Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Conflicts of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712 and D-11713

United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Definition of the Term "Fiduciary" - Delay of Applicability Date, RIN-1210-AB79

Ladies and Gentlemen:

The Financial Planning Coalition (Coalition),[1] which is comprised of the Certified Financial Planner Board of Standards (CFP Board), Financial Planning Association® (FPA®) and National Association of Personal Financial Advisors (NAPFA), appreciates the opportunity to comment on the proposal by the Department of Labor, Employee Benefits Security Administration (the Department) for a 60-day delay to the applicability date for the definition of the term "fiduciary" under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC) (hereinafter "Delay Rule").[2] CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for over 76,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country.[3] FPA® is the largest membership organization for CFP® professionals and those who support the financial planning process in the U.S. with over 23,000 members nationwide.[4]

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[1] The Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession. Together, the Coalition seeks to educate policymakers about the financial planning profession, to advocate for policy measures that ensure financial planning services are delivered with fiduciary accountability, and to enable the public to identify trustworthy financial planners.

[2] Definition of the Term "Fiduciary" - Delay of Applicability Date, 82 Fed. Reg. 12319 (Mar. 2, 2017) (to be codified at 29 C.F.R. pt. 2510).

[3] CFP Board's mission is to benefit the public by granting the CFP® certification and upholding it as the recognized standard of excellence for the delivery of competent and ethical personal financial planning services. CFP® professionals voluntarily agree to comply with CFP Board's rigorous standards including education, examination, experience and ethics and subject themselves to disciplinary oversight of CFP Board.

[4] With a national network of 91 chapters and state councils, FPA® represents tens of thousands of financial planners, educators and allied professionals involved in all facets of providing financial planning services. FPA® works in alliance with academic leaders, legislative and regulatory bodies, financial services firms and consumer interest organizations to represent its members.

NAPFA is the nation's leading organization of fee-only comprehensive financial planning professionals with more than 2,500 members.[5]

The Coalition believes that a strengthened fiduciary rule under ERISA is essential for America's Retirement Investors and is workable for Advisers,[6] and we strongly support implementation of the Department's final fiduciary rule (hereinafter "Final Rule").[7] For those who truly want to strengthen retirement security and ensure that Advisers protect their clients' best interests, allowing the Final Rule to be implemented without delay is the best way to achieve those goals. The Final Rule is fully consistent with the principles of a true fiduciary standard under ERISA. Delaying implementation of the Final Rule is unnecessary, unwarranted and will only serve to derail this long overdue reform necessary to protect and preserve Americans' retirement savings.

The Coalition brings a unique perspective to this discussion. Coalition stakeholders and members have committed to provide financial planning services under a fiduciary standard of conduct.[8] CFP® professionals hold registrations and/or licenses across business models as investment adviser representatives, registered representatives of broker-dealers and/or insurance agents and in many instances hold dual or multiple registrations or licenses. Regardless of business model, or compensation model, they are obligated to provide financial planning services under a fiduciary standard of conduct. The views stated in this comment letter are based on the real-world experience of the Coalition and its more than 80,000 financial professionals and other stakeholders in applying the fiduciary standard across business and compensation models.

I. <u>Delay Will Harm Consumers</u>

Retirement investors face a perfect storm in today's financial services marketplace. With the dramatic shift in the retirement landscape from defined benefit plans to 401(k) plans and Individual Retirement Accounts (IRAs), Americans increasingly are responsible for making investment decisions that will, in large part, determine their financial security in retirement. At the same time, they need to choose from an increasingly complex set of financial products and services. *When they seek financial advice, they face a marketplace in which it is virtually impossible to distinguish a salesperson from an Adviser or between those Advisers who are legally obligated to provide advice in their best interest versus those who are not.*

[5] NAPFA members adhere to some of the highest standards in the profession and annually each advisor must sign and renew a Fiduciary Oath and subscribe to the Association's Code of Ethics. NAPFA-affiliated advisors are committed to the organization's core values of competency, commitment to holistic financial planning, compensation under a model that facilitates objective advice, client-centered standard of care, complete disclosure of potential conflicts of interest and explanation of fees.

[6] The term "Adviser" as used herein is defined in the Final Rule and includes any individual or entity who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance representative and company, or a registered representative of a broker-dealer and broker-dealer. Accordingly, the term "Adviser" is not limited to investment advisers registered under the Investment Advisers Act of 1940 or under applicable state law.

[7] Definition of the Term "Fiduciary," 81 Fed. Reg. 20,846 (Apr. 6, 2016) (to be codified at 29 C.F.R. pt. 2510).

