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

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

To Whom It May Concern:

Thank you for the opportunity to respond to your Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (“RFI”). In response to the RFI’s Question #1, National Planning Holdings, Inc. (“NPH”) ¹ strongly supports a 18-24 month delay of the January 1, 2018, applicability date of those portions of the “fiduciary rules” that did not apply on June 9, 2017.²

I. Introduction

The fiduciary rules are the most extensive revision of the regulation of retirement investment advice and products since the Employee Retirement Income Security Act (“ERISA”) was enacted in 1974. By drastically expanding the definition of “fiduciary” and “recommendation” through a complete re-writing of a 40-year-old, well-understood test, the rules extend the application of the ERISA fiduciary duty standard to virtually every interaction between individual retirement savers and advisers. We estimate that the fiduciary rules impact approximately 70% of the retail advice market. Many of these retail advice accounts are newly subject to the stringent ERISA fiduciary regulation. Simply, the fiduciary rules are a massive experiment. Not surprisingly, they have caused radical changes in

¹ NPH is affiliated with Jackson National Life Insurance Company (“Jackson”) which has separately filed a letter in response to this request. NPH owns four retail firms – INVEST Financial Corporation, Investments Centers of America, Inc., National Planning Corporation, and SII Investments, Inc. - offering securities and insurance products, and investment advisory products.

² The “fiduciary rules” consist of the Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice, and subsequent amendments; Best Interest Contract Exemption (Prohibited Transaction Exemption (“PTE”) 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02); and PTEs 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128, 82 Fed. Reg. 16902 (Apr. 7, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-04-07/pdf/2017-06914.pdf>. The fiduciary rules became “effective” on June 9, 2016, with an initial applicability date of April 10, 2017, which was subsequently delayed until June 9, 2017.

product and service markets, and provoked responses from other regulatory bodies.

This experiment is being conducted, and these radical changes are occurring, amid an expanding retirement crisis in this country. A large percentage of U.S. working households have no retirement savings, including those households closest to retirement - between the ages of 55 and 64.³ A large majority of “baby boomers” do not believe their savings will last them through retirement. Many experts believe the problem of retirement savings “adequacy” is significantly worse than retirement savers perceive it to be, and that the problem extends well beyond baby boomers to younger generations. So, while the goal of the fiduciary rules may be to alleviate the retirement crisis, the DOL must take great care to ensure that the fiduciary rules and their implementation are not, in fact, exacerbating the crisis.

Some market developments caused by the fiduciary rules appear to be consistent with the DOL’s goals and generally favorable to investors. For example, the transition to level compensation within product categories to mitigate the risk of conflicted advice at the point of sale appears to be a beneficial development.⁴ Other market developments caused by the rules appear to be harmful to investors. For example, the stampede to fee-based arrangements will leave many small and mid-sized investors without access to advice, or increasing their costs for access to products and services designed to meet their retirement needs. Further, retirement investors are completely losing access to some retirement products they need to ensure guaranteed lifetime incomes, including variable annuities, whose usage has plummeted. These market developments will cause more leakage and reduce already inadequate retirement resources for millions of retirement savers. In other words, in many ways, the fiduciary rules are deepening the retirement crisis.

A third category of significant market developments caused by the rules need more time to mature before anyone can definitively determine whether they are helpful or harmful. For example, annuity and mutual fund manufacturers are innovating new products in response to the fiduciary rules. Manufacturers and distributors need a delay in the applicability date to bring these innovations to market, and market observers and policymakers will need additional time thereafter to assess their effects on leakage and adequacy, as well as their consequences for the involved industries.

³ U.S. GOV’T ACCOUNTABILITY OFF., “Most Households Approaching Retirement Have Low Savings.” (May 2015), <http://www.gao.gov/assets/680/670153.pdf>. See also, Elyssa Kirkham, *1 in 3 Americans Have \$0 Saved for Retirement*, *GOBankingRates*, (Mar. 16, 2016), <https://www.gobankingrates.com/retirement/1-3-americans-0-saved-retirement/>.

⁴ For example, NPH is supportive of the concept that a financial representative should not receive a different level of compensation for selling insurance product A, which is substantially comparable to insurance product B.

