easing transitions for their clients;
- To allow the Department and the SEC to craft a solution that works for all investors; and
- To ensure individuals will continue to receive the help necessary to save for retirement so they do not suffer unnecessary financial losses due to lack of assistance.

Accordingly, it is critical that the Department delay the January 1, 2018 date by a minimum of 24 months after completion of the review and publication of final rules. Piecemeal delays cause retirement investors confusion, uncertainty and additional cost. They cause financial institutions enormous additional costs to create systems which may never be needed, and make it hard to run a business that requires legal certainty. Successive short delays will harm investors and institutions.

### Delay is Necessary to Complete Review as Required by the President's Memo

In accordance with the President's February 3, 2017 Memo (the "President's Memo")<sup>2</sup>, the Department is required to reexamine the Rule and all of the exemptions. There is no question that the comprehensive reexamination directed by the President cannot be completed by January 1, 2018, especially where the record is replete with evidence that the result of that review will be required revisions to the Rule and the exemptions, all of which take time.

The President's Memo stated that "[o]ne of the priorities of my Administration is to empower Americans to make their own financial decisions." Therefore, while a requisite feature of this rulemaking must be that it allows retirement investors to continue

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<sup>2</sup> <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule>

to make choices that they deem appropriate for their retirement savings, the current Rule and the related exemptions severely limit people's choices and as a practical matter forces them to accept products and services the Department wants them to have. The President's memo underscores the point we have made from the start: the Department should not through regulation seek to deny Americans the freedom to make their own investment decisions by imposing its judgment of preferred investment options upon millions of Americans. Continuing down a path in opposition with the President's directive does a disservice to retirement savers and retirees.

The President directed the Department to rescind or revise the Rule if the Department's reexamination indicates that the Rule is inconsistent with empowering Americans to make their own financial decisions. It is therefore critical that, as the Department moves forward with its review and the resulting required additional rulemaking, it keeps in mind that it should not craft rules and exemptions in an attempt to favor certain types of services, investment products or classes of funds over others. The Department should not be creating an artificial product market that discourages innovation and is not in the best interest of retirement investors. Nor should it focus on one particular innovation, especially when the entire market is changing rapidly, and today's newest idea may be quickly outdated.

Instead, any rulemaking should facilitate the selection of products and services that offer flexibility to address the unique goals and circumstances of Americans. The current Rule adds significant regulatory barriers that inhibit the flexibility that Americans need to make their own financial decisions. Forcing Americans to choose what the Department thinks they should want directly contradicts the President's directive.

#### Delay is Necessary as a Result of Operational Complexity

As the Department completes the important and necessary work on the reexamination of the Rule and the related exemptions, we believe that the resulting findings will lead the Department to conclude that both the Rule and the exemptions must be significantly revised, or rescinded altogether. As a result, retirement investors would be best served if the Department announced a delay in the January 1, 2018 date as soon as possible to avoid confusion, limited access to services and products, as well as industry compliance expenditures that may well turn out to be unnecessary and divert resources away from consumer product and service enhancements that bolster retirement security rather than putting it at risk. Technology systems, compensation changes, and compliance and supervision changes all are required for the exemption conditions scheduled to take effect in 2018. These changes are extraordinarily expensive, complicated, disruptive to investors and inter-connected and they will need to be launched this summer if our members are to meet that deadline. For this reason, the industry is at a critical crossroads and must decide very soon whether to move forward with their additional compliance

efforts, or whether to defer making those further adjustments in contemplation of rule changes.

As a result of the uncertainty regarding whether and to what extent there would be changes to the rules, financial institutions have been working to balance what aspects of the rule to move forward with versus those parts they should hold back on moving forward with. As the Department knows, if implementation efforts, including systems changes, do not comport to, or become unnecessary because of, rule changes, these efforts and attendant costs will have been entirely wasted, which is to nobody's benefit. Despite the uncertainties, our members have spent hundreds of millions of dollars thus far; causing them to spend still more without certainty of the ultimate requirements is not responsible.<sup>3</sup>

The system changes that financial institutions are currently struggling with include, but are not limited to:

- Creating an extraordinarily complex website, with extensive detail that needs to be created and kept up-to-date; the list of all product manufacturers and the details of third party payments are both challenging to create and maintain;
- Collecting and creating a database for any institution that sells either proprietary products or receives third party fees that might need to be updated regularly in order to remain accurate in a rapidly changing financial world;
- Changing the applicable cash sweep vehicles for every retirement account, and reprogramming the cash sweep systems to accommodate these changes. Such changes will require communications with clients, along with explanation as to why their retirement accounts cannot have the same access or flexibility as the other accounts they hold;
- Reflecting all of the required material contained in the scores of conditions in the exemptions in new IRA and plan documents;
- Implementing a re-engineered account opening process across front, middle and back offices;
- Enhancing audit, compliance and supervision functions for newly required documentation and investor information;

