CFA Consumer Federation of America

July 21, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

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

Ladies and Gentlemen:

We are writing on behalf of the Consumer Federation of America (CFA)[1] to express our opposition to delaying the January 1, 2018 applicability date, when the full protections under the Best Interest Contract (BIC) Exemption, Principal Transactions Exemption, and amendments to PTE 84-24 are currently scheduled to be implemented. Without complete implementation of these Prohibited Transaction Exemptions (PTEs), the full protections and benefits of the fiduciary rule won't be realized, and retirement savers will continue to suffer the harmful consequences of conflicted advice. Unfortunately, by posing the question about whether there should be a further delay, the Department is creating unnecessary uncertainty and confusion in the market. More concerning, it is creating a self-fulfilling prophecy: firms, in anticipation that a delay will be granted, are likely to stall their compliance efforts, which the Department is then likely to point to as the justification to delay. Investors will suffer the consequences. We urge the Department to implement, without further delay, the full protections of the rule so that retirement savers receive the benefits of a meaningful, legally enforceable best interest standard backed by real restraints on conflicts of interest.

If the Department nonetheless moves forward with a delay, it must narrowly tailor it to the stated purpose of the delay -- to allow for a more efficient implementation that is responsive to recent market developments. Such a delay must only be available to firms that affirmatively show they have already taken concrete steps to adopt recent market developments as part of their compliance plans. A delay should not be available for firms that have not taken any such concrete steps and have no plans to use recent market developments in ways that benefit themselves and their customers. Such an approach, if it were adopted, would benefit those firms

[1] The Consumer Federation of America is a non-profit association of nearly 300 consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.

that are using the delay productively, and, by extension, their customers, rather than providing an undue benefit to firms that are merely looking for reasons to stall implementation. Most critically, under no circumstances would it be appropriate for the Department to provide an indefinite delay. Such an approach would provide strong evidence that the Department's real purpose is not more efficient implementation that is responsive to recent market developments, as it has stated, but is instead elimination, through an end run, of the operational requirements of the PTEs that ensure compliance with and enforcement of the Impartial Conduct Standards. If the Department pursues an indefinite delay, it will expose itself to considerable litigation risk.

I. The Benefits of the Full Protections of the Rule and PTEs Are Not In Question.

We have comprehensively discussed the benefits of the full protections of the rule and its accompanying PTEs elsewhere,[2] so we will not do so again here. Simply put, the full benefits of the BIC and Principal Transactions Exemptions won't be delivered to retirement savers unless the Impartial Conduct Standards are both legally enforceable and backed by meaningful anti-conflicts policies and procedures that ensure compliance with the Impartial Conduct Standards. The Department previously concluded that the contractual commitment "provides an administrable means of ensuring fiduciary conduct, eliminating ambiguity about the fiduciary nature of the relationship, and enforcing the exemption's conditions, thereby assuring compliance. The existence of enforceable rights and remedies gives Financial Institutions and Advisers a powerful incentive to comply with the exemption's standards, implement effective anti-conflict policies and procedures, and carefully police conflicts of interest."[3] The Department has provided no evidence to negate this finding.

II. The Department is Creating Unnecessary Uncertainty and Confusion in the Market and a Self-Fulfilling Prophecy of Delay.

By posing the question of whether there should be a delay of the January 1, 2018 applicability date of the PTEs, the Department is injecting unnecessary uncertainty into the market and creating a situation that is likely to result in the setting back of firms' compliance efforts. Many firms, to their credit, have been taking seriously their compliance obligations under the rule, announcing workable, pro-investor approaches to compliance and working in good faith to implement those approaches on schedule. For these firms, the January 1, 2018 applicability date will provide a final push to get them into full compliance. By posing the question about whether there should be further delay of the applicability date, however, and suggesting that further changes to the rule are likely to be forthcoming, the Department risks causing even well-intentioned firms to stall their compliance efforts. It also risks eliminating any competitive advantage these firms would have gained relative to less responsible firms that have decided not to make such prudent efforts toward compliance. The Department also risks increasing burdens on firms that have acted in good faith to come into compliance, if they have to reevaluate and potentially modify their compliance decisions based on the specific contours of a delay.

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[2] *See* Letter from Barbara Roper and Micah Hauptman, Consumer Federation of America (CFA), to the Department of Labor (DOL), July 21, 2015, http://bit.ly/2mtNqgg; Letter from Roper and Hauptman, CFA, to the DOL, September 24, 2015, http://bit.ly/2nK64ge; Letter from Roper and Hauptman, CFA to the DOL, March 17, 2017, http://bit.ly/2oUGSnU; Letter from Roper and Hauptman, CFA, to the DOL, April 17, 2017, http://bit.ly/2uABfCv.

[3] Best Interest Contract Exemption, 81 Fed. Reg. 21022 (April 8, 2016).