NPH therefore urges the DOL to delay the January 1, 2018, applicability date for the next tranche of extensive and costly --- and, in many ways, more radical --- additional requirements in the fiduciary rules. An 18 to 24 month delay will enable the DOL, other regulators, the industry, and retirement savers to assess these substantial transformations in the market and regulatory environments and to determine the best path forward.

II. NPH and Jackson are well-positioned to offer knowledge, experience, and insight.

NPH owns four retail broker-dealers with more than 3,200 registered representatives, who deal directly with investors seeking advice. The NPH firms offer a comprehensive menu of securities and insurance, and also operate as registered investment advisers. Nearly 60% of the accounts opened by clients of the NPH firms are IRA and 401k accounts, using products designed to meet the retirement needs of these clients.

Jackson and its U.S. affiliates (including NPH) employ more than 5,000 workers, who manage more than \$199 billion in fixed and variable annuities for over 1.5 million investors, including approximately \$106 billion in annuities held in accounts that qualify as Section 408 Individual Retirement Annuities. In 2016, Jackson was the largest provider of annuities in the United States.⁵ Jackson's insurance products are offered by more than 150,000 financial advisers affiliated with more than 600 independent broker-dealers, wirehouses, financial institutions and independent insurance agents. Thus, NPH and Jackson have unique perspectives as both a manufacturer and a retail distributor of retirement savings and income products.⁶

III. Delay is essential so that the DOL can assess the radical market transformation resulting from the already-applicable elements of the fiduciary rules, remedy any negative consequences, and guard against future bad outcomes.

A. The Fiduciary Rules' Already-Applicable Provisions Have Had Beneficial Effects.

⁵ "LIMRA Secure Retirement Institute U.S. Individual Annuities Sales Survey." (Mar. 2017.) http://www.limra.com/Posts/PR/Data_Bank/_PDF/2016-Q4-Annuity-Company-Rankings.aspx.

⁶ Jackson National Life Distributors LLC ("JNLD") and National Planning Holdings, Inc. ("NPH") are affiliates of Jackson. JNLD serves as the wholesale distributor of Jackson's variable annuity products, and is registered as a broker-dealer with the Securities and Exchange Commission ("SEC") under the Securities Exchange Act of 1934, and is a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"). NPH is a FINRA member broker-dealer holding company, providing retail distribution of a broad variety of products and services to retirement investors.

Even before the fiduciary rules began to apply on June 9, 2017, most of the businesses providing advice and products to retirement savers had begun to change in their practices and products. Some of these developments appear to be realizing the goal of reducing undue leakage from retirement savings. One important and beneficial change has been pay structures that provide financial representatives with level compensation for investment products within the same product category. For example, retirement advisers of all sorts are increasingly receiving the same percentage commissions for distributing variable annuities with common characteristics, regardless of the carrier that manufactured the annuity. This compensation reform is the product of the Impartial Conduct Standards in the Best Interest Contract Exemption (“BICE”) and Prohibited Transaction Exemption (“PTE”) 84-24, and two of their requirements: (1) retirement investment advice must be in the “best interest” of the retirement saver “without regard to the financial or other interests of the Adviser . . .”, and (2) compensation earned by investment advisers must be “reasonable.”⁷ This development in market practices arguably addresses the principal motivating factor behind the fiduciary rules: retirement advisers recommending one retirement product over another because the adviser perceives that he/she will derive an economic advantage.

Jackson has noted that there are more than ninety broker-dealers that have purposefully decided to require every annuity manufacturer with which they deal to offer the same commission options to their representatives. Thus, these representatives have no potential financial incentive to recommend an annuity from one carrier over another. The recommendation will be based solely on the merits of the annuity recommended. This development in market practices addresses the principal motivating factor behind the fiduciary rules: retirement advisers recommending one retirement product over another because the adviser perceives that he or she will derive an economic advantage.

This reform occurred without the need for the extensive and costly additional mandates currently scheduled to apply on January 1, 2018. The DOL can delay the January 1 applicability date without slowing or reversing these new compensation practices. Further, when assessing the costs and benefits of the new January 1 mandates, the DOL should consider the new baseline of a transformed compensation landscape in the retirement advice and retirement products industries. If it does, the benefits of the January 1 mandates will shrink to insignificance.

