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March 16, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule Examination
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AB79 – Proposed Rule; Extension of Applicability Date

Dear Sir or Madam:

On behalf of a group of firm clients, I am writing today in support of the Department of Labor's ("DOL") proposed delay of the following rules: the new definition of a fiduciary, the new prohibited transaction exemptions, and the modifications of existing exemptions (together referred to here as the "Fiduciary Rule" or "Rule"). The Fiduciary Rule is clearly in need of a review that is only possible with a delay. Without a delay, a rule that is poised to do great harm will be allowed to become applicable.

In fact, the prior Administration's continued portrayal of the core issue as whether advisors are willing to act in the best interest of their clients demonstrates very powerfully how the prior Administration never confronted the key issues in the regulation. The industry has for over six years supported a best interest standard; that has never been the problem with the DOL rule. The key problem has been the "prohibited transaction rules" that would cut off low and middle-income individuals and small businesses from access to personal investment assistance.

By not recognizing the core problem and the risk to low and middle-income individuals, DOL, under the prior Administration, created a deeply flawed Fiduciary Rule that is badly in need of review, because it is already creating the predicted adverse results. In order to perform that review, a delay is needed. (References below in this letter to actions taken by DOL prior to January 20, 2017 refer, of course, to actions taken by the prior Administration.)

We offer ten key points, as discussed in more detail below:

- **Critical to finalize delay by April 10th.** The temporary enforcement relief issued on March 10 was greatly appreciated but it does not apply to private sector lawsuits based on

advice to plans or plan participants, including advice to a plan participant regarding whether to take a distribution or roll over to another plan or IRA. The DOL enforcement relief also does not provide relief with respect to IRA or plan prohibited transaction taxes, which are enforced by the IRS, not DOL. Thus, there is a critical need for the delay to be finalized by April 10th. If it cannot be finalized by April 10th, we would urge DOL to issue an interim final delay to cover the gap period between April 10th and finalization of the proposed delay, as discussed further below.

- **Studies confirm harm to investors.** Two independent studies of the final Fiduciary Rule conclude that the Fiduciary Rule will deprive small accounts of access to personal investment advice, thus strongly supporting the need for a delay to review the rule.
- **The alleged benefits of the Fiduciary Rule, as determined by the prior Administration, have already been shown not to exist, leaving much harm and cost.** A delay is needed to prevent the harm that was not previously recognized in a rushed and politically driven process.
- **Good cause finding required.** Under the Congressional Review Act and the Administrative Procedure Act, it is critical that DOL include in the preamble to the final delay regulation a finding of good cause for having the delay be immediately effective.
- **Rule rushed through for political reasons.** The Fiduciary Rule was rushed through the process expressly for political reasons, which explains why the Rule's adverse effects were never fully considered. This clearly supports the need to review the rule now, which can only be done by delaying the applicability date.
- **Critical information withheld from public.** Information regarding SEC/DOL discussions that was critical to the public's evaluation of the proposal was withheld from the commenting public.
- **DOL ignored SEC, Treasury, and OMB recommendations.** According to a Congressional report that DOL never responded to, DOL consistently ignored recommendations made by the SEC, Treasury, and OMB to improve the Rule.
- **No DOL analysis of applicability date.** The applicability date was never realistic, and DOL performed no economic analysis of its feasibility.
- **Need for grandfathering**. Continued uncertainty is harming individuals, triggering a need for the preamble to the final delay regulation to send a signal that broad grandfathering will be provided.
- **Extension of delay needed for thorough review.** A thorough review will take much longer than 60 days. After the 60-day delay is finalized, we ask that in connection with the broader review of the effects of the rule, the delay be extended by at least 180 days. A corresponding 180-day extension is needed with respect to the end of the transition period, i.e., the period from April 10, 2017 through December 31, 2017 during which the Best Interest Contract Exemption ("BICE") can be satisfied in a simpler manner.

I. Critical to finalize delay by April 10th.

The temporary enforcement relief issued on March 10 was greatly appreciated but it does not apply to private sector lawsuits based on advice to plans or plan participants, including advice to a plan participant regarding whether to take a distribution or roll over to another plan or

IRA. The DOL enforcement relief also does not provide relief with respect to IRA or plan prohibited transaction taxes, which are enforced by the IRS, not DOL.

