July 21, 2017

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

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions – RIN 1210-AB82 - 82 Fed. Reg. 31278 (July 6, 2017) ("Release")

Dear Madam/Sir:

We[1] are writing to express our strong opposition to any further delay in the full implementation of the Department of Labor's ("DOL") fiduciary duty rule ("Rule") and accompanying exemptions, including the Best Interest Contract Exemption ("BICE"). Collectively, these reforms are essential to ensure that financial advisers are no longer permitted to saddle American workers and retirees with poor investments that line the pockets of advisers with high fees and commissions at a cost of tens of billions of dollars a year in lost retirement savings.

In light of the extensive rulemaking record developed by the DOL, the well-designed provisions of the Rule and the exemptions resulting from that process, and recent events showing that the Rule is in fact eminently workable for industry, there is no basis for any further delay, alteration, or repeal of the Rule.

In fact, it would be arbitrary and capricious, and subject to legal challenge, if the DOL were to deprive millions of American workers and retirees of the full array of protections and remedies set forth in the Rule and the exemptions simply because the DOL **may** someday

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

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conclude that adjustments to the Rule are appropriate, or because **some** members of industry claim they need more time to develop new products so they can more profitably navigate the Rule. Conflicts of interest among advisers to retirement savers must be eradicated to the maximum extent possible while these processes—wherever they may lead—unfold.

SUMMARY OF COMMENTS

In this comment letter, we first review the context, from the extensive rulemaking process to the decisive court decisions, and we recapitulate the long list of economic, legal, policy, and procedural reasons why the Rule and the exemptions should be allowed to go into full effect as soon as possible.

Second, we review the significant harm that delay will cause to retirement savers if the January 1st deadline is pushed back. In that event, retirement savers—and most importantly, IRA owners—will lose the benefit of the strongest compliance incentives in the Rule as well as the most effective means of redress for violations of the Rule, actions for breach of contract. Driving home the point, multiple courts have considered a host of legal attacks on the Rule and the exemptions, and they have rejected not only every substantive legal challenge but also every attempt to delay the rule while the litigation and related appeals play out. As those courts have repeatedly held, delay is not in the public interest.

Third and finally, we highlight the lack of any valid reason for further delay of the January 1st compliance deadline. Even though the DOL may have an obligation to re-examine the Rule as a result of President Trump's memorandum,[2] nothing in that memorandum or in the Release justifies delaying any aspect of the Rule or the exemptions **pending** that re-examination. Nor is it necessary or appropriate to afford more time—following an already generous delayed implementation date—to the members of industry who would prefer to finish developing new products, such as clean shares, that would enable them to more easily and profitably comply with the BICE. They have had ample time to prepare for implementation of the BICE, and any further accommodation to them in the form of delay would come at the expense of retirement savers.

In short, it would be arbitrary and capricious for the DOL to deprive millions of American workers and retirees the full protections and remedies provided by the Rule and the exemptions simply because the DOL may conclude that some adjustments to the Rule would be appropriate, or because some members of industry claim they need additional time to develop new products to help them more profitably navigate the Rule and the exemptions.

2 *See* Presidential Memorandum, 82 Fed. Reg. 9675 (Feb. 3, 2017).

I. Context: Every economic, legal, policy, and procedural consideration bearing on the Rule supports its full implementation in accordance with the original applicability dates.

The re-examination of the Rule ordered by President Trump is actually an indefensible pretext for suspending its implementation and contriving new but imaginary problems to justify either outright repeal or significant dilution of the Rule. In reality, the Rule is an extraordinarily important and carefully crafted measure that warrants no re-examination, no amendment, and no additional delay of any duration whatsoever. Remember the following facts:

A. **The basic principles underlying the Rule are time-honored and undeniably appropriate for anyone purporting to be a financial adviser.** The Rule requires all financial advisers to give advice about retirement assets that is in their clients' best interest. And the BICE simply affords relief to advisers, at their option, subject to sensible conditions that protect retirement savers, deter violations, and afford savers a meaningful remedy for violations of the Rule.

B. **The benefits of the Rule are enormous, dwarfing its costs.** The Rule will confer huge benefits on the American people, far outweighing its costs to the relatively narrow segment of the regulated industry so desperately opposed to it. Without the Rule in place, American workers and retirees will continue to lose tens of billions of dollars every year in hard-earned savings. That estimate is extremely conservative, as it reflects losses just from conflicted mutual fund recommendations to IRA owners, without accounting for the harm to 401(k) accountholders arising from other conflicts of interest and other investment products.

C. **The Rule helps resolve the larger retirement crisis our country faces.** The retirement outlook for many Americans is bleak.[3] Every day, 10,000 Baby Boomers turn 65, but the majority of them lack sufficient savings for retirement. If financial advisers incentivized by conflicts of interest are allowed to continue bleeding off a large portion of their clients' retirement savings, without facing meaningful consequences, then the prospects for a secure, dignified, and independent retirement will continue to fade for too many Americans.

