



September 15, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
Attention D-11712, 11713, and 11850
U.S. Department of Labor
200 Constitution Avenue, NW, Suite 400
Washington, D.C. 20210

Re: Proposed Extension of Transition Period and Delay of Applicability Dates (“Proposed Delay”) under the Fiduciary Duty Rule and Certain Prohibited Transaction Exemptions (“PTEs”) (collectively the “Rule”), ZRIN 1210-ZA27, 82 Fed. Reg. 41,365 (Aug. 31, 2017) (“Release”)

Dear Madam/Sir:

We¹ appreciate the opportunity to comment on the Proposed Delay captioned above. If adopted, it would push back for at least a year and a half critically important safeguards carefully designed to protect retirement savers from conflicts of interest among financial advisers. It would do so without any legitimate factual, legal, or policy-based justification, and it would inflict very substantial losses on IRA owners and other retirement savers without conferring any relevant benefits. We strongly oppose the delay.

According to the Release, the basic goal of the Proposed Delay is to spare regulated parties the expense of complying with requirements in the PTEs that the DOL **might** revise or repeal once it has completed its review of the Rule in accordance with the Presidential Memorandum issued on February 3, 2017.² Yet this highly speculative rationale and the accompanying explanations offered in the Release cannot justify any further delay in implementing the full protections of the Rule. In reality—

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans’ jobs, savings, retirements, and more.

² See Office of the White House Press Secretary, Presidential Memorandum on Fiduciary Duty Rule (Feb. 3, 2017) (“Presidential Memorandum”).

- The Proposed Delay violates the law, as ERISA nowhere establishes minimizing industry compliance costs as factors the DOL is to consider when determining the timing or substance of exemptive conditions. In fact, the law requires the DOL to put the protection of plan participants and beneficiaries above any other considerations as the DOL administers exemptions under ERISA. Similarly, the Proposed Delay fails even to satisfy the criteria for changing the Rule—including delays—set forth in the Presidential Memorandum.
- It violates the most rudimentary principles of cost-benefit analysis by almost entirely ignoring, let alone appropriately quantifying, the significant harm that the Proposed Delay will inflict on millions of retirement savers, especially IRA owners, and by instead prioritizing the desire among a relatively small number of advisory firms to avoid hypothetical and in any event modest compliance costs.
- It undermines basic principles of regulatory rationality and fairness by rewarding industry participants who were inexcusably dilatory in preparing to comply with the exemptions, effectively punishing the many advisers who stand ready, willing, and able to abide by all provisions in the Rule. And as a justification, the proposal relies impermissibly on the prospect of confusion and uncertainty among advisers, when in fact, the DOL itself created that uncertainty, resulting in a form of regulatory bootstrapping that cannot support any further delay in implementation of the entire Rule.
- It disobeys important procedural requirements under the APA by ignoring numerous substantive arguments presented in prior comment letters opposing any further implementation delays for the Rule. It also affords an inadequate 15-day comment period on a proposed delay that will last a year-and-a-half and adversely affect millions upon millions of retirement savers. This is a short-cut that the courts do not countenance absent genuine threats to public health and safety or clear Congressional mandates for haste, none of which are present here.

In short, nothing in this proposal or in any other recent issuance from the DOL come close to overturning the conclusions that follow from the record in the original rulemaking process. That record reflects years of exhaustive deliberation, an extensive comment period, countless meetings with all types of stakeholders, a detailed regulatory impact analysis showing that the benefits of the Rule outweigh its costs to industry, days of hearings, and multiple court decisions uniformly rejecting challenges to the Rule as well as attempts to delay it.

Based on that robust record, we know that (1) absent implementation of the Rule and the exemptions in their entirety and as soon as possible, American retirement savers will continue to lose billions of dollars a year due to adviser conflicts of interest; (2) all of the issues the DOL is re-examining in accordance with the Presidential Memorandum have

already been thoroughly evaluated in the rulemaking process and in the court challenges, and they have all been found meritless; and (3) **while** the DOL engages in the re-evaluation, and **while** some members of industry explore new product lines, there is no justification for delaying full implementation of the Rule.

Nothing in the Proposed Delay alters these conclusions, and the DOL should immediately withdraw the proposal. If it is nevertheless finalized, the Proposed Delay will be vulnerable to challenge in court as an extraordinary example of arbitrary and capricious agency action.

