



# FINANCIAL PLANNING COALITION

July 21, 2017

Office of Exemption Determinations  
Employee Benefits Security Administration  
Attention: D-11933  
[EBSA.FiduciaryRuleExamination@dol.gov](mailto:EBSA.FiduciaryRuleExamination@dol.gov)

United States Department of Labor  
200 Constitution Avenue, NW  
Suite 400  
Washington, D.C. 20210

***RE: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, RIN-1210-AB82***

Ladies and Gentlemen:

The Financial Planning Coalition (Coalition),<sup>1</sup> which is comprised of the Certified Financial Planner Board of Standards (CFP Board), Financial Planning Association® (FPA®) and National Association of Personal Financial Advisors (NAPFA), appreciates the opportunity to comment on the proposal (hereinafter, “Exemptions Delay Proposal”)<sup>2</sup> by the Department of Labor, Employee Benefits Security Administration (the Department) for a delay in the January 1, 2018 applicability date of the provisions in the Best Interest Contract Exemption (BICE),<sup>3</sup> Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption),<sup>4</sup> and amendments to Prohibited Transaction Exemption 84-24 (PTE 84-24)<sup>5</sup>

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<sup>1</sup> The Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession. Together, the Coalition seeks to educate policymakers about the financial planning profession, to advocate for policy measures that ensure financial planning services are delivered with fiduciary accountability, and to enable the public to identify trustworthy financial planners.

<sup>2</sup> Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31278 (July 6, 2017) (to be codified at 29 C.F.R. pt. 2509, 2510, and 2550), available at <https://www.federalregister.gov/documents/2017/07/06/2017-14101/request-for-information-regarding-the-fiduciary-rule-and-prohibited-transaction-exemptions> (hereinafter, “RFI RIN 1210-AB82”).

<sup>3</sup> See Best Interest Contract Exemption with Amended Applicability Dates, Employee Benefits Security Administration (EBSA), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/best-interest-contract-exemption-with-amended-applicability-dates.pdf>.

<sup>4</sup> See Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption) with Amended Applicability Dates, EBSA, available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/class-exemption-for-principal-transactions-with-amended-applicability-dates.pdf>; See also Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs; Correction, 81 Fed. Reg. 44784 (July 11, 2016) (to be codified at 29 C.F.R. pt. 2550), available at <https://www.federalregister.gov/documents/2016/07/11/2016-16354/class-exemption-for-principal-transactions-in-certain-assets-between-investment-advice-fiduciaries>.

<sup>5</sup> Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters with Amended Applicability Dates, EBSA, available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/pte-84-24-with-amended-applicability-dates.pdf>.

(together, “Exemptions”) – all part of the Department’s final fiduciary rule (hereinafter “Final Rule”)<sup>6</sup> pursuant to the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC). CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for over 80,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country.<sup>7</sup> FPA® is the largest membership organization for CFP® professionals and those who support the financial planning process in the U.S. with over 23,000 members nationwide.<sup>8</sup> NAPFA is the nation’s leading organization of fee-only comprehensive financial planning professionals with more than 2,500 members.<sup>9</sup>

The Coalition strongly opposes any delay in the January 1, 2018 applicability date of the Exemptions. The Coalition believes that a strengthened fiduciary rule under ERISA, complete with all exemptions, is essential for America’s retirement investors and is workable for Advisers.<sup>10</sup> As the Coalition previously commented,<sup>11</sup> a meaningful, legally enforceable fiduciary standard that puts investors’ interests first is the best method to strengthen Americans’ retirement security. The Final Rule and the Exemptions are fully consistent with the principles of a true fiduciary standard under ERISA. Further delaying implementation of the Exemptions is unnecessary, unwarranted, and will only serve to derail this long overdue reform necessary to protect and preserve Americans’ retirement savings. Specifically, delaying the January 1, 2018 applicability date of the Exemptions will eliminate important enforcement mechanisms and limit the ability of retirement investors to hold financial professionals accountable.

The Coalition brings a unique perspective to this discussion. Coalition stakeholders and members have committed to provide financial planning services under a fiduciary standard of conduct.<sup>12</sup> CFP® professionals hold registrations and/or licenses across business models as investment adviser representatives, registered representatives of broker-dealers, and/or insurance agents and in many

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<sup>6</sup> See Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128, 82 Fed. Reg. 16902 (Apr. 7, 2017) (to be codified at 29 C.F.R. pt. 2510), available at <https://www.federalregister.gov/documents/2017/04/07/2017-06914/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice-best>; See also Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20945 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550), available at <https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>.

