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March 3, 2017

Edward Hugler, Acting Secretary of Labor
c/o Office of Regulations and Interpretations
Attn: Fiduciary Rule Examination
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW, Room N-5655
Washington, DC 20210

Dear Mr. Acting Secretary:

RE: Comments in Support of 60-Day Delay in Applicability Date of Fiduciary Rule,
Employee Benefits Security Administration, RIN 1210-AB79 (82 *Fed. Reg.*
12319, March 2, 2017)(“NPRM of March 2, 2017”)

The National Federation of Independent Business (NFIB) strongly supports the U.S. Department of Labor proposal to delay by at least sixty days, from April 10, 2017, to June 9, 2017, the applicability date of the final rule titled “Definition of the Term ‘Fiduciary;’ Conflict of Interest Rule--Retirement Advice” that the Department published in the *Federal Register* of April 8, 2016. A delay of sixty days or more is essential and reasonable: (1) to permit the Department of Labor to carry out effectively the President’s direction in his memorandum to the Secretary of Labor dated February 3, 2017, and (2) to avoid unnecessary and unwarranted disruption of and expenditures by small and independent businesses in the financial services industry. The Department can prescribe the delay under the authority of subchapter II of chapter 5, including section 559, of title 5 of the U.S. Code, section 301 of title 5, and other applicable law.

NFIB is an incorporated association with more than three hundred thousand members across the country. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. The membership of the NFIB includes small and independent businesses in the financial services industry directly affected by the Fiduciary Rule issued by the U.S. Department of Labor on April 8, 2016.

These comments in response to the NPRM of March 2, 2017, address only the proposed delay in the applicability date of the Fiduciary Rule. NFIB intends to submit separately comments in response to the NPRM of March 2, 2017, that address the demerits of the Fiduciary Rule and the questions the President’s memorandum raised about the Rule; as the Department of Labor is aware from the comments NFIB filed in the docket on the Fiduciary Rule on July 21, 2015 (EBSA-2010-0050-0830), the NFIB among other things remains concerned that the Fiduciary Rule could result in providers no longer offering needed financial services to small businesses and their employees in an affordable manner.

Effective Implementation of the President's Memorandum

The Employee Retirement Income Security Act (ERISA) (29 U.S.C. 1002(21)) and the Internal Revenue Code (IRC) (26 U.S.C. 4975(e)(3)) define the term "fiduciary" with respect to an employee benefit plan to include a person who ". . . renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so" On April 8, 2016, the U.S. Department of Labor's Employee Benefits Security Administration published the final Fiduciary Rule construing the ERISA/IRC definition.

On February 3, 2017, President Trump issued a memorandum to the Secretary of Labor titled "Fiduciary Duty Rule" (82 *Fed. Reg.* 9675). The President's memorandum noted that a priority of his Administration is "to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies." In section 1 of the memorandum, the President issued the following direction to the Secretary of Labor:

(a) You are directed to examine the Fiduciary Duty Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of this examination, you shall prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Duty Rule, which shall consider, among other things, the following:

(i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;

(ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

(iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

(b) If you make an affirmative determination as to any of the considerations identified in subsection (a) -- or if you conclude for any other reason after appropriate review that the Fiduciary Duty Rule is inconsistent with the priority identified earlier in this memorandum - - then you shall publish for notice and comment a proposed rule rescinding or revising the Rule, as appropriate and as consistent with law.

The Department of Labor must carry out the directive the President issued in exercising "the executive Power" vested in him by the Constitution and in carrying out the duty to "take Care that the Laws be faithfully executed" assigned to him by the Constitution. The Department must do so in a manner consistent with applicable law, including ERISA, the Internal Revenue Code, and the Administrative Procedures Act. As a practical matter, the

Department of Labor will need a significant period of time, and at least through the June 9, 2017, date it proposes, to conduct the review the President directed and determine upon the issuance of a notice of proposed rulemaking to revoke or modify the Fiduciary Rule. The work the Department of Labor undertakes in performing the review between now and June 9, 2017, will aid the Department, should it seek to revoke or modify the Fiduciary Rule, to meet its duty to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made,’” *Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Avoidance of Disruption and Costs for Small and Independent Businesses

Absent a delay of the applicability date of the Fiduciary Rule, the financial services industry must comply with the Fiduciary Rule by April 10, 2017. Given the Department of Labor review of the Rule directed by the Presidential memorandum of February 3, 2017, there is a substantial possibility that the Department will determine that it needs to revoke or modify the Rule, which would necessitate another round of compliance activity by the financial services industry either to unwind its previous compliance process, or to revise it to meet the modified requirements of yet another version of the fiduciary rule.

Large corporations in the financial services industry may have the large staffs of lawyers and accountants necessary to deal with a fast do-undo-redo sequence of rules emanating from the Department of Labor concerning the definition of “fiduciary,” but small businesses in the financial services industry most assuredly do not. As the Department of Labor recognized in the NPRM of March 2, 2017, “[o]ver 90 percent of broker-dealers (BDs), registered investment advisers (RIAs), insurance companies, agents, and consultants are small businesses according to the SBA size standards (13 CFR 121.201)” (82 Fed. Reg. at 12322, col. 3). Small businesses lack the personnel and financial resources necessary to deal with implementing, reversing, and then implementing with changes a sequence of regulations. Accordingly, the Department of Labor should, as the NPRM of March 2, 2017, proposes, delay for at least 60 days, to June 9, 2017, the applicability date of the Fiduciary Rule. Such a delay ensures that small businesses, and other entities, in the financial services industry will not have to deal more than once, if at all, with implementation of a new Department of Labor rule construing the term “fiduciary” as used in ERISA and the Internal Revenue Code.

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For the reasons set forth above, the NFIB urges the U.S. Department of Labor to publish in the Federal Register a notice of a delay, of not less than sixty days, of the applicability date of the Fiduciary Rule. Thank you for the opportunity to comment on the Department’s proposal to delay the applicability date of the Fiduciary Rule.

Sincerely,



David S. Addington

Senior Vice President and General Counsel