I. The Proposed Delay finds no support in the law or the Presidential Memorandum.

A. The Proposed Delay conflicts with ERISA.

The Proposed Delay has no legal foundation. Quite to the contrary, it conflicts with the plain language and intent of ERISA. As a threshold matter and as the D.C. Circuit has recently confirmed, agencies do not have inherent authority to stay their rules while they reevaluate them; rather, they must rely on some Congressional authority.³ Certainly, minimizing industry compliance costs or resolving “uncertainty” among regulated firms is nowhere listed among the factors that Congress instructed DOL to consider when it establishes exemptions allowing advisers to engage in otherwise prohibited conduct. In fact, the statute’s repeated and paramount concern is protecting plan participants and beneficiaries.

Under ERISA, exemptions must meet a three-part statutory test. As a condition of granting an individual or class exemption, the Secretary must find that the exemption is:

- (1) administratively feasible;⁴
- (2) in the interests of the plan and of its participants and beneficiaries, and
- (3) protective of the rights of participants and beneficiaries of the plan.⁵

This standard focuses exclusively on the protection of plans, participants, and beneficiaries, without regard to the costs, disruptions, or other burdens that the members of the regulated industry might face. Since the Proposed Delay constitutes, in effect, a new prohibited transaction exemption, the DOL must make these findings. However, the DOL did not and could not possibly have satisfied this test: The Release concedes that far from

³ See *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017).

⁴ As previously argued in numerous court briefs, the law is clear that administratively feasible refers to the DOL’s ability to administer, oversee, and implement the exemption, not the industry’s ability to comply with it or to minimize compliance costs. See, e.g., Amicus Curiae Brief of Better Markets *et al.* filed in *Chamber of Commerce v. U.S. Dep’t of Labor*, No. 17-10238 (5th Cir. 2017).

⁵ 29 U.S.C. § 1108 (2012).

protecting retirement savers, the Proposed Delay will inflict at least some harm on them. And previously, the DOL carefully considered all of the conditions in the Best Interest Contract Exemption (“BICE”) and determined that all of them—from the written contract to the policies and procedures—were necessary to protect retirement savers. The Proposed Delay essentially rewrites this portion of the Rule in a way that conflicts with the letter of the law. It also conflicts with the APA requirement that agencies refrain from changing their position unless they rely on and articulate “good reasons.”

The Proposed Delay also offends the Congressional intent underlying the specific provisions governing the conditions under which the DOL may grant exemptive relief. Forms of adviser compensation that vary with the advice given, such as commissions, clearly give rise to the very type of conflict of interest that ERISA was designed to prohibit.⁶ The case law reflects Congress’s intent that ERISA’s prohibited transactions be applied with the utmost rigor:

With the exception of the provision in § 1108 for the granting of exemptions by the Secretary on a case-by-case basis, it is apparent that Congress intended § 1106 to be virtually a per se prohibition against the enumerated transactions. In interpreting the prohibitions of § 1106(b), the Third Circuit discussed the provision in light of the underlying policy goals of ERISA.

We note the national public interest in safeguarding anticipated employee benefits by establishing minimum standards to protect employee benefit plans. The substantial growth of plans affecting the security of millions of employees and their dependents, as well as the limited resources of the Department of Labor in the enforcement of ERISA, leads us to believe that Congress intended to create an easily applied per se prohibition of the type of transaction in question.⁷

In light of this admonition about the importance of ERISA’s almost iron-clad prohibition against certain transactions, the DOL cannot so cavalierly dispense with the protective conditions that the DOL previously deemed necessary before allowing such inherently conflicted practices to persist—including the requirements set forth in the BICE.

Finally, the Proposed Delay conflicts with the larger policy goals underlying ERISA. Enacted in 1974, ERISA establishes vitally important protections for retirement plans, plan participants, and beneficiaries. It safeguards plan participants by imposing standards of care and undivided loyalty on plan fiduciaries and holds them accountable when they breach

⁶ See ERISA § 406(b) and Internal Revenue Code § 4975(a), (b), and (c), which prohibit conflict of interest transactions and third-party payments by investment advice fiduciaries.

