

March 15, 2017

**VIA ELECTRONIC MAIL ([EBSA.FiduciaryRuleExamination@dol.gov](mailto:EBSA.FiduciaryRuleExamination@dol.gov))**

The Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Proposed Definition of Fiduciary Regulation  
U.S. Department of Labor  
200 Constitution Avenue, N.W. Room N-5655  
Washington, DC 20210

**Re:** Definition of the Term "Fiduciary" and Related Prohibited Transaction Exemptions  
Proposed Extension of Applicability Date (RIN 1210-AB79)

Ladies and Gentlemen:

HD Vest Investment Services® ("HD Vest") appreciates the opportunity to comment on the Department of Labor's ("Department") proposal to delay the applicability date of the Department's final rule that redefines the term "fiduciary" and its related prohibited transactions exemptions (collectively, the "Fiduciary Rule").<sup>1</sup> The proposed delay would extend the applicability date 60 days.<sup>2</sup>

**Executive Summary**

HD Vest supports a delay of at least 60 days; however, we firmly believe that a one-year delay is in the interest of retirement investors. A much longer delay will provide the Department with ample time to conduct a thorough review of the Fiduciary Rule in accordance with the President's Memorandum, and it will (1) provide commenters with a meaningful opportunity to supply the Department with additional comments beyond the scheduled applicability date; (2) provide the Department time to develop and issue additional interpretive guidance; (3) save firms valuable time and money from implementing solutions that are subject to change if the rule is materially revised or rescinded; (4) prevent firms from prematurely altering their business models; (5) provide firms with additional time to prepare customers for changes they will experience; and (6) give market participants the opportunity to evaluate the flood of new products that are being introduced in our industry in response to the Fiduciary Rule's requirements.

**About HD Vest**

HD Vest is a broker-dealer with approximately 4,500 registered representatives nationwide. The firm conducts business primarily through tax professionals and accountants who have longstanding relationships with their customers. Our Advisors care deeply about helping investors achieve their financial goals, including retiring with financial dignity.

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<sup>1</sup> Definition of the term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8, 2016).

<sup>2</sup> Definition of the term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice; Extension of Applicability Date, 82 Fed. Reg. 12319 (Mar. 2, 2017).

## A Delay is Necessary for the Following Reasons

### 1) Provide the Department a meaningful opportunity to respond to the President's Memorandum.

The President's Memorandum directs the Department to evaluate whether the Fiduciary Rule will cause (1) harm to retirement investors due to reduced access to retirement products, advice, and services; (2) disruption in the financial services industry in a way that harms retirement investors; and (3) an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.<sup>3</sup> Considering the scope of the President's Memorandum, it should or will likely take the Department several months to prepare a thoroughly updated comprehensive economic and legal analysis concerning the likely impact of the Fiduciary Rule. Indeed, the Department has already acknowledged that a delay is necessary because of the impending scheduled applicability date – April 10, 2017. Specifically, the Department stated:

*The Department believes it may take more time than that to complete the examination mandated by the President's Memorandum. Additionally, absent an extension of the applicability date, if the examination prompts the Department to propose rescinding or revising the rule, affected advisers, retirement investors and other stakeholders might face two major changes in the regulatory environment rather than one. This could unnecessarily disrupt the marketplace, producing frictional costs that are not offset by commensurate benefits. This proposed 60-day extension of the applicability date aims to guard against this risk. The extension would make it possible for the Department to take additional steps (such as completing its examination, implementing any necessary additional extension(s), and proposing and implementing a revocation or revision of the rule) without the rule becoming applicable beforehand. In this way, advisers, investors and other stakeholders would be spared the risk and expenses of facing two major changes in the regulatory environment.<sup>4</sup>*

Significant criticism has been directed at the Department's Regulatory Impact Analysis that accompanied the Fiduciary Rule when it was adopted.<sup>5</sup> Specifically, commenters raised questions about the methodology used, including, inter alia, the data used, interpretations of that data, and subsequent regulatory developments that reduce the relevance of that data.<sup>6</sup> HD Vest, for example, previously suggested that the Department underestimates the cost of its own proposal and that it failed to perform any analysis of the overall cost of current securities regulation for broker-dealers, or explain how the Department's incremental cost would impact the industry, competition, capital formation and capital markets.<sup>7</sup> A delay would therefore provide the Department with the needed opportunity and time to perform a thorough review of public comments and to fulfill its obligation to respond to the President's directive.

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<sup>3</sup> Presidential Memorandum, *Fiduciary Duty Rule* (Feb. 3, 2017), 82 Fed. Reg. 9675 (Feb. 7, 2017), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/presidential-memoranda>.

