



Consumer Federation of America

March 17, 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-AB79, Fiduciary Rule Examination

Ladies and Gentlemen:

We are writing on behalf of the Consumer Federation of America (CFA)¹ to express our strong opposition to the proposed delay of the Department of Labor’s conflict of interest (or “fiduciary”) rule. Enactment of the rule last year represented the most significant advance in investor protection for working families and retirees in at least a generation. Although financial firms and their lobbyists fought hard to prevent the rule from being adopted, since then the majority of firms have been working in good faith to implement it, and have done so in ways that are already delivering tangible benefits to retirement savers. We remain convinced that, if the Department fairly evaluates the rule and its impact on retirement savers, the only reasonable conclusion will be that the rule and accompanying prohibited transaction exemptions (PTEs) should be implemented as drafted without further delay.

The Department argues in the Notice of Proposed Rulemaking (NPRM) that a 60-day delay of the April 10 implementation date is needed in order to allow the Department to conduct the new legal and economic analysis demanded by the Presidential Memorandum issued by the White House on February 3.² But the Department fails to make a rational case for why delay is needed to allow time to conduct this review. Specifically, the Department fails to explain why the reconsideration couldn’t be conducted during the transition period between initial implementation in April of the rule’s core principles and full implementation January 1 of the more extensive operational changes required by the rule.

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.

² The White House, Office of the Press Secretary, Presidential Memorandum on Fiduciary Duty Rule, February 3, 2017, <http://bit.ly/2l6xxrr>.

Nor has it shown the proposed delay to be justified. Even though the Department’s analysis of the costs and benefits of delay significantly understates the harmful impact of a delay on investors and other market participants, that analysis nonetheless shows that the harm from a delay dwarfs any cost savings to financial firms. If the Department were to approve a delay based on this analysis, the only reasonable interpretation would be: (1) that it began the process with a predetermined policy outcome, to delay the rule’s implementation, before even considering the far-reaching effects of its action and (2) that it chose to proceed with that plan even after calculating the costs and benefits and learning that they do not justify delay. If the Department were to adopt such an approach, its blatant disregard for the consequences of its actions and of its obligations to comply with rules designed to ensure a rigorous and deliberative regulatory process would constitute an arbitrary and capricious action.

Another reason why a blanket 60-day delay would be arbitrary and capricious is that there are other approaches available to the Department that are less harmful to retirement investors and that serve the Department’s purported interests no less well – namely, a partial delay rather than a full delay. This could be achieved through an approach that allows the revised definition of fiduciary investment advice and the impartial conduct standards of the best interest contract exemption (BIC) to become applicable, while delaying other operational requirements due to be implemented in April. Such a partial delay would achieve the desired result of providing time for the required reconsideration with minimal disruption to industry and less harm to retirement savers. While this more narrowly tailored approach would not fully cure the fact that the Department is acting in an arbitrary and capricious manner in delaying implementation, it would at least show some recognition that the Department’s previous findings and analysis demonstrate the need for enhanced protections for retirement savers and that the harm to investors from a wholesale delay greatly outweigh the benefits to financial firms.

I. The Proposal Suffers from Serious Procedural Deficiencies

A. The proposal violates the CRA

The NPRM states that the “delay would be effective on the date of publication of a final rule in the Federal Register.” This is a clear violation of the Congressional Review Act (CRA), which requires that the effective date of all “major” rules be delayed for 60 days after they are submitted to Congress or after they are published in the Federal Register, whichever date is later. The NPRM offers no justification for this CRA violation, which departs dramatically from the Department’s rigorous compliance with all such legal obligations in adopting the rule. Without question, if the situation were reversed and the Department were to adopt this approach in proposing changes to strengthen the rule’s investor protections instead of to delay them, both industry rule opponents and a majority of members of Congress would accuse the Department of engaging in an improper process. This willingness to play fast and loose with its procedural obligations suggests that the Department is prepared to ignore its legal obligations to accommodate industry demands and press ahead to repeal or revise the rule, regardless of the merits.

B. The proposal is inconsistent with EO 12866

The Department's willful disregard of its procedural obligations is further reinforced by the fact that the Department has ignored its obligations under Executive Order 12866.³ This is particularly ironic, since that Executive Order (EO) was specifically designed to ensure that the "regulatory system works for [the American people], not against them," something President Trump promised would be a priority of his Administration.⁴ In contravention of EO 12866: the Department has failed to adequately explain why the delay is necessary; it has failed to weigh the costs and benefits of alternative approaches, including the alternative of not delaying implementation or issuing only a partial delay; and, by its own calculations, it has proposed a delay that fails to "maximize net benefits."⁵

Moreover, the Department has rushed forward with this delay proposal without offering adequate opportunity for public input and without adequately considering the public input it has so far received. The accelerated 15-day comment process, just a fraction of the 60 days recommended for a significant rule, does not meet the Department's obligation to "provide the public with meaningful participation in the regulatory process" and, as a result, favors industry rule opponents. Members of the public and public interest advocates simply do not have the same resources as financial firms and their lobbyists to respond quickly to such a request. This compressed schedule for implementation also fails to provide adequate time for the Department, not to mention the Office of Management and Budget (OMB), to carefully review and respond to all the comments they receive.

While the executive order recognizes agencies' authority to adopt a more abbreviated review schedule in emergency situations, the Department has not articulated an emergency sufficient to justify its contravention of these review procedures. On the contrary, the delay proposal was issued a full month after publication of the Presidential Memorandum calling for reconsideration of the rule. The Department cannot reasonably rely on its own dilatory actions in releasing the delay proposal to justify a truncated comment period and rushed review of that proposal.

Finally, records suggest that all of the meetings held at the OMB in accordance with the executive order were with rule supporters who argued against further delay of its implementation.⁶ The Department has failed to acknowledge this record, let alone explain why it has chosen to ignore the public input it has so far received. This reinforces the impression that the Administration is giving greater weight to input received in private from industry lobbyists than it is to input submitted through the appropriate, public rulemaking process.

³ Executive Order 12866, Regulatory Planning and Review, September 30, 1993, <http://bit.ly/2mJgOvC>.

⁴ *Id.*; Nolan D. McCaskill, *Trump promises to 'work so hard' for the American people*, POLITICO, January 19, 2017, <http://politi.co/2jE9F1i>.

⁵ *Id.*

⁶ EO 12866 Meeting Search Results, Search Criteria: RIN=1210-AB79, Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, RegInfo.gov, <http://bit.ly/2nrxDif>.

C. The proposal is inconsistent with EO 13563

In addition, this rulemaking is inconsistent with the DOL's obligations under Executive Order 13563. Adopted as a supplement to EO 12866, EO 13563 requires a federal agency to "(1) ... propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; [and] (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);" among other requirements.⁷ Further, "[i]n applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."⁸ The Department hasn't complied with these requirements here. In fact, the analysis presented in the NPRM suggests it hasn't even attempted to fulfill these obligations.

D. The proposal misinterprets EO 13771

The proposal is also inconsistent with the Trump Administration's own Executive Order 13771, which "requires an agency, unless prohibited by law to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment, or otherwise promulgates, a new regulation. In furtherance of this requirement, section 2(c) of EO 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations." We do not agree with the intent behind Executive Order 13771, which encourages an arbitrary and irrational approach to policymaking, but its harmful impact will be magnified if it is used opportunistically to advance industry's interests at the expense of the public interest, as appears to be the case here.

The NPRM summarily states that, "OMB has determined that this proposed rule does not impose costs that would trigger the above requirements of Executive Order 13771." As a result, the EO's requirements do not apply, according to the NPRM. However, that conclusion is incorrect. It appears to be based on an analysis that is inconsistent with the OMB's interim guidance implementing the EO as well as previous guidance the OMB has issued. The interim guidance, in the form of Questions and Answers (Q&As), expressly addresses the question of how costs should be measured.⁹ It states that, "Costs should be measured as the opportunity cost to society," and cites OMB Circular A-4 for the appropriate application of this concept.¹⁰

⁷ Executive Order 13563, Improving Regulation and Regulatory Review, January 18, 2011, <http://bit.ly/2na4Crh> at b.

⁸ *Id.* at c.

⁹ Dominic J. Mancini, Acting Administrator, Memorandum: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs," Office of Information and Regulatory Affairs, February 02, 2017, <http://bit.ly/2kqp6rA>.

¹⁰ *Id.* at Part III. Accounting Questions.