<sup>7</sup> CFP Board’s mission is to benefit the public by granting the CFP® certification and upholding it as the recognized standard of excellence for the delivery of competent and ethical personal financial planning services. CFP® professionals voluntarily agree to comply with CFP Board’s rigorous standards including education, examination, experience and ethics, and subject themselves to disciplinary oversight of CFP Board.

<sup>8</sup> With a national network of 91 chapters and state councils, FPA® represents tens of thousands of financial planners, educators and allied professionals involved in all facets of providing financial planning services. FPA® works in alliance with academic leaders, legislative and regulatory bodies, financial services firms and consumer interest organizations to represent its members.

<sup>9</sup> NAPFA members adhere to some of the highest standards in the profession and annually each advisor must sign and renew a Fiduciary Oath and subscribe to the Association’s Code of Ethics. NAPFA-affiliated advisors are committed to the organization’s core values of competency, commitment to holistic financial planning, compensation under a model that facilitates objective advice, client-centered standard of care, complete disclosure of potential conflicts of interest and explanation of fees.

<sup>10</sup> The term “Adviser” as used herein is defined in the Final Rule and includes any individual or entity who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance representative and company, or a registered representative of a broker-dealer and broker-dealer. Accordingly, the term “Adviser” is not limited to investment advisers registered under the Investment Advisers Act of 1940 or under applicable state law.

<sup>11</sup> Letter from Coalition to Office of Regulations and Interpretations, EBSA, U.S. Dep’t of Labor (Mar. 15, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00943.pdf>.

<sup>12</sup> See CFP Board *Standards of Professional Conduct*, Rule of Conduct 1.4 available at <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct>; NAPFA, “Mission and Fiduciary Oath,” available at <https://www.napfa.org/about/FiduciaryOath.asp>. More recently, on June 20, 2017, CFP Board issued a request for public comment on proposed revisions to its *Standards of Professional Conduct*, which set forth ethical standards for CFP® professionals. The draft revision, titled *Code of Ethics and Standards of Conduct*, proposes to (1) expand the application of the fiduciary standard by effectively requiring CFP® professionals to put a client’s interest first at all times, and (2) enhance and update standards related to financial planning. The proposal is available at <https://www.cfp.net/about-cfp-board/proposed-standards>. The public comment period closes on August 21, 2017.

instances hold dual or multiple registrations or licenses. Regardless of business model, or compensation model, they are obligated to provide financial planning services under a fiduciary standard of conduct. The views stated in this comment letter reflect the real-world experience of the Coalition and its more than 80,000 financial professionals and other stakeholders in applying the fiduciary standard across business and compensation models.

## I. Delay Will Harm Consumers

Retirement investors face a perfect storm in today's financial services marketplace. With the dramatic shift in the retirement landscape from defined benefit plans to 401(k) plans and Individual Retirement Accounts (IRAs), Americans increasingly are responsible for making investment decisions that will, in large part, determine their financial security in retirement. It is consistent with this shift of responsibilities that the Exemptions place enforcement mechanisms in the hands of retirement investors. For example, the BICE provides a directly enforceable contract through which consumers may demand fiduciary accountability from their Advisers.<sup>13</sup> The Principal Transactions Exemption and PTE 84-24<sup>14</sup> similarly envision accountability through an appropriate combination of written records, policies and procedures designed to ensure that financial professionals adhere to a genuine fiduciary standard of conduct. Amending or eliminating these important Exemptions would further endanger the retirement savings of American investors.

It is well documented that the accounts of workers and retirees saving for retirement suffer billions of dollars in losses every year as a result of conflicted advice. As such, every day that the full implementation of the Final Rule is delayed results in losses to these workers and retirees. For example, during the 60-day delay from April 10, 2017 to June 9, 2017,<sup>15</sup> the applicability date of key provisions of the Final Rule, it is estimated that retirement investors lost a collective \$3.7 billion.<sup>16</sup> The Coalition believes that any delay in the applicability date or implementation of the Exemptions will result in significant additional losses in retirement accounts.