⁷ *McDougall v. Donovan*, 552 F. Supp. 1206, 1215 (N.D. Ill. 1982), citing *Cutaiar v. Marshall*, 590 F.2d 523, 529 (3d Cir. 1979).

those obligations.⁸ At the heart of the fiduciary duty is the best interest standard: the obligation to act solely in the interest of plans and plan participants.

The “Congressional Findings and Statement of Policy” in ERISA articulate the profound importance of employee benefit plans, and the need to adopt standards of conduct for plan fiduciaries:

[T]he continued well-being and security of millions of employees and their dependents are directly affected by these plans It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.⁹

This provision reflects no solicitude for the industry’s desire to maximize its profits by delaying and deferring its compliance obligations in the hope that a more friendly set of regulatory requirements **might** be in the offing.

B. The Proposed Delay also conflicts with the Presidential Memorandum.

Under the explicit terms of the Presidential Memorandum, the DOL’s re-examination of the Rule must remain focused on whether the Rule may adversely affect the ability of Americans “to gain access to retirement information and financial advice.”¹⁰ And the DOL’s authority under the Memorandum to rescind or revise the Rule is contingent on a finding that the Rule will either (1) interfere with such access to information and advice, or (2) undermine the ability of Americans to “make their own financial decisions,” to “save for retirement,” and to build “individual wealth.”¹¹

Far from undermining or interfering with any of these goals, the Rule is essential to their fulfillment. Therefore, under the explicit terms of the Presidential Memorandum, no basis exists for any substantive changes to the Rule. Any proposed revisions to the Rule or the PTEs would require well-supported findings that these interests are in jeopardy—which they are not. A mere desire to streamline the Rule or alleviate some industry burdens would not suffice.

⁸ Employee Benefits Security Administration, Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice; Proposed Rule, 80 Fed. Reg. 21928 (Apr. 20, 2015).

⁹ 29 U.S.C. § 1001 (2012).

¹⁰ Presidential Memorandum, at Section 1, para. (a).

¹¹ *Id.* at para. (b) (referring to priorities referenced in a preceding section).

Essentially the same analysis applies to the Proposed Delay itself, which is a significant revision to the Rule, including the PTEs. Here too, the DOL must find, in accordance with the Presidential Memorandum, that the delay itself would enhance access to advice or further the other priorities listed in the memorandum. The DOL has not made such a finding, nor could it. In fact, the delay will harm investors by decreasing their access to quality advice that is in their best interest and by impeding their ability to make their own financial decisions, save for retirement, and build individual wealth. Moreover, the Presidential Memorandum nowhere instructs the DOL to delay or suspend any implementation dates in the Rule while the reevaluation is underway, nor does it even suggest such a course of action. This is further proof that even the President envisioned full implementation of the Rule pending the DOL's consideration of possible adjustments.

And while the Release canvasses some of the comments claiming that the **Rule** in its current form will impede access to advice, those are not relevant to any proposed **delay of the Rule**. Nowhere in the Release does the DOL make any findings or even reference "access to advice" as it explains its decision to propose a delay of the Rule. Rather, it predicates the delay on the misplaced desire to save industry some highly speculative compliance costs.

The point is simply this: **While** the DOL conducts the reexamination of the Rule, including the PTEs, it cannot lawfully delay the full implementation of any of its provisions. The Proposed Delay represents not only harmful policy, but also arbitrary and capricious agency action in conflict with the law and with the Presidential Memorandum.

II. The cost-benefit analysis offered in the Release is deficient, as it brushes aside serious and inevitable investor harms while relying heavily on far more speculative and insignificant industry costs.

A. Delay will harm investors.

The single most important consideration in evaluating the Proposed Delay should have been its adverse impact on retirement savers, yet the DOL largely ignores this threatened harm with mere suppositions, unaccompanied by any concrete analysis. The Release concedes that investors will suffer to some degree from the delay, but simply incants the DOL's belief that, in light of the Rule provisions that are currently in effect, "investor losses from the proposed transaction period extension **could be** relatively small."¹² Elsewhere, the Release notes that the DOL "**expects** affected investors will generally receive a significant portion of the estimated gains" from the Rule—although clearly not all.¹³ Nowhere does the DOL attempt to measure the magnitude of investor losses that the delay will cause.