[8] *See* CFP Board *Standards of Professional Conduct*, Rule of Conduct 1.4 *available at* http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct; NAPFA, "Mission and Fiduciary Oath," *available at* https://www.napfa.org/about/FiduciaryOath.asp.

The previous regulatory framework allowed Advisers to make financial recommendations that placed Advisers' interests ahead of retirement investors' interests. Because of this misalignment of interests, retirement investors often faced financial harm, in the form of higher costs and lower savings. Based on a careful review of the evidence, the Department concluded that the underperformance associated with conflicts of interest – in the mutual fund 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.[9] Retirement investors lose $1.4 billion every month (equivalent to $2.8 billion for a 60-day delay) due to conflicts of interest. The Final Rule must be implemented as scheduled to stem these substantial monthly losses to retirement investors' savings.

II. <u>Department's Cost-Benefit Analysis is Inadequate</u>

Courts have held that when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.[10] As noted below, the limited analysis provided by the Department in its Delay Rule proposal is fundamentally flawed.

The Department's cost-benefit analysis has not met the requirements of the Administrative Procedure Act (APA)[11] and Executive Orders, which affect the level of regulatory analysis conducted by Federal agencies.[12] Importantly, the Department does not take into account the long-term harm to investors from a delay; does not provide any reasoning of why the Department's previous analysis was inadequate or that factual circumstances have changed; has not provided a range of regulatory alternatives; has not addressed the federal court cases which confirmed the adequacy of the Regulatory Impact Analysis and upheld the Final Rule; has not addressed how the Delay Rule would contribute to marketplace confusion and would harm companies that have implemented the Final Rule; and does not address how the Delay Rule would stifle marketplace innovation.[13]

According to the Office of Information and Regulatory Affairs ("OIRA"), the Office of Management and Budget ("OMB") office that plays a key role in coordinating the review of Federal regulations, "the purpose of the Regulatory Impact Analysis is to inform agency decisions in advance of regulatory

[9] U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, p. 9, April 2016, *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf.

[10] Nat'l Ass'n of Home Builders v. Envtl. Prot. Agency, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *see also* City of Portland v. Envtl. Prot. Agency, 507 F.3d 706, 713 (D.C. Cir. 2007) (noting that the court "will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses").

[11] 5 U.S.C. §§ 501 *et seq.*

[12] Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735, Oct. 4, 1993; Executive Order 13563, "Improving Regulations and Regulatory Review," 76 FR 3821, Jan. 21, 2011.

[13] Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983). "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

actions and to ensure that regulatory choices are made after appropriate consideration of the likely consequences."[14]

A comprehensive Regulatory Impact Analysis will generally include three basic elements: (1) a statement of the need for the regulatory action; (2) a clear identification of a range of regulatory approaches; and, (3) an estimate of the costs and benefits of the proposed regulatory action and its alternatives, and should be based on the best available scientific, technical, and economic information.[15]

First, the Department has not provided an adequate statement of the need for the delay. The Department states that a delay is necessary so that "advisers, investors and other stakeholders would be spared the risk and expenses of facing two major changes in the regulatory environment."[16] However, the Department admits in the Delay Rule proposal that "[t]he nature and magnitude of any such delay … is highly uncertain."[17] The Supreme Court has held that it is not sufficient for an agency to merely recite the terms "substantial uncertainty" as a justification for its actions.[18]

The Department's statement that it is delaying applicability of the Final Rule to address questions raised by the Presidential Memorandum is also not adequate.[19] The Presidential Memorandum directs the Department to modify the Final Rule if it concludes the Final Rule, among other things, is inconsistent with the new administration's priorities.[20] However, a statement concerning a change in priorities, without additional explanation, is not an adequate statement of need for the delay.[21]

The Presidential Memorandum also states "it shall be implemented consistent with applicable law."[22] Under a settled principle of federal administrative law, a federal agency may not announce a position that abruptly changes direction from prior agency pronouncements without providing a reasoned explanation for the change.[23] Courts have held that "an agency must explain why the original

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[14] OIRA, "Regulatory Impact Analysis: A Primer," *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

[15] OMB Circular A-4, "Regulatory Analysis", Sept. 17, 2003, *available at* https://www.gpo.gov/fdsys/pkg/FR-2003-10-09/pdf/03-25606.pdf.

[16] Delay Fiduciary Rule, 82 Fed. Reg. at 12,320.

[17] *Id.*

[18] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42.