B. The Serious Negative Consequences of the Fiduciary Rules Must Be Understood and Remedied Before More Cost, Complexity, and Risk of Worse Consequences Are Imposed Through Application of the Additional Provisions Scheduled to Apply on January 1, 2018.

⁷ 81 Fed. Reg. 44773, 44777 (July 7, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-07-11/pdf/2016-16355.pdf>.

Many changes in market practices caused by the fiduciary rules are harmful to retirement savers. For example, in response to the BICE's section 2(h) and its creation of an exception for "level fee fiduciaries," many retail firms have aggressively expanded the availability and usage of fee-based advisory services. This movement to fee based advisory services is in direct response to the increased risks and costs of advising retirement savers using a commission-based compensation model under the fiduciary rules. A 2017 American Action Forum analysis concludes that the fiduciary rules will result in additional charges to retirement investors of approximately \$800 per account or over \$46 billion in aggregate as advisers try to cover the new costs and risks.⁸ A consequence of these new costs to distributors has been the loss of retirement investment advice for retirement savers with small and mid-sized accounts. Many savers with smaller accounts are unable to meet account minimums, which have risen and can be expected to rise further.

The heightened costs, and the unquantified costs and risks of litigation, excise taxes, and other potential penalties, make the small fees associated with low-balance accounts uneconomical for firms like the NPH broker-dealers. A 2016 study by A.T. Kearney found that, by 2020, broker-dealer firms will stop providing advice to retirement savers with low-balance accounts containing the majority of the \$400 billion currently in such accounts.⁹ Another recent study found that 71 percent of financial advisers plan to disengage from some retirement savers as a result of the fiduciary rule.¹⁰ A 2017 survey by the National Association of Insurance and Financial Advisors found that nearly 90 percent of financial professionals believe consumers will pay more for professional advice services, and 75 percent have seen or expect to see increases in minimum account balances for the clients they serve.¹¹

Beyond the loss of advice, retirement savers are losing access to retirement products, including products retirement savers want and need. For example, variable annuities ensure guaranteed lifetime incomes for their owners and

⁸ Meghan Milloy, *The Consequences of the Fiduciary Rule for Consumers*, American Action Forum (Apr. 10, 2017), <https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/>.

⁹ *The \$20 billion impact of the new fiduciary rule on the U.S. wealth management industry*, A.T. Kearney Study, Oct. 2016, <https://www.atkearney.com/financial-institutions/dol-fiduciary-rule>.

¹⁰ *Fiduciary rule to leave US mass-market investors stranded, study shows*, VALUEWALK (Nov. 2016),

<http://www.valuwalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-percentE2percent80percent93-CoreData-Research.pdf>.

¹¹ *NAIFA Survey Gauges Impacts of DOL Fiduciary Rule*, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS, (Apr. 2017), <http://www.naifa.org/news-publications/naifa-blog/april-2017/naifa-survey-gauges-impacts-of-dol-fiduciary-rule>; *See also*, *The Economics of Change: How the DOL Fiduciary Rule Will Set Money in Motion and Alter Business Models Across the Advice Industry*, INVESTMENT NEWS (May 6, 2016), http://www.investmentnews.com/dcce/20160506/4/4/WP_SPONSORED/3403986.

provide an opportunity for retirement savings to grow with equity markets while insuring against market downturns. These features of variable annuities offer one valuable solution to the adequacy problem stoking the retirement crisis. Yet, the fiduciary rules have caused a steep decline in the sale of variable annuities. Despite a rising stock market, which has always led to increased sales of variable annuities in the past, sales declined by 21.6 percent from 2015 to 2016.¹² In the first quarter of 2017, variable annuity total sales declined an additional 4.6 percent from the prior quarter, and 10.2 percent when compared with the first quarter of 2016.¹³ For 2017, LIMRA projects that total sales of variable annuity sales will drop 10 percent to 15 percent, bringing them to their lowest level since 1998.¹⁴ These declines in variable annuity sales are directly related to the DOL's decision to disfavor these products by removing them from PTE 84-24 beginning on January 1, 2018, and subjecting them to the much more burdensome requirements of the BICE. Sales of fixed index annuities, which also will be removed from PTE 84-24 on January 1, have also fallen in recent quarters.¹⁵ By contrast, sales of fixed rate annuities, which will remain subject to PTE 84-24 after January 1, have grown.