¹² Release at 41372 (emphasis added).

¹³ *Id.* (emphasis added).

The Release is especially weak in its attempt to minimize the investor harm that will arise from the disappearance, for at least 18 months, of the important accountability mechanisms in the BICE, including the condition that advisers enter enforceable contracts with IRA owners. The Release mischaracterizes this impact as simply the “deferral of some of the estimated investor gains” from the Rule. In fact, of course, the delay represents far more than a mere deferral of investor benefits. The long-term suspension of these accountability conditions will remove an important deterrent against violations of the Rule, resulting in conflicts of interest taking a greater toll on IRA investors in particular and causing greater overall losses in retirement savings, especially as they are compounded over time. And, while some commenters, including Better Markets, previously highlighted the special importance of these provisions in the BICE in protecting retirement savers from conflicts of interest, the Release makes no effort to address those comments.

In an attempt to minimize the prospective harm from depriving investors of enforceable impartial conduct standards, the Release offers two considerations: First, that advisers to IRA owners who violate the impartial conduct standards will continue to face the prohibited transaction excise tax which has been in place for years, and second, that many investors have, as a result of publicity surrounding the Rule, come to expect that advisers will adhere to the fiduciary standard.¹⁴ Neither of these points is persuasive. The excise tax has proven to be a notoriously weak deterrent, and more enlightened investor expectations do nothing to promote deterrence or enhance the ability of investors to recover losses they suffer from conflicts of interest. Neither of these factors can substitute for the conditions set forth in the BICE, including the obligation to enter an enforceable contract.

Even more important, both of these points were carefully considered by the DOL when it originally determined, in accordance with ERISA Section 1108, that all of the conditions of the BICE were necessary to ensure that investors had adequate protections against advisers allowed to be engaged in otherwise prohibited transactions. The DOL is now reversing course on this critically important aspect of the Rule, at least for an extended period of time, without anywhere near an adequate justification and without addressing previously submitted comments on these very points.

- B. Industry injury is purely hypothetical, and if it ever comes to bear, is likely to be minimal.

The Release makes clear that the DOL’s primary concern is with members of industry who may have to expend compliance costs needlessly, in the event the exemptions undergo some modifications in the future. But the Release also makes abundantly clear that the DOL simply does not know whether, when, or how it might adjust the exemptions or conditions in the Rule. The Release concedes that because “more time is needed” to complete the review

¹⁴ Release at 41372.

ordered by the Presidential Memorandum, “**Whether, and to what extent, there will be changes to the Fiduciary Rule and PTEs as a result of this reexamination is unknown . . .**”¹⁵ And throughout the Release, the DOL consistently frames the prospect of changes to the Rule in speculative and hypothetical terms: “the **possibility** of alternatives on the horizon,” “conditions which **may** be revised,” “a delay **may** be necessary and appropriate,” “the possibility that the Department **could** adopt more efficient alternatives,” “there **may** be evidence of alternatives that reduce costs,” and “provide firms with enough time to prepare for **whatever** action is prompted by the review.”

As a result, the DOL has no idea how much in compliance costs, if any, the industry may actually save if the DOL ultimately decides to alter the exemptions or create new ones. Further, the DOL has no idea how much firms are currently spending on compliance costs,¹⁶ nor does it even know the extent to which the compliance systems firms have already established would suffice for compliance with any new modifications: “The Department also cannot determine at this time to what degree the infrastructure that affected firms have already established to ensure compliance with the Fiduciary Rule and PTE’s exemptions would be sufficient to facilitate compliance with the Fiduciary Rule and PTE’s conditions **if** they are modified in the future.”¹⁷ All of this uncertainty about the benefits of delay to industry is by itself enough to discredit the notion of extending the compliance deadlines for another year and a half.

In addition, the Release indicates that the cost savings to industry from a delay are not only hopelessly speculative but also likely to be comparatively small. For example, the Release observes that “many financial institutions already have completed or largely completed work to establish policies and procedures necessary” to support compliance with the Rule, including compliance with the exemptions.¹⁸ The DOL cites these already-expended compliance efforts in an attempt to show that strong protections are largely in place and investors therefore won’t suffer much harm from the delay—an unfounded supposition, as argued above. But in any event, to the extent firms have already paid for necessary compliance measures, the DOL’s attempt to justify the delay based on potential future savings to industry is that much weaker.

