FINANCIAL SERVICES ROUNDTABLE

VIA http://www.regulations.gov

September 15, 2017

Employee Benefits Security Administration
Suite 400
U.S. Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

Attention: Fiduciary Rule Examination - RIN 1210-AB82

Gentlemen and Ladies:

The Financial Services Roundtable ("FSR")[1] supports the Department of Labor's (the "Department") proposed extension of the transition period from January 1, 2018 to July 1, 2019,[2] for the reasons set forth by the Department as well as other reasons discussed below.[3]

The proposed extension followed the Department's request for information (the "RFI"), which, among other things, solicited comments regarding the possibility of delaying the application of certain conditions (the "Additional Conditions") and regarding the "Impartial Conduct Standards" applicable under the administrative

1 FSR represents the largest integrated financial services companies providing banking, insurance, payment, investment and finance products and services to the American consumer. FSR member companies provide fuel for America's economic engine, accounting for $54 trillion in managed assets, $1.1 trillion in revenue and 2.1 million jobs.

2 82 Federal Register 41,365 (Aug. 31, 2017).

3 *See also*, FSR Comment Letter (July 21, 2017), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00271.pdf.

exemptions (the "Accompanying Exemptions") accompanying the promulgation of the final regulation (the "Rule") [4] defining who is a "fiduciary" under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and section 4975 of the Internal Revenue Code of 1975, as amended (the "Code").

The Department subsequently proposed to extend the transition period, primarily "to give the Department of Labor the time necessary to consider possible changes and alternatives to these exemptions. The Department is particularly concerned that, without a delay in the applicability dates, regulated parties may incur undue expense to comply with conditions or requirements that it ultimately determines to revise or repeal."[5]

FSR members include banks, broker-dealers, insurance companies, investment advisers, and other financial institutions providing products and services to employee benefit plans, individual retirement accounts, and other entities treated as plans for purposes of the Code (collectively, "Retirement Investors").[6] FSR and our members support retirement security and increased incentives and opportunities for Americans to plan, save, and invest to meet their needs in retirement. FSR also supports efforts to educate workers on the need for adequate savings targets and the availability of financial products designed to help them meet their unique needs throughout their retirement. FSR believes the broad availability of retirement savings opportunities is important because savings increase domestic investment, encourages economic growth, and results in higher wages, financial freedom, and a higher standard of living.[7]

FSR supports a best-interest standard being applicable to all persons providing personalized investment advice to retail customers (including non-retirement accounts), which is administered in a coordinated manner by agencies and self-regulatory organizations that serve as front-line regulators of the financial services industry. FSR opposes the Rule, which continues to be challenged in litigation, and some or all of the requirements that are included in the Additional Conditions could be rendered

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4 82 Federal Register 31,278 (July 6, 2017).

5 82 Federal Register 41,365 (Aug. 31, 2017).

6 FSR members also act as distributors, intermediaries, investment managers, product manufacturers, recordkeepers, trustees and custodians in the retirement services marketplace. FSR members provide a broad array of services to Retirement Investors, including (1) asset allocation (among funds or managers); (2) cash sweep; (3) estate planning; (4) financial planning; (5) interactive website tools; and (6) retirement planning.

7 *See also,* OXFORD ECONOMICS, *Another Penny Saved: The Economic Benefits of Higher US Household Saving* at vi (June 2014), *available at* http://www.oxfordeconomics.com/anotherpennysaved (noting that an increase in the nation's saving rate over the next 25 years "would add a discounted $7 trillion to America's economy, equal to about half of today's GDP;" a result that would "generate greater [U.S.] household wealth, [and] better insulate the [U.S.] economy from international capital shocks").

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.[8]

I. Executive Summary

- The current transition period is inadequate.
- Revisions to the Rule and Accompanying Exemptions are necessary.
- Extension of the Transition Period would facilitate the Department's coordination with the Securities and Exchange Commission (the "SEC"), FINRA, and Banking and Insurance Authorities.
- The Department and the Internal Revenue Service (the "Service") should extend their Good Faith Compliance Enforcement Policy.
- Tiering of the Transition Period should not be adopted.
- The Department should adopt a principled-based exemption framework instead of a streamlined exemption for particular products.
- Retirement Investors will be protected by the Impartial Conduct Standards during the extended Transition Period.