[19] Presidential Memorandum on Fiduciary Duty Rule, Feb. 3, 2017, *available at* https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

[20] *Id.*

[21] Int'l Union, United Mine Workers of Am. v. United States Dep't of Labor, 358 F.3d 40, 44 (D.C. Cir. 2004) (the DC Circuit noted that one of the agency's proffered explanations for withdrawing a proposed regulation, a "change in agency priorities," was, without additional explanation, "not informative in the least; it is merely a reiteration of the decision to withdraw the proposed rule.").

[22] Presidential Memorandum on Fiduciary Duty Rule, *supra* note 19.

[23] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42 ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (an agency has a duty to "explain its departure from prior norms"); Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Unexplained inconsistency is … a reason for holding an interpretation to be an arbitrary and capricious change

reasons for adopting the rule or policy are no longer dispositive"[24] and that "[w]hen an agency departs from its own prior precedent without explanation … its judgment cannot be upheld."[25]

Specifically, the Department has not adequately explained what environmental changes, if any, led the Department to believe that the Final Rule and Regulatory Impact Analysis completed less than a year ago are now inadequate or defective. To the contrary, the limited evidence provided by the Department directly contradicts the rationale for the proposed delay. In the Delay Rule proposal, the Department found that investor gains would be reduced by $104 million, using a three percent discount rate and $87 million, using a seven percent discount rate. Compliance costs for the industry would only be $8 million, using a three percent discount rate and $9 million, using a seven percent discount rate. The Department needs to address why it believes a delay is warranted when, under its own analysis, investor harm greatly outweighs any cost savings for the industry.

Second, in addition to not providing adequate evidentiary support for the delay, the Department fails to address multiple federal court opinions upholding the Final Rule. In a recent opinion from the District Court for the Northern District of Texas, Chief Judge Barbara Lynn found the plaintiffs' arguments unpersuasive. The court upheld each component of the Final Rule noting, in particular, the DOL's authority to propose the Final Rule, the comprehensive and inclusive rulemaking process that DOL followed, and the rigorous and thorough cost-benefit analysis that concludes the benefits to consumers substantially outweigh the costs to industry.[26]

The Northern District of Texas was the third district court to uphold the Final Rule's legality in lawsuits brought by industry groups, following earlier 2016 rulings in Kansas[27] and in the District of Columbia.[28] For example, in the District of Columbia case, the National Association of Fixed Annuities (NAFA) admitted that the Best Interest Contract requirement does not go into effect until January 1, 2018, and offered no support for the contention that immediate relief was necessary.[29] In the Kansas case, the Court found Market Synergy's claim of irreparable harm unpersuasive and held that any delay in the implementation of the rule "will produce a public harm that outweighs any harm that plaintiff may sustain from the rule change."[30]

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from agency practice under the Administrative Procedure Act."); Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1335, 1345 (D.C. Cir.1992) (requiring the agency "to show not only that its new policy is reasonable, but also to provide a reasonable rationale supporting its departure from prior practice").

[24] Brae Corp. v. United States, 740 F.2d 1023, 1038 (D.C. Cir. 1984) (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42).

[25] Manin v. NTSB, 627 F.3d 1239, 1243 (D.C. Cir. 2011).

[26] Chamber of Commerce of the United States v. Hugler, 2017 U.S. Dist. LEXIS 17619 (N.D. Tex. Feb. 8, 2017).

[27] Mkt. Synergy Grp. v. Perez, 2016 U.S. Dist. LEXIS 163663 (D. KS. Feb. 8, 2016).

[28] Nat'l Ass'n for Fixed Annuities v. Perez, 2016 U.S. Dist. LEXIS 153214 (D.D.C. Nov. 4, 2016).

[29] Nat'l Ass'n for Fixed Annuities v. Perez, 2016 U.S. Dist. LEXIS 162428 (D.D.C. Nov. 23, 2016).

[30] *Mkt. Synergy Grp.*, 2016 U.S. Dist. LEXIS at *98.

The Department's Delay Rule proposal is also contrary to the position it has taken in each of the court cases, where it has vigorously defended the Final Rule.[31] While the Department, represented by the Department of Justice, recently filed motions to stay the cases in the Northern District of Texas and District of Minnesota based upon the Presidential Memorandum,[32] both motions were denied. In the Minnesota case, the District Court held that the burden was on the Department to show why a delay was necessary and that "mere speculation about the possibility of administrative action—especially when compounded by uncertainty regarding what form that action might take—does not discharge that burden."[33]

While these rulings hold the Final Rule, which is scheduled to begin implementation on April 10, 2017, to be legal, they do not prevent the administration from taking steps to delay, revise or revoke the Final Rule through new rulemaking. Thus, it is important to note the rationale provided by the Department in the Delay Rule proposal is contrary to the courts' rationales supporting the Final Rule. The Department must address these issues and provide evidence of how its conclusion differs from its own position in litigation and from multiple federal courts that have upheld the Final Rule.