OMB Circular A-4¹¹ first requires the agency to identify a baseline so it can evaluate the costs and benefits relative to that baseline. It then states: “Benefits and costs are defined in comparison with a clearly stated alternative. This normally will be a ‘no action’ baseline: what the world will be like if the proposed rule is not adopted.” It’s clear that, in this case, the baseline against which the Department should evaluate its proposal is one in which this proposed delay is not adopted, and implementation of the rule begins on April 10. Thus, any costs and benefits must be judged relative to that baseline.¹²

OMB Circular A-4 further clarifies that, “With regard to measuring costs, you should be sure to include all the relevant costs to society – whether public or private.”¹³ Thus, the costs to retirement savers of a delay must be considered a cost under the proposal. And, because the costs on retirement savers dwarf the benefits to industry that result from forestalling compliance with the rule, there clearly are incremental costs of the rule relative to the baseline. Thus, OMB is incorrect in its conclusion that the proposal does not impose costs that would trigger the requirements of the EO. In reality, the proposal does impose such costs, and they are immense. The Department’s failure to comply with the EO’s requirements is further evidence that the agency is playing fast and loose with its responsibilities, including those that the Trump Administration itself has demanded that all executive agencies meet.

In short, the Department is flouting what is supposed to be a rigorous process and engaging in an abuse of process by proposing to violate the CRA and ignoring its mandates under several EOs. The DOL’s blatant disregard of these procedural requirements constitutes arbitrary and capricious action.

E. The Department has provided inadequate time for comment on the reconsideration.

Procedural deficiencies regarding the delay proposal are compounded by the fact that the Department has provided grossly insufficient time for comment on the reconsideration of the rule itself. A lot is riding on the new legal and economic analysis the Department is required to conduct. Assuming the Department is acting in good faith and has not predetermined the outcome, this analysis will determine both whether the Department decides to move forward with new rulemaking to revise or repeal the rule and what form that rulemaking will take. Moreover, a decision to reopen the rulemaking process threatens to delay, possibly for years, the protections that retirement savers are due to begin receiving, at a cost of tens of billions of dollars in lost retirement savings. And yet, the Department provides only a 45-day comment period in which to answer complex questions about the likely impact of the rule on the retirement advice market and retirement investors.

The rushed process proposed for the reconsideration stands in sharp contrast to the careful and deliberate review that went into the rule’s adoption, discussed further below. Up until this point, consideration of the issue also appears to be based on a far more limited outreach to only those stakeholders who oppose the rule. If news reports are accurate, industry rule opponents have already been given a significant procedural advantage by being directly involved

¹¹ OMB, Circular A-4, To the Heads of Executive Agencies and Establishments, September 17, 2003, <http://bit.ly/2mSuQOh>.

¹² *Id.* at 2.

¹³ *Id.* at 11.

in the drafting of the Presidential Memorandum on which the reconsideration proposal is based. A lobbyist for the Financial Services Roundtable acknowledged, for example, having taken part in reviewing and making recommendations on the memorandum.¹⁴ This is an opportunity that, to our knowledge, was not afforded to any rule supporters.

That one-sided consultation with industry rule opponents appears to have biased Administration officials against the rule. At a press briefing to announce the signing of the Presidential Memorandum, for example, White House spokesman Sean Spicer called the rule “a solution in search of a problem” and parroted industry’s favorite talking point, that “its effect has been to limit the financial services that are available to” retirement savers.¹⁵ Spicer also stated as if it were fact industry’s contention that the Department had overstepped its authority in promulgating the rule, an argument that has been soundly debunked in four court decisions. Statements such as these create the strong impression that the reconsideration is a mere formality and that the outcome is pre-determined. That impression is reinforced by the Department’s failure to provide adequate time for public input into that process.

At a bare minimum, if the Department wishes to allay suspicions that it is merely going through the motions in conducting its reconsideration, it should provide a 75-day comment period at this crucial stage of the process during which time implementation of the rule’s core principles should be allowed to proceed.

II. The Proposed 60-Day Delay is a Fiction

The NPRM claims that a 60-day delay is needed because the Department cannot complete the legal and economic reconsideration of the fiduciary rule required by the Presidential Memorandum in the roughly 45 days between the publication of the NPRM on March 2 and the current implementation deadline of April 10. We agree that the analysis required by the Presidential Memorandum will be time-consuming to complete – indeed will take far longer than has been allowed for it here – and believe this fact weighs heavily in favor of *not* delaying implementation in the meantime. The far longer delay that would be needed to complete a thorough and careful review is indefensible since, as we discuss further below, even the 60-day delay proposed here cannot be justified in light of the harm to retirement investors.

Frankly, we question whether a fair evaluation of the proposed delay can be conducted in the few weeks remaining before the April 10 implementation deadline. After all, not only must the Department consider and respond to comments on the delay during that time period, which already poses a significant challenge, it must also send the final rule back to OMB for review before it is finalized. Suggesting that a careful review of the delay proposal by both the Department and OMB can all be accomplished in the time allowed reinforces the impression that the Department has predetermined the outcome of this process and that OMB is prepared to rubber stamp whatever justification for delay the Department manages to cobble together.

¹⁴ Charles Lane, *Trump Thwarts Action On Dodd-Frank Investor Protection*, WSHU PUBLIC RADIO, Feb. 5, 2017, <http://bit.ly/2kLoCyK>.

¹⁵ The White House, Office of the Press Secretary, “Press Briefing by Press Secretary Sean Spicer, 2/3/2017, #8,” Feb. 3, 2017, transcript available at <http://bit.ly/2lbwoyS>.

The fact that the Department has also proposed a shorter than necessary time period for review regarding the need for additional rulemaking suggests either: (1) that the Department does not anticipate conducting a thorough, rigorous review before concluding that rulemaking to revise or repeal the rule is needed; or (2) that it expects to extend this initial 60-day delay, perhaps more than once, in order to complete the required legal and economic reconsideration. Given the large number of complex questions the Department has posed as part of its request for comment on the reconsideration, it appears at least on the surface that the latter offers the more likely explanation, despite the evidence cited above that the Department is prepared to act in an arbitrary and capricious manner.

We are not alone in anticipating that the Department will seek to extend this initial 60-day delay. For example:

- Judi Carsrud, director of federal government relations at the National Association of Insurance and Financial Advisors (NAIFA), reportedly told *Investment News* that doing the analysis will take longer than 60 days.¹⁶ “We believe there will be another delay,” she reportedly said. “They may determine they need more time when they get the comment letters, particularly the second set of comments, which speak to the rule itself.”
- Bradford Campbell, a partner at Drinker Biddle & Reath and a former DOL assistant secretary, reportedly predicted that many commenters are likely to request that the rule be delayed for a longer period, perhaps as long as 12 months.¹⁷ A number of early commenters have already done just that.¹⁸
- Arjun Saxena, a partner at consulting firm PricewaterhouseCoopers LLP who has been following the debate over the rule, reportedly told the *Wall Street Journal* that he too believes further delays are likely.¹⁹ PwC subsequently published an *Insights* document, explaining its reasoning. “Given the number of expected comments and the additional information that DOL requested, including information relating to the costs and benefits of delaying the applicability date for six months to a year, it is possible that the rule may be further delayed beyond the June 9 date.”²⁰
- Compass Point’s Isaac Boltansky put it this way: “This delay should be viewed as a timeout that provides the Trump Administration with the timing latitude necessary to craft its fiduciary rule strategy. To that end, we note that this may not be the only extension of the applicability date.”²¹

¹⁶ Mark Schoeff Jr., *Delay of DOL fiduciary rule likely to extend beyond 60 days*, INVESTMENT NEWS, March 1, 2017, <http://bit.ly/2miFy0p>.

¹⁷ *Id.*

¹⁸ See, e.g., Andrew Welsch, *Baird to DoL: Delay fiduciary rule for a year (or more)*, ONWALLSTREET, March 9, 2017, <http://bit.ly/2m4MMRu>. See also Comment by Chamber of Commerce, calling for a minimum of an additional year delay, <http://bit.ly/2m5tFfh>; Comment by Financial Services Roundtable, calling for an additional 180-day delay, <http://bit.ly/2n3nxDj>; Comment by SIFMA, calling for an additional 180-day delay, <http://bit.ly/2myeh7l>; Comment by Insured Retirement Institute, calling for at least an additional 180 day delay, <http://bit.ly/2mN4Stf>; NAIFA calling for an additional 180-day delay, <http://bit.ly/2mNheSq>.

¹⁹ Lisa Beilfuss and Michael Wursthorn, *Donald Trump’s Labor Department Proposes Delaying ‘Fiduciary’ Rule*, THE WALL STREET JOURNAL, March 1, 2017, <http://on.wsj.com/2mx6Hxd>.

²⁰ PwC, *DOL proposes 60 day delay in fiduciary rule applicability date*, INSIGHTS FROM PEOPLE AND ORGANIZATION, March 3, 2017, <http://pwc.to/2nakJFA>.