Declining sales of variable annuities are not the result of consumer preferences. Variable annuities offer the opportunity to establish a regular "retirement paycheck" that helps control spending, protects financial resources from fraud and leakage, and ensures retirees have an income source other than Social Security that cannot be exhausted or outlived. A 2017 Insured Retirement Institute ("IRI") survey found that more than 85 percent of consumers believe they need a source of guaranteed lifetime retirement income other than Social Security.¹⁶ In a recent survey conducted by IRI and Jackson, 80 percent of retirement savers said they would purchase an investment product providing guaranteed lifetime income, even if it cost more than an alternative.¹⁷ Eighty percent of advisers participating in the IRI/Jackson survey said that annuities' guaranteed lifetime income features have had a positive impact for their

¹² Press Release, Insured Retirement Institute, IRI Issues Fourth-Quarter 2016 Sales Report, March 30, 2017, at <https://www.myirionline.org/newsroom/newsroom-detail-view/iri-issues-fourth-quarter-2016-annuity-salesreport>

(variable annuity sales data provided by Morningstar, Inc.).

¹³ Press Release, Insured Retirement Institute, IRI Issues First-Quarter 2017 Annuity Sales Report, June 6, 2017, <https://www.myirionline.org/newsroom/newsroom-detail-view/iri-issues-first-quarter-2017-annuity-sales-report>.

¹⁴ Press Release, LIMRA Secure Retirement Institute: First Quarter 2017 Annuity Sales Decline (May 18, 2017), http://www.limra.com/Posts/PR/News_Releases/LIMRA_Secure_Retirement_Institute__First_Quarter_2017_Annuity_Sales_Decline.aspx.

¹⁵ *Id.*

¹⁶ Insured Retirement Institute, Boomer Expectations for Retirement 2017 (April 5, 2017) available at https://www.myirionline.org/docs/default-source/research/iri_boomers-expectations-for-retirement-2017.pdf.

¹⁷ Insured Retirement Institute and Jackson, The Language of Retirement 2017: Advisor and Consumer Attitudes Toward Securing Income in Retirement, (March 2017), will be available in August 2017 at <http://www.irionline.org/newsroom> (August 2017).

clients.¹⁸ More than half of the advisers predicted that some of their clients will run out of money during retirement if they do not buy annuities.¹⁹ Yet, 60 percent of advisers reported that legal and regulatory barriers are “very” or “somewhat” impactful in reducing annuity purchases by retirement savers.²⁰

As noted above, the fiduciary rules are a huge experiment with high stakes. The proper way to conduct an experiment is to measure and assess the consequences of one intervention rather than blindly pushing ahead with further large-scale interventions. The provisions of the fiduciary rules applicable on June 9, 2017, have already intervened and produced many negative consequences for retirement savers. These results must be better understood before the remaining provisions begin to apply, likely exacerbating the known problems, as well as creating new and difficult challenges. Further, the DOL should set forth a comprehensive strategy for remedying the fiduciary rules’ existing negative consequences before experimenting with new regulatory burdens like those scheduled to apply on January 1.

C. The Fiduciary Rules Have Fostered Innovations with Unknown Effects and Consequences for Retirement Savers, the Industry, and the Retirement Crisis.

In addition to the demonstrably beneficial and harmful consequences of the fiduciary rules, some transformations are too new for the DOL, the industry, and retirement savers to understand their meaning and effects. For example, in response to the fiduciary rules, retirement product manufacturers are in the process of innovating new products. As a leader in annuity sales in the United States, Jackson offers an excellent example. Jackson introduced its first fee based variable annuity in 2016. In September 2017, Jackson will introduce a next generation of its fee based variable annuity called Perspective Advisory II.²¹ The objective of this product is increased transparency and better alignment with non-annuity fee based product offerings. Like other non-annuity fee based products, Perspective Advisory II will not have a withdrawal charge schedule and will utilize Class I (Institutional) share funds that do not include 12b-1 fees. Even though Perspective Advisory II is an excellent solution for investors with sufficient funds to establish a relationship with a fee-based adviser, fee-based insurance products must still overcome regulatory and platform integration obstacles before they are likely to be widely used.