On the other hand, many firms are apparently still sitting on the sidelines, waiting for a final determination on the Department's ongoing reexamination before adopting any changes to their business practices.[4] We note that, to the extent these firms are flouting any of the requirements that became applicable on June 9th, 2017, these firms potentially would be violating the terms of the Department's and the Treasury Department and IRS's temporary non-enforcement policies, which are premised on good faith efforts at compliance. Moreover, to the extent firms do not currently have sufficient incentive to comply with the applicable requirements of the rule, it only confirms the need for the full protections of the rule, including the independent enforcement mechanism, to become applicable as scheduled in order to provide that incentive for compliance. By posing the question of whether there should be a delay, however, the Department risks reinforcing these firms' imprudent behavior, leaving investors susceptible to harmful practices yet without a ready means of holding these firms accountable for their harmful behavior.

The Department is unfortunately repeating past practices, recreating the same self-fulfilling prophecy that was used to justify delay of the initial implementation date of the rule. After the President directed the Department to prepare an updated analysis of the likely impact of the rule and the Department proposed a 60-day delay of the original applicability date of the rule and PTEs, many firms, in anticipation that a delay would be granted, stalled their efforts to come into compliance with the rule and innovate in pro-investor ways. For example, several mutual fund companies had filed to launch T shares and were prepared to move forward by bringing them to market, but were "remaining on hold" until there was more clarity from the Department, according to a *Wall Street Journal* article.[5] Then the Department pointed to market participants' stalling as the justification to delay out of concern that, without such a delay, there could be a disorderly transition to compliance.[6]

In contrast, the final delay rule, which provided certainty that the rule would begin to become applicable on June 9th, followed by Secretary Acosta's conclusive statement that there was "no principled legal basis to change the June 9 date while we seek public input,"[7] forced

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[4] Envestnet, Inc. Chairman and CEO Judson T. Bergman contrasted the more "compliance minded" firms that are adopting new programs to comply with the rule in the IRA market from those who are "back to the way it was earlier." According to Bergman, for example, "Most independent broker dealers are not rushing to implement any new DOL or fiduciary compliant programs, rather they are allowing advisors to continue to do their business, as they've always done it." Envestnet (ENV) Q1 2017 Results - Earnings Call Transcript, SEEKING ALPHA, May 10, 2017, http://bit.ly/2vbbZQ9; Similarly, Pershing's managing director of investment and retirement solutions Robert Cirotti stated, "I think there are still pockets of the industry that suspended either their implementation or their belief that this thing was actually going to take effect. I think that really puts them behind the eight ball. On the flip side of that, there are plenty of other firms that are well prepared." Diana Britton, *DOL in the Real World*, WEALTHMANAGEMENT.COM, June 19, 2017, http://bit.ly/2tAwYgm.

[5] Daisy Maxey, *5 Things Mutual-Fund Investors Should Know About Mutual-Fund 'T' Shares*, THE WALL STREET JOURNAL, April 9, 2017, http://on.wsj.com/2oY1S0U.

[6] Final Rule, extension of applicability date, 82 Fed. Reg. 16905 (April 7, 2017), http://bit.ly/2oFQTG9 ("The Department is also concerned that many firms may have reasonably assumed that the Department is likely to delay implementation as proposed and may, accordingly, have slowed their compliance efforts. As a result, rigid adhere to the April 10 applicability date could result in an unduly chaotic transition to the new standards as firms rush to prepare required disclosure documents and finalize compliance structures that are not yet ready, resulting in investor confusion, excessive costs, and needlessly restricted or reduced advisory services.")

[7] Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too,* THE WALL STREET JOURNAL, May 22, 2017, http://on.wsj.com/2q57jwk.

firms off the sidelines. Knowing what was expected of them and when it was expected provided a critical stimulus to firms to prepare for compliance. According to an *InvestmentNews* article, for example, several technology providers have stated that interest in their fiduciary fintech solutions "cooled" following the election, when some speculated that the rule would be rescinded or substantially revised. But adviser demand for a technological solution to help meet the requirements of the rule has jumped since the June 9th applicability date.[8]

Without a firm deadline and a clear message about what is required of them, firms will be reluctant to commit to making the changes necessary to fully implement the rule. And, when given the opportunity, they will always claim they need more time for implementation. On the other hand, when firms have a firm deadline in sight and a clear message about what the rules are going to be, they will comply accordingly. The January 1, 2018 applicability date provides the clarity and certainty that will allow firms to prepare for full compliance.

III. If the Department Moves Forward With a Delay Regardless of Investor Opposition, it Should Narrowly Tailor it to the Department's Stated Purpose for a Delay.