²¹ Ben White, *Trump rally rages on*, Fiduciary React, MORNING MONEY, March 2, 2017, <http://politi.co/2lTxG6h>.

- Edward Mills of FBR & Co said: “If the change is put into place, as expected, the fiduciary rule would not become applicable until June 9 – though we expect additional delays in the coming months....Despite a shorter-than-expected proposed delay and later-than-expected action, we expect further delays to the rule.” He continued, stating: “Once a Labor Secretary is confirmed and sworn in, we expect the rule to be delayed further, possibly as long as two years. The delay would be designed to get further comment and conduct a more thorough cost/benefit analysis of the rule.”²²
- Drinker Biddle & Reath partner Fred Reish predicted that “the process of deciding whether and how to modify the fiduciary rule will be much slower than people think.”²³

Assuming that the Department agrees that further delay is likely, it must evaluate the economic impact of the proposed delay based on the reasonably anticipated length of the delay and not just the seemingly arbitrary 60 days proposed here. That would greatly magnify the projected harm to retirement investors resulting from such a delay, further undermining the already flimsy argument that a delay of the April 10 implementation date is warranted. In fact, the strong likelihood that more than 60 days will be needed to conduct the required review argues for adopting an entirely different approach. Specifically, the Department should conduct the required reconsideration during the transition period between initial implementation of the rule’s core principles in April and full implementation of its operational requirements in January 1, as we discuss further below. Failure to consider such an approach would further reinforce the argument that the Department is acting in an arbitrary and capricious manner in approving the delay.

III. The Reasoning Behind the Proposed Delay Does Not Withstand Scrutiny

In the NPRM, the Department argues that delay of the April 10 implementation date is needed to protect “advisers, investors and other stakeholders” from “the risk and expenses of facing two major changes in the regulatory environment.” First, it is frankly disingenuous to suggest that delaying implementation of a rule that would require financial professionals to act in their customers’ best interests is being done to protect investors. At the very least, the Department must recognize that investors do not desire the delay and are at far greater risk from the perpetuation of well documented abuses associated with conflicted advice than they are from the speculative risk of regulatory “disruptions” should the rule later be significantly revised. To do otherwise would strongly suggest that the Department has prejudged the question of whether investors are being harmed by the rule before any evidence has been offered to support this contention. This leads to the obvious conclusion that the Department is more concerned about protecting firms from the costs of compliance with the rule during the reconsideration than it is with protecting investors from the harmful impact of conflicts.

But even as applied to advisers, the logic used to justify the delay falls short. With scheduled implementation of the rule just weeks away, the first of the two major regulatory changes referred to in the NPRM has already occurred. The reason the Department adopted a

²² Edward Mills, FBR Flash, Washington Policy: Financial Policy, Policy Update, March 1, 2017, on file with authors.

²³ Melanie Waddell, *Quick Action on DOL Fiduciary Rule Unlikely With Acosta Confirmation*, THINKADVISOR, March 8, 2017, <http://bit.ly/2nq1LGW>.

one-year phase-in period between enactment of the rule and the initial implementation was precisely because firms indicated that they needed that time to prepare for compliance. Logic dictates that any firm that moved forward in good faith to comply has already taken extensive steps to prepare to do so.

But we need not rely on logic alone to reach this conclusion. A number of firms have publicly described the significant investments of time and money they have made in preparing for implementation of the rule. In response to a letter from Sen. Elizabeth Warren, for example, firms such as Charles Schwab, BBVA Compass, Capital One, John Hancock, U.S. Bancorp, Fidelity, RBC, Principal Financial Group, Prudential Financial, LPL Financial, Symetra Life Insurance, TIAA, Transamerica and Wells Fargo all indicated that they had devoted considerable time and resources to meeting the April 10, 2017 implementation date.²⁴ While a number of these firms said they would welcome additional time to prepare, all expressed confidence that they would indeed be ready to comply on that date.

The following are a few examples of the answers Sen. Warren received from firms operating under a variety of business models in response to her questions about their readiness for compliance:

- “We have spent several months and invested considerable financial resources preparing to implement the new DOL rule. As of today, we are confident we would be ready to comply with the rule by the April 2017 deadline.” – Charles Schwab Corporation
- “TIAA is working hard to accommodate the DOL rule’s more technical aspects in order to meet the April 10, 2017, applicability date. This extensive work includes, but is not limited to, updating and building new IT systems, revising and creating marketing and disclosure documents and training employees to comply with the rule’s technical requirements.” – TIAA
- “We are prepared to comply with the Rule, and to react to any impending changes.” – U.S. Bancorp
- “We have been working diligently to identify and implement the necessary changes to address the Fiduciary Rule’s wide-ranging requirements by the current applicability date.” – BBVA Compass
- “With the DOL rule now in final form, we have committed our resources to implement the processes, procedures and technology necessary for compliance.” – LPL
- “Compliance with the DOL Rule is to be phased in starting on April 10, 2017. Transamerica is preparing to comply with the DOL Rule as issued.” – Transamerica
- “Any delay of the applicability date of the Rule is not going to distract our focus on doing what is right for our clients, and additional time will allow our implementation team to develop better technology systems and automate new controls and processes that will benefit our clients. Regardless, we are continuing the work needed to prepare for implementation of the Rule, as scheduled for April 2017.” – Wells Fargo
- “Capital One’s investment business has been on a multi-year journey to reduce the number of commission-based products we sell to advised retirement clients because it

²⁴ Letter from United State Senator Elizabeth Warren to Acting Department of Labor Secretary Edward Hugler, Feb. 7, 2017, <http://bit.ly/2ITyMPg>.

aligns with our vision of serving clients by putting their interests first. It provides the added benefit of lowering costs for our clients. This initiative was started well before the Department of Labor’s proposed regulations were made public.” – Capital One

These firms’ significant and commendable investment in compliance could go to waste if the rule is ultimately revised or repealed. In addition, many financial firms have made public announcements regarding their plans for implementation, announcements that may have to be walked back if rule requirements are changed. Other companies have developed new product lines and services in anticipation of the rule’s implementation which may be rendered either irrelevant (e.g., DOL rule compliance services) or far less attractive to financial services providers (e.g., American Fund “clean shares”) depending on the outcome of the reconsideration.

All these firms are already exposed to “the risk and expenses of facing two major changes in the regulatory environment” as a result of the proposed delay and reconsideration. Only those firms that have irresponsibly delayed planning for compliance would avoid those risks and expenses if the Department moves forward with the proposed delay. In short, it is the Department’s last-minute reconsideration of a well-reasoned rule that raises the specter that firms’ investment in compliance has been wasted or that additional costs may be incurred as they are forced to respond to a changing regulatory environment. The only way to remove that risk is to move forward with implementation of the rule as planned.

IV. The NPRM Dramatically Understates the Harm to Investors From a Delay

Weighed against the questionable benefits that the Department has attributed to a delay are the all too real harms that would result. Extrapolating from the Regulatory Impact Analysis (RIA) prepared in support of the conflict of interest rule, the Department estimates that a 60-day delay would cost investors \$147 million in the first year and \$890 million over 10 years using a three percent discount rate. The cost to retirement investors of the longer delay most commenters believe will be necessary to complete the required reconsideration would quickly mount into the billions, using the Department’s own narrow assumptions.

Moreover, the losses investors suffer will not be recouped, even if the rule is eventually implemented as drafted. As footnote 3 in the NPRM states: “While losses would cease to accrue after the funds are re-advised or withdrawn, afterward the losses would not be recovered, and would continue to compound, as the accumulated losses would have reduced the asset base that is available later for reinvestment or spending.” Not only does this make clear that the losses to investors resulting from the delay will persist and compound long after the delay is ended, it also highlights the strong incentive financial firms have during the delay to recommend those investment products with the longest surrender periods and the highest surrender fees. Given those perverse incentives, the harm is likely to be far greater than predicted.

A. The harm estimate doesn’t fully account for the different types of conflicts that may influence advice

Even if the costs of a longer delay are taken into account, the Department’s illustration of harm dramatically understates the actual harm to investors. As the NPRM itself notes, “The illustration is incomplete because it represents only one negative effect (poor mutual fund

selection), of one source of conflict (load sharing), in one market segment (IRA investments in front-load mutual funds).” In reality, conflicts are far more extensive than is captured here. Advisers can earn significantly more money recommending certain products over others, with the highest compensation typically rewarding the sale of the highest cost, riskiest, and least liquid investment products. In addition, many firms have incorporated incentives in their payout grids that magnify the conflicts associated with differential compensation at key points when the adviser is on the cusp of moving up to the next rung of the payout grid. In addition to responding to perverse incentives by recommending more expensive and more poorly performing investments, advisers may also act on other sources of conflict, including by trading too much and chasing returns, which can cause clients to pay excessive trading costs and incur more costly timing errors.

