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INVEST Financial Corporation
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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5655
Washington, DC 20210

Re: RIN 1210-AB79 - Proposal to Extend the Applicability Date of Certain New and Amended Definitions, Rules, and Prohibited Transaction Exemptions (the "Proposal")

To Whom it May Concern:

National Planning Holdings, Inc. ("NPH") [1] supports the Proposal to extend the application date of the extensive new and amended defintions, rules, and prohibited transaction exemptions adopted by the Department of Labor ("Department") a little more than nine months ago. NPH formerly filed a comment letter, dated September 24, 2015, raising concerns with the original proposal for modification of the Definition of the Term Fiduciary (RIN 1210-AB32)(the "Fiduciary Rule") and the Best Interest Contract Exemption (ZRIN 1210-ZA25)(the "BICE"). Many of the concerns raised in our comment letter are directly relevant to the consideration of the sixty (60) day delay.

The Fiduciary Rule has a laudable aim: to ensure that retirement investors receive high quality, unbiased advice to help them save and plan for their retirement. We support this goal, but believe that reasonable minds can differ on whether more than 1000 pages of new, complex federal regulation is the best path forward. Not surprisingly, the new rules, like many pieces of sweeping regulation, are having (and are expected to continue to have) significant predictable and unpredictable effect. Some will be positive for consumers and our markets, but others will certainly be adverse.[2] NPH believes that additional time is needed:

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[1] NPH owns four retail investment firms – INVEST Financial Corporation, Investment Centers of America, Inc., National Planning Corporation, and SII Investments, Inc. (collectively the "NPH Firms"). NPH is commonly owned with Jackson National Life Insurance Company ("Jackson"), an insurance company organized under the laws of the state of Michigan. Jackson is separately filing a comment letter on this matter.

[2] NPH plans to send a separate comment letter relative to the substantive impact of the Fiduciary Rule and the BICE, and addressing the questions raised in the Presidential Memorandum, together with those raised by the Department in the Proposal section entitled "Examination of Fiduciary Rule and Exceptions". For purposes of this comment letter, we are able to cite concerns impacting clients, including those who are less affluent and who will be underserved after April 10, 2017 (the "Implementation Date"). These concerns including inability to immediately support commission-based mutual fund classes needed to implement the BICE (T shares being unavailable at many mutual fund sponsors

- To give reasonable time to prepare;
- To respond to the President's directive to study the effects of the new rules and to evaluate whether better alternatives exist; and
- To prevent waste.

NPH also believes that the Department should state clearly and plainly that neither the new rules, nor any potential successor to them, will apply to any investment advice given, or sales enacted, during the pendency of the delay.

A Delay is Necessary to Give Reasonable Time to Prepare.

Like many of our peer firms, we have spent significant time and effort to prepare for the Fiduciary Rule and the BICE, which are designed to effect significant regulatory restructurings. Despite this effort, there are items outside the control of NPH and the NPH Firms that impair our ability to properly implement the rule in a manner that is responsible and least impactful for our clients, our advisers and our firms. This industry wide inability to properly implement the rule is largely due to the breadth of changes caused by the new rules.

The new rules represent one of the most significant regulatory restructurings of the investment advice market since the Great Depression. The new rules radically expand the application of the fiduciary standards under the Employee Retirement Income Income Security Act ("ERISA") by revising the Department's 40-year-old test for determining when a person giving advice about retirement savings is deemed a "fiduciary." The prior test applied principally to interactions between representatives of retirement plans and advisers. The revised test extends ERISA's reach to virtually every interaction between individual retirement savers and advisers. The revised test extends the application of ERISA from only a small portion of our business to over 50% of the NPH Firms retail business in a way that (i) effectively trumps the rules of the primary regulators of the securities and insurance markets for the last eighty years (the SEC, FINRA, and the states), (ii) leaves consumers virtually no option to obtain investment advice from a financial representative or adviser who is not a fiduciary, and (iii) exposes businesses to enormous compliance costs and risks of private and class action litigation.

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and operationally unavailable at our clearing firms on the Implementation Date), inability to clearly identify systematic investments for grandfathering purposes, questions relative to subsequent deposits into existing variable annuities where the compensation option is not supported post-Implementation Date (forcing the client into a new contract that may be less advantageous compared to an existing contract), unwillingness of firms or representatives to service existing accounts where the clients account is no longer profitable due to greater operational requirements, abandonment of accounts where clients are not responsive in providing information to verify the account, and transitions of accounts from other broker/dealers where products or the pricing options of certain share classes are not supported on our platform. These and other adverse impacts need to be more fully researched and understood. Other concerns have been noted in published reports. See Iacurci, Greg, and Christine Idzelis. "Broker-dealers Split on Commissions in Wake of DOL Fiduciary Rule." *Investment News*. N.p., 30 Oct. 2016. Web. 13 Mar. 2017. <http://www.investmentnews.com/article/20161030/FREE/161029902/broker-dealers-split-on-commissions-in-wake-of-dol-fiduciary-rule; http://time.com/money/4459130/edward-jones-bans-funds-etfs-in-iras/>; Leonhardt, Megan. "Why Edward Jones Won't Let Investors Buy Funds, ETFs in IRAs | Money." *Money*. Time, 22 Aug. 2016. Web. 13 Mar. 2017. <http://time.com/money/4459130/edward-jones-bans-funds-etfs-in-iras/>.

