NAIFA
National Association of Insurance
and Financial Advisors

March 10, 2017

VIA ELECTRONIC FILING – www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Fiduciary Rule Examination
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

RE: RIN 1210-AB79
Proposed Rule to Extend Applicability Date of Conflict of Interest Rule

To Whom It May Concern:

The National Association of Insurance and Financial Advisors ("NAIFA") appreciates this opportunity to comment on the Department of Labor's ("Department" or "DOL") Proposed Rule (or "Proposal") to extend the applicability date of the Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice (the "Rule"), and related Prohibited Transaction Exemptions ("PTEs").[1]

NAIFA strongly supports the Department's Proposal and we applaud your efforts to conduct a thorough re-examination of the Rule and PTEs consistent with the President's February 3, 2017 memorandum.[2] In the Proposal's preamble, the Department correctly notes that without some action to delay, the applicability date will arrive before the Department can properly complete its study. Additionally, should the Department's review result in a determination that rescission or revision of the Rule/PTEs is necessary, absence of a sufficient extension period could cause multiple major disruptions to the regulatory environment and the marketplace, and needless consumer confusion and harm.

---

[1] Proposed Rule; extension of applicability date, *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 Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128*, 82 Fed. Reg. 12319 (Mar. 2, 2017) (hereinafter "Proposed Rule").

[2] Presidential Memorandum, *Fiduciary Duty Rule* (Feb. 3, 2017), available at: https://www.whitehouse.gov/briefing-room/presidential-actions/presidential-memoranda.

To avoid precisely these issues in the near- and long-term, as explained in further detail below, NAIFA urges the Department to:

- Finalize the 60-day extension—with respect to all parts of the Rule and PTEs—in advance of the current April 10, 2017 applicability date, and as proposed, deem the delay effective upon publication of a final rule;
- Extend both applicability dates (April 10, 2017 for the transitional provisions and January 1, 2018 for full PTE compliance) for an *additional* 180 days to allow for a thorough review of public comments and to fulfill the President's directive; and
- Utilize the additional delay period to conduct a new, independent cost analysis, particularly in light of negative market responses to the final Rule and PTEs to date.

BACKGROUND & IMPACT OF THE RULE/PTES ON NAIFA MEMBERS

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation's oldest and largest associations representing the interests of insurance professionals from every Congressional district in the United States. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

NAIFA members—comprised primarily of insurance agents, many of whom are also registered representatives—are Main Street advisors who serve primarily middle-market clients, including individuals and small businesses. In some cases, our members serve areas with a single financial advisor for multiple counties. And often, our members' relationships with their clients span decades and various phases of clients' financial and retirement planning needs. Most of our members work in small firms—sometimes firms of one—with little administrative or back office support. Often, their business practices are dictated by the broker-dealer or insurance company with whom they work, including the format and provision of client forms and disclosures. They also are subject to transaction-level oversight and review by their overseeing financial institutions.

The retirement products most commonly offered by NAIFA members are annuity products (fixed and variable) and mutual funds. Some of our members are independent advisors working with independent broker-dealers; others are affiliated with (or captives of) product providers and are restricted to some degree in the products they are permitted to sell. Virtually all NAIFA members working in the individual IRA space will have to rely on the Best Interest Contract ("BIC") Exemption, which represents a far more onerous compliance regime than any of our members (or their financial institutions) have previously faced.

Despite former Secretary Perez's statement before Congress on June 17, 2015 that the Department's Rule makes things "simpler" by imposing a uniform fiduciary standard on investment advisors, the Rule and its accompanying PTEs are anything but simple. Instead, the regime is complex and contains extensive conditions that will put a tremendous burden on advisors who serve the middle market, as well as their clients. As discussed below, we already have seen negative market reactions to the Rule and PTEs—direct evidence that concerns for small and mid-level savers are justified.