Even on its own terms, the illustration of harm provided in the NPRM significantly understates the extent of harm associated with this one conflict. The estimate is based on academic research that looks at the underperformance of broker-sold funds relative to direct-sold funds. But as finance professor Dan Bergstresser has pointed out, “This underperformance was calculated before subtracting the brokers’ fees; underperformance after subtracting their fees would be even larger.”²⁵ The introduction of a new class of T shares, with much lower sales loads,²⁶ and clean shares, which make broker compensation transparent and subject it to market forces,²⁷ illustrates the potential of the rule to narrow and even eliminate the traditional underperformance of broker-sold funds, and to do so much more quickly than the RIA predicts.

B. The estimate doesn’t include the harm from conflicted advice regarding other types of investments

The NPRM’s estimate of harm also does not include the harm IRA investors suffer as the result of conflicted advice about other types of investment products or other mutual fund share classes. To put this in context, IRAs held roughly \$7.8 trillion in assets at the end of the third quarter of 2016, considerably more than the roughly \$3.7 trillion of that total that was invested in mutual funds, let alone the estimated \$1 trillion of that total that was invested in front-load mutual funds.²⁸ In weighing the harm that results from conflicted advice, however, it is important to remember that mutual funds are among the most transparent and liquid of investment products, with information widely available that provides detailed comparisons among funds, including with regard to cost and performance. These factors should serve to reduce the harmful impact of conflicts on recommendations of mutual funds, particularly relative to other investments, such as annuities and REITs, that are more complex and less transparent, and where much less third-party information is available comparing the various investment options. That complexity and opacity creates greater potential for investor harm.

²⁵ Dan Bergstresser, What is at Stake in the Battle over the Fiduciary Duty Rule? ECONOFACT, Feb. 8, 2017, <http://bit.ly/2kM2pOW>.

²⁶ John Rekenhaller, Lower-Cost T Shares Coming to a Fund Near You, Morningstar, Jan. 6, 2017, <http://bit.ly/2lsAoiR>.

²⁷ Alec Lucas, SEC Signs Off on Clean Share Proposal, MORNINGSTAR, Jan. 11, 2017, <http://bit.ly/2ngqjmr>.

²⁸ Investment Company Institute, Report: The US Retirement Market, Third Quarter 2016 (xls), Dec 22, 2016, <http://bit.ly/2n1nZSY>; Estimate is calculated the same way estimates of load mutual funds within IRAs are calculated in the Obama White House Council of Economic Advisers Report, “The Effects of Conflicted Investment Advice on Retirement Savings,” February 2015, <http://bit.ly/2lTEYqx>.

By way of illustration, a 2015 study compared the costs and performance of traded and non-traded real estate investment trusts (REITs) and found that investors in just 81 non-traded REITs suffered \$45 billion in under-performance relative to traded REITs. The authors attributed the high costs and poor performance of the non-traded REITs, as well as the propensity of brokers to recommend them, to conflicts that “permeate the structure of non-traded REITs, which typically use affiliated firms as advisors and managers.”²⁹ The Department should reasonably assume, therefore, that the harmful impact of conflicts on recommendations of these other types of investments is likely to be much greater than the harm associated with conflicted recommendations of mutual funds on which their estimate of harm is based.

In particular, given that there is currently more than \$700 billion in variable annuities and roughly another \$200 billion in fixed indexed annuities in the IRA market, both the magnitude and extent of harm to retirement savers are likely to be considerably greater than the proposal would lead one to believe.³⁰ As the RIA explained at length, these products are particularly complex, opaque, costly, beset by adviser conflicts, and vulnerable to abuse. Delay will only add to the harm that is already occurring as a result of conflicted advice to purchase these investments, and it will do so in material ways that the Department must factor into its economic analysis. If one considers the fact that there are roughly \$100 billion in variable and fixed indexed annuity sales in the IRA market per year, it’s reasonable to estimate that roughly \$17 billion will be sold to IRA investors during the 60-day delay.³¹ With every month of delay beyond the 60-day delay, we can further estimate that more than \$8 billion in additional sales of these products will occur. Alone, these costs of delay render the proposal’s economic analysis fatally flawed. The fact these costs haven’t even been considered in evaluating the effects of delay further renders the Department’s actions arbitrary and capricious.

In many cases, a retirement saver will not be able to undo the damage that has occurred as a result of buying these often detrimental annuity products. This is because these products typically come with long surrender periods and hefty surrender charges. For example, we conducted a survey of fixed indexed annuities and found several with surrender periods between 10 and 14 years and surrender charges between 10% and 15%. In addition, according to market research, surrender fees for the ten top-selling indexed annuities averaged 11.25% in the first year, as of 2015.³² Should an investor purchase one of these products during the delay period, the harm that accrues to them won’t just be limited to 60 days. Instead, it will persist for over a decade, as the investor faces a choice of suffering the opportunity costs, in the form of missing out on other investment opportunities, or paying the devastating price of “freedom,” in the form of a hefty surrender charge. With industry observers predicting a rush to sell fixed indexed annuities before implementation of the rule is finalized,³³ the Department must consider the strong likelihood that advisors will preference the recommendation of such products if the rule is

²⁹ Brian Henderson, Joshua Mallett, and Craig McCann, Securities Litigation and Consulting Group, Inc., “An Empirical Analysis of Non-Traded REITs,” 2015, <http://bit.ly/2IHE0tl>.

³⁰ These figures are derived from Figure 3-12 of the RIA “Year-End Deferred Annuity Assets in the IRA Market by Product Type (\$ in Billions)” at 118.

³¹ These figures are derived from Figure 3-10 of the RIA “Deferred Annuity Sales in the IRA Market by Product Type (\$ in Billions)” at 118.

³² Fidelity, Indexed Annuities: Look Before You Leap (July 13, 2016), <http://bit.ly/2mCGmLg>.

³³ Cyril Tuohy, Dear Advisors: Keep Selling FIAs Despite DOL Rule, ADVISORNEWS, April 19, 2016, <http://bit.ly/2nqxQ14>.

delayed. Many of these annuity products are likely to be sold as a result of rollover recommendations.

C. The Department hasn't adequately considered the risk of harm associated with rollover recommendations more generally

The Department has also failed to give adequate consideration to the risks of investor harm associated with rollovers more generally. According to industry statistics, \$429.6 billion was rolled over in 2014, and that trend has been growing every year since 2009.³⁴ Assuming this trend continues, it is reasonable to assume that upwards of \$40 billion is being rolled over every month. This would mean that more than \$80 billion could be rolled over during the delay. And with every month of delay beyond the 60-day delay, we can further estimate that more than \$40 billion will be rolled over. Much of the money that's rolled over will be transferred because a financial advisor recommended doing so. According to ICI's 2016 *Fact Book*, "Advisers were consulted by 63 percent of traditional IRA-owning households with rollovers, with nearly half indicating they primarily relied on financial professionals."³⁵

Rollover recommendations clearly would be covered under ERISA's full legal protections beginning on April 10th. Delaying the rule's applicability date would mean that the protections of the rule do not apply to these recommendations. That would leave investors vulnerable to recommendations that are not in their best interests, which has been identified by the Government Accountability Office and others as a serious problem. It would also leave them without any ability to hold financial professionals who make such recommendations accountable. That risk is not included in the Department's estimate of investor harm.

D. The Department hasn't even considered the harm that would result from non-fiduciary advice to small retirement plans during the delay

Nor does the Department's illustration of harm include the harm that retirement plan participants suffer when their employers get conflicted advice about plan offerings, driving up the cost of plan investment options. The RIA highlighted a GAO study that found that defined benefit pension plans using consultants with undisclosed conflicts of interest earned 1.3 percentage points per year less than other plans, for example. The proposal doesn't consider the ongoing harm to plan participants as a result of these reductions in performance. Yet, because of the large number of individuals affected, including individuals who will never directly consult a financial professional, this is likely the single greatest source of investor harm that results from gaps in the definition of fiduciary investment advice.

Recent research shows that conflicts in the 401(k) context can harm 401(k) participants, in the form of both excessive costs and inferior returns. For example, a study by the Center for Retirement Research at Boston College found that mutual fund companies involved in plan management often act in ways that appear to advance their interests at the expense of plan

³⁴ Investment Company Institute, Report: The US Retirement Market, Third Quarter 2016 (xls), Table 9, Traditional IRA Assets and Flows, Table 10, Roth IRA Assets and Flows, Dec 22, 2016, <http://bit.ly/2n1nZSY>.

