March 13, 2017

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

Attention: Fiduciary Rule Examination, RIN 1210-AB79

Gentlemen and Ladies:

The Financial Services Roundtable ("FSR")[1] welcomes the opportunity to comment on the proposed 60-day delay of the applicability date of the final regulation (the "Final Rule") defining who is a "fiduciary" under section 3(21)(A)(ii) Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and section 4975 of the Internal Revenue Code of 1975, as amended (the "Code"), and the prohibited transaction exemptions promulgated or amended in connection with the adoption of the Final Rule (the "Associated PTEs").

The 60-Day Delay Would Avoid Unnecessary Disruption and Confusion for Retirement Investors

FSR strongly supports the proposed 60-day delay, and the Department's stated intention to make the delay effective upon publication of a final rule in the Federal Register. As the Department notes in discussing the study mandated by the Presidential Memorandum of February 3, 2017, a result of the study may be a rescission or revision of the Final Rule. The Department further notes that without the 60-day extension of the applicability date, "advisers, retirement investors, and other stakeholders might face two major changes in the regulatory environment instead of one"—which "could unnecessarily disrupt the marketplace and produce frictional costs that are not offset by commensurate benefits." See,

[1] As *advocates for a strong financial future*™, FSR represents the largest integrated financial services companies providing banking, insurance, payment, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO.

82 Federal Register 12320 (Mar. 2, 2017) (proposed rule; extension of applicability date).

Thus, allowing the applicability date to arrive before postponing the effect of the Final Rule and Associated PTEs will be confusing and disruptive for retirement investors. To avoid disruption and additional confusion in the marketplace, it is imperative that the review and re-evaluation of the Final Rule and Associated PTEs that is contemplated by the Presidential Memorandum be completed before the Final Rule and Associated PTEs would otherwise take effect.

The 60-Day Delay Should Become Effective Immediately

FSR also urges the Department to expressly find, in accordance with Section 808 of the Congressional Review Act, that it would be impracticable, unnecessary, or contrary to the public interest for the 60-day delay (and any additional extensions of the applicability of the Final Rule and Associated PTEs) not to become effective immediately upon publication in the Federal Register of a final rule adopting the delayed applicability dates. The transition that is required to comply with the Final Rule is itself already vastly complex and difficult to implement and explain to retirement investors, plus it entails numerous and substantial systematic changes to processes and information systems.

Further Extensions Would Facilitate an Efficient Evaluation of the Final Rule and Associated PTEs

FSR also recommends the adoption of an additional 180-day delay of the applicability date of the Final Rule and the Associated PTEs, as well as comparable extensions of the grandfathering relief under the Best Interest Contract Exemption (the "BIC Exemption") and the January 1, 2018 date by which institutions relying on the BIC Exemption must comply in full with all of the requirements of the BIC Exemption (the "Full Requirements"), including the requirement that a written contract be in effect with an applicable retirement investor. FSR believes that the additional delay in the implementation of the Final Rule, the Associated PTEs and the Full Requirements would facilitate a more efficient process for the Department to evaluate whether the Final Rule "may adversely affect the ability of Americans to gain access to retirement information and financial advice."

The Delay Would Enable the Department to Revisit Regulations That Impair Investors' Access to Assistance, Products, and Overall Investment Choice

FSR supports the 60-day delay to enable the Department to conduct a thorough review of new and previously submitted information, including economic studies, that present evidence that the data and assumptions upon which

the Department relied in promulgating the Final Rule significantly overstated the potential positive effects of the Final Rule on retirement investors, failed to assess properly the adverse effect the Final Rule will have on the access retirement investors will have to expert assistance and investment products and choices, and grossly underestimated the costs of compliance with the Final Rule without commensurate benefits to retirement investors, including considerable on-going compliance costs. See, Berkowitz, Conolli, and Conway, Review of the White House Report Titled "The Effects of Conflicted Investment Advice on Retirement Savings," NERA (Mar. 15, 2015), http://www.nera.com/content/dam/nera/publications/2015/PUB_WH_Report_Conflicted_Advice_Retirement_Savings_0315.pdf.

For example, in support of the decision to adopt the Final Rule, the Department has consistently referenced the estimate produced by the Obama Administration that the adverse financial impact on retirement investors of so called "conflicted" advice was $17 billion dollars. But this figure is not the determination of the academic studies on which the Obama Administration's Final Rule purports to rely. Rather, it is an estimate of losses made by the authors of the report, extrapolating from data on mutual fund investments that conflicted advice has a 1% impact on invested assets of $1.7 trillion. But this 1% estimate is based on generalizations and extrapolations which are not fully supported in the report, and ignores other potential bases for this impact beside the potential presence of conflicts. Moreover, the estimate lumps together retirement investments in annuities with those in mutual funds, despite the fact that no data is provided to project the potential impact of so-called conflicted advice on annuity products. *Id.*

The adverse effects, both near-term and long-term, of the Final Rule are apparent. Published reports indicate that several large providers of financial products and services to retirement investors have determined to cease entirely serving such investors as a result of the Final Rule. Many others, including several of the largest providers of services to individual retirement account investors, are reducing the investment products that they will offer to such investors, or are eliminating the availability of recommendations or advice to all or some types of retirement investors, or both. Such reports also indicate that the Department's estimates of the burdens of the Final Rule were materially understated, including the Department's estimates with respect to on-going compliance following the crushing expense of initial compliance. See, Batkins, *Fiduciary Rule Has Already Taken Its Toll: $100 Million in Costs, Fewer Options*, Insight, February 22, 2017.

In its request for comment, the Department seems to imply that that the most substantial costs of compliance have already been incurred by institutions and that a further review would not recapture these "sunk" costs. While it is true that the Final Rule has already resulted in substantial compliance expense for financial institutions that cannot be recaptured, that is not a valid reason not to

revisit a burdensome regulation that impairs the ability of retirement investors to access advice, products and overall investment choice. The Final Rule will still impose significant additional and on-going compliance costs and burdens on, and creates significant litigation risk for, those institutions assisting such retirement investors without commensurate benefit to those retirement investors.

Indeed, the acting Chair of the Securities Exchange Commission has stated that he believes the Final Rule is primarily an invitation to litigation. See, Michaels, *SEC's Piwowar: Obama-Era Retirement-Savings Rule Boon for Trial Lawyers*, WALL ST. J. (Mar. 2, 2017). The risks and burdens of such litigation will only further increase compliance costs and the cost of advice to, and products for, retirement investors. As and when such anticipated litigation becomes a reality, it can be expected to diminish further investor access to assistance, products and choice as institutions that initially opt to continue to service their retirement investor clients are forced by economic realities to re-evaluate the cost-benefit analysis of their initial decision to attempt to operate within the precarious parameters of the Final Rule and in particular the BIC Exemption. Re-evaluating the Final Rule and the Associated PTEs now can at least avert the potentially sizable costs and disruption to investor access that will almost assuredly follow protracted litigation for well-meaning institutions that, despite their best efforts, may not have been completely successful in navigating the complex and narrow path that the Final Rule and the Associated PTEs have carved out for those institutions that try to advance the interests of their clients.

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FSR appreciates the opportunity to submit comments on the proposed delay of the applicability date of the Final Rule and Associated PTEs. If it would be helpful to discuss our specific or general views on the Fiduciary Rule Examination, please contact Richard Foster at Richard.Foster@FSRoundtable.org; or Felicia Smith at Felicia.Smith@FSRoundtable.org.

Sincerely yours,

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