Moreover, as to compliance costs not yet incurred, the Release correctly notes that industry’s benefits from an 18-month delay cannot reasonably include the bulk of such costs, since they would only be delayed for 18 months, not entirely avoided.¹⁹ The DOL thus

¹⁵ Release at 41371.

¹⁶ *Id.* at 41373 n. 38.

¹⁷ *Id.* at 41373 (emphasis added).

¹⁸ *Id.* at 41372.

¹⁹ *Id.* at 41372-73.

focuses its analysis simply on the money the industry need not spend on compliance for 18 months or the time value of those avoided expenditures.

Recent developments in the adviser market provide yet further evidence that the industry does not actually need any relief from the current January 1, 2018 compliance deadline. In February of 2017, Senator Elizabeth Warren collected a set of compelling statements from a wide swath of the industry confirming that they are prepared to comply with the Rule: “[T]he overwhelming voice of financial firms is clear: they support the goals of the rule; they have invested in this rule; they have planned for this rule; and they will be ready by the April deadline.”²⁰ And those statements were actually confirming industry’s readiness to comply with the original April 10, 2017 compliance deadline, not the current deadline as extended to January 1, 2018.

Even more compelling is another group of industry representations that Senator Warren collected this past summer, all made during fiscal year 2017 second-quarter earnings calls with investors. As Senator Warren pointed out, those firms were under a stringent legal obligation to “accurately share all information pertaining to material matters affecting their business models or stock valuations.”²¹ Those statements further confirm that “companies are well-prepared for the rule’s implementation,” and “compliance with the rule is not overly burdensome.”²² As one CEO put it:

“On DOL, we saw no adverse impacts on the business of any note, following the initial June 9 change and remain on-track for a full implementation on January 1, if the Fiduciary Rule goes into effect in its current form.”²³

All of this stands to reason, of course, as preparing to comply with the Rule entails, as Charles Schwab succinctly put it, “modifications—not significant overhauls.”²⁴

In short, the DOL’s entire approach to the costs and benefits of the Proposed Delay is unacceptable. As shown above, the analysis is flawed in the way it minimizes the investor harms that will flow from the delay while placing great stock in purely conjectural and by all accounts modest compliance cost savings for industry. The analysis also threatens to set a remarkably de-regulatory precedent that would imperil any number of rules providing

²⁰ Letter from Elizabeth Warren, Senator from Mass., to Edward Hugler, Acting Secretary of Labor, at 5 (Feb. 7, 2017) *available at* https://www.warren.senate.gov/files/documents/2017-2-7_Warren_Ltr_to_DOL.pdf.

²¹ Letter from Elizabeth Warren, Senator from Mass., to Alexander Acosta, Secretary of Labor at 2 (Sept. 5, 2017) *available at* https://www.warren.senate.gov/files/documents/2017_09_05_Letter_to_Acosta_Fiduciary_Rule.pdf
²² *Id.* at 3.

²³ *Id.* (quoting Blucora CEO, John Clendening).

²⁴ *Id.* (quoting Charles Schwab).

critical safeguards for the public health and welfare. Under the DOL’s reasoning, any agency could justify delay of its regulatory requirements—no matter how well thought-out, no matter how many times vindicated in court, and no matter how broadly supported—simply by announcing that it is considering modifications to those requirements. The resulting “uncertainty” among members of the regulated industry would then serve as a pretext for suspending industry’s compliance obligations, while mounting costs to investors and other consumers are essentially ignored. This is not rational rulemaking, nor does it serve the public interest.