Timely implementation of the Exemptions will ensure that conflicts of interest, if not entirely avoided, will be appropriately disclosed and properly managed by Advisers held to a fiduciary standard, ultimately benefitting retirement investors. The Exemptions also will serve as an important enforcement tool and can more easily be communicated to retirement investors if the Department confirms the January 1, 2018 compliance deadline, thus reducing uncertainty for the industry and enabling consumers to take timely, appropriate steps to stem further losses. In its regulatory impact analysis of the Final Rule, the Department found that underperformance associated with conflicts of interest – in the mutual fund segment alone – could cost IRA investors between \$95 billion and \$189 billion over the next 10 years and

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<sup>13</sup> See generally U.S. Dep't of Labor, "Best Interest Contract Exemption with Amended Applicability Dates," available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/best-interest-contract-exemption-with-amended-applicability-dates.pdf>.

<sup>14</sup> See generally U.S. Dep't of Labor, "Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption) with Amended Applicability Dates," available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/class-exemption-for-principal-transactions-with-amended-applicability-dates.pdf>; And see U.S. Dep't of Labor, "Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters with Amended Applicability Dates," available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/pte-84-24-with-amended-applicability-dates.pdf>.

<sup>15</sup> Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128, 82 Fed. Reg. 16902 (Apr. 7, 2017) (to be codified at 29 C.F.R. pt. 2510), available at <https://www.federalregister.gov/documents/2017/04/07/2017-06914/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice-best>.

<sup>16</sup> Heidi Shierholz, "EPI comment on the proposal to extend the applicability date to the fiduciary rule," Economic Policy Institute (Mar. 17, 2017), available at <http://www.epi.org/publication/epi-comment-on-the-proposal-to-extend-the-applicability-date-to-the-fiduciary-rule/>.

between \$202 billion and \$404 billion over the next 20 years.<sup>17</sup> The White House Council of Economic Advisers estimated that the cost of conflicted advice costs retirement investors approximately \$17 billion per year.<sup>18</sup> These costs could easily spiral upward, given that the Department's Exemptions Delay Proposal did not include a definite extension date for the applicability of the Exemptions.

Further delaying the applicability date for the Exemptions, which are currently set to go into effect on January 1, 2018, will only continue to confuse consumers. Many retirement investors already believe that a fiduciary standard is the law of the land and expect their financial services professionals to provide them conflict-free advice. A landmark 2008 SEC-sponsored study conducted by the RAND Center for Corporate Ethics, Law, and Governance found that “[e]xisting studies suggest that investors do not have a clear understanding about the distinction between broker-dealers and investment advisers and their different levels of fiduciary responsibility.”<sup>19</sup> Likewise, an InfoGroup study conducted on behalf of the Financial Planning Coalition, Consumer Federation of America (“CFA”), American Association of Retired Persons (“AARP”), and the North American Securities Administrators Association (“NASAA”), found that:

- 60% of U.S. investors mistakenly think “insurance agents” owe a fiduciary duty to their clients;
- 66% of U.S. investors are incorrect in thinking stockbrokers are held to a fiduciary duty;
- 76% of investors are wrong in believing that “financial advisors” – a ubiquitous term used by financial services and insurance firms to describe their salespersons – are held to a fiduciary duty; and
- 75% of investors incorrectly believed the fiduciary standard is already in place for “financial planners.”<sup>20</sup>

An indefinite delay of the Exemptions will only further exacerbate investor confusion and will prevent the Exemptions from being applied and enforced at all. Without the enforcement mechanisms found in the Exemptions, the Final Rule will be rendered toothless and ineffective. The Coalition strongly opposes the Department's vague Exemptions Delay Proposal to delay the applicability date of the Exemptions.

## **II. Other Issues with Exemptions Delay Proposal**

The Department states that a delay may be necessary so that financial services providers will have adequate time to further develop innovative responses to a requirement that they deliver fiduciary level advice.<sup>21</sup> However, in failing to set a concrete extension deadline, the Department appears to be relinquishing its responsibility for assuring work-related benefits and rights,<sup>22</sup> including retirement savings, and instead appears to be relying on the industry to set the pace of any proposed delay.<sup>23</sup>

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<sup>17</sup> U.S. Dep't of Labor, *Regulating Advice Markets: Definition of the Term “Fiduciary” Conflicts of Interest – Retirement Investment Advice; Regulatory Impact Analysis for Final Rule and Exemptions*, at p. 9 (April 2016), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf>.