If the delay is not finalized by April 10th, all advice to plans, plan participants, and IRAs will be effectively subject to the Fiduciary Rule and to sanctions for noncompliance. In short, there is a critical need for the delay to be finalized by April 10th.

If, on the other hand, DOL determines that it is not likely to be able to finalize the delay by April 10th, it then becomes essential for DOL to issue a short-term interim final rule delaying the applicability date by just enough time to enable DOL to finalize the proposed delay. In other words, assume, for example, that, after the comment period ends on March 17th, DOL projects that it will not be able to finalize the proposed delay until around April 17th. In that case, it is essential that DOL immediately take steps to issue, by April 10th, an interim final rule delaying the applicability date from April 10th to April 17th, or a few days later than April 17th in case finalization of the proposal is delayed a few days.

Ideally, this interim final rule can be sent to OMB for review no later than March 31st to give the public advance notice that DOL has a back-up plan to deal with the possibility that the proposed delay cannot be finalized until after April 10th. (The advance notice would consist of the interim final rule being listed on OIRA's website as having been received for review.) This advance notice could be extremely valuable in avoiding the need to comply with a rule about to be delayed; thus, the advance notice could prevent a huge amount of investor confusion and cost, especially at such a busy time for individuals (including the due date for taxes).

There is clear legal support for using an interim final rule in exactly this type of situation. Under 5 U.S.C. §553(b) of the Administrative Procedure Act ("APA"), it is permissible to issue a rule without notice and comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." If DOL determines that it is impracticable to finalize the 60-day delay by April 10th, then by definition it is impracticable to rely on the notice and comment process, making use of an interim final rule permissible under the APA.

II. Two independent studies of the final Fiduciary Rule conclude that the Fiduciary Rule will deprive small accounts of access to personal investment advice, thus strongly supporting the need for a delay to review the rule.

Two major studies of the effects of the final regulation demonstrate very powerfully the errors in DOL's prior economic analysis. One study was conducted by CoreData Research UK, which is the London unit of a global financial services research and strategy consultancy. CoreData Research UK issued a ***non-commissioned report***, based on an October 2016 survey of 552 U.S. financial advisors. Here are key conclusions of the study:

- **71% of advisors will cut off advice to many small clients**. "The fiduciary rule could result in mass market investors being left out in the cold, creating the prospect of an advice gap. ***Seven in ten (71%) financial advisors will disengage with at least some***

mass-market investors because of the DOL's rule. These advisors estimate they will disengage with an average of 25% of their mass market clients." (emphasis added)

  - For purposes of the report, mass- market investors are defined as investors with less than $300,000 in net investable assets. In my view, this underscores the depth of the problem with the Fiduciary Rule. For the truly small accounts, like those under $25,000, the result may be that almost none of the 71% will provide services.

- **"Most" investors could find advice too expensive**. "Meanwhile, the cost of advice is expected to increase and be passed on to investors. ***Nearly four in ten (39%) advisors believe the cost of personal financial advice will become too expensive for most investors***." (emphasis added)
- **With the threat of retirees outliving their retirement savings, annuity sales will be very adversely affected.** "About a third (32%) believe shifting away from certain products, such as annuities and non-traded REITs, is one of the biggest challenges posed by the fiduciary rule."
- **More paperwork and more litigation.** "A majority (57%) believe increased paperwork stemming from reporting and disclosure requirements will be one of the top three challenges of the fiduciary rule. . . . Advisors are also in a heightened state of readiness for a potential rise in lawsuits related to the fiduciary rule. Nearly two in 10 advisors (18%) believe preparing for potential litigation will be one of the biggest challenges they must overcome."

In October of 2016, A.T. Kearney, a global management consultant, published a study of the effects of the fiduciary rule, in connection with a discussion of how Kearney can help financial institutions adjust to the rule. The study was not structured to influence rulemaking in any way, but rather was structured to identify the effects of the rule and to offer strategies to deal with those effects.