³⁵ Investment Company Institute, 2016 Investment Company Fact Book, A Review of Trends and Activities in the U.S. Investment Company Industry 56th edition, <http://bit.ly/2mEoGR9>, at 154.

participants.³⁶ The authors found that this bias is especially pronounced in favor of affiliated funds that delivered sub-par returns over the preceding three years. And participants do not shift their savings to undo this favoritism, especially the favoritism shown to sub-par affiliated funds, according to the study. The study also found that the lackluster performance of these sub-par funds usually persists.

Another recent study published in the *Yale Law Journal* found that a significant portion of 401(k) plans establish investment menus that predictably lead investors to hold high-cost portfolios.³⁷ Using data from more than 3,500 401(k) plans with more than \$120 billion in assets, the authors found that fees and menu restrictions in an average plan lead to a cost of seventy-eight basis points in excess of index fund fees. The authors also documented a wide array of “dominated” menu options – funds that make no substantial contribution to menu diversity but charge fees significantly higher than those of comparable funds in the marketplace. The authors estimated that fees were so high in 16% of the plans they analyzed, that, for a young employee, the fees would consume the tax benefits of investing in a 401(k). Importantly, the authors observed that costs did not appear to simply be due to economies of scale; rather, the authors found substantial variation in total costs over plans of similar size. This suggests a serious breakdown in the protections that are supposed to apply to retirement plans, one that can likely be attributed in large part to the lack of financial sophistication among employers and their reliance on non-fiduciary advice from financial firms.

At the end of the third quarter of 2016, 401(k)s held roughly \$4.8 trillion, with mutual funds managing \$3.0 trillion of that total. If we make the most conservative estimates – that just 5% of the 401(k) mutual fund market is invested in mutual funds that underperform available alternatives because of conflicts of interest – that would yield an estimate that \$150 billion of the 401(k) mutual fund market is affected. If we assume, conservatively, that this part of the market is underperforming available alternatives by 50 basis points per year because 401(k) plan sponsors and participants are not receiving best interest advice, that means 401(k) investors are losing \$750 million annually, which amounts to \$125 million in losses during the proposed 60-day delay. And for every month of delay, we can further estimate that 401(k) investors will lose an additional \$62.5 million. If, however, we assume that conflicts of interest are more pronounced in certain parts of the 401(k) market and that 5% of the 401(k) mutual fund market is invested in mutual funds that underperform available alternatives by 1% per year, that means 401(k) investors are losing \$1.5 billion annually, which amounts to \$250 million during the proposed 60-day delay. And for every additional month of delay, we can further estimate that 401(k) investors will lose an additional \$125 million.

There is strong evidence to suggest that these estimates greatly understate the percentage of the market that is affected. If, therefore, we assume that 10% of the 401(k) mutual fund market is invested in mutual funds that underperform available alternatives because of conflicts of interest, that would yield an estimate that \$300 billion of the 401(k) mutual fund market is affected. If we assume that this part of the market is underperforming available alternatives by 50

³⁶ Veronika K. Pool, Clemens Sialm, and Irina Stefanescu, Are 401(k) Investment Menus Set Solely for Plan Participants?, Center for Retirement Research Boston College, August 2015, <http://bit.ly/1Fhyu97>.

³⁷ Ian Ayres & Quinn Curtis, Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans, *Yale Law Journal*, March 2015, <http://bit.ly/2nwVtFF>.

basis points per year because 401(k) plan sponsors and participants are not receiving best interest advice, that means 401(k) investors are losing \$1.5 billion annually, which amounts to \$250 million in losses during the proposed 60-day delay. And for every additional month of delay, we can further estimate that 401(k) investors will lose an additional \$125 million. If, however, we assume that conflicts of interest are more pronounced in certain parts of the 401(k) market and that 10% of the 401(k) mutual fund market is invested in mutual funds that underperform available alternatives by 1% per year, that means 401(k) investors are losing \$3 billion annually, which amounts to \$500 million in losses during the proposed 60-day delay. And for every additional month of delay, we can further estimate that 401(k) investors will lose an additional \$250 million.

If we assume that conflicts of interest in the 401(k) market are pervasive and that 25% of the 401(k) mutual fund market is invested in mutual funds that underperform available alternatives because of conflicts of interest, that would yield an estimate that \$750 billion of the 401(k) mutual fund market is affected. If we assume that this part of the market is underperforming available alternatives by 50 basis points per year because 401(k) plan sponsors and participants are not receiving best interest advice, that means 401(k) investors are losing \$3.75 billion annually, which amounts to \$625 million in losses during the 60-day delay and an additional \$312.5 million for every added month of delay. If we assume that 25% of the 401(k) mutual fund market is invested in mutual funds that underperform available alternatives by 1% per year because of conflicts of interest, that would suggest that 401(k) investors are losing \$7.5 billion annually. That amounts to \$1.25 billion in losses during the proposed 60-day delay, and an additional \$625 million for every added month of delay.

Estimated % of Assets Affected	Assets Affected	50 bps underperformance	1% underperformance
5%	\$150 billion	\$750 million/year = \$125 million/60-day delay and \$62.5 million/month thereafter	\$1.5 billion/year = \$250 million/60-day delay and \$125 million/month thereafter
10%	\$300 billion	\$1.5 billion/year = \$250 million/60-day delay and \$125 million/month thereafter	\$3 billion/year = \$500 million/60-day delay and \$250 million/month thereafter
25%	\$750 billion	\$3.75 billion/year = \$625 million/60-day delay and \$312.5 million/month thereafter	\$7.5 billion/year = \$1.25 billion/60-day delay and \$625 million/month thereafter

These estimates don't include the harms to 401(k) investors that result from investing in non-mutual funds, including high-cost variable annuities, when they are offered in 401(k) plans.

In summary, 401(k) participants are likely to suffer at least \$125 million in harm, and possibly as much as \$1.25 billion, as a result of the proposed 60-day rule delay. Each additional month of delay to complete the reconsideration is likely to result in between \$62.5 and \$625 million in harm. And yet, the proposal doesn't even consider the harm to 401(k) participants that would result from a delay, an oversight that renders its analysis grossly insufficient.

E. The Department must consider this qualitative information in determining whether a delay is appropriate even if it cannot quantify the full extent of the harm

Because of all that it leaves out, suggesting that the estimate presented in the NPRM reflects the totality of the harm to investors is akin to placing one's toe on a scale and then claiming that the result is an accurate measure of one's weight. Looked at in this light, industry rule opponents' quibbling over the RIA calculations are irrelevant, and their suggestions that the Department has overstated the harm are patently absurd. The Department, of course, has suggested no such thing. The limited scope of the cost estimate presented here reflects the dearth of peer reviewed independent research on which to base a quantitative estimate of investor harm, not a belief that this reflects the full extent of harm that results from conflicted advice.

On the contrary, the RIA prepared during the Department's consideration of the conflict of interest rule extensively chronicles the nature and extent of conflicts that can influence retirement investment advice.³⁸ Documenting the many forms advisers' conflicts can take and the variety of ways in which those conflicts can bias their advice, the RIA found that "conflicted advice is widespread, causing serious harm to plan and IRA investors."³⁹ Furthermore, the RIA found that advisers' compensation arrangements are often calibrated to align the interests of the firms, their advisers, and product manufacturers, not to promote investors' best interests.⁴⁰

Having examined "a wide body of economic evidence," the Department concluded "that the impact of these conflicts of interest on investment outcomes is large and negative."⁴¹ It based that assessment on an evaluation of "statistical analyses of conflicted investment channels, experimental studies, government reports documenting abuse, and economic theory on the dangers posed by conflicts of interest and by the asymmetries of information and expertise that characterize interactions between ordinary retirement investors and conflicted advisers."⁴² That evidence, which "consistently point to a substantial failure of the market for retirement advice," led the Department to estimate that: "The underperformance associated with conflicts of interest – in the mutual funds segment alone – could cost IRA investors between \$95 billion and \$189 billion over the next 10 years and between \$202 billion and \$404 billion over the next 20 years."⁴³ Importantly, the RIA cautions that, "While these expected losses are large, they

³⁸ Department of Labor, "Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest, Retirement Investment Advice," *Regulatory Impact Analysis for Final Rule and Exemptions*, April 2016, <http://bit.ly/2mT9Gfq>. (hereinafter RIA)

³⁹ *Id.* at 8.

⁴⁰ *Id.*

⁴¹ *Id.* at 158.

⁴² *Id.*; CFA presented extensive evidence of the harmful impact of conflicted advice in its original comment letter on the rule proposal. See, July 21, 2015 letter from Barbara Roper and Micah Hauptman, Consumer Federation of America, to the Department of Labor, <http://bit.ly/2mtNqgg>.