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<sup>3</sup> Of course, the Rule also continues to be challenged in litigation, and some or all of the requirements currently set to take effect on January 1, 2018 could be rendered unnecessary by forthcoming court rulings. Although we will not repeat them at length here, we do respectfully submit that the Rule raises a host of serious legal problems. Indeed, the Department itself has recently acknowledged in its legal briefing that the BIC and Principal Transaction Exemptions' restrictions on class-litigation waivers, which are among the requirements set to take effect January 1, are improper and should be vacated. A postponement of the January 1 deadlines is thus warranted to allow the courts additional time to consider these issues before further requirements take effect.

- Creating document upload capabilities and formalizing reports and other oversight tools on the rollover process to ensure appropriate documentation and information is collected;
- Creating an on-demand disclosure process. This is particularly challenging where firms do not have automated feeds on certain investment products which do not now feed daily information to their distributors, including Alternative Investment Products, Insurance and Annuities, and Structured Products;
- Altering mutual fund offerings, receiving approval on prospectuses, obtaining approval on changes in insurance products, and drafting the necessary offering materials. The product manufacturers cannot take these multiple steps until financial institutions determine how the exemptions, if and when changed, will affect their business model and then, the creation of that model with the compliance infrastructure necessary to meet the new requirements;
- Training the entire salesforce (front office, back office) on all the elements needed for each of the exemptions they will rely upon. This step cannot occur until the new policies and procedures are set; and
- Communicating with clients, which has proven to be particularly challenging, with changing deadlines, short preparation periods, and complicated business workarounds that have proven confusing and unpopular with clients.

We remain concerned about upheaval in the industry stemming from the Rule and the negative implications for individuals working to save and invest for retirement. We believe a meaningful delay in the January 2018 applicability date, announced as soon as possible and before additional resources are wasted, is critical.

The delay announcement should provide for ample time to accomplish all that needs to be done, rather than multiple short, last-minute delays as the Department has done thus far. The Department should announce a minimum of a 24-month delay on the assumption that the necessary coordination with the SEC, and the crafting, proposal and finalization of sensible exemptions would take at least six months, giving the markets at least 18 months to comply with the new rules.<sup>4</sup> If six months is unrealistic, the dates should be pushed out to dates that businesses can count on. These timeframes are necessary to allow the industry to fully analyze changes, to properly make the adjustments to their business models, their products and their services to reflect those changes, and to communicate the changes to their financial advisors and retirement investors in an appropriate and orderly fashion, as well as to transition from manual to automated

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<sup>4</sup> A short delay of 180 days, when the Department has neither finished its study, received responses to its RFI and analyzed those responses, nor gone through an additional rule-making process, is unrealistic and irresponsible. Inadequate delay will only exacerbate uncertainty and leave the industry in the untenable position of having to further invest in compliance efforts, without regard to possible future changes. These expenditures do not help retirement savers.

processes, where appropriate. This thoughtful approach will clearly benefit individual investors so they are not subject to continually changing rules and standards.

### Delay is Necessary to Allow the Department and the SEC to Work Together to Craft a Better Rule

A delay is necessary to allow the Department to work with the SEC to assess how the Rule and related exemptions have harmed retirement investors, and might cause further harm in the future. We appreciate the recent comments of both SEC Chairman Clayton and Secretary of Labor Acosta that they desire to coordinate the work of their agencies in the interest of consumers. At the recent hearing of the Senate Appropriations Subcommittee on Labor, Secretary Acosta stated, “The SEC has important expertise and they need to be part of the conversation. It’s my hope that as the SEC also receives a full complement of commissioners that the SEC will continue to work with the Department of Labor on the issue.”

We have also heard a similar willingness to work together from SEC Chairman Clayton, who has made it clear that he does not view these rules as a success for retail investors. At a recent hearing of the Senate Appropriations Subcommittee on Financial Services, Chairman Clayton stated in reference to the Department’s rule, “It’s my intent as chairman to try and move forward and effectively deal with that in a way that is coordinated so that our Main Street investors have access to investment advice and access to investment products...[and] at the same time very much fulfilling our investor-protection mission.”

These statements by Secretary Acosta and Chairman Clayton reflect an understanding of the confusion caused by different rules for a person’s investment accounts, even if the accounts are targeted for retirement goals. The Department repeatedly takes the position that retirement savings deserve more protection than other savings. There is no basis for such an arbitrary distinction. Ask any saver and he or she will say that these accounts are interchangeable; a retirement account should not be more limited in access or more expensive than other accounts, but that is the inevitable result of the Department’s Rule.