Fee based annuity products are not new to the industry. They have been offered for more than 10 years; however, sales have been minimal primarily due to the additional regulatory burdens that hinder access and utilization. FINRA Rule

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Jackson is not the industry’s sole innovator. Over 38 new fee-based products have been launched in 2016 and the first quarter of 2017, and NPH also distributes some of these products.

2330 and NAIC 275-1 were adopted to address regulators concerns about sales of annuities with high up-front commission costs and long surrender periods.²² Yet, the significant additional requirements imposed by these regulations currently apply equally to sales of fee-based annuities with no up-front commission, and no surrender charges, placing fee based variable annuities at a huge disadvantage to stocks, bonds, ETFs, and mutual funds.²³ In light of the increasing attention on our country's looming retirement crisis and a growing consensus among lawmakers that a component of the solution includes increasing access to, and utilization of, guaranteed income products, this is another strong reason that variable annuities should remain in PTE 84-24.

Outside the annuities industry, as the RFI and the DOL "Conflict of Interest FAQs (Transition Period)" issued in May 2017 both noted, the mutual fund industry is in the process of producing new "clean shares" and "T shares" funds to facilitate compliance with the fiduciary rules. Like fee-based annuities, these mutual fund products are important innovations. NPH has been in frequent communication with the mutual fund manufacturers. Initially, the industry trended towards use of T shares; however, many mutual fund manufacturers have not pursued a launch of this share class nor are many clearing firms able to support T shares. Subsequently, "clean" shares have been introduced as a possible option, but both T shares and clean shares would be difficult to implement for widespread distribution to retirement savers before the January 1, 2018, applicability date. The lack of widespread adoption of the new pricing options will result in the inability to support certain fund sponsors or individual funds, reducing the options available to investors to meet their retirement needs.

Even if these products can be manufactured and distributed by January 1, 2018, they are new to distributors, advisers, and retirement savers. As a result, an education period will be necessary to explain how these products operate, whether they will succeed in helping retirement savers to secure guaranteed

²² Joint SEC/NASD Report on Examination Findings Regarding Broker-Dealer Sales of Variable Insurance Products (June 2004), <https://www.sec.gov/news/studies/secnasdvip.pdf>; Securities and Exchange Commission Release 34-52046A, "Notice of Filing of Proposed Rule and Amendment ... to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities" (July 19, 2005), <https://www.sec.gov/rules/sro/nasd/34-52046a.pdf>; FINRA 2015 Regulatory and Examination Priorities Letter (Jan. 6, 2015), <http://www.finra.org/industry/2015-exam-priorities-letter>.

²³ Based on an analysis prepared by Jackson, it takes approximately two days and 200 pages of documentation to complete a mutual fund transaction. In contrast, due to the regulatory requirements currently in place, it takes approximately 5 days and 1,000 pages of documentation to complete a variable annuity transaction.

lifetime incomes, which types of retirement savers might find them to be suitable products that serve their best interests, how they might fit in a diversified retirement investment portfolio, and how compensation associated with the products will be structured, among other issues. More time, made possible by a delay in the January 1 applicability date, will make the success of these compliance focused products more likely

Further, the DOL and the industry do not and, at this stage, cannot know what effect these products will have on consumer choice, leakage, and retirement savings adequacy. These innovations need time to mature and their effects to develop. Again, as with any responsible experiment, the proper approach is for the DOL to pause until it fully understands and has responded to the fiduciary rules' last set of deeply disruptive interventions in retirement advice and products markets.

IV. The Regulatory Environment for Retirement Investment Advice and Products is in Flux and Both Comity and Federalism Require a Delay in the Applicability Date.

A. The Applicability of the Fiduciary Rules Has Sparked Action by the Securities and Exchange Commission (SEC) and the National Association of Insurance Commissioners (NAIC) That Should be Given Time to Develop.