<sup>4</sup> See *supra* note 2, at 12320.

<sup>5</sup> See, e.g., NERA Economic Consulting, Comment on the Department of Labor Proposal and Regulatory Impact Analysis (July 17, 2015), p. 28-38 available at <http://www.sifma.org/workarea/downloadasset.aspx?id=8589955443>

<sup>6</sup> *Id.*

<sup>7</sup> See HD Vest Investment Services Comment Letter re Proposed Conflict of Interest Rule (RIN 1210-AB32), Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25) (July 21, 2015) at p. 6, available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00765.pdf>; see also Committee on Capital Markets Regulation Comment Letter re Proposed Conflict of Interest Rule (RIN 1210-AB32), Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25) (September 24, 2015) at pp. 8-9, available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00343.pdf>

A delay should also be approved because the 45-day comment period for addressing the specific areas outlined in the President's Memorandum ends seven days *after* the scheduled applicability date. Aside from being temporarily discordant, a failure to delay the scheduled applicability date will effectively deprive commenters of a meaningful opportunity to address the specific areas identified by the President.

**2) Provide the Department time to develop and issue additional interpretive guidance aimed at helping firms develop better, compliant solutions.**

Despite HD Vest's steadfast efforts to prepare for the scheduled applicable date, we, like many firms, continue to experience challenges and interpretive issues presented by the Fiduciary Rule. In the summer of 2016, the Department promised it would issue three sets of FAQs; however, it has only issued two, with the second set issued in January 2017. The Fiduciary Rule is complex and some of the FAQs have included unexpected interpretations that have required firms to reconsider their compliance plans. A delay will provide the Department with additional time to provide this much needed guidance.

**3) Stop unnecessary spending implementing changes for the Fiduciary Rule.**

HD Vest has expended significant resources in a good faith effort to ensure compliance to the often confusing or inchoate mandates of the Fiduciary Rule as currently written. Several full-time HD Vest employees have spent a considerable amount of time evaluating the Fiduciary Rule's complexities and trying to determine how we can continue to provide our customers a wide variety of investment products and services and comply with the rule. We have also spent a significant amount of money addressing interpretive issues by: (1) engaging outside consultants; (2) evaluating and investing in technology solutions; (3) preparing for material changes to our business model, compliance policies and procedures, surveillance programs; (4) drafting customer correspondence; and (5) preparing explanations of revised product offerings necessitated by the Fiduciary Rule. Firms should not be forced to divert focus, energy and resources that could be better used providing for their clients' needs to develop and implement changes for the Fiduciary Rule's requirements if it may be materially changed or rescinded. A delay will give firms the ability to conduct business without interruption and reduce the expenses that are being solely incurred to implement changes for the Fiduciary Rule's requirements.

**4) Avoid premature changes to firms' business models.**

The Fiduciary Rule's complexities and compliance requirements may cause HD Vest (and many other firms) to limit the investment products and services available for retirement investors. Several firms have already announced that they are fundamentally altering their business models to comply with the Fiduciary Rule, *e.g.*, by eliminating commissions-based products for retirement investors.<sup>8</sup> Commission-based products provide an affordable way for smaller investors to gain access to valuable products, advice and services. In addition, some firms are considering other sweeping changes to their business models to comply with the Fiduciary Rule, *e.g.*, limiting or eliminating customers access to certain application-way business (*i.e.*, direct-to-fund accounts). Limiting or jettisoning investment products or entire investment platforms will be detrimental to smaller investors and will undoubtedly increase their costs to obtain investment products, advice and services. HD Vest firmly believes that, after careful consideration, the Department will determine that the Fiduciary Rule forces firms to limit

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<sup>8</sup> See, *e.g.*, Christine Idzelis, *JPMorgan Chase Will Stop Charging Commissions on IRAs Due to DOL Fiduciary Rule*, INVESTMENTNEWS (Nov. 10, 2016), available at <http://www.investmentnews.com/article/20161110/FREE/161119998/jpmorgan-chase-will-stop-charging-commissions-on-iras-due-to-dol>; See, *e.g.*, InvestmentNews Staff, *Commonwealth Financial Eliminates Commission-Based Retirement Products in the Wake of DOL Rule*, INVESTMENTNEWS (Oct. 24, 2016), available at <http://www.investmentnews.com/article/20161024/FREE/161029956/commonwealth-financial-eliminates-commission-based-retirement>

investor choice and this will harm retirement investors, disrupt the industry and cause an increase in the price of investment advice.