A coordinated comprehensive approach is necessary and in the best interests of savers and investors. Financial institutions have spent significant money to implement rules that make arbitrary distinctions and restrict an investor’s access. It is far more practical to allow the agency with the most experience and expertise in the financial markets to weigh in on how to proceed.

In the end, we continue to support a best interest standard for all that puts retail customers’ interests first, while preserving customer choice and flexibility. Ensuring

investors continue to have access to affordable investment products and services is critical to the retirement security of millions of Americans, as well as to the success and growth of our capital markets. We hope the Department will take the time necessary to work with the SEC to come up with a solution that achieves that goal without an unworkably broad definition of investment advice” and a set of unworkably complicated prohibited transaction exemptions. The Department should not continue to conflate our support for a standard that puts the interest of customers first, with the impartial conduct standards and an overly broad definition of who is a fiduciary. As many commenters predicted, the 2016 framework has proven to be very difficult to translate into a practical and effective framework that maintains robust choice and access for all Americans. Small changes at the edges will not fix the problem that the Department’s Rule has created.

Senate Committee on Homeland Security and Governmental Affairs Chairman Ron Johnson issued a report in February 2016 which found the Department had disregarded concerns and recommendations of SEC regulatory experts.<sup>5</sup> We urge the Department under this administration not to repeat the mistake of going-it-alone, without input from the SEC and without a coordinated output from both agencies. The SEC has significant expertise that is critical to the creation of a regulatory structure that works in the best interest of investors, and it plays an important regulatory role that needs to be considered as part of the Department’s reexamination of the Rule and the exemptions. Secretary Acosta publicly stated that “[u]nder the Obama administration, the Securities and Exchange Commission declined to move forward in rule-making. Yet the SEC has critical expertise in this area. I hope in this administration the SEC will be a full participant.” Chairman Clayton has clearly stated that the SEC intends now to be a full participant. The Department needs to delay the scheduled January 1 final implementation of its exemption to allow the type of coordination with the SEC that Secretary Acosta, Chairman Clayton and Members of Congress have acknowledged is critical.

#### Delay is Necessary to Help Protect Investors from Unnecessary Losses that Harm Retirement Security

The Department’s cost analysis needs to be completely updated and revised. The President’s Memo called for an updated economic and legal analysis as to whether the Rule will harm investors due to a reduction in access to “retirement savings offerings, retirement products structures, retirement savings information, or related financial advice.”<sup>6</sup> The Department needs to understand and take into consideration the significant information provided by many commenters since the Department’s initial analysis was completed, including information that shows its initial analysis was flawed.

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<sup>5</sup> <https://www.hsgac.senate.gov/media/majority-media/chairman-johnson-releases-report-on-flawed-department-of-labor-process-that-could-hurt-retirement-savers>

<sup>6</sup> See Footnote 1

As the Investment Company Institute has calculated, investors could lose \$109 billion over 10 years because of the Rule's implementation. This would amount to \$908 million per month in losses to investors (or \$780 million per month after taking into account the time value of money.) Any delay would save investors millions in lost returns. These lost returns far exceed the Department's estimated \$104 million losses in the form of foregone gains—gains that are widely overstated.<sup>7</sup> The Department has never considered in its calculation the additional costs many investors will bear from moving to fee-based advised accounts or the costs of mistakes by investors who lose investment services and assistance. Intermediaries have announced a variety of changes to service offerings, including no longer offering mutual funds in brokerage IRA accounts and raising account minimums or discontinuing advisory services and commission-based arrangements for lower balanced accounts. The Department should not ignore these actual consequences in hopes that, sooner or later, it will all work out the way the Department hoped it would when it first conceived of the Rule and the exemptions.

Furthermore, the Council of Economic Advisers' (CEA) February 2015 report, on which the Department principally relied and which continues to be cited in justifying the rule, is significantly flawed, and should not be the basis on which the Department seeks to completely upend over 40 years of law. The NERA Economic Consulting 2015 analysis<sup>8</sup> showed that this \$17 billion estimate in the CEA study was flawed, outdated, and based on a small percentage of the market. It was based on a study comparing broker-sold to direct channel mutual funds relative underperformance of 110 bps – but the CEA had no basis to extrapolate from this single study on a small portion of the market for retirement assets and apply it to all IRA assets, including products like variable annuities that were not even studied in the CEA report.

