

GROOM LAW GROUP

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Filed Electronically

Office of Exemption Determinations
Employee Benefits Security Administration (Attn: D-11933)
U.S. Department of Labor
200 Constitution Avenue, N.W., Suite 400
Washington, D.C. 20210

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, Comments Responsive to Question 1; RIN 1210-AB82

Ladies and Gentlemen:

Groom Law Group, Chartered is providing the comments set forth in this letter on behalf of a group of client companies, each of which is a major provider of annuity and insurance products to employer-sponsored plans subject to ERISA and to individual retirement accounts (the "Groom Group"). These Groom Group comments are responsive to the above-referenced question ("Question 1") concerning whether the U.S. Department of Labor (the "Department of Labor") should delay the January 1, 2018 applicability date of certain provisions in the Best Interest Contract Exemption, the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, and Prohibited Transaction Exemption 84-24 (the "Applicability Date").¹ In short and as discussed further below –

- The Department should grant an extension of the Applicability Date, although not for the reasons identified by Question 1. The Department must delay the Applicability Date so that it will have a sufficient amount of time to reassess, in light of ongoing changes in the retirement services marketplace, the costs and benefits of the "Definition of the Term 'Fiduciary'; Conflict of Interest Rule-- Retirement Investment Advice", 81 Fed. Reg. 20946 (April 8, 2016), Prohibited Transactions 2016-01 and 2016-02 and the 2016 amendments to Prohibited Transactions 75-1, 77-4, 80-83, 83-1, 84-24, 86-128, (together, the "Fiduciary Rule"). This review is required by the Presidential Memorandum on Fiduciary

¹ The Groom Group is also preparing, and will separately submit, comments responsive to the other portions of the above-referenced request for information.

Duty Rule for the Secretary of Labor (February 3, 2017), published at 82 Fed. Reg. 9675 (Feb. 7, 2017) (the “Presidential Memorandum”).

- Without an extension of the Applicability Date, financial institutions, including the members of the Groom Group, will continue to incur substantial expenditures of resources to implement compliance strategies for the Fiduciary Rule, even though the Fiduciary Rule remains subject to review and could change in significant ways.
- For the above reasons, the Department should promptly announce that the Applicability Date will be extended to a date not less than one year following the finalization of any changes to the Fiduciary Rule prompted by the Presidential Memorandum and the instant request for information.

I. The Applicability Date Should Be Extended to Allow for a Fundamental Reevaluation of the Fiduciary Rule’s Costs and Benefits

On February 3, 2017, the President of the United States signed the Presidential Memorandum directing the Secretary of Labor to update the Department's original economic and legal analysis pertaining to the Fiduciary Rule, to consider that updated analysis in light of the President's stated policy objectives and, subject to certain determinations, to either revise the Fiduciary Rule or rescind it altogether. Significant disruption and dislocation to the retirement services marketplace is occurring as a result of the Fiduciary Rule, and the Department must consider these changes in light of the Presidential Memorandum. However, Question 1 reads as follows:

Would a delay in the [Applicability Date] reduce burdens on financial services providers and benefit retirement investors by allowing for more efficient implementation responsive to recent market developments? Would such a delay carry any risk? Would a delay otherwise be advantageous to advisers or investors? What costs and benefits would be associated with such a delay?

Despite the fact that the Department has not completed the work required by the Presidential Memorandum, Question 1 presumes that the Department will not rescind the Fiduciary Rule, and that the only remaining issue on the table is “efficient implementation.” This pre-judgment of the outcome of the review required by the Presidential Memorandum raises serious concerns.

Instead of presuming that the only remaining issue is implementation, the Department should fundamentally reevaluate the Fiduciary Rule and its costs and benefits. The Applicability Date should be extended to provide the Department with a sufficient amount of time to complete a fulsome review. Of paramount concern is the Fiduciary Rule’s effect on access to investment advice. To the extent that the Fiduciary Rule causes investment advice to become unavailable to significant numbers of retirement investors, its costs would clearly outweigh its benefits.