Third, the Department has not provided a clear identification of a range of regulatory approaches. For example, in its Regulatory Impact Analysis, the Department discussed the regulatory alternatives that it considered before settling on the Final Rule. These alternatives included: (1) excluding IRAs in whole or part from the rule; (2) not issuing the PTEs; (3) adopting the statutory definition of fiduciary advice; (4) relying heavily on disclosure as an adequate consumer protection; (5) deferring this rulemaking until the SEC takes related actions; (6) treating certain ESOP valuations as fiduciary advice; (7) conditioning the PTEs on disclosure alone; (8) issuing a streamlined, "low-fee" PTE; (9) issuing a prescriptive PTE in lieu of the proposed "best interest contract" exemption; (10) prohibiting mandatory binding arbitration; (11) adjusting the date by which affected advisers must comply; and, (12) delaying the Re-Proposed Rule's compliance date.[34] The Delay Rule proposal, beyond noting that it considered a longer 180-day delay period, does not reflect that the Department provided any analysis of alternative regulatory approaches.

Fourth, the Department's Delay Rule proposal does not adequately take into account the scope of harm to investors from the 60-day delay. While the Department recognized in its Regulatory Impact Analysis that some businesses "may need to undertake major changes to adviser incentive structures and loyalties, and/or lose market shares to businesses more prepared or willing to align adviser and investor interests and honor fiduciary norms,"[35] it also concluded that retirement

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[31] Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 544 (2008) (courts will not uphold an agency decision "where the agency has offered a justification in court different from what it provided in its opinion.").

[32] Defenders of Wildlife v. Norton, 258 F.3d 1136, 1145-46 n.11 (9th Cir. 2001) (noting court did not owe deference to statutory interpretation "newly minted, it seems, for this lawsuit").

[33] Thrivent Fin. for Lutherans v. Perez, 2017 U.S. Dist. LEXIS 24115 (Feb. 21, 2017) (citing City of Duluth v. Fond du Lac Band, 2011 U.S. Dist. LEXIS 17279 (Jan. 5, 2011)).

[34] U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Apr. 14, 2015, *available at* http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.

[35] *Id.* at 309.

investors "could lose 6 to 12 and as much as 23 percent of the value of their savings by accepting conflicted advice."[36]

The Coalition believes that this distinction is critical. While firms and advisors will incur up-front and on-going compliance costs for implementation, retirement investors' losses will be compounded over the life of the investment product; even if investors quickly act to unwind conflicted advice, they could incur substantial fees from extricating themselves from certain products. Investors who receive conflicted advice during this 60-day period will have no recourse if the Final Rule is modified or repealed, while firms that proceed with implementing the Final Rule will not be required to unwind these changes even if the rule is modified or repealed.

Fifth, the Department does not adequately address how the Delay Rule would (i) contribute to unnecessary marketplace confusion and (ii) harm companies that have acted in good faith to implement the Final Rule. Since April 2016, firms and the industry have operated under the assumption that the Final Rule would begin implementation on April 10, 2017. The Department was cognizant of this in the Final Rule when it stated that the effective date would "provide certainty" to market participants by assuring them that "the rule[s] [are] final and not subject to further amendment or modification without additional public notice and comment."[37]

It is important to note, as required by law, the Department must be aware that its current policies may have "engendered serious reliance interests that must be taken into account"[38] and that in "such cases … a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[39]

Many firms have already spent millions of dollars to comply with the Final Rule. For example, public reports demonstrate that a number of firms, including Charles Schwab, BBVA Compass, Capital One, Raymond James, John Hancock, U.S. Bancorp, Fidelity, RBC, Principal Financial Group, Prudential Financial, LPL Financial, Symetra Life Insurance, TIAA, Transamerica and Wells Fargo, have each devoted substantial time and resources to meeting the April 10, 2017 implementation date.[40]

While we applaud these firms for moving forward to act in the best interest of their clients, without the Final Rule and the Best Interest Contract in place, there will not be a uniform method of enforcement and industry compliance would be voluntary.

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[36] Final Fiduciary Rule, 81 Fed. Reg. at 20,949.

[37] Final Fiduciary Rule, 81 Fed. Reg. at 20,993.

[38] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

[39] *Id.* at 515-16; City of Anaheim v. FERC, 723 F.2d 656, 659 (9th Cir. 1984) ("agencies may not impose undue hardship by suddenly changing direction, to the detriment of those who have relied on past policy").