II. The Current Transition Period is Inadequate

President Trump directed the Department to re-examine the Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice.[9] FSR believes that the current transition period does not provide the Department adequate time to consider possible additional exemption approaches or changes to the Rule in light of the Presidential Memorandum. The current transition period also does not provide adequate time for entities providing services to Retirement Investors to be able to make necessary or appropriate changes in practices arising as a result of the Department's review of the Rule and the Accompanying Exemptions.

Indeed, we believe the confusion and angst that exists among Retirement Investors is a direct result of the fact that the initial period to implement the material

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[8] Indeed, the Department itself acknowledged in its legal briefing that the PTEs' restrictions on class-litigation waivers, which are among the requirements set to take effect January 1, are improper and should be vacated. Brief for Appellee at 44, 45, 48, Chamber v. Department of Labor (5th Cir. 2017) (no. 17-10238).

[9] 82 Federal Register 9,675 (Feb. 7, 2017) (Presidential Memorandum on Fiduciary Duty Rule).

changes to business practices that were necessary to comply with the Rule was itself inadequate. Despite the Department's efforts to provide interim guidance throughout the implementation period, substantial compliance questions still abound regarding the Rule and the Accompanying Exemptions. Many in the industry have significant questions regarding how to comply with the requirements in the context of important matters, including, for example, rollovers and the treatment of cash held temporarily pending investment. The brief six- month transition period adopted by the Department to address the issues raised in the Presidential Memorandum exacerbated this uncertainty. With the possibility of changes to the Rule and the Accompanying Exemptions, institutions did not know what actions would be necessary to implement such changes, or what to tell Retirement Investors about what changes might be applicable regarding their accounts.

As noted in our letter of July 21, 2017, FSR recommended a delay of 24 months to avoid further confusion and disruption for Retirement Investors.[10] In reaching this conclusion, FSR determined that such a delay should allow sufficient time for the Department to complete the study mandated by the Presidential Memorandum, consider responses to the RFI, issue a notice of proposed rulemaking and consider comments on the rulemaking, finalize the rule, and allow <u>at least</u> one (1) year for financial institutions to implement any changes reflected in the Rule and the Accompanying Exemptions (or the conditions of any new exemptions promulgated).

While the proposed extension of the transition period is shorter than the period which FSR recommended, FSR believes the proposed extension provides the minimum period needed to allow the Department and other interested parties to review and improve the Rule and the Accompanying Exemptions to enhance the interests of Retirement Investors. However, the Department should solicit notice and comment on any new applicability and compliance dates, taking into account the necessity for financial institutions to have a reasonable period to implement any changes in an orderly and cost-effective manner.[11]

III. Revisions to the Rule and the Accompanying Exemptions Are Necessary

If the Rule and Accompanying Exemptions are retained following the Presidentially-mandated reexamination, FSR believes that, at a minimum, revisions to the Rule and significant revisions to the Additional Conditions are required to fulfill the

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[10] FSR Comment Letter (July 21, 2017), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00271.pdf.

[11] For example, financial institutions must take steps to implement rule changes, including (i) evaluate system changes and implement system modifications; (ii) develop sound policies to comply with the applicable conditions of any exemptions; (iii) train personnel responsible for regular interaction with the Retirement Investors; and (iv) prepare effective communication to (and obtaining of any necessary consents from) Retirement Investors of the changes to the manner in which their accounts will be invested.

objectives that the Department sought to obtain in promulgating the Rule, while providing a path that allows Retirement Investors continued access to appropriate investment advice and a wide range of investment alternatives. FSR's August 10 comment letter presented our recommendations to improve the Rule and Accompanying Exemptions, including: (i) to expand the grandfather provision; (ii) to revise PTE 84-24 and the Best Interest Contract ("BIC") Exemption to eliminate restrictions that impair Retirement Investors' access to fixed-indexed annuities offered through independent marketing organizations; and (iii) to adopt a presumptive counterparty exception for communications between financial institutions.[12] FSR believes the proposed extension provides the Department adequate time to consider revisions to the Rule and Accompanying Exemptions.

