NAIFA
National Association of Insurance
and Financial Advisors

July 12, 2017

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

RE: RIN – 1210-AB82
RFI Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

To Whom It May Concern:

The National Association of Insurance and Financial Advisors ("NAIFA") appreciates this opportunity to comment on the Department of Labor's ("Department" or "DOL") request for information ("RFI") regarding the fiduciary rule (Conflict of Interest Rule—Retirement Investment Advice (the "Rule")) and related Prohibited Transaction Exemptions ("PTEs");[1] specifically, the Department's RFI with respect to a potential delay of the January 1, 2018 applicability date ("applicability date").[2]

EXECUTIVE SUMMARY

NAIFA strongly supports a delay of the applicability date for the Rule and all PTEs for a minimum of 24 months. Such a delay is justified for several reasons; namely, to:

(1) Facilitate completion of the Department's economic and legal analysis of the Rule/PTEs pursuant to the President's February 3 Memorandum and review of comments submitted in response to the current RFI, as well as any rulemaking to rescind or make changes to the Rule/PTEs based on the Department's evaluation of all input gathered;

[1] Department of Labor, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31278 (July 6, 2017) (hereinafter "Department RFI").

[2] Department RFI, 82 Fed. Reg. 31278, 31279 (Question 1).

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(2) Allow for coordination and collaboration between the Department and the Securities Exchange Commission ("SEC"), which also is soliciting public comment on a standard of care and related requirements for financial institutions and advisors; and

(3) Prevent further harm to Main Street retirement investors.[3]

Notably, the Department's RFI solicits additional public comments on *numerous* potential changes to the Rule and PTEs, and states that the Department is still reviewing comments on issues raised in the President's February 3, 2017 Memorandum.[4] We applaud the Department's continued evaluation of the substance of the Rule/PTEs and urge you to take sufficient time and care to complete your review. Of course, should the Department determine that rescission or revision of the Rule/PTEs is warranted, absence of an adequate extension of the applicability date would cause multiple major disruptions to the regulatory environment and the marketplace, and needless consumer confusion and harm.

Additionally, the Securities Exchange Commission ("SEC") recently released its own RFI regarding standards of conduct for financial institutions and advisors. Both Secretary Acosta and Chairman Clayton have publicly expressed their desire and intent to work together on developing consistent standards and requirements—a prospect fully supported by NAIFA. Given the parallel and related regulatory processes now underway, we encourage the Department to extend the applicability date so that it and the SEC can collaborate and finalize complimentary structures.

Finally, as discussed in further detail below, the negative impact of the Rule/PTE on Main Street advisors and retirement savers already is evident. Substantial changes (about which NAIFA intends to submit separate detailed comments) must be made to the current regime to accomplish its purported goal—to increase retirement savings. Such a revamp will require more time than the roughly five months remaining until the January 1, 2018 applicability date. In the meantime, tremendous resources are being spent to comply with the counterproductive Rule/PTEs (including building new websites, disclosures, auditing processes for new documentation requirements, and new policies and procedures and related front- and back-office training).

[3] Of course, the Rule also continues to be challenged in litigation, and some or all of the requirements currently set to take effect on January 1, 2018 could be rendered 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. Indeed, the Department itself has recently acknowledged in its legal briefing that the Exemptions' restrictions on class-litigation waivers, which are among the requirements set to take effect January 1, are improper and should be vacated. A postponement of the January 1 deadlines is thus warranted to allow the courts additional time to consider these issues before further requirements take effect.

[4] Presidential Memorandum, *Fiduciary Duty Rule* (Feb. 3, 2017), available at: https://www.whitehouse.gov/briefing-room/presidential-actions/presidential-memoranda.

A decision by the Department to not delay the applicability date will only result in wasteful expenditures by U.S. businesses, increased costs for consumers, lack of retirement services and products for middle- and low-income savers, and additional market disruptions and consumer confusion. NAIFA encourages the Department to avoid all of these consequences by immediately delaying the applicability date for the Rule and all PTEs.