<sup>18</sup> White House Council of Economic Advisers, “The Effects of Conflicted Investment Advice on Retirement Savings” (February 2015), available at [https://obamawhitehouse.archives.gov/sites/default/files/docs/cea\\_coi\\_report\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf) (“[T]he aggregate annual cost of conflicted advice is [estimated at] about \$17 billion each year.”); See also Heidi Shierholz and Ben Zipperer, “Here is what’s at stake with the conflict of interest (“fiduciary”) rule,” Economic Policy Institute (May 30, 2017), available at <http://www.epi.org/publication/here-is-whats-at-stake-with-the-conflict-of-interest-fiduciary-rule/>.

<sup>19</sup> Angela Hung, et al., RAND Corp., *Technical Report, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, Jan. 3, 2008, available at [http://www.rand.org/pubs/technical\\_reports/TR556.html](http://www.rand.org/pubs/technical_reports/TR556.html).

<sup>20</sup> InfoGroup, *U.S. Investors and the Fiduciary Standard*, Sept. 15, 2010, <http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf>.

<sup>21</sup> See RFI RIN 1210-AB82, *supra* n. 2, at p. 31279 (“Many firms appear to be considering the use of such “clean shares” as a long-term solution to the problem of mitigating conflicts of interest with respect to mutual funds. Commenters noted, however, that funds will need more time to develop clean shares than contemplated by the current January 1, 2018, deadlines.”).

<sup>22</sup> Dep't of Labor, “Our Mission,” available at <https://www.dol.gov/general/aboutdol/mission>.

<sup>23</sup> See RFI RIN 1210-AB82, *supra* n. 2, at p. 31279 (“If commenters believe more time would be necessary to build the necessary distribution and compliance structures for such innovations, the Department is interested in information related to the amount of time expected to be required.”).

In suggesting that a delay of the Exemptions may be appropriate, the Department overlooks multiple federal court opinions upholding the Final Rule. In the opinion from the District Court for the Northern District of Texas, Chief Judge Barbara Lynn found the plaintiffs' arguments against the Final Rule, *including its exemptions*, unpersuasive. The court upheld each component of the Final Rule noting, in particular, that the Department did **not** exceed its statutory authority in granting conditional exemptions, and the Department's rigorous and thorough cost-benefit analysis concluded that the benefits to consumers substantially outweigh the costs to industry.<sup>24</sup>

The Department's Exemptions Delay Proposal also is contrary to the position it has taken previously in court, where it has vigorously defended the Final Rule.<sup>25</sup> Most recently, at the federal appellate level, the Department specifically supported its rulemaking authority in crafting the Final Rule and almost all parts of the Exemptions.<sup>26</sup> The Department has not provided evidence demonstrating how its Exemptions Delay Proposal differs from its stated position in litigation and from the decisions of multiple federal courts that have upheld the Final Rule, its exemptions and its inherent enforcement mechanisms.

The Department's Exemptions Delay Proposal does not adequately take into account the scope of harm to investors from a delay lacking a set deadline. While the Department in its 2015 Regulatory Impact Analysis (hereinafter, "RIA") acknowledged that firms will face upfront implementation costs of most proposed alternatives, it also concluded that investors will be burdened with even larger losses over the lifetime of their investment products.<sup>27</sup> The Coalition believes that this distinction is critical. While firms and Advisers may incur modest up-front and ongoing compliance costs for implementation, retirement investors' losses will be compounded over the life of the investment product; even if investors quickly act to unwind conflicted advice, they could incur substantial fees from extricating themselves from certain products.