NAIFA Supports the Department's Proposal & Further Actions Necessary to Properly Study the Fiduciary Rule and Propose Appropriate Next Steps

The Department's proposed 60-day extension is warranted and not unprecedented. As the Proposal's preamble recognizes, the Department's preparation of new legal and economic analyses of the Rule/PTEs and related determination of whether (and/or to what extent) they are consistent with the new Administration's policies—including an assessment of all public comments received in response to the Department's current request for stakeholder input—will take a significant amount of time. The 60-day proposed delay is absolutely necessary, given the fast-approaching April 10 applicability date, and will provide the Department a bare minimum of time to consider and implement its next steps without the disputed Rule becoming applicable in the meantime (with the attendant risks regarding harmful costs, confusion and disruptions listed in the Proposal's preamble).

Relatedly, the Department should include the following in its final rule:

- As proposed, make the 60-day delay effective as of publication of a final rule;
- Apply the delay to *all* of the Rule's and PTEs' provisions and requirements; and
- Apply a parallel delay to the Rule's/PTEs' final applicability date for full compliance (January 1, 2018).

Prolonging the effective date beyond publication would thwart the very purposes of the Proposal,[3] rendering this entire process moot.[4] Further, applying the extension to some components of the Rule/PTEs but not others would create even *more* risk of confusion and unnecessary costs because industry participants and consumers would have to parse what is applicable and what is not within a complex regime built upon many intertwining and related parts (and, if even practicable at this stage, adjust their expectations and preparations accordingly in an extremely short timeframe). Additionally, the more onerous PTEs (e.g., the BIC Exemption) were designed in the first instance to include an adequate transition period prior to the full compliance deadline on January 1, 2018.[5] By the same rationale, because the 60-day

[3] According to the Department, the proposed 60-day extension "aims to guard against" certain identified risks associated with the current applicability date preceding conclusion of the Department's analysis of the Rule and PTEs, and any decision by the Department regarding appropriate next steps. 82 Fed. Reg. 12320 (Mar. 2, 2017).

[4] Notably, the Congressional Review Act ("CRA"), 5 U.S.C. § 801, *et seq.*, which generally requires a major rule's effective date to be delayed for 60 days following publication of a final rule, contains a relevant exception. Namely, the Department can identify any effective date for its rule, so long as it finds (and briefly describes in the final rule) good cause that the normal CRA procedure is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 808(2). Such good cause clearly exists here for all of the reasons identified in the Proposal.

[5] *See* Final BIC Exemption, 81 Fed. Reg. 21069 (Apr. 8, 2016) (explaining that the April 10, 2017 applicability date "is appropriate for plans and their affected service providers to adjust to the *basic* change from

extension effectively would pause the implementation timeframe and related industry preparations, the stay should apply to the transition period as well, and the January 1, 2018 deadline should be extended by a commensurate period.

Finally, there is clear precedent for the Department's proposed extension. In fact, earlier Department rules regarding fiduciary investment advice (issued by the George W. Bush Administration) were delayed for 60 days in 2009 by the Obama Administration, following public notice and comment, "in order to afford the Agency the opportunity to review legal and policy issues relating to the final rules."[6] Ultimately, to give the Department "additional time to consider the issues raised by commenters" regarding the merits of rescinding, modifying or retaining the rules, the Department delayed the effective and applicability dates of those rules twice more (two successive six-month periods) before ultimately withdrawing the rules and formulating its own proposal.[7]

Similarly, here, an *additional* 180-day extension following the proposed 60-day delay will be necessary for the Department to review public responses to its broader questions regarding the merits of the Rule and PTEs, conduct a thorough policy and cost-benefit analysis, potentially develop an alternative rule or amendments to the Rule/PTEs, and avoid further harm to retirement investment consumers. The President's memorandum appropriately focuses on the Rule's/PTEs' potential impact on retirement savers, including savers' access to investment advice and products, and market dislocations. It is clear from market reactions to date that these are serious concerns, which must be addressed.

For instance, 2,708 NAIFA members—along with thousands more Main Street advisors across the country—no longer will be able to provide personalized retirement investment advice to their clients because *just one* financial institution (of the many with which NAIFA members are affiliated) has banned its advisors from offering mutual funds, variable annuities and other investment products that trigger onerous compliance obligations under the Rule/PTEs. Instead, these clients—*hundreds* per advisor—will be sent to a self-directed call center where they will have to make investment decisions on their own.

