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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of the Term "Fiduciary" – Delay of Applicability Date
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed 60-Day Extension of the Fiduciary Rule Applicability Date RIN 1210-AB79

Groom Law Group is providing the comments set forth in this letter on behalf of a group of client companies, each of which is a major provider of recordkeeping services to employer-sponsored plans subject to ERISA and to individual retirement accounts (the "Groom Group"). These Groom Group comments are responsive to the referenced proposal (the "Extension Proposal") which would extend by 60 days and until June 9, 2017 the current April 10, 2017 "Applicability Date" provided for under the regulations "Definition of the Term 'Fiduciary'; Conflict of Interest Rule--Retirement Investment Advice", 81 Fed. Reg. 20946 (April 8, 2016), Prohibited Transactions 2016-01 and 2016-02 and the 2016 amendments to Prohibited Transactions 75-1, 77-4, 80-83, 83-1, 84-24, 86-128, (together, the "Fiduciary Rule").[1] The Groom Group believes that delaying the Fiduciary Rule serves the interests of retirement consumers and other stakeholders because it will help prevent consumer confusion while the Department engages in the review required by the Presidential Memorandum on Fiduciary Duty Rule for the Secretary of Labor (February 3, 2017), published at 82 Fed. Reg. 9675 (Feb. 7, 2017) (the "Presidential Memorandum"). As discussed in greater detail below, the Groom Group strongly believes –

[1] The Groom Group is preparing, and will separately submit, comments pertaining to the examination described in the Presidential Memorandum.

- **The Department should grant an extension of the Applicability Date; the extension period should be modified from the Department's 60-day proposal, which is unduly restrictive, to run for an indefinite period of time that would end at least 60 days *after* the date that the Department completes all of the work required to be undertaken by the Presidential Memorandum to the Secretary of Labor.**

- **The benefits of an appropriate Applicability Date extension clearly justify the costs, both from a qualitative and quantitative standpoint.**

- **The Department should not pursue a piecemeal approach but should delay *all* of the Fiduciary Rule's provisions. Moreover, if the Fiduciary Rule ultimately becomes applicable, the "Transition Period" provided for under PTEs 2016-01 and 2016-02 should be extended for a period of time commensurate with the Applicability Date extension.**

I. The Presidential Memorandum

On February 3, 2017, the President of the United States signed the Presidential Memorandum directing the Secretary of Labor to update the Department's original economic and legal analysis pertaining to the Fiduciary Rule, to consider that updated analysis in light of the President's stated policy objectives and, subject to certain determinations, either revise the Fiduciary Rule or rescind it altogether. The comprehensive and far-reaching nature of the re-examination ordered by the President clearly merits an extension of the Applicability Date for the duration of the re-examination process.

The updated economic and legal analysis and related considerations that the President has directed the Secretary to undertake could culminate in a rescission of the Fiduciary Rule or in significant revisions. Even if the Department's re-examination results in no material changes to the Fiduciary Rule, the re-examination period itself is likely to continue beyond the proposed 60-day extension period ending June 9, 2017. Until the process concludes, the regulated community cannot know the outcome with any certainty and cannot reasonably be expected to commence implementation of the most expensive and complex ERISA compliance effort required since the statute's passage.

The Groom Group urges the Department to increase the duration of the proposed extension by postponing the Applicability Date for an indefinite period of time that continues until at least 60 days *after* the date that the Department completes all of the work required to be undertaken by the Presidential Memorandum. Under the Groom Group's suggested approach, the length of the extension period would run at least 60 days beyond (i) the period of time required for the Department to update its economic and legal analysis, (ii) the time period required for a deliberate and well-considered weighing by the Department of the updated analysis in light of the policy considerations identified by the Presidential Memorandum, and (iii) the time period required to effect the rescission or amendment of the Fiduciary Rule, if it would be appropriate to do so.