The release suggests that an implementation delay could reduce burdens on financial services providers and benefit retirement investors by "allowing for more efficient implementation responsive to recent market developments." Given that industry opponents have continuously argued that all issues identified in the Presidential Memorandum should be resolved before any aspect of the rule or PTEs become applicable, and that the delay being contemplated would relieve the industry opponents of having to comply with the provisions of the rule that put real teeth into it, we worry that the Department may be inappropriately using recent market developments as a guise for justifying a delay. We also worry that a broad delay would provide an undue benefit to firms that have not taken seriously their compliance obligations and have no plans to harness recent market developments to more efficiently comply.

While we still oppose any further delay, the Department could help to address our concerns, raised above, by narrowly tailoring a delay to the Department's stated purpose in proposing a delay -- "allowing for more efficient implementation responsive to recent market developments." In other words, if the Department decides to move forward with a delay, it should only allow firms to take advantage of the delay if they affirmatively show they have already taken concrete steps to harness recent market developments for their compliance plans. For example, if a broker-dealer has decided that it is more efficient to move straight to clean shares rather than implementing the rule using T shares, the broker-dealer should, as a condition of delay, be required to provide evidence to the Department of the steps that it has already taken to distribute clean shares, including, for example, providing evidence of efforts to negotiate sellers agreements with funds that are offering clean shares. The Department should not provide a blanket delay to all firms, including those firms that have not taken any meaningful, concrete steps to harness recent market developments and have no plans to do so. This narrowly tailored approach has the advantage of benefitting only those firms and, in turn, their customers, that are using the delay productively rather than providing an undue benefit to firms that are merely looking for reasons to further stall implementation.

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[8] Liz Skinner, *Fintech sales take off after DOL fiduciary rule's partial implementation*, INVESTMENTNEWS, June 29, 2017, http://bit.ly/2tk8cTa.

In addition, as a condition of delay, firms should be required to provide evidence to the Department that, in the interim, they have adopted anti-conflict policies and procedures, particularly at the adviser level. The adoption of anti-conflict policies and procedures can be accomplished irrespective of the various products or share classes of products that firms recommend. This condition would include providing evidence of eliminating quotas, bonuses, contests, special awards, differential compensation, ratcheted payout grids, or other actions or incentives that are intended or would reasonably be expected to cause individual advisers to make recommendations based on factors other than the best interest of the retirement investor. There is simply no legitimate reason for the Department to allow firms to continue to provide perverse incentives that reward their advisers for violating the Impartial Conduct Standards during a delay whose stated purpose is to allow for more efficient implementation that's responsive to recent market developments.

Most critically, under no circumstances would it be appropriate for the Department to provide an indefinite delay. Such an approach would provide strong evidence that the Department is not truly focused on allowing for a more efficient implementation that is responsive to recent market developments. Instead, an indefinite delay would suggest that the Department's real goal is eliminating, through an end run, the operational requirements of the PTEs that ensure compliance with and enforcement of the Impartial Conduct Standards.

Without an effective accountability and enforcement mechanism, particularly for the IRA market, the requirements of the BIC and Principal Trading Exemptions would be effectively toothless. There would be no administrable means of ensuring compliance and enforcing the Impartial Conduct Standards if they are violated. Moreover, absent the contract requirement and the legal enforcement mechanism that goes with it, firms would no longer have a powerful incentive to comply with the Impartial Conduct Standards, implement effective anti-conflict policies and procedures, or carefully police conflicts of interest. It could be too easy for firms to claim that they are complying with the PTEs, but still pay advisers in ways that encourage and reward them not to. Based on the Department's previous extensive analysis and findings relating to the value of the contract, eliminating this essential component of the rule through the back door would expose the Department to considerable litigation risk.

Conclusion

By keeping the rulemaking process open and the ultimate fate of the rule in flux, and by signaling that a further delay is in the offing, the Department is creating unnecessary and protracted uncertainty and confusion in the market. In response, firms predictably will slow or completely stall their preparation for compliance, as they will no longer have a strong incentive to reform their conflict-ridden practices. As a result, the full benefits of the rule won't be delivered to retirement savers. Providing certainty by stating unequivocally that there will be no more delays will benefit not only retirement savers, but also industry participants who are willing to serve their clients' best interest and compete based on cost and quality, firms that have moved forward responsibly to develop pro-investor implementation plans, and small businesses that have built technology solutions for compliance with the rule. A broad and protracted delay benefits only those firms that have irresponsibly delayed developing implementation plans in the hopes that they would eventually be spared being held legally accountable for acting in customers' best interests and reining in harmful conflicts.

For these reasons, we urge the Department to implement, without further delay, the full protections of the rule so that working families and retirees finally benefit from the meaningful, legally enforceable best interest standard they so desperately need and deserve.

Respectfully submitted,

Micah Hauptman

Micah Hauptman
Financial Services Counsel

Barbara Roper

Barbara Roper
Director of Investor Protection