Here is a key excerpt from the Kearney study:

"The rule will usher in several key shifts that industry players must understand to position themselves effectively for the future. . . .

- Certain high-cost investment products (such as variable annuities) will be phased out as the business model is no longer viable under the new rule. . . .
- As firms move toward fee-based advisory, many low-balance accounts will no longer be served, shifting many assets to formats such as robo-advice and self-directed."

The study recommends that the broker/dealers should: **"Accelerate the transition to fee-based services and advisory, and evaluate account thresholds to continue to serving (for example, accounts greater than $200,000)."** Thus, we have a management consultant recommending consideration be given to ceasing to provide personalized advice to accounts under, for example, $200,000, due to the fiduciary rule.

These are very serious concerns that confirm the fears of the financial services industry and directly contradict DOL's earlier analysis of the Fiduciary Rule. The findings by CoreData and Kearney support the need to revisit the Fiduciary Rule to ensure that great harm is not done to investors who will lose access to personal advice, pay far more for advice, lose access to protection against outliving their retirement savings, and pay for increased paperwork and litigation.

III. The alleged benefits of the Fiduciary Rule, as determined by the prior Administration, have already been shown not to exist, leaving much harm and cost. A delay is needed to prevent the harm that was not previously recognized in a rushed and politically driven process.

DOL's prior economic analysis concluded that the Fiduciary Rule will produce significant benefits. The question asked in the preamble to the proposed delay is generally whether it is valid to assume that a delay will cause these significant benefits to be lost during the period of delay.

The benefits of the Fiduciary Rule identified in DOL's prior economic analysis were illusory and the harms were overlooked. Thus, in the short term, the delay will prevent those harms for the period of delay; in the long term, the delay will facilitate a review that can eliminate those harms permanently.

Facts have already shown DOL's prior economic analysis was simply wrong. Here are clear examples of that point:

- **DOL economic analysis (page 312):** "the Department believes that quality, affordable advisory services will be amply available to small plans and investors under the final rule and exemptions."
- **Actual results:** As noted, an independent study has found that over 70% of advisors will cease providing services to many small investors.
- **DOL economic analysis (page 313):** "revisions to the 2015 Proposal reflected in the Best Interest Contract Exemption will reduce compliance costs and thereby help make advice affordable to small investors."
- **Actual results.** As noted, an independent study has found that almost 40% of advisors believe that ***most*** investors will be priced out of the advice market because of the Fiduciary Rule.

As discussed below in this letter, the development of the Fiduciary Rule was the product of a rushed and politically driven process. So we should not be relying on predictive analysis offered by the prior Administration. We need to be asking whether, in light of everything we now know, the Fiduciary Rule is causing more harm than good. There is clear evidence in the independent studies cited above that this is the case. A delay is needed to further explore this critical question in light of the new facts.

IV. It is critical that DOL include in the final delay document a finding of good cause for having the delay be immediately effective.

The proposed 60-day delay was found in the preamble to the delay proposal to be an economically significant regulatory action "because it would likely have an effect on the economy of $100 million in at least one year." This same finding would appear to make the proposed delay a "major rule" under the Congressional Review Act ("CRA"). See 5 U.S.C. § 804(2). If the delay is a major rule, the CRA generally states that the rule cannot be effective for at least 60 days after publication as a final rule in the Federal Register. See 5 U.S.C. § 801(a)(3)(A). There are, however, key exceptions to the 60-day rule that would permit a major rule to be effective on publication.

Under the section 808(2) of the CRA, the 60-day rule can be overridden by an agency if the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." There is clear precedent for using this exception in the context of a final rule.[1] However, in order to use this exception, DOL needs to incorporate the good cause finding in the delay document, as was done in the HHS document cited.

Under section 553(d) of the Administrative Procedure Act ("APA"), a substantive regulation generally cannot be effective until 30 days after publication, subject to certain exceptions, two of which are listed below. (There are questions regarding whether a delay is a substantive regulation, but we assume here that it is.)