IV. Extension of the Transition Period Would Facilitate the Department's Coordination with the SEC, FINRA, and Banking and Insurance Authorities

FSR believes an extension of the transition period would allow for regulatory coordination between the Department and other authorities—including the SEC, FINRA, and banking and insurance[13] regulators—having jurisdiction over the products, services, and regulated institutions and individuals which are affected by the Rule and the Accompanying Exemptions. FSR believes that such coordination could enable these regulators to craft a regulatory regime that is logical, coordinated and effective in promoting the interests of Retirement Investors. An improved regulatory regime would allow Retirement Investors access to a wide array of investment guidance, and products and services designed to help them meet their needs throughout their retirement. An improved regulatory regime also would afford Retirement Investors reasonable protections that can be administered efficiently and effectively by persons serving their needs.

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[12] FSR Comment Letter (August 10, 2017) (recommending improvements to the Rule and Accompanying Exemption), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00601.pdf ("FSR August 10 Comment Letter").

[13] *See* National Association of Insurance Commissioners Comment Letter (August 7, 2017) (encouraging the Department to coordinate with state insurance authorities and discussing state regulatory authorities over life and annuity products), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00452.pdf.

V. The Department and the Service Should Extend Their Good Faith Compliance Enforcement Policy

Having the Impartial Conduct Standards in place during the extended transition period should serve to afford Retirement Investors a material level of protection and comfort that their financial professionals will be acting first and foremost with their best interests in mind. However, the Impartial Conduct Standards are very broad concepts that could have many different interpretations and applications in the context of the complex world of financial products and services. Thus, institutions that are operating in this environment need to have comfort and certainty that they will not violate these principles when undertaking in good faith to comply with such principles during the proposed extension of the transition period.

Extending the good faith enforcement policies previously announced by the Department and the Service for the current transition period to apply during the extended transition period would facilitate the ability of institutions to provide appropriate products and services to Retirement Investors while at the same time still complying with the Impartial Conduct Standards in the provision of these products and services.

VI. Tiering of Transition Period Should Not Be Adopted

FSR appreciates the Department's recognition of the need to provide the industry adequate time to respond to developments following the Department's study of the issues and concerns presented. However, the Department should not adopt a tiered transition period, because the time needed to respond to a revised regulatory regime can only be gauged with reasonable accuracy after financial institutions have had an adequate period to review and assimilate the proposed revisions, and assess the action steps needed to comply.

The tiering concept may place the industry and Retirement Investors in a position where the pre-established period is inadequate to respond to the changes the Department ultimately proposes. FSR has concern that there could be reticence to provide additional time needed to comply, due to the presence of the tiering and the length of time that revisions to the fiduciary rule have been under consideration. Any minimum period established today would be set without any insight into what changes the Department is considering and may undertake to make. Indeed, the one-year implementation period that was provided for the final version of the current Rule was far from adequate to accomplish the myriad of changes required to implement that Rule.

It also seems highly unlikely that the transition period established by any tiering system would coincide with the implementation period that would be appropriate in the context of any across-the-board, integrated regime developed by securities, banking, and insurance regulators. We believe it is essential such an integrated regime become effective concurrently with further changes adopted by the Department. Setting a time frame pursuant to the tiering approach could make that impossible.

Finally, the Department itself noted that the industry responded to the Rule in a manner that has led to innovation in product offerings, but in the heavily regulated financial services industry, such innovations cannot be developed and launched in a tight window. More innovations may develop, or need to be developed following the current review. Changes that are conceptually simple and beneficial may prove to require approvals from other agencies, or simply require material retooling of processes and procedures that are critical to the operation of banks, broker-dealers, insurance companies, independent marketing organizations and other intermediaries.