BACKGROUND & IMPACT OF THE RULE/PTES ON NAIFA MEMBERS

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation's oldest and largest associations representing the interests of insurance professionals from every Congressional district in the United States. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

NAIFA members—comprised primarily of insurance agents, many of whom are also registered representatives—are Main Street advisors who serve primarily middle-market clients, including individuals and small businesses. In some cases, our members serve areas with a single financial advisor for multiple counties. And often, our members' relationships with their clients span decades and various phases of clients' financial and retirement planning needs. Most of our members work in small firms—sometimes firms of one—with little administrative or back office support. Often, their business practices are dictated by the broker-dealer or insurance company with whom they work, including the format and provision of client forms and disclosures. They also are subject to transaction-level oversight and review by their overseeing financial institutions.

The retirement products most commonly offered by NAIFA members are annuity products (fixed and variable) and mutual funds. Some of our members are independent advisors working with independent broker-dealers; others are affiliated with (or captives of) product providers and are restricted to some degree in the products they are permitted to sell. Virtually all NAIFA members working in the individual IRA space will have to rely on the Best Interest Contract ("BIC") Exemption, which represents a far more onerous compliance regime than any of our members (or their financial institutions) have previously faced.

Despite former Secretary Perez's statement before Congress on June 17, 2015 that the Department's Rule makes things "simpler" by imposing a uniform fiduciary standard on investment advisors, the Rule and its accompanying PTEs are anything but simple. Instead, the regime is complex and contains extensive conditions that will put a tremendous burden on advisors who serve the middle market, as well as their clients. As discussed below, we already have seen negative market reactions to the Rule and PTEs—direct evidence that concerns for small and mid-level savers are justified and that the Department should take the time required to craft a more effective, less harmful rule.

NAIFA SUPPORTS A 24-MONTH DELAY OF THE JANUARY 1, 2018 APPLICABILITY DATE

First, the Department's preparation of new legal and economic analyses of the Rule/PTEs and related determination of whether (and/or to what extent) they are consistent with the new Administration's policies—including an assessment of all public comments received in response to the Department's request for stakeholder input related to the President's February Memorandum—will take a significant amount of time. Indeed, comment letters submitted on or before April 17 are still being reviewed by the Department some three months later. And in the event the Department's final analysis reveals that changes need to be made, any new rulemaking to implement rescission of, or changes to, the Rule/PTEs will take even more time.

Second, beyond the ongoing analysis called for by the President, the Department itself has invited additional comments on a plethora of technical and conceptual issues underlying the Rule/PTE. Again, to the extent those comments justify changes to the prior Administration's rule—as NAIFA believes they will—the Department will need ample time to recreate its own approach. As experience tells us, a thorough rulemaking process on such complex topics can take several months. Under a best case scenario, any such process would run right up to the existing applicability date of January 1, 2018, at which point impacted parties are expected to be in *full* compliance with the Rule/PTEs and will have expended tremendous resources on those compliance efforts.[5]

There is clear precedent for a delay of the applicability date to provide the Department with sufficient time to consider the merits of the Rule/PTEs and public comments thereon. In fact, earlier Department rules regarding fiduciary investment advice (issued by the George W. Bush Administration) were delayed for 60 days in 2009 by the Obama Administration, following public notice and comment, "in order to afford the Agency the opportunity to review legal and policy issues relating to the final rules."[6] Ultimately, to give the Department "additional time to consider the issues raised by commenters" regarding the merits of rescinding, modifying or retaining the rules, the Department delayed the effective and applicability dates of those rules

[5] Notably, the more onerous PTEs (e.g., the BIC Exemption) were designed in the first instance to include an adequate transition period prior to the full compliance deadline on January 1, 2018. *See* Final BIC Exemption, 81 Fed. Reg. 21069 (Apr. 8, 2016) (explaining that the April 10, 2017 applicability date "is appropriate for plans and their affected service providers to adjust to the basic change from non-fiduciary to fiduciary status" while being "subject to more limited conditions;" and the transition period between then and January 1, 2018 "is intended to give Financial Institutions and Advisers time to prepare for compliance with the [full set] of conditions" under the exemption) (emphasis supplied). By the same rationale, and anticipating that at least some changes will be made to the Rule/PTEs over the coming months, any applicability date should be commensurately prolonged to account for adjustments to the compliance scheme.