- Under APA section 553(d)(1), the 30-day delay does not apply to substantive regulations that provide an "exemption or relieve a restriction," both of which the delay would do.
- Under APA section 553(d)(3), the 30-day delay also does not apply if the agency finds good cause for not having a delay and publishes that finding of good cause.

To be safe, we recommend that DOL publish a finding of good cause under section 553(d)(3) of the APA.

In this case, a finding of good cause under both the CRA and the APA would be based on the disruption and harm that would be caused by having the Fiduciary Rule apply for a brief period prior to the effective date of the delay, especially since the purpose of the delay would be to reevaluate the Fiduciary Rule to determine if it needs to be modified or withdrawn. This brief period of application prior to the delay would cause enormous confusion among plans, plan participants, and IRA owners, and would impose huge compliance costs that would generally be borne by the same entities.

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[1] See, e.g., 70 Fed. Reg. 58,845 (Oct. 7, 2005) (waiver of 60-day delay in HHS final rule: "We ordinarily provide a 30-day delay in the effective date of the provisions of a rule in accordance with the Administrative Procedure Act (APA) (5 U.S.C. 553(d)), which requires a 30-day delayed effective date. The Congressional Review Act (5 U.S.C. 801(a)(3)), requires a 60-day delayed effective date for major rules. As stated in our regulatory impact analysis below, we believe this is a major rule. However, we can waive the delay in effective date if the Secretary finds, for good cause, that such delay is impracticable, unnecessary, or contrary to public interest, and incorporates a statement of the finding and the reasons in the rule issued. 5 U.S.C. 553(d)(3); 5 U.S.C. 808(2).").

V. The Fiduciary Rule was rushed through the process expressly for political reasons, which explains why the Rule's adverse effects were never fully considered. This clearly supports the need to review the rule now, which can only be done by delaying the applicability date.

Supporters of the Fiduciary Rule argue that the Rule was the product of six years of study and discussion, and that there is no reason to further study it. This view is factually incorrect.

The Fiduciary Rule was first proposed in October of 2010. However, the initial proposal was so woefully inadequate that it had to be withdrawn. In fact, ***the omissions from the 2010 proposal were so striking that the industry did not have a meaningful ability to engage on the core issues until April of 2015.*** For example:

- **No prohibited transaction relief was proposed in 2010**. This left the industry without any opportunity to consider proposed relief until April of 2015. This relief has always been the most important aspect of the Fiduciary Rule, so the statement that the issue has been discussed and studied for six years is simply incorrect.
- **DOL performed no economic analysis of the effect of the Rule on IRAs.** There is no question that the most significant effects of the Rule will apply to IRAs, yet the 2010 proposal offered absolutely no analysis of these effects. Again, this left the industry with nothing to respond to until April of 2015.
- **DOL did not propose treating salespersons as fiduciaries until April of 2015.** The 2010 proposal very appropriately treated salespersons as salespersons, not fiduciaries. It was not until April of 2015 that DOL first took the stunning position that selling is advising.
- **The 2010 proposal generally asked for comments on whether rollover advice should be fiduciary advice, but did not provide a proposal.** Thus, again, the industry's first opportunity to respond to a proposal was in April of 2015.

So the correct view of this process is that there was not a public dialogue on many key issues until April of 2015. From then on, the process was extraordinarily rushed by a Secretary of Labor who publicly stated that he had a deadline to meet, i.e., the date that President Obama left office. So the need to get the Rule right was apparently not his concern. His concern was meeting a political deadline.

- **Secretary Perez made it clear that finishing the rule was more important than getting it right.**
  - On August 7, 2017, Secretary Perez sent a letter to Congresswoman Wagner in response to the letter she and other Representatives had sent recently asking for a re-proposal. Secretary Perez states in his letter that "we will move forward towards issuing a Final Rule that balances the input we have received." What is most striking about the Perez letter is that it was sent before the DOL hearing on the April 2015 proposal started. Secretary Perez made the decision to go straight to a final rule before listening to the testimony presented at the hearing.

- A BNA article quoted Secretary Perez as saying on June 23, 2015: "Completing this rule is one of the single most important things we can accomplish in the remaining 577 days. I've got a note on my desk: 577 days until the weekend, Jan. 20, 2017."