⁴³ *Id.*

represent only a portion of what retirement investors stand to lose as a result of adviser conflicts. Data limitations impede quantification of all of these losses, but there is ample qualitative, anecdotal, and in some cases empirical evidence that they occur and are large both in instance and on aggregate.”⁴⁴ Four separate court decisions have endorsed the validity of the RIA analysis and rejected industry lobbyists’ claims to the contrary.⁴⁵

In considering whether to delay the rule – and if so whether to delay all or only some of the rule’s requirements – the Department should not limit itself to weighing just those costs that it can quantify, which it knows represent only a tiny fraction of the total harm to investors. It must also consider the broader range of evidence of harm evaluated in the RIA when it concluded that the rule was needed to protect investors from the harmful impact of conflicted retirement investment advice.

We say this even though we recognize that industry opponents will inevitably seek to flood the comment record in favor of delay and reconsideration with unverifiable, speculative, and anecdotal accounts of the harmful effect that they predict the rule will have on retirement investors. If they follow their past practices, those accounts will in many cases consist of (1) paid studies using cherry-picked “data” that the sponsors will not share and that cannot be replicated or tested for accuracy and reliability; (2) an astroturf campaign designed to generate letters from customers who have been fed misinformation about the rule by industry trade associations and their member firms;⁴⁶ or (3) self-interested comments from individual financial professionals who conveniently, but falsely, claim that this rule is a “solution in search of a problem” and that any harms in the market are the result of “a few bad apples,” pointedly ignoring evidence of a market failure that is driven by skewed incentives.

The Department must therefore draw a clear distinction between credible but non-quantifiable information of the type it relied on in developing the RIA and the self-serving and unverifiable complaints of financial firms that stand to profit from the rule’s demise.

V. Other Stakeholders Would Also Be Harmed By a Delay of the Rule

While our primary concern is the harm to investors that would result from a delay, they are not the only ones who would be harmed.

⁴⁴ *Id.*

⁴⁵ Nat’l Ass’n for Fixed Annuities v. Perez, No. 16-1035 (D. D.C. Nov. 4, 2016); Mkt. Synergy Grp. v. Perez, No. 16-CV-4083-DDC-KGS, (D. KS. Nov. 28, 2016) (denying plaintiff’s motion for preliminary injunction); (Feb. 17, 2016, granting summary judgment in favor of Department); Chamber of Commerce of the United States v. Hugler, No. 3:16-cv-1476-M (N.D. Tex. Feb. 8, 2017).

⁴⁶ A recent *Wall Street Journal* article illustrates the pitfalls of relying on these sorts of accounts. (Daisy Maxey and Veronica Dagher, Meet the Retirement Savers Who Oppose the Fiduciary Rule, WALL STREET JOURNAL, Feb. 15, 2017, <http://on.wsj.com/2IDh5Pg>). One individual quoted in the article blamed the regulation for a change that would likely constitute a violation of the rule if it were already in effect -- being steered out of a commission account and into a fee account, even though she only trades a few times a year and her costs would go up because of the switch. Another suggested that, rather than focusing on advisers, the rule should limit the incentives that those providing investment products can offer, which is of course precisely what the rule aims to do.

A. Companies that have marketed compliance services based on the rule would be harmed by a delay

A number of companies have invested considerable resources in developing compliance services that they are marketing to financial firms to aid in implementation of the rule. Delaying the rule, and doing so with an eye toward revising or repealing it, raises the very real prospect that their investment in those services could be wasted, and their businesses could be destroyed. At the very least, they may have to make substantial revisions in their services to accommodate any changes the Department may adopt. In the meantime, they risk being left in limbo during a delay, without a ready market for their services. As one compliance service provider, who developed a business specifically tied to the rule, recently told us: “We’ve built a company on this product. We paid lawyers, hired people, and marketed that service. Then suddenly there’s no clear direction, and we’re in wait and see mode. That’s a significant problem for us.”

To the degree that firms are counting on income from these services, delaying the rule, and doing so with an eye toward its eventual revision or repeal, threatens their very livelihood. Facing a 60-day period without revenue, and with no new business coming in, could force companies to make severe cut-backs. Will employees have to take a reduction in salary or even go unpaid during this period? Will they be laid off? Will the delay drive some of the smallest operators out of the market entirely? The longer the delay, the more firms likely it is that could see their businesses destroyed, particularly when there is no certainty that there will be a market for their services at the end of the delay. These businesses reasonably relied, to their detriment, on a regulatory regime which is now facing possibly significant change or even repeal. The fact that the Department hasn’t even considered this issue as part of its analysis of the delay proposal further exposes the fact that its action is arbitrary and capricious.

B. Mutual funds that developed new share classes to ease compliance with the rule would be harmed by a delay

In addition to the compliance services discussed above, a number of companies have developed new product lines designed to ease compliance with the rule. In perhaps the most exciting, beneficial development attributable to the rule, the Securities and Exchange Commission (SEC) earlier this year approved a proposal from Capital Research to develop a new class of mutual fund shares, dubbed “clean shares,” which allow the broker’s compensation for recommending the funds to be separately negotiated with the client, in the same way that commissions on sales of stocks and ETFs are.⁴⁷ Since then, Janus has also sought approval for a similar offering.⁴⁸ Judging from the price competition that exists for brokerage commissions, investors can expect to reap cost savings far beyond anything the Department anticipated if “clean shares” are adopted more widely and commissions for mutual funds are finally subject to the same market forces that have been so successful in bringing down other brokerage costs.

Another cost-saving development attributable to the rule is the broad adoption of a new class of T shares. Like clean shares, T shares are designed to reduce differential compensation

⁴⁷ Jason Zweig, SEC Blesses Negotiable Mutual-Fund Fees, WALL STREET JOURNAL, Jan. 11, 2017, <http://on.wsj.com/2IL61iW>.

⁴⁸ Johanna Bennett, Janus Seeks SEC Approval For Clean Shares, BARRON’S, Jan. 26, 2017, <http://on.barrons.com/2maHwz7>.

that creates incentives to favor sale of funds that compensate the broker more generously. With front loads that are roughly half of those for typical A shares, T shares also promise significant cost reductions for investors.⁴⁹ More than 30 fund companies have already launched the new shares, and 20 more have filed to do so, with 3,800 such offerings now available.⁵⁰ Morningstar predicts that every fund company that currently offers A shares will soon offer lower cost T shares, and thousands of such offerings are already in development.

While these new share classes provide an excellent alternative to ease compliance with the conflict mitigation requirements of the rule, financial firms' interest in recommending these shares may evaporate if the rule is delayed and ultimately revised or repealed. Indeed, we are already seeing evidence that, as a result of this proposed delay, brokerage firms that were planning to offer the new share classes are being forced to reconsider those plans as fund companies have responded to the delay proposal by halting their development. As the *Wall Street Journal* recently reported, "Work to create these transaction or 'T' shares has been delayed or suspended while the Labor Department reviews the rule for repeal or revision, according to some brokerage firms familiar with fund managers' efforts surrounding the shares."⁵¹ According to the article, "fund firms are expected to wait and see how the review plays out before deciding whether to proceed with the T shares' development." Investors, who would have benefitted from the reduced conflicts and cost savings, brokers who counted on the funds' availability when developing their implementation plans, and fund firms, that devoted significant resources to development of the new fund options, will all therefore be harmed as a result of the delay.

C. Insurers that developed new, more consumer-friendly annuities would be harmed by a delay

Insurance companies have also developed new share classes of annuities, including new versions designed to be sold by fee-only advisers.⁵² Fee-based varieties of both variable and fixed indexed annuities are available.⁵³ This ensures that annuities will still be available to retirement savers, even at firms that choose to implement the rule by converting to fee accounts. Many of the new options appear to have very attractive features, including low costs, short surrender periods, and good investment options to choose from. These changes are directly attributable to the rule, according to industry experts: "Many expect that the trend of fee-based annuities with short (or no) surrender periods and low surrender charges will continue as fees must be disclosed and the client's best interests must be taken into account."⁵⁴ Indeed, as one

⁴⁹ John Rekenhaller, Lower-Cost T Shares Coming to a Fund Near You, MORNINGSTAR, Jan. 6, 2017, <http://bit.ly/2lsAoiR>.

⁵⁰ John Waggoner, Expect a spring torrent of new mutual fund share classes, INVESTMENT NEWS, March 8, 2017, <http://bit.ly/2nr9C6Y>.