All evidence thus far has shown the Fiduciary Rule has had an extremely detrimental effect on retirement investors' access to investment advice. A number of Groom Group member companies that engage in the manufacture of annuity products have been notified by their distribution partners that those distributors are suspending the provision of investment advice to annuity holders as a result of the Fiduciary Rule's applicability. Within the industry, these groups of individual annuity holders are referred to as "orphans." This phenomenon is occurring across the broader retirement services marketplace. In this respect, a 2016 study found that 71% of financial professionals will disengage from at least some retirement investors because of the Fiduciary Rule.² A 2017 survey reported that 75% of financial professionals have seen increases in minimum account requirements.³ The loss of access to investment advice will primarily affect retirement investors with low account balances.⁴

We believe that these developments, which are widespread and well known, raise troubling questions about the harmful effects of the Fiduciary Rule. Although the Department issued a request for information relating to the Presidential Memorandum in March, it is well-established that the Fiduciary Rule's detrimental effect on access to investment advice has accelerated, especially after the June 9, 2017 applicability date of the Fiduciary Rule's investment advice definition. The economic analysis required by the Presidential Memorandum needs to take these developments into account.

II. Given the Likelihood of Changes to the Fiduciary Rule, the Applicability Date Should Be Extended to Allow Financial Institutions to React to Any Changes

Although the Applicability Date should be extended to provide time for a top-to-bottom reevaluation of the costs and benefits of the Fiduciary Rule, a delay of the Applicability Date is also essential to save the financial services industry from fruitlessly expending time and resources to comply with aspects of the Fiduciary Rule, and related exemptions, that are subject to change. For example, the instant request for information suggests that the prohibited transaction exemptions, and to a limited extent, exceptions to fiduciary status, of the Fiduciary Rule, may be changed. In particular, several conditions of the BIC Exemption remain ambiguous and unclear. The Department has itself noted on several occasions that the retirement

² CoreData Research UK, *Fiduciary rule to leave US mass-market investors stranded, study shows*. Available at <http://www.valuwalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-%E2%80%93-CoreData-Research.pdf> (November 2016).

³ National Association of Insurance and Financial Advisors, *NAIFA Survey Gauges Impacts of DOL Fiduciary Rule*. Available at <http://www.naifa.org/news-publications/naifa-blog/april-2017/naifa-survey-gauges-impacts-of-dol-fiduciary-rule> (April 2017).

⁴ InvestmentNews. "The Economics of Change: How the DOL Fiduciary Rule Will Set Money in Motion and Alter Business Models Across the Advice Industry" p.11, *available at* <http://www.investmentnews.com/assets/docs/CI105297516.PDF> (May 2016).

services marketplace may require substantial time to develop and more fully evolve their product platforms and service delivery models to fit the stringent standards of the full BIC Exemption as it is currently written.

In addition, the Applicability Date should be extended to provide sufficient time for the retirement services industry to come into compliance with any aspects of the Fiduciary Rule the Department might change. For this purpose, the Department should announce that the Applicability Date will be extended to a date that is at least 12 months from the final Federal Register notice of any changes to the Fiduciary Rule. This approach would be consistent with the final Fiduciary Rule, which set forth an applicability date 12 months from publication in the Federal Register.⁵ In other regulatory initiatives, such as the last significant change to Form 5500, the Department has provided more than 12 months from final publication in the Federal Register to come into compliance.⁶ In addition, the Department should announce this delay as soon as possible to reduce uncertainty in the regulated community.

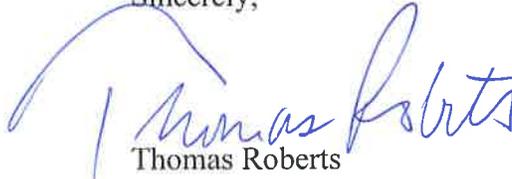
III. Conclusion

For the reasons described above, the Groom Group strongly urges the Department to focus its efforts on reevaluation of the Fiduciary Rule and to extend the Applicability Date to a date not less than 12 months from the final notice of any change to the Fiduciary Rule in the Federal Register. The Department should announce that it will take this approach promptly.

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We appreciate the opportunity to comment on Question 1, and we are available to discuss our comments with the Department or provide additional information.

Sincerely,



Thomas Roberts

⁵ 81 Fed. Reg. 20946, 20993 (Apr. 8, 2016).

⁶ 72 Fed. Reg. 64710 (Nov. 16, 2007).