A former SEC chief economist is among the many that have pointed to the flaws in the Department's reliance upon this error-filled CEA report. He notes that none of the research reviews the performance of mutual funds held in annuities, despite the fact that more than one-third of the \$1.7 trillion amount of retirement assets is comprised of mutual funds sold through variable annuities. He also notes that the CEA's conclusions ignore the

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<sup>7</sup> Investment Company Institute, March 17, 2017, submission to the Department of Labor on the proposed delay to the applicability date, available at: [https://www.ici.org/pdf/17\\_ici\\_dol\\_fiduciary\\_applicability\\_ltr.pdf](https://www.ici.org/pdf/17_ici_dol_fiduciary_applicability_ltr.pdf)

<sup>8</sup> NERA, March 2015, Review of the White House Report Titled, "The Effects of Conflicted Investment Advice on Retirement Savings" by Dr. Jeremy Berkowitz and Dr. Patrick Conroy et al, available at: <http://www.nera.com/publications/archive/2015/Review-of-the-White-House-Report-Titled-The-Effects-of-Conflicted-Investment-Advice-on-Retirement-Savings.html>



asset-weighted performance of broker-sold funds, and writes, “As a consequence, the report paints an incomplete and misleading picture of fund performance.”<sup>9</sup>

NERA also noted that the CEA analysis completely disregards the benefits of assistance to consumers, with brokers helping customers understand the long-term benefits of retirement saving and avoiding panic/irrationality in their investment decisions. The Department’s own study shows that a lack of investment advice to retirement savers already costs them \$114 billion per year in savings. In its current form, the Rule would further reduce the availability of needed assistance, costing consumers much more than any savings they would secure from the elimination of supposedly conflicted advice.<sup>10</sup> The Department erroneously concluded that the problem that “needs fixing” is broker-sold funds. It did not look at leakage, the potentially higher cost of advisory fees for some clients who may be better served in a brokerage account, or the cost of abandoning retirement investors with no financial planning or investment assistance limited to do-it-yourself research information accessed online.<sup>11</sup> Even one of the consultants hired by the Department to respond to the criticisms of the research in the 2016 Regulatory Impact Analysis noted that the Department did not take account of the value that advisors provide.<sup>12</sup> The Department must stop dismissing any study that disagrees with its preconceived notion of harm. We now have two additional years of real world experience to consider and it would be arbitrary and capricious of the Department to fail to recognize that. See also our previous comment letter submitted April 17, 2017.<sup>13</sup>

#### Delay is Necessary for All Prohibited Transaction Exemptions

The Department, without explanation, only included the delay of certain provisions of the Best Interest Contract Exemption and the Class Exemption for Principal Transaction in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, and Prohibited Transaction Exemption 84-24. As there is no compelling reason for the Department to make a distinction, the Department should have

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<sup>9</sup> <https://www.forbes.com/sites/realspin/2015/12/16/an-inflated-17-billion-talking-point-from-the-dol/#54f8c0d02831>

<sup>10</sup> Investment Advice – Participants and Beneficiaries; 76 Fed. Reg. 66136, (Oct. 25, 2011), available at: <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=25414>

<sup>11</sup> While the Department has provided an exception for education, most firms have concluded that the litigation risk of the plaintiff’s bar claiming that education was really advice is too great in a one-on-one conversation setting. Thus, it seems inevitable that education will suffer.

<sup>12</sup> Comments on a Review of a White House Report on Conflicted Investment Advice, August 21, 2015, Advanced Analytical Consulting Group, which can be found here: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/proposed-regulations/1210-AB32-2/comments-on-a-review-of-a-white-house-report-on-conflicted-investment-advice.pdf>

<sup>13</sup> See <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01396.pdf>

proposed delaying all the affected provisions, including the Exemptions which amended PTE 86-128, PTE 77-4 and PTE 75-1.

#### Delay Should Include an Extension of Temporary Enforcement Policy

In Field Assistance Bulletin No. 2017-02, the Department announced that “during the phased implementation period ending on January 1, 2018, the Department will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions.” The Department also noted that “[t]o the extent that circumstances surrounding the applicability date of the fiduciary duty rule and exemptions give rise to the need for other temporary relief, EBSA will consider taking such additional steps as necessary.”

The Department should extend this temporary enforcement policy so that it continues to apply for at least 12 months beyond the end date of any extension of the January 1, 2018 transition period. In addition, the Department should coordinate with the Treasury Department and the IRS to confirm that, for purposes of applying IRS Announcement 2017-4, the extension of the Department’s temporary enforcement policy will constitute “other subsequent related enforcement guidance.” This extension of the temporary enforcement policy is consistent with the Department’s general approach to implementation, which the Department has said “will be marked by an emphasis on assisting (rather than citing violations and imposing penalties on) plans, plan fiduciaries, financial institutions, and others who are working diligently and in good faith to understand and come into compliance with the fiduciary duty rule and exemptions.”

#### Conclusion

We would strongly urge the Department to delay, as soon as possible, the January 1, 2018 date for a minimum of 24 months beyond the Department’s full review of regulatory language and exemptions that constitute the change to the definition of fiduciary.

Sincerely,

A handwritten signature in cursive script, reading "Lisa J. Bleier".

Lisa J. Bleier  
Managing Director & Associate General Counsel