**5) Provide firms with additional time to prepare customers for changes they will experience.**

Due to the lack of clarity of the existing Fiduciary Rule, and the likelihood that the Department would revisit and reconsider at least portions of it, HD Vest and other firms have delayed certain communications to our customers regarding how the rule may impact the products, advice and services available to them. For some firms, the first written communication that will be sent to customers is the fiduciary notification (a/k/a transition notice). Several firms plan to send this communication slightly before the scheduled applicability date. Sending a fiduciary notification to customers with all of the uncertainty surrounding the rule may result in significant confusion – and may adversely impact advisor/client relationships should it need to be retracted. Moreover, sending a transition notice can be costly for firms. Conservatively, HD Vest will spend between \$180,000 and \$375,000 (or more) to send this notice to our customers. By any standards, this is a substantial expense – but especially so for smaller companies. Forcing firms to incur this expense is not justifiable if the Fiduciary Rule may be materially revised or rescinded in the near term.

**6) Provide the market with the opportunity to evaluate new products.**

In response to the Fiduciary Rule's requirements, several mutual fund companies have registered (or intend to register) a new type of share class – T shares. Estimates suggest fund companies will introduce 3,800 T shares this year<sup>9</sup> and a number of fund companies are looking to introduce clean shares.<sup>10</sup> These *new* share classes are being touted as solutions *compliant* with the Fiduciary Rule, though these share classes are not yet available to investors. Introducing new products to the market without giving them the opportunity to be practically evaluated by firms, advisers and investors creates regulatory uncertainty for firms. Even assuming these new products are designed to comply with the Fiduciary Rule, firms should still have the opportunity to receive guidance from the securities regulators regarding offering these products to retirement investors. The securities regulators have not had a sufficient opportunity to evaluate T shares or clean shares in the marketplace, and firms need additional guidance before offering these products to retirement investors.

Considering the infancy of these new products, the lack of guidance from securities regulators and the rapidly approaching scheduled applicable date, the Department should delay the applicability date so these new products can be properly vetted and firms can design reasonable supervisory compliance policies and procedures for these products.

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The reasons outlined in this letter strongly support delaying the scheduled applicability date at least 60-days, and we encourage the Department to provide a one-year delay. As explained above, a much longer delay will provide the Department with ample time to conduct a thorough review of the Fiduciary Rule in accordance with the President's Memorandum, and it will (1) provide commenters with a meaningful opportunity to supply the Department with additional comments beyond the scheduled applicability date; (2) provide the Department time to develop and issue additional interpretive guidance; (3) save firms valuable time and money from implementing solutions that are

<sup>9</sup> John Rekenhaller, *Lower-Cost T Shares Coming to a Fund Near You*, MORNINGSTAR (Jan. 6, 2017), available at <http://www.morningstar.com/advisor/t/118056663/lower-cost-t-shares-coming-to-a-fund-near-you.htm>

<sup>10</sup> John Waggoner, *Expect a Spring Torrent of New Mutual Fund Share Classes*, INVESTMENTNEWS (Mar. 8, 2017), available at [http://www.investmentnews.com/article/20170308/FREE/170309920/expect-a-spring-torrent-of-new-mutual-fund-share-classes?NLID=daily&NL\\_issueDate=20170309&utm\\_source=Daily-20170309&utm\\_medium=email&utm\\_campaign=investmentnews&utm\\_visit=346382&itx\[email\]=6ddb7ee998666dacf227cd48125ecocc29fc749292f9530a0762584aeocef504%4oinvestmentnews](http://www.investmentnews.com/article/20170308/FREE/170309920/expect-a-spring-torrent-of-new-mutual-fund-share-classes?NLID=daily&NL_issueDate=20170309&utm_source=Daily-20170309&utm_medium=email&utm_campaign=investmentnews&utm_visit=346382&itx[email]=6ddb7ee998666dacf227cd48125ecocc29fc749292f9530a0762584aeocef504%4oinvestmentnews)

subject to change if the rule is materially revised or rescinded; (4) prevent firms from prematurely altering their business models; (5) provide firms with additional time to prepare customers for changes they will experience; (6) and give market participants the opportunity to evaluate the flood of new products that are being introduced in our industry in response to the Fiduciary Rule's requirements.

We intend to comment separately on the other issues raised in the Department's notice of proposed rulemaking.

Thank you for considering HD Vest's comments.

Sincerely,

A handwritten signature in blue ink that reads "Bob Oros". The signature is written in a cursive, flowing style.

**Bob Oros**  
Chief Executive Officer