[40] *See, e.g.,* Greg Iacucri, "Insurance-based broker-dealers plan to use BICE under DOL fiduciary rule," InvestmentNews, Jul. 7, 2016, ***available at*** http://www.investmentnews.com/article/20160707/FREE/160709959/insurance-based-broker-dealers-plan-to-use-bice-under-dol-fiduciary; Janet Levaux, "Raymond James, Ameriprise Keeping Commissions in Retirement Accounts," ThinkAdvisor, Oct. 27, 2016, ***available at*** http://www.thinkadvisor.com/2016/10/27/raymond-james-ameriprise-keeping-commissions-in-re.

Sixth, the Department does not address how the Delay Rule would stifle marketplace innovation. Recent developments have shown how the Final Rule is transforming the way commission-based advice is offered, with enormous potential benefits for all investors, not just those saving for retirement. For example, the U.S. Securities and Exchange Commission (SEC) recently approved a proposal from Capital Group to create a new class of mutual fund shares for its American Funds that will greatly ease compliance with the DOL rule while preserving investors' ability to get commission-based advice.[41] The approved "clean shares" will allow the broker, rather than the fund, to determine how much to charge for their services. In addition, many other fund firms are responding to the Final Rule by issuing transaction or "T" shares that both dramatically reduce commissions for broker-sold funds and reduce the compensation-related conflicts associated with those funds. With "T" shares carrying a maximum sales load of 2.5 percent, compared with an industry standard for "A" shares of 4.75 percent (and as high as 5.75 percent), and 12b-1 fees of just 0.25 percent, investors will also benefit from these dramatic reductions in cost.[42]

The Coalition believes that any delay to the Final Rule may halt or impair these innovations. For example, according to multiple firms, work to create "T" shares has been delayed or suspended pending the outcome of the Delay Rule proposal.[43] Importantly, "firms are expected to wait and see how the review plays out before deciding whether to proceed with the T shares' development."[44] The Department must address these issues, clearly explain why it believes a delay would not halt or impair these innovations, and quantify the harm to consumers that will result from their inability to purchase these products that have been promised to them.

The Department has not provided adequate justification for changing its prior position.[45] Importantly, "an agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'"[46] The Department must comprehensively address each of these issues and clearly explain why it believes a delay is not

[41] John Waggoner, "American Funds gets SEC approval for clean shares," Jan. 13, 2017, http://www.investmentnews.com/article/20170113/FREE/170119955/american-funds-gets-sec-approval-for-clean-shares.

[42] John Rekenthaler, Lower-Cost T Shares Coming to a Fund Near You, Morningstar, January 6, 2017, http://beta.morningstar.com/articles/787395/lower-cost-t-shares-coming-to-a-fund-near-you.html.

[43] Michael Wursthorn and Sarah Krouse, New Class of Mutual Fund Shares in Limbo as 'Fiduciary' Rule Is Delayed, Wall Street Journal, Mar. 5, 2017, *available at* https://www.wsj.com/articles/new-class-of-mutual-fund-shares-in-limbo-as-fiduciary-rule-is-delayed-1488736422.

[44] *Id.*

[45] "When an agency departs from its own prior precedent without explanation . . . its judgment cannot be upheld." *Manin*, 627 F.3d at 1243. Agencies must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." Greater Boston Television Corp. v. Fed. Commc'n Comm'n, 444 F.2d 841, 852 (D.C. Cir. 1970).

[46] Ramaprakash v. Fed. Aviation Admin., 346 F.3d 1121, 1125 (D.C. Cir. 2003) (quoting Columbia Broad. Sys. V. FCC, 454 F.2d 1018, 1027 (D.C. Cir. 1971)). "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." Young v. Reno, 114 F.3d 879, 883 (9th Cir. 1997) (quoting INS v. Cardozo-Fonseca, 480 U.S. 421, 446 n.30 (1987)).

contrary to the evidence before it; any failure to do so would constitute an "arbitrary and capricious" act under the APA.[47]

III. Delay is Contrary to ERISA's Language and Purpose

The Supreme Court has repeatedly held that the validity of a regulation will only be sustained if it is "reasonably related to the purposes of the enabling legislation."[48]

In the Preamble to the Final Rule, the Department stated it was replacing the previous five-part test "with a definition of fiduciary investment advice that better reflects the broad scope of the statutory text and its purposes and better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty."[49] In the Northern District of Texas, the Court held that the previous five-part test, which will continue to apply under a delay, is at "odds with the statute's text and its broad remedial purpose, especially given today's market realities and the proliferation of participant-directed 401(k) plans, investments in IRAs, and rollovers of plan assets to IRAs" and that the Department's current rule "better comports with the text, history, and purposes of ERISA."[50] The Court further reasoned "ERISA was enacted on the premise that the then-existing disclosure requirements did not adequately protect retirement investors, and that more stringent standards of conduct were necessary."[51]