⁵¹ Michael Wursthorn and Sarah Krouse, New Class of Mutual Fund Shares in Limbo as 'Fiduciary' Rule Is Delayed, WALL STREET JOURNAL, March 5, 2017, <http://on.wsj.com/2mUDBaL>.

⁵² Robert Bloink and William H. Byrnes, "After the DOL Fiduciary Rule, Enter the Fee-Based Variable Annuity," THINKADVISOR, July 4, 2016, <http://bit.ly/29xyBnk>.

⁵³ See, e.g., Press Release, "Jackson Launches Elite Access Advisory," (January 23, 2017) <http://bit.ly/2mdi7S1>; Jefferson National, Monument Advisor, The Industry's First Flat-Fee Variable Annuity, <http://bit.ly/2lOirvk>; Christopher Robbins, AIG Enters Fee-Only VA Business, Financial Advisor, Feb. 10, 2017, <http://bit.ly/2mdTYvz>; and Press Release, "Allianz Life Launches New Retirement Foundation ADV Annuity," Business Wire (February 7, 2017), <http://bit.ly/2mUJzIK>.

⁵⁴ Robert Bloink, and William H. Byrnes, After the DOL Fiduciary Rule, Enter the Fee-Based Variable Annuity, THINKADVISOR, July 4, 2016, <http://bit.ly/29xyBnk>.

financial planner and industry analyst suggested, the rule may provide the impetus the insurance industry needs to improve annuity products, making them more attractive to a wider array of financial advisers operating under a fiduciary standard.⁵⁵

If the Department delays the rule, and does so with an eye to eventual repeal or revision, investments by mutual fund companies and insurers in the development of the share classes and investment options designed to work with the rule could be lost, along with the enormous potential savings to retirement savers that they promise to deliver. The Department has failed to give adequate consideration to this issue in assessing the costs of a delay. It will take on added importance when the Department begins its reconsideration of the rule itself. As these developments make clear, the conflict of interest rule is delivering benefits to retirement savers far beyond anything the Department envisioned when developing the rule, thanks to financial firms' capacity for innovation. These advances must not be put at risk.

VI. The NPRM Likely Overstates the Cost Savings to Financial Firms

As discussed above, the estimate of harm in the rule proposal is based on only a tiny portion of the total harm that would result from a delay. The same is not true of the estimated cost savings to industry, which is derived from information supplied by financial firms and their lobbyists regarding their total expected costs of compliance. While the actual costs may be marginally more, or less, than is estimated here, the estimate of cost savings to industry from a delay does not exclude whole categories of cost, let alone the majority of those costs, as is the case with the estimate of investor harm.

We fully expect, based on their past actions, that the industry opponents will claim that their costs of compliance are significantly larger than the Department's estimates in order to help the Department "justify" what is clearly an arbitrary and capricious action. When considering this new information, the Department must bring the same scrutiny and skepticism that it brought previously to the industry opponents' cost estimates. Specifically, we remind the Department of its concerns about both the SIFMA and FSI cost estimate reports, on which the Department ultimately based its final rule cost estimates and which are also the basis for the cost savings to industry in this proposal: "These data are problematic due to small sample sizes, selection issues, lack of peer review, lack of independent verification, and the reports' omission of details about sample composition, survey design, and data collection. All of these factors cast doubt on the accuracy and reliability of these data."⁵⁶

Despite these specific concerns, and the broader concern that "[i]t is likely that the reports err on the side of overestimating compliance costs," the Department nonetheless decided to use the two reports' estimates as benchmarks for its own cost estimates.⁵⁷ Given that the current cost savings to financial firms are already derived from industry cost estimates, which are likely to be overstated, the current cost savings estimates to financial firms are similarly likely to

⁵⁵ Michael Kitces, Why The DoL Fiduciary Rule Won't Kill Annuities, It Will Make Them Stronger!, NERD'S EYE VIEW AT KITCES.COM, April 12, 2016, <http://bit.ly/22THLKe>.

⁵⁶ RIA at 209.

⁵⁷ *Id.* at 210.

be overstated. The Department must not compound this deficiency by accepting at face value whatever numbers the industry opponents provide.

In addition, the Department must not include start-up costs in its cost-savings estimates. With scheduled implementation of the rule just two months away when the White House issued its memorandum directing the Department to reconsider the rule, only the most irresponsible of firms would have failed to have completed the bulk of the changes needed to comply with those rule requirements due to take effect in April. As discussed above, numerous firms report having already invested significant resources in order to be prepared to comply with the rule as scheduled. Ironically, those firms that have been responsible and moved forward quickly to ensure they would be ready for compliance on day one would be punished by a delay, relative to those who drag their feet, since the more responsible firms will have greater sunk costs. At best, firms that remain committed to acting in customers' best interests would be unable to recoup those sunk costs. However, if firms that have invested heavily in compliance try to recoup a portion of those sunk costs by aggressively pushing investments during the delay that pay higher compensation to the seller, and particularly those with long surrender periods and high surrender costs, the harm to retirement investors will be magnified.

Finally, the NPRM suggests that an implementation delay could reduce the cost of compliance by allowing firms to take "gradual steps toward preparing for compliance." Such benefits would only accrue, however, if the firms know precisely what compliance requirements they are facing once the delay ends. That is not the case here, where the delay is designed, not to ease compliance, but to allow for a sweeping reconsideration of the rule. No one knows at this point what the end result of that reconsideration will be. Anything from reaffirmation of the rule in its current form to complete repeal is possible. As a result, most firms are likely to pause their implementation efforts until a clearer picture of the likely outcome emerges, not gradually implement a rule that may ultimately be repealed or radically revised. Under these circumstances, the Department cannot reasonably include a more gradual implementation schedule among the cost savings associated with the proposed delay.

VII. The Analysis Provided Does Not Support an Implementation Delay

Despite overstating the cost savings to financial firms from a delay and vastly understating the harm to retirement investors, the Department's cost benefit analysis does not support a decision to delay implementation of the rule. The Department estimates savings to financial firms of \$42 million from a 60-day delay. That's less than a third of the \$147 million in lost investment gains the Department estimates retirement savers would suffer in the first year as a result of the delay. The \$42 million in projected cost savings is just under five percent of the 10-year total of \$890 million in lost investment gains that the Department estimates the delay would cause. For the Department to approve a delay based on this analysis of the costs and benefits would expose it to legal challenge on the grounds that it had acted in an arbitrary and capricious manner. The longer the delay is expected to last, the greater the imbalance between cost savings to industry and harm to retirement savers becomes.

In considering whether to delay the rule, the Department cannot simply disregard the extensive analysis that went into the rule's adoption. That analysis was developed through one of

the most open and inclusive comment processes on record, a process that spanned six years. During that time, the Department provided several opportunities to comment on the proposal and the RIA, receiving thousands of individual comment letters and hundreds of thousands of submissions made as part of 30 separate petitions. More than 75 individuals testified during four days of public hearings on the rule and the RIA. And, throughout that period, Department officials met individually with hundreds of stakeholders, including both supporters and opponents of the rule. And the Department listened, revising both its rule proposal and the RIA in response to comments received.

While a proposal to delay implementation may not require as extensive an analysis as a proposal to repeal would require, the Department nonetheless must give serious and careful consideration to the potential harmful impact of a delay. The reconsideration on which a decision to engage in additional rulemaking will be based will require more extensive analysis still. The rush to judgment reflected in statements by Administration officials call into question the Department's willingness to engage in a fair and open process. If the Department continues to move forward with a delay and reconsideration based on the hasty, superficial, and biased analysis so far in evidence, it will be guilty of engaging in an inadequate process and vulnerable to legal challenge for acting in an arbitrary and capricious manner.

VIII. Delay is Not Needed to Conduct the Required Reconsideration

In light of the overwhelming evidence that the harm of a delay greatly outweighs the benefits, the Department needs to carefully evaluate whether it would be possible to conduct the required reconsideration of the rule without delaying the April 10 initial implementation date. There is no evidence in the NPRM that the Department has even considered the feasibility of this approach, let alone weighed its costs and benefits. In fact, however, the bulk of the fiduciary rule's operational requirements, including its most controversial elements, are not due to be implemented until January 2018. We therefore see no reason why it wouldn't be feasible for the Department to conduct the required reconsideration during the nearly nine months before the full complement of rule requirements are due to become applicable.

