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March 17, 2017

Mr. Timothy D. Hauser  
Acting Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: Delay of Applicability Date of Fiduciary Rule (RIN 1210-AB79)

Vanguard<sup>1</sup> welcomes the opportunity to comment on the Department of Labor's (the "Department") proposed 60-day extension of the applicability date of the revised definition of the term "Fiduciary" and related exemptions (the "Rule").<sup>2</sup> We urge the Department to act quickly and decisively – before the Rule's applicability date of April 10, 2017 – to delay the applicability date by at least 12 to 18 months. This delay is necessary to allow the Department to review the legal and economic basis for the Rule and consider public comments as required by the Presidential Memorandum.<sup>3</sup>

Vanguard strongly believes that investors should always receive investment advice that is in their best interest, and those who provide investment advice should be held to a fiduciary standard. At the same time, we want regulations as far-reaching as the Rule to be well-crafted and thoughtfully implemented to limit investor confusion, disruption and cost. Regardless of the Department's ultimate conclusions in response to the substantive questions raised by the Presidential Memorandum, the Department will need time to review and analyze the Rule's

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<sup>1</sup> Vanguard is one of the world's leading asset managers, managing over \$4 trillion for institutional and retail investors. Vanguard manages over \$1 trillion in defined contribution ("DC") and defined benefit ("DB") plan assets and provides recordkeeping and administrative services for over 4 million participants in over 6,700 DC and DB plans. We also manage over \$600 billion for over 6 million individual retirement account ("IRA") investors. We provide fiduciary investment advice to IRAs and other clients through Vanguard Personal Advisor Services, which currently has approximately \$75 billion in assets under advisement across all client types. We also provide fiduciary investment management to retirement plan clients through the Vanguard Managed Account Program, an investment management service based on systems and methodology developed and maintained by Financial Engines Advisors LLC. VMAP manages over \$20 billion on a discretionary basis.

<sup>2</sup> 81 Fed. Reg. 20946 (Apr. 8, 2016).

<sup>3</sup> The Memorandum directs the Department to prepare an updated economic and legal analysis considering, among other things, (1) whether the Rule harms investors due to reduced access to retirement savings products, information or advice; (2) whether the Rule has resulted in dislocation or disruptions within the retirement services industry that may adversely affect investors and retirees; and (3) whether the Rule is likely to cause increased litigation and cost to investors to access retirement services. Depending on the outcome of this review, the Department is directed to issue a new proposal to revise or rescind the Rule. 82 Fed. Reg. 9675 (Feb. 7, 2017).

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existing record along with further comments from investors, the regulated community and other stakeholders. Investors and the regulated community, in turn, will need time to ensure a clear and orderly transition to implement the requirements of the Rule. It is unrealistic to expect the Department to accomplish the full review and potential revision or rescission of the Rule as directed in the Presidential Memorandum in 60 days.<sup>4</sup>

While we recognize that the Department can delay the Rule in a series of steps as needed, a phased approach to delay and potential reproposal of the Rule would be confusing for investors and disruptive to providers. Worse still, a short delay increases the risk that the Department will not publish the necessary further delays before the Rule becomes effective, requiring uncertain and unclear retroactive action by the Department. That approach is particularly troubling in the case of this Rule, which includes provisions in the Best Interest Contract Exemption encouraging private litigation as a means of enforcement. While we greatly appreciate the Department's guidance in Field Assistance Bulletin 2017-01 announcing a temporary non-enforcement policy in the unlikely event the Department does not act on the proposed delay until after April 10, the FAB alone may not be sufficient to mitigate the risks of lawsuits attempting to enforce the complex provisions of the Rule or the Best Interest Contract Exemption.

The Department requested comments as to whether any part of the Rule may become effective on schedule while other parts are delayed. We encourage the Department to avoid this piecemeal approach to implementation of the Rule. Instead, the Department should apply a consistent delay to all fiduciary guidance finalized by the Department in April 2016, including the revised definition of "fiduciary," the new Best Interest Contract Exemption and the associated revisions to existing prohibited transaction exemptions.<sup>5</sup> A phased implementation of the Rule will require institutions to revise processes and systems multiple times to comply, and complexity in the application of the prohibited transaction rules and exemptions is likely to lead to unintended consequences.

As the Department evaluates the potential costs and benefits of a delay in the Rule, we ask the Department to recognize the extent to which the industry has changed over the past year and continues to evolve to deliver better solutions to investors. These changes suggest that – as directed in the Presidential Memorandum – the Rule's economic analysis must be updated, and likely overstates the potential costs of a delay in the applicability date. For example, many providers have changed their service models and investment platforms to remain competitive in a market increasingly aware of the fact that costs matter. The SEC has issued additional guidance accommodating new share classes designed to facilitate level compensation platforms as a way

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<sup>4</sup> In the case of the regulation interpreting the exemption for eligible investment advice arrangements under ERISA section 408(g), the Department delayed, reviewed and revised a rule finalized by the Bush Administration in January 2009. The revised rule was not finalized until October 25, 2011, roughly 21 months later. *See* 76 Fed. Reg. 66136-37 (Oct. 25, 2011) (discussing background).

<sup>5</sup> The Department should also extend (by a commensurate period) the transition period afforded by the Best Interest Contract Exemption to contribute to an orderly transition once the Rule is applicable.

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to mitigate conflicts of interest in compensation.<sup>6</sup> These developments have accelerated changes in the market that were not reflected in the economic analysis developed by DOL in 2016. Accordingly, that economic analysis does not serve as an appropriate basis for estimating the cost of delay.

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Vanguard appreciates the opportunity to submit these comments and would welcome further discussion with the Department. If there you have any questions or wish to discuss in greater detail, please do not hesitate to contact Ann Combs at 610-503-6305, John Schadl at 610-669-4011 or Stephanie Napier at 610-503-1377.

Sincerely,



F. William McNabb III  
Chairman and Chief Executive Officer  
The Vanguard Group, Inc.

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<sup>6</sup> SEC No Action Ltr. to Capital Group (Jan. 11, 2017) (providing that certain restrictions under section 22(d) of the Investment Company Act of 1940 do not apply to brokers when they act as agent on behalf of customers and charge commissions for effecting transactions in a class of mutual fund shares without any front-end loads, deferred sales charges or other asset-based fees for sales or distribution).