D. **The Rule fulfills the letter and spirit of ERISA and removes a material conflict between the old rule and the statute.** The original DOL rule, promulgated in 1975, was riddled with loopholes and almost never enforceable. And it deviated substantially from the plain language of ERISA and its underlying remedial purposes. As numerous courts have recently observed, the new Rule

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3 House Committee on the Education and the Workforce, *Time to Modernize Multiemployer Pension System* (Apr. 29, 2015), *available at* http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=398799

eliminates these conflicts with ERISA and much more effectively serves its remedial purposes.

E. **The rulemaking process was extraordinarily thorough and inclusive**. The Rule resulted from one of the most lengthy, data-driven, and open rulemakings in history. It included years of consultation with industry and public interest stakeholders; a robust economic analysis detailing the costs and benefits of the Rule; over 100 days of public comment; the consideration of over 3000 comment letters and 30 petitions containing over 300,000 submissions; and four full days of hearings at which over 75 speakers testified. The comments received and carefully reviewed by the DOL came from a broad spectrum of stakeholders, including consumer groups, plan sponsors, financial service companies, academics, elected government officials, trade and industry associations, and others. In light of this extensive process, it is incredible to suggest that only a year after being issued, the Rule requires re-examination, amendment, or further delay.

F. **The DOL generously accommodated the industry in the final Rule by granting discretionary exemptions and affording ample time to comply.** The final Rule reflected significant accommodations to industry. For example, ERISA actually prohibits the conflicts of interest that arise from adviser recommendations incentivized by the prospect of commission payments. However, rather than banning commission payments outright, the DOL fashioned a new exemption allowing such commission-based sales to continue, provided advisers adhere to the fiduciary standard and comply with other requirements. Moreover, the DOL provided ample time for the industry to comply, allowing a full year before the core requirements of the Rule would take effect, and an additional 8 months, until January 1, 2018, of a grace period before the requirements would become fully applicable.

G. **The Rule has been upheld by every court to consider it.** The Rule has survived fully intact after a series of court challenges advancing a wide range of legal theories. Every one of the three federal district courts to reach the merits has rejected all of the legal attacks advanced by the industry plaintiffs and their trade association representatives. On three separate occasions, those district courts, along with one federal appellate court, have also rejected attempts to enjoin the Rule pending litigation or appeal. In the words of the United States District Court for the District of Kansas in the *Market Synergy* case, "Any injunction will produce a public harm that outweighs any harm that plaintiff may sustain from a rule change."[4]

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[4] *See Chamber of Commerce v. U.S. Dep't of Labor,* No. 17-10238, 2017 WL 1284187 (5th Cir. Apr. 5, 2017) ("*Chamber III*") (denying appellants' motion for injunction pending appeal and for expedited appeal); *Chamber of Commerce v. Hugler*, No. 3:16-cv-1476-M, 2017 WL 1062444 (N.D. Tex. Mar. 20, 2017) (*"Chamber II*") (denying appellants' motion for injunction pending appeal); *Mkt. Synergy Grp., Inc. v.*

H. **The Rule has won widespread support, even among some industry segments.** The Rule has received strong support from a broad swath of organizations representing the country's workers and retirees, including the AARP and the AFL-CIO, as well as many members of Congress. And large segments of the financial services industry either already operate under the fiduciary standard or are prepared to embrace the Rule and to ensure that their advisers provide advice that is solely in their clients' best interest.

I. **Recent events show that the Rule is eminently workable.** Major sectors of the adviser industry have, through their public statements, advertisements, and actions, clearly indicated that the Rule is eminently workable and in fact, good for business. Some firms are planning to maintain commission-based accounts, in conformity with the Rule. Some are shifting to fee-based accounts, while reducing account minimums and fees so they can serve even the most modest retirement savings. Some are simply reducing their fee and cost structures on existing products to be more competitive. In addition, firms are evolving new product lines that will enhance the role of commission-based accounts under the Rule. These include new classes of mutual fund shares that reduce loads and help minimize conflicts of interest in compensation structures. And even in the litigation challenging the Rule, affidavits from some members of the insurance industry conceded that insurance firms and Independent Marketing Organizations ("IMOs") were taking steps to comply with the Rule. Plainly, the industry will adapt, and retirement savers will benefit from ample access to vastly better investment advice.

Clearly, there is no basis for delaying the Rule or the exemptions. And it would be especially misguided to do so simply because some advisory firms would prefer to avoid their compliance obligations until they have in place the product line they view as optimal. Conflicts of interest among financial advisers serving retirement savers should be eradicated to the maximum extent possible while the DOL evaluates possible amendments and while some in the industry explore a re-design of their investment offerings.