A. The rule elements due to be implemented in April are not controversial

The key components of the rule that are due to be implemented in April are the revised definition of fiduciary investment advice and the impartial conduct standards. The impartial conduct standards include the requirements to offer recommendations in the best interest of the customer, charge only reasonable fees, and avoid misleading statements. These requirements are not controversial. On the contrary, even the most ardent opponents of the conflict rule have stated repeatedly that they favor applying a uniform best interest standard to personalized investment advice.⁵⁸

- SIFMA, the leading lobbyist for the brokerage industry, stated in its July 2015 comment letter that, "SIFMA and the broader financial services industry have long advocated for such a best interest standard when providing personalized investment advice." SIFMA CEO Kenneth Bentsen reiterated that point in his testimony at the public hearing on the

⁵⁸ The following statements are all taken from the groups' July 2015 comment letters.

proposed rule, when he said that “DOL’s definition of a best interest standard ... is fairly consistent with SIFMA’s longstanding advocacy in support of such a standard.”

- The Insured Retirement Institute (IRI), which represents manufacturers and distributors of annuity products, listed as a “core principle” that, “Financial professionals should be held to a best interest standard when recommending investments to retirement savers.”
- The Financial Services Institute (FSI), which represents independent broker-dealers often dually registered as investment advisers, similarly proclaimed its support for a best interest standard, “Since 2009, FSI has supported a uniform fiduciary standard of care applicable to all professionals providing personalized investment advice to retail clients. Consistent with the Department’s intent, this standard of care would require financial advisors to act in the best interest of their clients.”
- The American Council of Life Insurers (ACLI), a trade association for life insurance companies, stated, “We share the Department’s interest in seeing that plan sponsors, plan participants and IRA owners receive advice that is in their best interest,” while the National Association of Insurance and Financial Advisors (NAIFA), representing life insurance agents and registered representatives of broker-dealers, states, albeit grudgingly, that it “does not oppose a ‘best interest’ fiduciary standard for its members.”
- Financial Services Roundtable (FSR), which bills itself as the leading advocacy group for America’s financial services industry, similarly proclaimed its support for “a ‘best interests’ standard that would be applicable to investment products and services provided to Americans,” and the Investment Company Institute (ICI) affirmed its agreement that “advice providers should act in their clients’ best interest.”
- Kent Mason, a lobbyist on behalf of financial industry clients and a vocal opponent of the rule, stated unequivocally in his comment letter that “industry supports a best interest standard.”

B. Rule elements due to be implemented in April are consistent with securities law principles

The groups cited above have generally expressed a preference for rulemaking under the securities laws, but it would not be possible to achieve the uniform standard they profess to support through such an approach. While SEC rulemaking would cover advice to individuals in both retirement and non-retirement accounts, it would cover only advice about securities. Thus, investors would receive inconsistent protections depending on the type of investment recommended, and financial advisors could easily evade the best interest standard by recommending non-securities, such as insurance products, or fixed indexed annuities, which are exempt from SEC oversight. Ultimately, the DOL, SEC and state insurance regulators all need to act to get a truly uniform best interest standard. But the Department’s conflict rule provides an excellent starting point by creating a uniform standard for all recommendations, regardless of investment type, within retirement accounts.

Moreover, both the DOL rule’s definition of investment advice and its best interest standard are consistent with the approach industry rule opponents have said they support. In fact, the Department bent over backwards in drafting the rule, and the prohibited transaction exemptions that accompany it, to incorporate securities law principles so that DOL’s approach would be generally consistent with a uniform fiduciary rule under the securities laws, should the SEC eventually get around to adopting such a rule. Indeed, the adoption of a “best interest”

standard that accommodates sales-related conflicts is a departure from ERISA’s sole interest standard that was adopted for precisely this purpose of promoting greater uniformity across accounts. The Department looked to FINRA guidance on what constitutes a recommendation in order to ensure consistency with securities laws in the definition of personalized advice.

C. If a reconsideration is to be conducted, it should focus on the more controversial aspects of the rule, which are not due to take effect until January 2018

In voicing their opposition to the rule, industry rule opponents have focused primarily not on the best interest standard for personalized advice but rather on those additional rule requirements that the Department adopted to ensure compliance with the best interest standard. These include the contract requirement, which creates an enforcement mechanism for the fiduciary standard, and the requirement to adopt policies and procedures to minimize conflicts, which will at many firms necessitate extensive changes to compensation and other business practices that encourage and reward advice that is not in customers’ best interests.

SIFMA, for example, stated in its comment letter that its objection is not to the proposed best interest standard but to the “hundreds of pages of extraneous conditions, restrictions, and prescriptions” that the Department has added “on top of its proposed best interest standard.” ICI stated that it would have been “most supportive” of the rule if the Department had “adhered to a true principles-based approach,” but it criticized the Department for proposing “a set of convoluted, inflexible, and highly prescriptive rules.” And Fidelity Senior Vice President Ralph Derbyshire summed up this argument in his testimony at the public hearing on the proposed rule: “Unfortunately, the exemption structure in the proposal is so burdened with unnecessary restrictions and conditions that it is anything but principles-based and largely unworkable. The problem is easily solved by implementing what the Department said it was aiming to do: create a broad, principles-based approach that provides an exemption for regulated financial institutions that agree to act in the investor’s best interest. In fact, the Department, within this very same rule proposal, does follow a true principles-based approach in the form of standards of impartial conduct that are proposed as amendments to several existing exemptions. Those standards should form the basis for the broad principles-based exemption the Department has promised, that is, a commitment to act in the customer’s best interest, payment of no more than reasonable compensation, and full disclosure of material conflicts.”

We strongly disagree with industry rule opponents’ characterization of the rule. Experience since the rule was finalized provides overwhelming evidence that the rule is both workable and working as intended to reduce conflicts and drive down costs while preserving access to advice for even the smallest of retirement accounts. It nonetheless makes sense that, if a reconsideration of the rule is to be conducted, it should focus on those elements of the rule that have been most controversial rather than those, like the best interest standard for investment advice, that have virtually universal support. Fortunately, the rule provisions due to become applicable in April consist almost exclusively of those “principles-based” elements that even rule opponents agree are appropriate. Thus, the staggered implementation schedule built into the rule should allow for the reconsideration to go forward without requiring a delay of the April implementation date.

If, however, the Department identifies certain of the rule requirements due to become applicable in April that it believes need to be suspended during the reconsideration, it should limit the delay to those provisions of the rule. These might include the notice and disclosure requirements, for example, which account for the majority of costs to financial firms during the transition period. The burden of proof lies with the Department, however, to show why any such delay is needed and justified. Under no circumstances should implementation of the revised definition or impartial conduct standards be delayed, since such an approach risks causing harm to retirement investors that simply cannot be justified based on the cost savings to industry.

Conclusion

The conflict of interest rule was developed through a careful and deliberative process over a number of years with input from all interested stakeholders. Based on its thorough evaluation of the evidence, the Department concluded that conflicts of interest were pervasive in the retirement advice market, that those conflicts too often led financial firms to place their own financial interests ahead of their customers' best interests, and that retirement investors were suffering billions of dollars a year in lost retirement income as a result. Despite strong and well-funded opposition from powerful special interest groups, the Department succeeded in finalizing a pro-investor rule that has withstood legal challenge in three separate federal courts. Experience since the rule was adopted has shown conclusively that the rule is workable and working as intended to reduce conflicts and drive down costs to retirement investors while preserving access to advice for even the smallest account holders. Indeed, the record suggests that the rule is already delivering tangible benefits to retirement savers on a scale and with a rapidity never anticipated by the Department.

The proposal to delay implementation of the rule in order to conduct a sweeping reconsideration disrupts that progress. Some rule opponents have publicly celebrated what they view as the first step toward the rule's eventual repeal or radical revision. We remain convinced that a fair and thorough reconsideration will support implementation of the rule as drafted without further delay. But the one-sided input from industry rule opponents that led to the decision to reconsider the rule and the rushed process being proposed for that reconsideration call into question the Department's willingness to conduct a fair evaluation. The fact that the Department has proposed to delay implementation even though its own limited analysis shows that the harm of a delay far outweighs the benefits further suggests that the Department is prepared to flout its procedural obligations and act in an arbitrary and capricious fashion in order to advance the agenda of powerful special interest groups.

The Department could help to alleviate these concerns, and appropriately focus its reconsideration on the more contentious elements of the rule, if it allowed the rule's core principles – its revised definition and impartial conduct standards – to be implemented as scheduled in April. That would send a strong message that the Department (1) recognizes that it cannot simply ignore the evidence it collected in developing the rule and (2) is not backtracking on its commitment to protect retirement investors from the harmful effects of conflicted advice.

For these reasons, we urge the Department to withdraw this proposal to delay the rule so that working families and retirees can begin receiving the desperately needed benefits of best interest retirement investment advice without further delay.

Respectfully submitted,

Handwritten signature of Barbara Roper in cursive script.

Barbara Roper
Director of Investor Protection

Handwritten signature of Micah Hauptman in cursive script.

Micah Hauptman
Financial Services Counsel