The fiduciary rules' applicability and these transformative changes in retirement investment advice and products prompt a response from the industry's principal regulators: the SEC and the state insurance commissioners, through their national organization, the NAIC. The fiduciary rules were a significant intrusion into --- some would say usurpation of --- the traditional regulatory and enforcement responsibilities of these two regulatory bodies, and they have responded by reconsidering their rules, enforcement, and roles. On June 1, 2017, the SEC re-commenced its review of the federal securities laws' fiduciary standard with publication of Chairman Jay Clayton's "Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers."²⁴ In February 2017, the NAIC's Life Insurance and Annuities Committee established a new Annuity Suitability Working Group to determine whether the NAIC's Suitability in Annuity Transactions Model Regulation should be updated in response to the fiduciary rules and associated developments in the insurance industry. The NAIC last updated its model regulation in 2010. In addition to state insurance regulators,

²⁴ Jay Clanton, Chairman, Sec. and Exch. Comm'n, Public Statement: Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers (June 1, 2017), <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31>.

state legislatures have enacted or are considering fiduciary standards for broker-dealers²⁵.

At a minimum, comity among federal agencies and respect for our federalist system requires the DOL to give the SEC, state legislatures, and the NAIC an opportunity to develop and promulgate new regulatory and enforcement strategies. Further, harmony between the fiduciary standards under ERISA, the federal securities laws, and state laws will reduce the confusion discussed above and reduce costs across the industry. Enforcement of consistent fiduciary standards by the SEC, FINRA, the DOL, and the states' regulators will promote compliance across the industry. For this reason alone, the DOL should delay the January 1 applicability to give the SEC, the states, and the NAIC additional time to advance their examinations of their regulatory roles with respect to investment advice.

B. The DOL's Failure to Demonstrate An Understanding or Propose Strategies to Remedy the Fiduciary Rules' Consequences Requires a Delay in the Applicability Date.

On February 3, President Trump issued a memorandum directing the DOL to examine the fiduciary rules "to determine whether [they] may adversely affect the ability of Americans to gain access to retirement information and financial advice," including by preparing and publishing an updated economic and legal analysis.²⁶ On March 2, 2017, the DOL published a Notice of Proposed Rulemaking (NPRM)²⁷ proposing a delay in the April 10, 2017 applicability date. This NPRM, however, also included an extensive set of questions seeking information from the retirement investment advice and products industry and other public commenters purportedly to help the DOL respond to the President's mandate --- in essence, a Request for Information.

As of the date of this letter, the DOL has not responded to the President's memorandum or the questions he posed.²⁸ The DOL has not released a revised

²⁵ According to published reports, in addition to legislation passed in Nevada, other states such as New York and California are considering fiduciary statutes of their own. See Investment News, *States Pushing Fiduciary Rule Standards (with Success)*, June 16, 2017.

²⁶ Presidential Memorandum on Fiduciary Duty Rule for the Secretary of Labor (Feb. 3, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule>.

²⁷ 82 Fed. Reg. 12319, <https://www.gpo.gov/fdsys/pkg/FR-2017-03-02/pdf/2017-04096.pdf>.

²⁸ In response to Question #5 in its May 2017 Conflict of Interest FAQs (Transition Period), the DOL stated that it has not completed its review in response to President Trump's memorandum: "The DOL's review of the Fiduciary Rule and exemptions is ongoing. The DOL delayed full implementation of the Fiduciary Rule and associated PTEs in order to conduct the careful and thoughtful process contemplated in the Presidential Memorandum." DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, CONFLICT OF INTEREST FAQs (PART I- EXEMPTIONS) Question #5 and Answer (Oct. 27, 2016), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi->

legal analysis. It also has not publicly announced whether it is producing a new economic analysis of the fiduciary rules and their consequences, or disclosed any results from any economic analysis it has undertaken since it published the fiduciary rules in April 2016. Instead, the DOL issued a second RFI with a detailed set of new questions raising significantly more fundamental issues than the first RFI presented. It is worth noting that the comment periods provided for both RFIs (i.e., 45 days and 30 days, respectively) were not long enough to allow public commenters to conduct their own economic analyses of potential changes to the fiduciary rules given the radical transformations that have occurred.