U.S. Dep't of Labor, No. 16-CV-4083-DDC-KGS, 2017 WL 661592 (D. Kan. Feb. 17, 2017) ("*Market Synergy II"*) (granting summary judgment to the Department of Labor); *Chamber of Commerce v. Hugler*, No. 3:16-cv-1476-M, 2017 WL 514424 (N.D. Tex. Feb. 8, 2017) (*"Chamber*") (granting summary judgment to the Department of Labor); *Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, No. 16-CV-4083-DDC-KGS, 2016 WL 6948061 (D. Kan. Nov. 28, 2016) ("*Market Synergy I*") (denying plaintiff's motion for preliminary injunction); *Nat'l Ass'n for Fixed Annuities v.* Perez, 219 F. Supp. 3d 10 (D.D.C. Nov. 23, 2016) ("NAFA II") (granting motion for expedited ruling and denying plaintiff's motion for preliminary injunction); *Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1 (D.D.C. Nov. 4, 2016) ("*NAFA I*") (granting summary judgment to the Department of Labor).

II. <u>Postponing the January 1st compliance date will harm retirement savers.</u>

In accordance with the original Rule release, as amended by the April 7, 2017 delay rule, the new exemptions and the amendments to previously granted exemptions are currently available to advisers subject only to compliance with the Impartial Conduct Standards (along with the core provisions of the Rule). Those standards generally require advisers to render advice in retirement savers' best interest, charge no more than reasonable compensation, and avoid misleading statements.

Held in abeyance until January 1st are the remaining and all-important conditions for reliance on the exemptions. For example, with respect to the BICE, advisers are not yet required to enter an enforceable written contract with IRA owners, acknowledge fiduciary status, implement policies and procedures reasonably and prudently designed to prevent violations of the Impartial Conduct Standards, refrain from giving or using incentives for advisers to act contrary to the customer's best interests, and fairly disclose the fees, compensation, and material conflicts of interest associated with their recommendations.

Until those additional requirements become effective on January 1st, there will be at least three major gaps in the Rule reforms. First, retirement savers will have fewer protections, since, for example, adviser policies and procedures on compliance with the Impartial Conduct Standards will not be required, and the use of incentives that generate powerful conflicts of interest will not be adequately curbed. Moreover, retirement savers will not have the benefit of the more complete disclosures regarding adviser fees and conflicts of interest. Second, millions of IRA owners in particular will lack the ability to enforce their advisers' written contractual commitments under the Rule and the BICE. They will have little recourse in the event their advisers violate the Rule and drain precious savings from their retirement accounts. Third and finally, advisers will have much weaker incentives to comply with the Rule, since they will not face claims from their clients who have been wronged.

It is therefore imperative that the full array of protections goes into effect on January 1, 2018, and no later. If the Rule and the exemptions are not fully implemented on that date, the net effect will be a continued flow of conflicted advice to retirement savers, the continued depletion of retirement savings, and the continued degradation in the quality of life for millions of workers and retirees who can ill-afford to lose any portion of their hard-earned savings to the bloated fees and commissions that so often come with conflicted advice.

The recent court decisions uniformly rejecting attempts to delay the Rule and the exemptions provide more powerful evidence that delay of the January 1st compliance deadline would be incompatible with the public interest.

Three courts have recently rejected attempts to enjoin the Rule pending litigation or appeal, holding that the harm to investors from a delay in implementation would far exceed the benefits to the complaining industry. For example, in *Market Synergy I*, the Kansas federal district court concluded that "**Any injunction will produce a public harm that outweighs any harm that plaintiff may sustain from a rule change.**"[5] The court went on to emphasize the absence of any basis in the administrative record for questioning the DOL's conclusion that the Rule would produce valuable net benefits:

> The DOL has determined that the rule changes will benefit retirement investors throughout the United States by requiring investment advisers to act in the best interest of those investors. Congress authorized the DOL to evaluate these competing interests and it has concluded that significant public interests favor the proposed regulatory changes. **As already explained, evidence in the administrative record supports the DOL's determination and the court finds no basis for contradicting those findings**."[6]

In *NAFA I*, the D.C. district court squarely rejected all of the plaintiff's claims against the Rule. The plaintiff then sought a stay pending appeal, and the court rejected that request as well in *NAFA II*, with a special focus on the need to ensure that the "core protections" in the Rule go into effect without further delay:

> Second, this [is] not a case in which other interested parties or the public will suffer "little if any harm" if the new rules are enjoined pending appeal. The fundamental premise of the challenged rules is that those who provide investment advice to ERISA plans and IRAs on a commission basis have a conflict of interest that, absent further protections, the plan and IRA owners who they advise will suffer economic losses. It was for this reason that the [DOL] rejected requests—similar to the request that NAFA now makes—that the transition period extend over a period of two to three years. [citations omitted] Although the Department did agree that certain requirements would not take effect until January 1, 2018, it required that "certain core protections"—most notably, the requirement that financial institutions and advisers abide by the duties of prudence and loyalty—go into effect on April 20, 2017, in order to address "concerns about ongoing harm to [r]etirement [i]nvestors."[7]

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5 *Market Synergy I* at *30 (emphasis added).
6 *Id.* (emphasis added).
7 *NAFA II,* 219 F. Supp. 3d at 14.