VI. Information regarding SEC/DOL discussions that was critical to the public's evaluation of the proposal was withheld from the commenting public.

In a letter to then-House Education and the Workforce Committee Chairman John Kline (R-MN) and then-Subcommittee Chairman Phil Roe (R-TN), Secretary Perez stated that:

> the Department has consulted extensively with SEC staff on the draft proposal. . . . The SEC staff provided technical assistance on the Department's proposal, including the regulatory impact analysis. The Department has made numerous changes in response to observations and issues raised by SEC staff . . . .

No aspect of those substantive discussions was made available to the public during the comment process, despite repeated requests by Members of Congress. The views of the SEC, which has great expertise regarding the regulation of financial services, were very relevant to the notice and comment period regarding the proposal. Yet these views were unavailable to those commenting on the proposal. The unavailability of potentially important information was a serious flaw in the process here, depriving the commenting public of needed information. This further underscores the need for a delay to enable DOL to further review the Fiduciary Rule.

VII. According to a Congressional report that DOL never responded to, DOL consistently ignored recommendations made by the SEC, Treasury, and OMB to improve the regulation.

Senator Ron Johnson (R-WI) long sought documents from DOL and the SEC documenting the coordination that was said to have occurred regarding the fiduciary rule. Senator Johnson was able to obtain some documents, but still others were not turned over. Based on the documents that were turned over, Senator Johnson prepared a report, which very powerfully shows that DOL rejected comments from the SEC, Treasury, and OMB. ***Moreover, the report shows very clearly that the SEC raised some of the key concerns that the industry has raised – such as concerns that the rule will cut off access to advice.***

The report documents the following disturbing points:

- **DOL has refused to turn over what must be extremely damaging material.** As shown below, DOL consistently rejected much input from the SEC, Treasury, and OMB. And this is only based on the material that was turned over to Senator Johnson. ***DOL steadfastly refused to turn over what must be the damaging communications among the agencies, without any claim of privilege.***

- **Urging SEC not to cooperate.** ***DOL urged the SEC not to cooperate with Congressional requests for information about the SEC's comments on the fiduciary project.***
- **Inaccurate statement regarding DOL/White House communications.** ***DOL told Senator Johnson's office that there were no documented communications between the White House and DOL on the fiduciary rule, yet Senator Johnson's office obtained such documents from the SEC.***
- **More than half of SEC's 26 comments unheeded.** Career, non-partisan SEC staff identified at least 26 items of concern related to the substantive content of the proposed rule. As discussed in the report, DOL rejected or failed to implement 14 of those comments, more than half.
- **SEC's concerns about DOL cutting off access to advice unheeded.** SEC e-mail to DOL: "[W]e continue to believe that commenters are likely to raise concerns that the proposal may result in reduced pricing options, ***rising costs and limited access to investment advice, particularly for retail investors***. Commenters also may express concerns that broker-dealers, as a practical matter, may be unlikely to use the exemptions provided and ***may stop providing services*** because of the number of conditions imposed, likely compliance costs, and lack of clarity around several provisions." (emphasis added)
- **More SEC concerns about cutting off access rejected.** ***DOL did not follow SEC's recommendation "that the Labor Department analyze the costs and risks associated with the possibility that the rule could decrease the availability of investment advice and could drive firms to switch to registered investment advisor models from broker-dealer models."***
- **DOL expressly rejected SEC's request to examine the costs and benefits of alternative approaches.** Such an examination is required by Executive Orders.
- **Treasury's concern about regulating IRAs was rejected.** As stated in the report, "Treasury officials voiced concerns that the Labor Department's proposal, by attempting to regulate IRAs through the proposed rule, 'fl[ies] in the face of logic' and was contrary to Congressional intent."
- **DOL admits that they had to figure out a way to justify the regulation economically.** As stated in the report, "[t]he Administration was predetermined to regulate the industry and sought evidence to justify its preferred action. In emails to senior White House advisors, a Labor Department official wrote of the **'challenges in completing the [regulatory impact analysis]'** and of the need to find literature and data that **'can be woven together to demonstrate that there is a market failure and to monetize the potential benefits of fixing it.'** In another email, a Labor Department official discussed **'building the case for why the rule is necessary.'"**
- **E-mails from DOL employee harshly rejecting input from the SEC.** DOL employee: "***Well, I hate to break it to you, but you're wrong.... We have now gone far beyond the point where your input was helpful to me.... If you have nothing new to bring up, please stop emailing me.***" The SEC staffer responded: "***I am now also utterly confused as to what the purpose of the proposed DOL rule is*** . . . ." (emphasis added)
- **SEC: DOL rule's required disclosures "have very little economic meaning and thus no value to consumers."**