If the Exemptions Delay Proposal goes forward, it will reward those industry stakeholders that have chosen to forego anticipatory compliance systems and continue to treat regulatory sanctions as a cost of doing business, while punishing firms that "did the right thing" and expended resources to become early adopters of updated compliance systems. The Department does not adequately address how the Exemptions Delay Proposal would (i) contribute to unnecessary marketplace confusion and (ii) harm companies that have acted in good faith to implement the Final Rule. Since April 2016, firms and the industry have operated under the assumption that the Final Rule would begin implementation on April 10, 2017. The subsequent 60-day delay of the Final Rule did not change the fact that firms and the industry were amply warned far in advance of the applicability date. The Department was cognizant of this in the Final Rule when it stated that the effective date would "provide certainty" to market participants by assuring them that "the rule[s] [are] final and not subject to further amendment or modification without additional public notice and comment."<sup>28</sup>

Many firms have already spent millions of dollars to comply with the Final Rule. For example, public reports demonstrate that a number of firms, including Charles Schwab, BBVA Compass, Capital One, Raymond James, John Hancock, U.S. Bancorp, Fidelity, RBC, Principal Financial Group, Prudential Financial, LPL Financial, Symetra Life Insurance, TIAA, Transamerica and Wells Fargo, have each devoted substantial time and resources to meeting the original April 10, 2017 implementation date.<sup>29</sup>

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<sup>24</sup> *Chamber of Commerce of the United States v. Hugler*, 2017 U.S. Dist. LEXIS 17619 (N.D. Tex. Feb. 8, 2017).

<sup>25</sup> *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 544 (2008) (courts will not uphold an agency decision "where the agency has offered a justification in court different from what it provided in its opinion.").

<sup>26</sup> See generally *Chamber of Commerce of the U.S. v. U.S. Dep't of Labor*, No. 17-10238 (5<sup>th</sup> Cir., Brief for Appellees filed July 3, 2017) (With the exception of a provision that deprives fiduciaries of the BICE if "they enter into an arbitration agreement that prevents investors from participating in class-action litigation," the Department has continued to support its Final Rule and exemptions, and advocated for a *Chevron* deference to its reasonable interpretations. (See generally *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

<sup>27</sup> U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, at pp. 208-209 (Apr. 14, 2015), available at <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.

<sup>28</sup> See 81 Fed. Reg., at 20993, *supra* n. 6.

<sup>29</sup> See, e.g., Greg Iacucchi, "Insurance-based broker-dealers plan to use BICE under DOL fiduciary rule," InvestmentNews (Jul.

Cognizant of the June 9, 2017 applicability date, broker-dealers also have made numerous changes in order to comply with the Final Rule.<sup>30</sup> While we applaud these firms for moving forward to act in the best interest of their clients, without the Exemptions, there will not be a uniform method of enforcement and industry compliance would be voluntary.

The Department does not clearly address how the Exemptions Delay Proposal would hinder current marketplace innovation. Recent developments have shown how the Final Rule is transforming the way commission-based advice is offered, with enormous potential benefits for all investors, not just those saving for retirement. For example, the SEC recently approved a proposal from Capital Group to create a new class of mutual fund shares for its American Funds that will greatly ease compliance with the DOL rule while preserving investors' ability to get commission-based advice.<sup>31</sup> The approved "clean shares" will allow the broker, rather than the fund, to determine how much to charge for their services. It was precisely this "clean shares" innovation on which the Department partially relied as an example in issuing its Exemptions Delay Proposal.<sup>32</sup> If the regulatory purpose of the Exemptions Delay Proposal is truly to address current market developments and innovations, then the Department must narrowly tailor any delay of the Exemptions to this stated purpose and take into consideration those firms that can provide evidence that they are using the delay productively to better harness these market developments.

Segments of the industry have argued that development of innovative products has been put on hold due to uncertainty about the January 1, 2018 applicability deadline. While the Coalition may not necessarily agree with this industry segment's assessment, if that is the case, then affirming the originally established January 1, 2018 would provide the much-needed certainty for these innovations to continue. With a concrete January 1, 2018 applicability date for the exemptions, firms would be incentivized to allocate or continue allocating resources to develop these new methods of doing business.

The Department has not provided a detailed explanation for changing its prior position in support of a January 1, 2018 applicability date.<sup>33</sup> Importantly, "an agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'"<sup>34</sup> Labor Secretary Alexander Acosta recently issued a recognition of and emphasis on the rule of law, in particular on following the time-tested directives of the Administrative Procedure Act (APA). In a May 22, 2017 op-ed in the Wall Street Journal, Sec. Acosta opposed extending the June 9, 2017 applicability date of the Final Rule any further, citing "no principled legal basis to change the June 9 date" while the Department seeks additional input.<sup>35</sup> Similarly the Department must consider the APA carefully

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7, 2016), available at <http://www.investmentnews.com/article/20160707/FREE/160709959/insurance-based-broker-dealers-plan-to-use-bice-under-dol-fiduciary>; Janet Levau, "Raymond James, Ameriprise Keeping Commissions in Retirement Accounts," ThinkAdvisor (Oct. 27, 2016), available at <http://www.thinkadvisor.com/2016/10/27/raymond-james-ameriprise-keeping-commissions-in-re>.