II. An Appropriate Review Period

As noted above, the Presidential Memorandum instructs the Department to update its economic and legal analysis. The Presidential Memorandum further directs the Department to consider the effects of the anticipated Applicability Date of the Fiduciary Rule including whether the anticipated Applicability Date has harmed or is likely to harm or adversely affect investors including the ability of Americans to gain access to retirement information and financial advice. More specifically, the Department is instructed to consider –

> (i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
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> (ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
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> (iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

If the Department makes an affirmative determination as to any of the three above-listed considerations, or if the Department concludes for any other reason following "appropriate review" that the Fiduciary Rule is inconsistent with the President's policy priorities as outlined in the Presidential Memorandum, the Department is instructed to rescind or revise the Fiduciary Rule.[2]

The Groom Group believes that the Department's proposal to extend the Applicability Date for only 60 days, ending on June 9, 2017, is too short to allow an appropriate review. As the Department itself has noted "delay is intended to give the department time to collect and

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[2] 82 Fed. Reg. 9675.

consider information related to the memorandum before the rule and exemptions become applicable".[3]

Neither the interests of the retirement saver community nor the community of financial service providers are served by a constricted delay period that will likely expire before the Department's work is completed. Of course, it could be argued that if the Department's 60-day extension proposal turns out to be insufficient, the Department could always take the step of adding further extensions. Under that sort of "start, stop, start, stop" scenario, retirement savers and financial services providers would be subjected to needless expense, confusion and disruption. The Groom Group's proposal would avoid the uncertainty and economic pain associated with a series of short extensions.

III. The Qualitative Benefits of an Appropriate Extension Period Justify the Costs

In the absence of a sufficient delay, financial service providers, retirement plans, and individual savers would be subjected to extreme market dislocations. The pricing of investment products and services, the distribution models under which those services are delivered and the job responsibilities of thousands of financial services firm employees, would be subject to severe backward and forward swings while the re-examination process unfolds.

Access to investment advice by retirement savers and the terms and conditions under which that investment advice could be provided could change repeatedly, dramatically and seemingly arbitrarily absent a sufficient Applicability Date extension. This outcome can be avoided by the Department through the adoption of an Applicability Date extension of sufficient duration to afford retirement savers and the retirement industry with regulatory certainty. The language the Department uses to support the proposed 60-day extension of the Applicability Date provides even stronger support for an extension with a duration of at least as long as it takes the Department to complete the work that results from the Presidential Memorandum, "[A]bsent an extension of the applicability date, . . . 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."[4]

The implementation timelines that are required to provide transition notices and implement different types of client segmentation dictate service providers take action in advance of the Applicability Date if a smooth consumer experience is to be achieved. A failure to quickly finalize the Extension Proposal will lead to retirement investors receiving communications that

[3] DOL News Release, "US Labor Department Proposes Extension to Fiduciary Rule Applicability Date (March 1, 2017).

[4] 82 Fed. Reg. 12320.

could cause confusion as service providers will need to include caveats discussing the possibility of a delay and of changes to the Fiduciary Rule.[5]

IV. The Quantitative Benefits of an Appropriate Extension Period Justify the Costs.

The Department has estimated that the 60-day delay would reduce the estimated gains to investors from the regulation by $147 million in the first year and $890 million over a 10 year period.[6] This estimate rests on the assumption that "the final rule and exemptions would entirely eliminate the negative effect of load-sharing on mutual fund selection, and that the proposed delay would leave that negative effect undiminished for an additional 60 days."[7] In other words, the cost estimate assumes that in the absence of the delay, investors would have experienced the full benefit of the final rule during those 60 days in 2017.

On the other side of the equation, the Department has estimated that the 60-day delay would result in compliance savings of $42 million during those 60 days.[8] In its previous analysis, the Department estimated that the final rule would result in approximately $1.5 billion of annual compliance costs beginning in 2018.[9] If the cost of compliance is $1.5 billion per year, then it follows that the cost of compliance over 60 days is approximately $250 million. On the surface it appears that the Department's $42 million estimate of the savings during the 60-day delay period is dramatically understated when compared to past estimates of the ongoing industry costs. When examined on this basis, the industry cost savings of $250 million substantially outweighs the $147 million in first-year savings to investors. As to the projected $890 million in reduced investor gains over 10 years, the economic analysis does not project a comparable 10 year number for industry compliance costs savings. If industry cost savings were projected out over 10 years using return on capital assumptions similar to the assumptions used for projecting investor savings, we think the net cost of the extension would likely be substantially reduced.