VII. The Department Should Adopt a Principled-Based Exemption Framework Instead of a Streamlined Exemption for Particular Products

While specific comment was not requested on this issue, FSR nonetheless deems it necessary to comment on the suggestion in the statement accompanying the proposal to extend the transition period that the Department is anticipating providing streamlined exemptions for certain new investment products. FSR believes that adopting such streamlined exemptions with regard to particular investment products would not further the interests of Retirement Investors, and could have the very detrimental effects that the Presidential Memorandum was concerned could derive from the current Rule and Accompanying Exemptions.

FSR strongly believes that the most efficient and effective method of promoting the interests of Retirement Investors, without reducing investment choices and access, is to revise the Rule and the Accompanying Exemptions in a manner that establishes a principled-based approach that would apply equally across a wide array of products.[14] FSR believes streamlined exemptions with respect to particular products could have the unintended consequence of the Department essentially favoring such a particular product over other products that may be more appropriate for a given Retirement Investor.

Adopting a streamlined exemption for particular products will encourage the use of such products, perhaps almost to the exclusion of others. This will, as a practical matter, reduce the investment choices made available to Retirement Investors. If the Department were to leave in effect much of the additional conditions of the BIC Exemption for the vast majority of investment products, and adopt a streamlined exemption for one or more particular products, the Department will create a scenario where institutions will be faced with the choice of assuming significant risks and burdens to design and offer alternative products. The costs of developing alternative products may be difficult to justify, especially when firms face a material risk that additional

[14] *See* FSR August 10 Comment Letter.

regulatory relief might not be granted. A more principles-based exemption framework would avoid such biases, and would not diminish the industry's capacity and incentives to develop products that would facilitate compliance with such principles.

VIII. Retirement Investors Will Be Protected by the Impartial Conduct Standards During the Extended Transition Period

Any concern that Retirement Investors will be harmed by an extended transition period should be allayed because the Impartial Conduct Standards will continue to protect them during the extended transition period. The Department has concluded that the application of the Impartial Conduct Standards, standing alone, "provides retirement investors with the protection of basic fiduciary norms and standards of fair dealing."[15]

Opponents of the proposed extension will likely assert that the extension is unnecessary because the Rule became effective June 9, 2017, and the industry was prepared for compliance with the Rule. However, under the regime that took effect on June 9, 2017, institutions can provide Retirement Investors investment advice in good faith subject only to compliance with the Impartial Conduct Standards. From a compliance perspective, this regime is predictably less burdensome than that which would necessarily follow from the Additional Conditions, as had been scheduled to take effect January 1, 2018.

Such Additional Conditions will frequently compel institutions to enter a contract with investors. This contract places on the institution the burden of proving compliance with these basic, but amorphous, Impartial Conduct Standards. It also places numerous burdens on the institutions that could readily operate as a pretext for challenging the institutions compliance with the Accompanying Exemptions. The industry as a whole has consistently and repeatedly stated that the compliance regime that would follow from the Additional Conditions is so unduly burdensome that it limits the investment choices that can be made available to investors. Moreover, this will continue to be true even if the Department rescinds its open invitation to attorneys motivated by the fees that can be received in a class action litigation to challenge the institution's good faith effort to assist Retirement Investors in achieving their investment objectives.

FSR further expects that some commenters will contend that the possibility of revisions to the Rule and the Accompanying Exemptions has caused uncertainty that has adversely affected both Retirement Investors and the industry. As discussed above, FSR believes that this uncertainty was triggered by the unreasonably short initial implementation period and the brevity of the six-month review period. With only a six-month delay in the application of the Additional Conditions, the market understood that

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15 82 Federal Register 16902 at 16905 (Apr. 7, 2017).

there would be only a limited opportunity to respond to any changes that would be forthcoming, and virtually no time for Retirement Investors to become acquainted with the new business model before it applied to their investments.

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FSR welcomes the opportunity to work with the Department on how to address the concerns raised by the Rule and Accompanying Exemptions. If it would be helpful to discuss FSR's specific comments or general views on this issue, please contact me at Richard.Foster@FSRoundtable.org or Felicia Smith, Vice President and Senior Counsel for Regulatory Affairs, at Felicia.Smith@FSRoundtable.org.

Sincerely yours,

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