The Department must address these issues and clearly explain why it believes a delay is not contrary to the language and purpose of ERISA; any failure to do so would be an "arbitrary and capricious" act under the APA.[52]

IV. Department Has Not Provided Good Cause for Immediate Delay

The Coalition contends that the Department has not provided good cause under the APA for allowing the Delay Rule to become immediately effective upon publication in the Federal Register.[53] The

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[47] Agency must "explain how [it] resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." Rodway v. United States Dept. Agric., 514 F.2d 809, 817 (D.C. Cir. 1975).

[48] Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-81 (1969); AFL-CIO v. Brock, 835 F.2d 912, 918 (D.C. Cir. 1987) (rejecting agency's explanation for its change of course in part because there had been no change in underlying statute).

[49] Final Fiduciary Rule, 81 Fed. Reg. at 20,946.

[50] *Chamber of Commerce of the United States*, 2017 U.S. Dist. LEXIS 17619 at *22.

[51] *Id.* at *41 (citing H.R. Rep. No. 93-533 (1973) ("Experience...has demonstrated the inadequacy of the...Disclosure Act in regulating the private pension system for the purpose of protecting rights and benefits due to workers. It is weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards.")).

[52] NLRB v. Indianapolis Mack Sales and Serv., Inc., 802 F.2d 280, 284 (7th Cir. 1986) ("When an agency changes course, a reviewing court must be satisfied that the agency was aware of, and has given sound reasons for, the change, and that it has shown that the new rule is consistent with the statutory duties.").

[53] The Coalition notes the two distinct good cause provisions under the APA. The Department's action is being taken under Section 553(d) of the APA. Section 553(b)(B) of the APA provides that compliance with notice and comment rulemaking may be bypassed when an "agency for good cause finds" that [notice and comment rulemaking] would be "impracticable, unnecessary, or contrary to the public interest." Section 553(d) provides that the 30-day publication rule may be waived for good cause. Some courts have indicated that these are two distinct standards; others do not always distinguish between the two. The DC Circuit has held that both "exceptions to the provisions of section 553 'will be narrowly construed and only reluctantly countenanced.'" American Federation of Government Employees, AFL-CIO v.

Department states that the immediate effective date "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" and that "advisers, investors and other stakeholders would be spared the risk and expenses of facing two major changes in the regulatory environment."[54]

"Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of APA Section 553 will be narrowly construed and only reluctantly countenanced"[55] and the "use of these exceptions by administrative agencies should be limited to emergency situations."[56]

The Department's reasoning fails to meet this stringent threshold. First, Advisers and investors only face additional major changes due to the Department's decision to delay and reconsider the Final Rule. An emergency of an agency's own making does not constitute good cause.[57] Second, contrary to the Department's assertion, good cause does not exist merely because an incoming administration considers a regulation defective.[58] Third, deadlines alone do not justify bypassing the 30-day publication requirement,[59] in fact, "courts routinely decline[] to sanction recourse to the exception because of an impending deadline."[60] Importantly, the exception is not to be used as an "escape clause" to avoid rulemaking procedures when convenient for the agency.[61]

Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (quoting State of New Jersey, Department of Environmental Protection v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

[54] Delay Fiduciary Rule, 82 Fed. Reg. at 12,320.

[55] *N.J. Dep't of Envtl. Prot.*, 626 F.2d at 1045.

[56] American Fed'n of Gov't Employees, AFL-CIO v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

[57] NRDC v. Abraham, 355 F.3d 179, 204 (2d Cir. 2004).

[58] *See* Consumer Energy Council v Federal Energy Regulatory Com., 673 F.2d 425 (D.C. Cir. 1982), *affd* 463 U.S. 1216 (1983); Center for Science in Public Interest v. Dep't of Treasury, 573 F. Supp. 1168, 1173 (D.D.C. 1983) (quoting State Farm Mutual Auto Insurance v. Dep't of Transportation, 680 F.2d 206, 221 (D.C.Cir. 1982)) (While "basic political differences between administrations may be manifested in the way in which they choose to exercise their discretionary functions, 'sudden and profound alterations in an agency's policy constitute 'danger signals' that the will of Congress is being ignored.'").

[59] Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981); Am. Fed'n of Gov't Emp., AFL-CIO v. Block, 655 F.2d 1153, 1158 (D.C. Cir. 1981); United States Steel Corp. v. United States Environmental Protection Agency, 595 F.2d 207, 213 (5th Cir. 1979); Sharon Steel Corp. v. Environmental Protection Agency, 597 F.2d 377 (3rd Cir. 1979).