<sup>30</sup> Greg Iacurci, "As DOL fiduciary rule takes effect, B-Ds focus on compliance," InvestmentNews (June 9, 2017), available at <http://www.investmentnews.com/article/20170609/FREE/170609937/as-dol-fiduciary-rule-takes-effect-b-ds-focus-on-compliance>; Bruce Kelly, "How broker-dealers have changed compensation to prepare for the DOL fiduciary rule," InvestmentNews (June 9, 2017), available at <http://www.investmentnews.com/gallery/20170607/FREE/607009999/PH/how-broker-dealers-have-changed-compensation-to-prepare-for-the-dol>.

<sup>31</sup> John Waggoner, "American Funds gets SEC approval for clean shares," (Jan. 13, 2017), available at <http://www.investmentnews.com/article/20170113/FREE/170119955/american-funds-gets-sec-approval-for-clean-shares>.

<sup>32</sup> See RFI RIN 1210-AB82, *supra* n. 2, at p. 31279, n. 8 ("As described in a 2017 SEC staff interpretive letter, clean shares are a class of shares of a mutual fund without any front-end load, deferred sales charge, or other asset-based fee for sales or distributions. See Capital Group, SEC Staff Letter (Jan. 11, 2017)", available at <https://www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm>).

<sup>33</sup> "When an agency departs from its own prior precedent without explanation . . . its judgment cannot be upheld." *Manin*, 627 F.3d at 1243. Agencies must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. Fed. Comm'n Comm'n*, 444 F.2d 841, 852 (D.C. Cir. 1970).

<sup>34</sup> *Ramaprakash v. Fed. Aviation Admin.*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (quoting *Columbia Broad. Sys. V. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971)). "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Young v. Reno*, 114 F.3d 879, 883 (9th Cir. 1997) (quoting *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n. 30 (1987)).

<sup>35</sup> Alexander Acosta, "Deregulators Must Follow the Law, So Regulators Will Too," The Wall Street Journal (May 22, 2017), available at <https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029>.

in not extending the January 1, 2018 applicability date of the Exemptions. Sec. Acosta rightfully acknowledged that courts have upheld the Final Rule as consistent with the U.S. Congress' delegated authority.<sup>36</sup> However, Sec. Acosta wrote that the Final Rule, "as written may not align with President Trump's deregulatory goals."<sup>37</sup> However, the Coalition strongly believes and courts have confirmed that a statement concerning a change in priorities, without additional explanation, is not an adequate statement of need for the delay. Moreover, the Department's 2014 and 2015 RIAs provided sound and strong support for a January 1, 2018 applicability date, countering shifting priorities of the executive branch.

### III. Conclusion

The Coalition opposes any delay that would prevent implementation of the Exemptions as scheduled on January 1, 2018 and thus prevent the Department from taking critically needed steps to enhance protections for retirement investors, including much-needed enforcement mechanisms. We believe that there is no justification for applying different standards of care to Advisers who are offering the same services to Retirement Investors and that a strengthened fiduciary rule is necessary and appropriate for Advisers and firms under ERISA and IRC.

The Coalition believes that requiring an Adviser to work in the retirement investor's best interest, with proper enforcement and accountability regimes under the applicable Exemptions, is an essential and long overdue reform. We urge the Department to move forward expeditiously with the timely implementation of the Exemptions.

The Coalition appreciates the opportunity to comment on the Department's Exemptions Delay Proposal. We would be happy to meet with the Department to discuss these important issues further. If you have any questions regarding this comment letter or the Coalition, please contact Maureen Thompson, Vice President of Public Policy, CFP Board, at (202) 379-2281 or [MThompson@cfpboard.org](mailto:MThompson@cfpboard.org).

Sincerely,



Kevin R. Keller, CAE  
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NAPFA

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*