Comparing the Department's estimates of the reduced investor gains and the compliance savings associated with the delay, it appears there is a disconnect between the two estimates.

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[5] We appreciate that the Department recently released Field Assistance Bulletin ("FAB") 2017-01 to curtail investor confusion. However, the FAB does not completely resolve the challenges of industry in complying with short term extensions.

[6] We note that while we are using the numbers and assumptions from the Department's April 2016 Regulatory Analysis for the Final Rule and Exemption, we do not agree with the Department's analysis and underlying assumptions.

[7] 82 Fed. Reg. 12320.

[8] 82 Fed. Reg. 12321

[9] April 2016 Regulatory Impact Analysis for Final Rule and Exemptions at 10.

The calculation of the reduced investor gains assumes that the full benefit of the rule is sacrificed during those 60 days, but does not appear to assume that the full ongoing compliance cost of the final regulation is saved during that same time period. We recognize that it is necessary to make simplifying assumptions in the course of complex analyses, and for financial modeling purposes it may be reasonable to assume that investors benefit from the full impact of the regulation even before the regulation becomes fully effective. But if this simplifying assumption is used when estimating the impact on investors, it must also be used when estimating the compliance savings. In its estimates, the Department appears to have evaluated the impact of the delay using a 'worst of both worlds' approach, in which investors are deprived of the maximum value of the fully-implemented rule, while the industry savings are based on the reduced ongoing compliance costs in effect in 2017 before the rule is fully-implemented. This disconnect suggests that the gap between the $890 million of lost investor gains and the $42 million of compliance costs savings may be dramatically overstated.

V. A Piecemeal Extension Approach is Unworkable

A piecemeal extension of the Applicability Date is unworkable and could generate the confusion that a delay seeks to avoid. Instead of providing the certainty that a complete pause would provide, the retirement services industry would be forced on the fly to adapt to the changes with almost no notice. Even if some of the more burdensome requirements were delayed, the retirement services industry would be forced to waste resources understanding and developing new systems to adapt to the changes. Because a delay lacks permanence, it is likely that the costs generated by implementing modified compliance would not be recaptured. To the extent the Department has recognized that two major changes in the regulatory environment "could unnecessarily disrupt the marketplace, producing frictional costs that are not outweighed by commensurate benefits," a piecemeal extension would only add the possibility of three or more major changes.[10]

VI. The Transition Periods under PTEs 2016-01 and 2016-02 should be Commensurately Extended

The Transition Periods under PTEs 2016-01 and 2016-02 should be commensurately extended by the same amount of time as the Applicability Date is extended. If the Transition Period is not also extended, then for the period of time that the Department is completing the work required to be undertaken by the Presidential Memorandum, the retirement services industry will be forced to continue to develop systems and incur start-up costs. As the Department recognizes, the start-up costs are front-loaded and using the Department's estimates will come to $5 billion in the first year.[11] By extending the Transition Period commensurately

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[10] 82 Fed. Reg. 12320

[11] April 2016 Regulatory Impact Analysis for Final Rule and Exemptions at 10.

with the extension of the Applicability Date, the delay would generate substantially more savings to the retirement services industry than the Department's proposal currently generates and would help avoid additional frictional costs that, if the Fiduciary Rule is revised or rescinded, would never be offset by commensurate benefits.

VII. Conclusion

For the reasons described above, the Groom Group not only supports the Department's proposed delay, but strongly urges the Department to extend the Applicability Date from the Department's 60-day proposal, which is unduly restrictive, to run for an indefinite period of time that would end at least 60 days *after* the date that the Department completes all of the work required to be undertaken by the Presidential Memorandum. Moreover, in addition to extending the Applicability Date, the "Transition Period" provided for under PTE's 2016-01 and 2016-02 should be extended for a period of time commensurate with the Applicability Date extension.

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We appreciate the opportunity to comment on the Extension Proposal, and we are available to discuss our comments with the Department or provide additional information.

Sincerely,

Stephen M. Saxon