[60] Union of Concerned Scientists v. Nuclear Regulatory Com., 711 F.2d 370, 382 (1983). "[T]the mere existence of deadlines for agency action . . . [does] not in itself constitute good cause." *Id.* (quoting Council of Southern Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981)). "A mere recitation that good cause exists, coupled with a desire to provide immediate guidance [or take immediate action], does not amount to good cause." Zhang v. Slattery, 55 F.3d 732, 746 (2d Cir. 1995).

[61] Tennessee Gas Pipeline Co. v. F.E.R.C., 969 F.2d 1141, 1144 (D.C. Cir. 1992) (citing American Fed'n of Govt. Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981)); Envtl. Defense Fund, Inc. v. Envt'l Prot. Agency, 716 F.2d 915, 920 (D.C. Cir. 1983); United States v. Gavrilovic, 551 F.2d 1099, 1104 (8th Cir. 1977) (citing 92 Cong. Rec. 5650-51 (1946) (remarks of Cong. Walter)).

V. Prior Precedent is Not Applicable

In its comment letter, the National Association of Insurance and Financial Advisors (NAIFA) argues that there is precedent for the delay. The letter relies on "earlier Department rules regarding fiduciary investment advice (issued by the George W. Bush Administration) [that] 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.'"[62] The current situation is fundamentally different.

First, the Bush Administration rule was delayed before its effective date, whereas the Final Rule has been legally effective and the "law of the land" since June 7, 2016.[63] Second, the Bush Administration rule cited by NAIFA was delayed as part of President Obama's regulatory moratorium,[64] a practice incoming administrations typically engage in to review recently approved but not yet effective agency regulations. On this point, it is important to note that the Final Rule was exempt from President Trump's January 2017 regulatory moratorium because the Final Rule was already the "law of the land." Third, the Bush Administration rule was withdrawn because, unlike the Final Rule, questions were raised concerning that rule's "adequacy to mitigate advisers' conflicts."[65] The Coalition notes that this is not the argument NAIFA makes today. To the contrary, NAIFA now argues that the rule is too broad and needs to be revised.

VI. Delay is Unnecessary

The Department's Final Rule thoroughly addresses issues raised by firms, industry organizations and consumer and public interest organizations concerning the Department's initial fiduciary rule proposal published in 2015.[66] Specifically, the Department listened to and addressed these concerns, and then issued a final, comprehensive rulemaking that included: a revised definition of who is a "fiduciary" under ERISA which extends the applicability of fiduciary duty to all retirement assets; principles-based Prohibited Transaction Exemptions (PTEs) to provide flexibility across business models for Advisers to adhere to a fiduciary standard; and a Regulatory Impact Analysis that, consistent with APA requirements, identified the costs, benefits and the economic justification for the Final Rule.

[62] Letter from Paul R. Dougherty, President, NAIFA, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Mar. 10, 2017), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00454.pdf (quoting Department of Labor, Withdrawal of final rule, Investment Advice—Participants and Beneficiaries, 74 Fed. Reg. 60156 (Nov. 20, 2009)).

[63] "The Supremacy Clause of the Constitution gives force to federal action … by stating that 'the Laws of the United States which shall be made in Pursuance' of the Constitution "shall be the supreme Law of the Land.' … The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." City of New York v. FCC, 486 U.S. 57, 63 (1988).

[64] Rahm Emanuel, Memorandum for the Heads of Executive Departments and Agencies, Jan. 20, 2009, *available at* https://www.nrc.gov/docs/ML0903/ML090370582.pdf.

[65] 74 Fed. Reg. at 60157.

[66] Definition of the Term "Fiduciary," 80 Fed. Reg. 21,928 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2510).

As the expert agency, the Department engaged in a rulemaking process that worked precisely as intended. The Department initially re-proposed its fiduciary rule on April 20, 2015 and provided a 75-day comment period, ending on July 6, 2015. The Department extended the comment period to July 21, 2015, to allow interested persons additional time to comment on the new proposal and proposed related exemptions. The Department held four days of public hearings (August 10 - 13, 2015) in Washington D.C. during which more than 75 speakers testified. The Department published the hearing transcript on its website on September 8, 2015, and provided additional opportunities to comment on the proposed regulation, exemptions, and hearing transcript until September 24, 2015.[67]

The record supporting the Final Rule is both substantial and comprehensive. The Department received more than 3,000 individual comment letters and more than 300,000 submissions as part of 30 separate petitions on the proposal. These comments and petitions "came from consumer groups, plan sponsors, financial services companies, academics, elected government officials, trade and industry associations, and others, both in support of, and in opposition to, the proposed rule and proposed related exemptions."[68] The Department also "held numerous meetings with interested stakeholders at which the Regulatory Impact Analysis was discussed."[69]

Additionally, throughout the comment process, former Secretary Perez and Department staff held hundreds of meetings with Members of Congress, financial services firms and organizations and consumer groups. In fact, both Republicans and Democrats commended the Department for its willingness to listen to all viewpoints.