In sum, since January 20, 2017, the DOL has not produced any analysis or offered any response to the commentary and information provided by the public apart from a few FAQs and unofficial hypothetical statements in speeches, congressional testimony, and press interviews. As described above, the landscape for retirement investment advice and products has already been radically transformed, but the DOL has done nothing more than ask questions of the public. As a result, the public, including NPH and Jackson, has been hampered in its effort to provide relevant information, data, and commentary to the DOL because we cannot know how the DOL plans to proceed or what it has learned from the new information and analyses it already possesses.

While it is certainly appropriate for the DOL to gather information and commentary from the public to determine a regulatory course, the Administrative Procedure Act requires the DOL to define the regulatory course it intends to pursue. Public comments are rendered less effective if the public is forced to provide information that would influence and inform the regulatory process absent sufficient background or supportive analysis from the DOL. The DOL should delay the rules until it has conducted the analyses it has been mandated to produce, published those analyses to the public, proposed a regulatory course for the future of the fiduciary rules, and given the public sufficient notice and a full opportunity to respond. NPH cannot know how much time will be required to perform these functions, but we are confident that a delay of 18 to 24 months would be sufficient.

Further, many large and important legal and interpretive issues arising under the fiduciary rules, including several uniquely affecting the insurance industry, remain unaddressed by the DOL. For example, the DOL published, but never finalized, a proposed PTE with respect to insurance intermediaries. Now, in its second RFI, the DOL has re-opened the issue of whether it should proceed with this PTE and how it might be reshaped. As a result, retirement savers served by independent insurance agents after January 1 will not know who is a fiduciary, who must sign a best interest contract, and which entity will be their financial institution.

rules-and-exemptions-part-1.pdf. NPH agrees with the implication of this statement that the DOL should delay application of the fiduciary rules until it has completed its review.

Similarly, the DOL has never satisfactorily addressed the question of which financial institution is responsible for the market conduct of insurance-product distributors that advise retirement savers with respect to products from multiple manufacturers. The concept advanced in an early FAQ that each manufacturer would be responsible only for market conduct associated with its own product may seem logical in the abstract,²⁹ but it is almost entirely nonsensical in the real world of investment advice, retirement products, distribution systems, and retirement savers.

Perhaps most important, the DOL recently reversed its position on the legality of the prohibition on contractual language in the BICE that would permit arbitration of claims that might otherwise be pursued through class action litigation (Section II(f)(2) of the BICE). Of course, this is one of the most controversial and problematic provisions of the BICE for all the reasons included in prior comments by numerous commenters. The disposition of this issue looms large in the relationships between investment advisers and retirement savers, and in the compliance plans of entities throughout the retirement advice and retirement products industries. At a bare minimum, the DOL must delay the January 1 applicability date until the U.S. Court of Appeals for the Fifth Circuit decides this question, and the U.S. Supreme Court decides closely related questions in *National Labor Relations Board v. Murphy Oil USA, Inc.*³⁰ during its October 2017 term.

It would be poor process for the DOL to allow the remaining requirements of the fiduciary rules to take effect on January 1, 2018, without providing detailed and clear guidance on critical open legal issues generated entirely by the DOL's own regulatory actions. It may be even worse process for the DOL to fail to delay the January 1 applicability date after directly asking a U.S. Court of Appeals to address a weighty legal question that is central to the fiduciary rules' enforcement mechanism.

For these reasons, a delay of the January 1 applicability date will benefit retirement savers, the providers of retirement advice and retirement products, other regulators, and the DOL. The DOL's section 408(b)(2) regulations revised in 2010 --- a mere 40 pages in length and affecting only the disclosure function of regulated entities --- were implemented over a two-year period before becoming applicable. The fiduciary rules --- weighing in at a whopping 1,000 pages and with a much broader reach --- began to apply after 14 months, and will apply fully on January 1 after only 20 months. Jackson urges the DOL to propose an 18-to-24-month delay of the January 1 applicability date for the remaining provisions of the fiduciary rules.

²⁹ *Id.* at Question #22 and Answer.

³⁰ *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S.Ct. 809 (Jan. 13, 2017) (No. 16-307).

Sincerely yours,

A handwritten signature in black ink, appearing to read "Scott Romine", written over a horizontal line.

Scott Romine
President/CEO