III. The Proposed Delay draws irrational and unfair distinctions among members of the industry.

The DOL seeks to justify the Proposed Delay by citing to the “uncertainty” arising from the reevaluation of the Rule and the potential for future revisions or even repeal of the Rule, including the PTEs. The DOL observes that in response to this uncertainty, “many financial firms have slowed or halted their efforts to prepare for full compliance with the exemption conditions that are currently scheduled to become applicable on January 1, 2018, because they are concerned about committing resources to comply with PTE conditions that could be modified or repealed.”²⁵

The DOL’s willingness to accept industry’s failure to prepare for timely compliance with all aspects of the Rule is irrational. As a threshold point, the DOL’s characterization of the industry’s response appears to be inaccurate. As discussed above, many firms, if not most, are prepared to comply with the Rule, including the PTEs, by January 1, 2018. But regardless of the precise level of compliance readiness among advisers, none of them have a legitimate excuse for not being completely prepared for full implementation of the Rule on January 1st. The original applicability date for the Rule was April 10, 2017, a full year following issuance of the final Rule. The DOL extended that deadline further, allowing an additional 60 days for compliance with the core provisions of the Rule and the impartial conduct standards, and until January 1st for compliance with the balance of the requirements in the PTEs. The industry has had ample time to comply.

And certainly, no firm is entitled to “slow” much less “halt” their preparations for full compliance with the Rule unless and until the January 1st deadline is actually changed. This is especially true since in its prior releases, the DOL repeatedly took pains to say that the outcome of the reevaluation under the Presidential Memorandum was open and indeterminate.²⁶ Firms that scaled back their compliance efforts without a legitimate reason

²⁵ Release at 41371.

²⁶ See, e.g., 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–

cannot now be heard to complain and to press the DOL for relief from a predicament of their own making. Even more important, the DOL should not countenance such disregard for its compliance deadlines by granting a lengthy new extension.

Finally, the DOL's approach is unfair to the majority of firms that accepted their compliance responsibilities and did what was necessary to adhere to the Rule, including the PTEs, by the deadline. Indeed, if the DOL does implement the Proposed Delay, then it will cause harm to those firms that needlessly expended resources on timely compliance with the Rule. Moreover, it will create an unlevel playing field, since the non-compliant firms will be able to operate free of many conditions in the PTEs, while those who have already implemented compliance measures or committed publicly to the Rule in its entirety may find it difficult to suspend or defer those mechanisms. In effect, the DOL engendered serious reliance interests among the compliant firms by setting the original April 10, 2017 compliance date, as extended to January 1, 2018, and the agency cannot dramatically change that deadline on the meager grounds offered in the Release.

The Release even acknowledges this unfairness: "Of course, the benefits of extending the transition period generally will be proportionately larger for those firms that currently have committed fewer resources to comply with the full exemption conditions."²⁷ Yet the DOL offers no defense of this outcome arising from the Proposed Delay.

Here again, the DOL is acting arbitrarily and capriciously, by affording relief to many firms that are not legally or equitably entitled to it, by punishing other firms who have met their regulatory obligations, and by failing to account for these consequences of the Proposed Delay.

IV. The Proposed Delay suffers from multiple procedural defects.

The Proposed Delay violates at least two basic procedural requirements under the APA. First, the DOL has failed address a number of important considerations and arguments that Better Markets and other commenters previously submitted in support of the Rule and in opposition to any further delay in the implementation of the Rule. Three examples stand out, and there are others.

1. Commenters have highlighted the legal standards that apply to possible Rule revisions or delays, including Section 1108 of ERISA setting forth the factors that govern the formulation of PTEs, as well as the provisions in the Presidential Memorandum that are to guide the DOL's reevaluation of the Rule. It is clear that

1, 77-4, 80-83, 83-1, 84-24 and 86- 128, 82 Fed. Reg. 16902 at 16906 (Apr. 7, 2017) (cautioning that the 60-day delay of the core provisions of the Rule "should not be viewed as **prejudging** the outcome of the examination").

²⁷

Release at 41371.

- under these standards, which do not mention or prioritize minimizing industry costs, the 18-month delay now being proposed cannot be justified. Notwithstanding these prior comments, the Release is devoid of any legal analysis and fails to explain how such an extensive delay, designed primarily to help recalcitrant firms avoid possibly unnecessary compliance costs, can be reconciled with ERISA, the APA, and the Presidential Memorandum.
2. Commenters have argued strenuously that any changes to the Rule, including possible delays, must be accompanied by an expansive economic analysis that captures the entirety of the harm to retirement savers that any revisions or delays would cause. They specifically stressed that such an analysis must counterbalance any assessment of benefits to industry, and must include the full range of investors harms, across all types of accounts and all categories of investments, not just certain mutual funds in IRAs. Yet the Release contains no evidence that the DOL has conducted such an analysis to support the Proposed Delay. In fact, as shown above, the DOL has not even attempted to quantify any of the harms to retirement savers that the DOL itself acknowledges will accrue from the delay.
 3. Commenters have demonstrated that as a legal and practical matter, a desire to further coordinate with the SEC as the DOL discharges its responsibilities under ERISA is no justification for further delaying the implementation of the Rule. Yet the Release expressly cites such coordination as one basis for the Proposed Delay.²⁸ Nowhere does the Release address or even reflect commenters' analysis showing that the DOL and the SEC have separate legal mandates and regulatory responsibilities, that coordination between the agencies in connection with the Rule has already been very extensive, and that linking any Rule changes to the SEC's regulatory process would be disastrous, given that agency's inexcusable inattention to the problem of conflicts of interest among advisers for decades.²⁹