More broadly, since the final Rule and PTEs were published in April 2016:

- Many advisors plan to exit the business entirely, which will restrict consumers' access to much-needed professional advice;[8]

---

non-fiduciary to fiduciary status" while being "subject to more limited conditions;" and the transition period between then and January 1, 2018 "is intended to give Financial Institutions and Advisers time to prepare for compliance with the [full set] of conditions" under the exemption) (emphasis supplied).

[6] *See* Department of Labor, Withdrawal of final rule, *Investment Advice—Participants and Beneficiaries*, 74 Fed. Reg. 60156 (Nov. 20, 2009) (background discussion of steps taken prior to ultimate withdrawal of the rule).

[7] *Id.*

[8] *See, e.g.*, ThinkAdvisor, *DOL Fiduciary Has Many Advisors Mulling Career Change: Fidelity Survey* (Nov. 3, 2016) (in a blind online poll of 459 advisors conducted by Fidelity Clearing & Custody Solutions from August 18 to 26, 2016, 10% of advisors reported they are planning to leave or retire from the field earlier than expected because of the rule, and another 18% said they are "reconsidering their careers as advisors").

- Firms have restricted product offerings to certain clients, thereby limiting consumer choice, and have abandoned traditional, lower-cost compensation arrangements for advisors (e.g., commissions, rather than high upfront management fees that small and first-time savers cannot afford) in order to avoid the cost of complying with the BIC Exemption and mitigate the threat of costly class action lawsuits; [9] and
- Firms are cutting back on hiring and R&D, and are foregoing investments in growth opportunities in anticipation of the cost of complying with the Rule and PTEs.[10]

All of these developments are harmful to consumers, including NAIFA members' clients, and are contradictory to the Rule's objective: bolstering retirement savings. Thus, they warrant careful study by the Department, and adequate time—at least an additional 180 days beyond the proposed extension—is a prerequisite. Further, for the same reasons outlined above, a longer 180-day extension should apply to all aspects of the Rule/PTEs and both applicability dates.

Thank you for your consideration.

Sincerely,

Paul R. Dougherty, LUTCF, FSS, HIA
NAIFA President

[9] *See, e.g.,* Wall Street Journal, *Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule* (Aug. 17, 2016) (Edward Jones announces it will limit mutual fund access for retirement savers in accounts that charge commissions); Crain's, *Why State Farm agents are getting out of the investment game* (Sep. 3, 2016) (State Farm directs 12,000 securities-licensed agents to no longer provide their clients with mutual funds, variable annuities and other investment products); Maxey, Daisy, Wall Street Journal, *New Rule Helps No-Loan Funds—But Investors Still Need to Watch for Other Fees* (Nov. 7, 2016) (Charles Schwab stops selling fund share classes with frond-end sales loads in May 2016). *See, e.g.,* Benjamin, Jeff, Fiduciary Focus, *DOL Fiduciary Rule Class-Actions Costs could Top $150M a Year* (Feb. 9, 2017) ("Some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC Exemption] that does not include a contract or variable commission rate, making them exempt from class-action lawsuits. Other firms will be rolling the dice."); AdvisorHUB, *Merill to End Commission-Based Retirement Business on Retail Accounts* (Oct. 6, 2016) available at https://advisorhub.com/exclusive-merrill-end-commission-based-retirement-business-retail-accounts/ (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000 brokers cannot receive commissions for advice on retirement accounts and will have to shift clients who remain with the firm to fee-based advisory accounts).

[10] *See, e.g.,* Skinner, Liz, InvestmentNews, *Outlook 2017 Haze Ahead; With a New Year, a New Government and Old Regulations, Advisers Feel More Optimistic About the Economy than Their Own Books of Business* (Jan. 9, 2017) ("Joshua Mellberg is avoiding long-term contracts with technology providers and others until his advisory firm has judged the financial fallout from the Labor Department's rule on retirement advice [and has also] cut this year's research [and has] also cut this year's research and development expenses and put a freeze on hiring to ensure that the hybrid advisory firm is prepared to handle any extra compliance costs or other ill effects of the fiduciary rule….").