[6] *See* Department of Labor, Withdrawal of final rule, *Investment Advice—Participants and Beneficiaries*, 74 Fed. Reg. 60156 (Nov. 20, 2009) (background discussion of steps taken prior to ultimate withdrawal of the rule).

twice more (two successive six-month periods) before ultimately withdrawing the rules and formulating its own proposal.[7]

Third, coordination with the SEC, which currently is undertaking a parallel public comment process, is essential. Such coordination is necessary to harmonize any standards for firms and advisors in the retail investor context, and to avoid potentially conflicting rules and requirements for the same investment transaction. Moreover, as the primary regulator in this area, the SEC has invaluable expertise that can and should help inform the Department's ultimate approach.

Finally, delay of the applicability date is warranted to avoid further harm to retirement savers. The President's February Memorandum appropriately focuses on the Rule's/PTEs' potential impact on retirement savers, including savers' access to investment advice and products, and market dislocations. It is clear from market reactions to date that these are serious concerns, which must be addressed.[8]

For instance, 2,708 NAIFA members—along with thousands more Main Street advisors across the country—no longer will be able to provide personalized retirement investment advice to their clients because *just one* financial institution (of the many with which NAIFA members are affiliated) has banned its advisors from offering mutual funds, variable annuities and other investment products that trigger onerous compliance obligations under the Rule/PTEs. Instead, these clients—*hundreds* per advisor—will be sent to a self-directed call center where they will have to make investment decisions on their own.

Additionally, according to a recent survey of NAIFA members (with 1,084 respondents), 91% of respondents have already experienced or expect to experience restrictions on product offerings to their clients, nearly 90% believe consumers will pay more for professional advice services, and 75% have seen or expect to see increases in minimum account balances for the clients they serve. And 78% of NAIFA members say that although they continue to offer professional advice to clients, general confusion about the complex Rule and PTEs is impeding their ability to serve clients. Further, a survey of 552 U.S. financial advisors conducted in October 2016 found that 71% "plan to disengage from some mass-market investors because of the DOL rule," and 94% of advisors say that small clients "orphaned" by advisors will have to turn to robo-advice.[9]

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[7] *Id.*

[8] NAIFA and other industry groups are working to collect additional data on the market impact of the Rule/PTEs since they partially went into effect on June 9, 2017.

[9] CoreData Research London, Press Release, *Fiduciary Rule to Leave US Mass-Market Investors Stranded, Study Shows* (Nov. 2016); *see also, e.g.,* Wall Street Journal, *Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule* (Aug. 17, 2016) (Edward Jones announces it will limit mutual fund access for retirement savers in accounts that charge commissions); Crain's, *Why State Farm agents are getting out of the investment game* (Sep. 3, 2016) (State Farm directs 12,000 securities-licensed agents to no longer provide their clients with mutual funds, variable annuities and other investment products); Maxey, Daisy, Wall Street Journal, *New Rule Helps No-Loan Funds—But Investors Still Need to Watch for Other Fees* (Nov. 7, 2016) (Charles Schwab stops selling fund share classes with

More broadly, since the final Rule and PTEs were published in April 2016:

- Many advisors plan to exit the business entirely, which will restrict consumers' access to much-needed professional advice;[10]
- Firms have restricted product offerings to certain clients, thereby limiting consumer choice, and have abandoned traditional, lower-cost compensation arrangements for advisors (e.g., commissions, rather than high upfront management fees that small and first-time savers cannot afford) in order to avoid the cost of complying with the BIC Exemption and mitigate the threat of costly class action lawsuits; [11] and
- Firms are cutting back on hiring and R&D, and are foregoing investments in growth opportunities in anticipation of the cost of complying with the Rule and PTEs.[12]

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frond-end sales loads in May 2016). *See, e.g.,* Benjamin, Jeff, Fiduciary Focus, *DOL Fiduciary Rule Class-Actions Costs could Top $150M a Year* (Feb. 9, 2017) ("Some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC exemption] that does not include a contract or variable commission rate, making them exempt from class-action lawsuits. Other firms will be rolling the dice."); AdvisorHUB, *Merill to End Commission-Based Retirement Business on Retail Accounts* (Oct. 6, 2016) available at https://advisorhub.com/exclusive-merrill-end-commission-based-retirement-business-retail-accounts/ (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000 brokers cannot receive commissions for advice on retirement accounts and will have to shift clients who remain with the firm to fee-based advisory accounts).

[10] *See, e.g.,* ThinkAdvisor, *DOL Fiduciary Has Many Advisors Mulling Career Change: Fidelity Survey* (Nov. 3, 2016) (in a blind online poll of 459 advisors conducted by Fidelity Clearing & Custody Solutions from August 18 to 26, 2016, 10% of advisors reported they are planning to leave or retire from the field earlier than expected because of the rule, and another 18% said they are "reconsidering their careers as advisors").

[11] *See, e.g.,* Wall Street Journal, *Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule* (Aug. 17, 2016) (Edward Jones announces it will limit mutual fund access for retirement savers in accounts that charge commissions); Crain's, *Why State Farm agents are getting out of the investment game* (Sep. 3, 2016) (State Farm directs 12,000 securities-licensed agents to no longer provide their clients with mutual funds, variable annuities and other investment products); Maxey, Daisy, Wall Street Journal, *New Rule Helps No-Loan Funds—But Investors Still Need to Watch for Other Fees* (Nov. 7, 2016) (Charles Schwab stops selling fund share classes with frond-end sales loads in May 2016). *See, e.g.,* Benjamin, Jeff, Fiduciary Focus, *DOL Fiduciary Rule Class-Actions Costs could Top $150M a Year* (Feb. 9, 2017) ("Some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC Exemption] that does not include a contract or variable commission rate, making them exempt from class-action lawsuits. Other firms will be rolling the dice."); AdvisorHUB, *Merill to End Commission-Based Retirement Business on Retail Accounts* (Oct. 6, 2016) available at https://advisorhub.com/exclusive-merrill-end-commission-based-retirement-business-retail-accounts/ (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000 brokers cannot receive commissions for advice on retirement accounts and will have to shift clients who remain with the firm to fee-based advisory accounts).

[12] *See, e.g.,* Skinner, Liz, InvestmentNews, *Outlook 2017 Haze Ahead; With a New Year, a New Government and Old Regulations, Advisers Feel More Optimistic About the Economy than Their Own Books of Business* (Jan. 9, 2017) ("Joshua Mellberg is avoiding long-term contracts with technology

All of these developments are harmful to consumers, including NAIFA members' clients, and are contradictory to the Rule's objective: bolstering retirement savings. Thus, they warrant careful study by the Department and a complete revamping of the Rule/PTEs, and adequate time is a prerequisite.

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Based on the foregoing, we strongly urge the Department to immediately delay the applicability date for a minimum of 24 months. Thank you for your consideration.

Sincerely,

Paul R. Dougherty, LUTCF, FSS, HIA
NAIFA President

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providers and others until his advisory firm has judged the financial fallout from the Labor Department's rule on retirement advice [and has also] cut this year's research [and has] also cut this year's research and development expenses and put a freeze on hiring to ensure that the hybrid advisory firm is prepared to handle any extra compliance costs or other ill effects of the fiduciary rule….").