A bedrock principle of administrative law is that an agency must consider and address all relevant and significant issues raised when it promulgates a Rule or a Rule change, including pertinent comments received from interested parties. With respect to the Proposed Delay, the DOL has repeatedly failed to comply with this requirement.

Finally, the comment period for the Proposed Delay is far too short. A mere 15 days does not allow sufficient time to allow everyone with a stake in the Rule to develop and submit meaningful and comprehensive input on the Proposed Delay, which is fraught with deficiencies. It also conflicts with the APA, which provides that "After notice required by this

²⁸ *Id.* at 41371.

²⁹ *See, e.g.*, Comment letters of Better Markets filed with the DOL on July 21, 2015; Sept. 24, 2015, Mar. 17, 2017; Apr. 17, 2017; and Aug. 7, 2017, available at www.bettermarkets.com or www.dol.gov, all of which are incorporated by reference as if fully set forth herein.

section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.”³⁰ And it further conflicts with Executive Order 12866, which obligates agencies to “afford the public a **meaningful** opportunity to comment on any proposed regulation, which in most cases should include **a comment period of not less 60 days.**”³¹

The need for a much more reasonable comment period is especially acute in this case, since the Rule not only affects the quality of life for virtually all American workers and retirees, but is also the subject of enormous interest and debate among a huge swath of interest groups, constituencies, and institutions, including public interest advocates, the industry, members of Congress, the Administration, and the courts. Reflecting the breadth and depth of interest in all aspects of the Rule, the DOL previously noted that it received some 193,000 comments on the subject of possible delays in the Rule during a 15-day comment period back in March (90% of which opposed any delay).³² Moreover, in that same release, the DOL noted that “The Department **continues to receive a very high volume** of comment and petition letters on a daily basis, both on the delay and on the more general questions that the Department set forth in its NRPM.”³³ The fact that commenters continued to submit their views on a possible delay well after the comment period had closed is compelling evidence that the comment period of 15 days was inadequate then, as it is now.

The only way an agency can legitimately avoid this obligation to provide a meaningful comment period is to invoke the “good cause” exception in the APA. It must find “good cause” for concluding that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”³⁴ Of course, here, the DOL has not invoked that exception, and with good reason. Under that provision of the APA, as interpreted by the courts, none of the criteria for dispensing with notice and comment apply to the Proposed Delay: There is no imminent hazard or threat to safety; the Proposed Delay is not insignificant or inconsequential; and the public interest is not well-served by the proposal.

Absent reliance on the good cause exception, an agency can only justify a truncated comment period along the lines of 15 days in rare circumstances, where there is a genuine, extrinsic, and urgent need for haste or if Congress has required the agency to move forward without delay. Not of those factors are present here, and the 15-day delay period cannot be justified.

³⁰ 5 U.S.C. § 553(c) (2012).

³¹ Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (Emphasis added).

³² 82 Fed. Reg. at 16903.

³³ *Id.* at 16903.

³⁴ 5 U.S.C. § 553 (2012).

CONCLUSION

For all of the foregoing reasons, the DOL should withdraw its Proposed Delay of the Rule. Thank you for the opportunity to submit our views.

Sincerely,



Dennis M. Kelleher
President & CEO

Stephen W. Hall
Legal Director & Securities Specialist

Better Markets, Inc.
1825 K Street, NW
Suite 1080
Washington, DC 20006
(202) 618-6464

dkelleher@bettermarket.com
shall@bettermarkets.com
www.bettermarkets.com