The Johnson report draws a very clear picture of an agency determined to complete a regulation on a political schedule established by the Secretary, without regard to whether the regulation reflected the input of experts and could have adverse effects. This is even further evidence of the need to revisit the rule during a period of much needed delay.

VIII. The applicability date was never realistic, and DOL performed no economic analysis of its feasibility.

The Fiduciary Rule provided 12 months from the issuance of the Rule to the Applicability Date. ***That is 12 months to restructure an entire multi-trillion dollar industry that includes the hard-earned savings of Americans across the country.*** That is 12 months to analyze and understand lengthy final regulations and exemptions, make business decisions that affect the entire retirement business, restructure that business, revise compensation packages and structures for advisors, renegotiate fee arrangements, design and implement company policies and procedures, and create and modify systems to produce an unprecedented amount of new data. That would take years; 12 months was never realistic.

But here is the most shocking element of the applicability date. ***DOL performed no economic analysis of whether a 12 month period was realistic. Absolutely none.*** There is an assumption that DOL's lengthy economic analysis must have examined every issue. To the contrary, here is DOL's entire analysis of the feasibility of a 12-month period to comply: "The Department believes that an applicability date that is 12 months after the date of publication provides adequate time for plans and their affected financial services and other service providers to adjust to the basis change from non-fiduciary to fiduciary status."

This stunning lack of analysis is justification alone for a delay in the applicability date.

IX. Continued uncertainty is harming individuals, triggering a need for the preamble to the final delay regulation to send a signal that broad grandfathering will be provided.

The looming Fiduciary Rule is causing great harm already. Advisors are hesitant to make recommendations for fear that such recommendations will later trigger fiduciary obligations and prohibited transaction problems. This is depriving many investors of needed help, especially with respect to variable annuities, which, as noted in the CoreData and Kearney studies, are particularly hurt by the Fiduciary Rule.

While the public policy discussion goes on, we ask DOL to consider sending a strong signal in the preamble to the final delay regulations that it is considering a much broader grandfather rule that would fully protect transactions entered into prior to any future applicability date, including future advice regarding any assets acquired prior to that date. This signal should indicate that neither the Fiduciary Rule, nor any potential successor rule, will apply to advice given, or transactions entered into, during the pendency of the delay. Otherwise, the adverse impacts of the Rule will continue to harm investors while the Rule's effect on the goals of the Administration is under review.

X. Extension of delay needed for thorough review.

In light of the very large number of issues involved in the upcoming comment process, a thorough review of the Fiduciary Rule will take much longer than 60 days. We support an immediate finalization of the 60-day delay, as discussed above. After the 60-day delay is finalized, we ask that in connection with the broader review of the effects of the rule, the delay be extended by a substantial period, e.g., at least 180 days.

It took several years to prepare the 2015 economic analysis of the proposed Fiduciary Rule. A careful review of the new circumstances, including the adverse effects of the Rule described above, will take an extended period of time. It is critical for retirement savers across the country to get this right.

A corresponding extension is needed with respect to the end of the transition period, i.e., the period from April 10, 2017 through December 31, 2017 during which the Best Interest Contract Exemption ("BICE") can be satisfied in a simpler manner. If the April 10th applicability date is extended by an additional 180 days, for example, the end of the transition period should be delayed 240 days, so that the time between the applicability date of the Fiduciary Rule and the applicability date of the full BICE requirements is the same as it was under the original Fiduciary Rule.

Thank you for your consideration of the views expressed in this letter.

Sincerely,

Kent A. Mason