The court in *Chamber II* also rejected the plaintiffs' attempt to obtain an injunction pending appeal, relying in part on a finding that the public interest would not favor such relief. As the court explained:

> The premise of the DOL's rules are that those who provide investment advice to ERISA and IRA plans have conflicts of interest, and absent further protection, the public will be harmed. During the rulemaking, the DOL concluded that consumers needed protections from conflicted advice with respect to fixed indexed and variable annuities due to their complexity and risks. The Court found that the DOL acted reasonably in so concluding. In the Court's view, Plaintiffs have not provided significant evidence in contravention of the DOL's reasonable conclusions. . . ."[8]

And most recently, on April 5, 2017, the United States Court of Appeals for the Fifth Circuit summarily denied the plaintiffs' emergency motion for an injunction pending appeal, and it further denied their alternative motion to expedite the appeal.[9] The matter is not a close call, and further delay of the Rule, the Impartial Conduct Standards, or the Prohibited Transaction Exemptions ("PTE") cannot be justified.

III. <u>There is no valid reason for delay.</u>

The Release suggests that an unspecified delay of the January 1st deadline may be appropriate to allow more time for (1) the DOL to consider possible "additional exemption approaches or changes to" the Rule, and (2) for some members of the industry to develop new products, such as "clean shares" or "fee-based annuities," which would enable them to more efficiently address conflicts of interest.[10]

Neither of these rationales can justify any delay in the January 1st applicability date for the remaining requirements of the Rule and the exemptions. The DOL's ongoing review of the Rule and consideration of possible changes certainly provide no basis, since (1) the Rule and the exemptions are on their face reasonable, appropriate, and effective in addressing the serious problem of adviser conflicts of interest; (2) they resulted from an extraordinarily thorough rulemaking process during which all reasonable alternative approaches were considered; (3) the courts, without exception, have expressly held that the Rule and the exemptions should go into effect; and (4) retirement savers—IRA owners most notably among them—will suffer significant harm without full implementation of the protections scheduled to take effect on January 1st. Against this backdrop, the pendency of the Rule review ordered by the President simply does not warrant any delay in full implementation of the Rule and the exemptions. While that wholly unnecessary review

8 *Chamber II* at *7.
9 *Chamber III,* at *1.
10 Release at 31279.

proceeds, retirement savers should have the full benefit of the protections that have been groomed for years and are now ready to go into effect.

The argument for accommodating industry's "product development" timeline is just as thin. The Rule and the exemptions were published in final form on April 8, 2016, over a year ago, with a full year of lead time until April 10, 2017, to come into compliance. The DOL further provided a grace period, extending, for example, the compliance deadline for some of the BICE requirements to January 1, 2018. Then on April 7, 2017, the DOL extended the applicability date of the core provisions of the Rule for 60 more days, until June 9, 2017, and pushed back the applicability dates of the BICE and other exemptions until January 1, 2018. And in yet another effort to accommodate the industry and soften the impact of the Rule and the exemptions, the DOL announced, on May 22nd, a temporary enforcement policy under which the DOL "will not pursue claims against advisers working diligently and in good faith to comply with their fiduciary duties and to meet the conditions of the PTEs."[11] Thus, the industry has already had ample time to prepare for the implementation of the Rule and all of the exemptions, including the BICE.

The only slightly novel contention now in play is the notion that with more time to develop some "innovative" new products, such as clean shares and fee-based annuities, the industry could position itself to comply with the BICE with a minimum of disruption in its business model and with presumably minimal loss of revenues and profits. But that argument misses the fundamental point: The industry has had ample time to prepare for compliance with the Rule and the exemptions with their existing product line. If they find that distasteful and refuse to accept the costs of compliance with the exemptions, then they may forego the types of commission compensation that trigger those requirements in the first place. The solution is **not** to delay application of the Rule and the exemptions and foist continued losses on retirement savers.

The industry is of course free—and indeed encouraged—to explore new products that make compliance with the Rule and the exemptions more manageable. However, that endeavor can hardly justify suspension of important and fully vetted investor protections in the meantime.

11 Release at 31279.

CONCLUSION

Thank you for the opportunity to submit our views.

Sincerely,

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