The Final Rule thoroughly addresses concerns raised by firms, industry organizations, consumer and public interest organizations, and Members of Congress. The process worked. Companies and organizations that were initially skeptical later stated publicly that the Department listened carefully to and responded to their concerns.[70]

VII. While the Coalition Opposes Delay, Any Partial Delay Must Not Affect the Current Applicability Date for the Revised Definition of Fiduciary or the Best Interest Obligation

In the Delay Rule proposal, the Department invites comments as to whether it should delay applicability of all, or only part, of the Final Rule's provisions.[71] The Coalition believes that a delay is unwarranted and strongly opposes any delay. If the Department, however, proceeds with its Delay Rule, the delay must include a requirement that the Final Rule's revised definition of fiduciary and the best interest obligation under Section IX(d)(1) of the BIC (duty of prudence; advice provided without regard to the financial or other interests of the Adviser or firm; requirement to impose only

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[67] Final Fiduciary Rule, 81 Fed. Reg. at 20,958.

[68] *Id.*

[69] RIA, *supra* note 9, at 6.

[70] *See, e.g.*, NAIFA, Fiduciary (Retirement Accounts), *available at* http://www.naifa.org/advocacy/federal-issues-positions/fiduciary-(retirement-accounts) ("NAIFA's efforts … resulted in meaningful improvements to the final regulation and related exemptions"); Financial Services Insitute (FSI), Final DOL Fiduciary Rule Summary, *available at* http://www.financialservices.org/uploadedFiles/FSI_Content/Docs/DOL/Final_DOL_Fiduciary_Rule_Summary.pdf ("[T]he final rules are responsive to FSI's comments in a number of respects.").

[71] Delay Fiduciary Rule, 82 Fed. Reg. at 12,321.

reasonable fees; no misleading advice; etc.) are applicable as scheduled on April 10, 2017. Opponents of the Final Rule have not objected to this best interest obligation.[72] While the Coalition believes a partial delay will have far-reaching consequences for the well-being of retirement investors, in the near term, requiring firms and Advisers to comply with this best interest obligation is the bare minimum that the Department must do to stem the losses that retirement investors are experiencing.

VIII. Conclusion

The Coalition opposes any delay that would prevent implementation of the Final Rule as scheduled on April 10, 2017 and thus prevent the Department from taking critically needed steps to enhance protections for retirement investors. We believe that there is no justification for applying different standards of care to Advisers who are offering the same services to Retirement Investors and that a strengthened fiduciary rule is necessary and appropriate for Advisers and firms under ERISA and IRC.

Importantly, while many Advisers seek to do what is best for their customers, others take advantage of regulatory gaps to steer their clients into high-cost, substandard investments that pay the Adviser well but eat away at retirement investors' nest eggs over time. The Coalition believes that requiring an Adviser to work in the retirement investor's best interest is an essential and long overdue reform. We urge the Department to move forward expeditiously with implementation of the Final Rule.

The Coalition appreciates the opportunity to comment on the Department's Delay Rule. We would be happy to meet with the Department to discuss these important issues further. If you have any questions regarding this comment letter or the Coalition, please contact Maureen Thompson, Vice President of Public Policy, CFP Board, at (202) 379-2281 or MThompson@cfpboard.org.

Sincerely,

Kevin R. Keller, CAE
Chief Executive Officer
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Lauren Schadle, CAE
Executive Director/CEO
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Geoffrey Brown, CAE
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NAPFA

[72] *See, e.g.*, Letter from Kenneth E. Bentsen, Jr., CEO, Securities Industry and Financial Markets Association, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Jul. 21, 2015), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00506.pdf ("SIFMA and the broader financial services industry have long advocated for such a best interest standard when providing personalized investment advice."); Petition of Financial Services Institute to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Mar. 9, 2017), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/petition1.pdf ("I agree that financial advisors and financial services firms should be required to ensure that the interests of their retirement clients come first"); Petition of Raymond James Financial to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Mar. 9, 2017), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/petition3.pdf ("I fully support a best interest standard that puts my clients' interests first").