The BICE was added as an exemption to allow commission-based business, but provides significant regulatory challenges. The requirements and conditions of the the Fiduciary Rule and the BICE are exceedingly complex and require changes in training, forms, disclosures, technology, compensation, operations, marketing, legal, compliance, and governance. Virtually no part of the financial services industry is unaffected. As set forth in this letter, there are a number of items impacting these areas where either the industry has not adequately responded (such as implementing mutual fund share classes designed by the BICE) or adequately assessed (such as class action litigation from new requirements). Additional examples, while provided in summary fashion in footnote 2, will be provided in more detail in our subsequent comment letter on the substantive aspects of the rule.

The very aggressive implementation timeline adopted by the Department is too short for such a radical change and is inconsistent with the Department's past practices for new regulations. For example, the Department provided a two year implementation period in connection with section 408(b)(2) regulations that were adopted in 2010. That regulation was 40 pages in length. By comparison, the industry was given just 12 months (20 months for certain elements) to meet the far more challenging and complex requirements under the new fiduciary rules, which run over 1,000 pages in length. For this reason, the Department should finalize the Proposal and, consistent with the precedent established with the 408(b)(2) regulations, implement a delay of 240 (not 60) days.

<u>A Delay Is Necessary to Respond to the President.</u>

On February 3, 2017, President Trump issued a memorandum that set forth several goals of his Administration that relate to retirement planning. The President also instructed the Department to undertaken a comprehensive review of the expected impact of the new rules, which are currently scheduled to go into effect on April 10, 2017. Allowing the new rules to apply while simultaneously undertaking the comprehensive analysis ordered by the President would undermine the President's legitimate mandate to the Department and potentially expose retirement investors and the industry to the whipsaw effect of new rules that apply, then are delayed, and then apply again after the delay.[3]

NPH supports the Proposal for the simple fact that it is inconceivable that the Department will be able to comply with the President's instructions without delaying the application date, which is now less than one month away. Performing this work in a thorough, valid, and evidence-based manner will require time. The proposed rule itself gives the public 45 days to comment on a lengthy and substantial list of questions derived from the issues raised in the President's memorandum. Gathering and analyzing all of this information, while also conducting the required review, will easily consume weeks or months beyond a 60-day delay in the applicability dates.

<u>A Delay is Necessary to Prevent Waste.</u>

[3] As the Department noted in the Proposal, over 90% of the industry affected by the new rules and the Proposal are "small businesses" according to the Small Business Adminstration size standards.

If the new rules are going to be studied further, then delaying their implementation date is sensible and prevents waste. NPH and the NPH Firms are expending considerable resources every day to prepare for implementation of the new rules. Like our peer firms, we have multiple workstreams, staffed by scores of our associates and outside advisors, working to implement the technological, operational, reporting, training, procedural, financial, governance, legal and compliance changes neeed to comply with the new rules. If there is even a remote possibility that the new rules are going to be changed, then industry members should immediately be granted permission to pause their implementation efforts. If and when the implementation of the new (or revised) rules is resumed and the path forward is clear, then the Department should grant an additional reasonable period of time to adapt or resume preparations.

The Benefits of a Delay will Outweigh the Costs

NPH believes that the economic assumptions on which the new rules were based are fatally flawed and not entitled to consideration. The purported economic benefits of the new rules were based upon a single factor related to one investment product (front-end load mutual funds). This isolated analysis provides no basis for regulating the entire advice market and all products, including annuities, that may not have any relation to mutual funds[4].

The Department also grossly underestimated the costs of the new rules. For starters, the Department did not consider the significant costs of the class action lawsuits that will proliferate under the new rules. A proper analysis of this known consequence of the new rules should reference the now industrialized class action litigation to which 401(k) plans are subject under a substantially similar ERISA rule set.

The Department also ignored the costs associated with the known (not unanticipated) consequence of the new rules. Namely, the new rules will substantially increase costs and decrease the accessibility of advice for retail investors, particularly investors who have not accumulated significant savings and are most in need of advice. By any measure, the new rules discourage commission-based compensation arrangements and encourage fee-based compensation arrangements. When the U.K. enacted rules with the same aim several years ago, they found that the rules had real and significant adverse effects on retirement savers, particularly those with lower income. They increased the costs and reduced the accessibility of personalized investment advice. Incredibly, a little more than five years ago, the Department itself estimated that access to financial advice reduced the cost of investor "mistakes" by $15 billion per year ... and that increasing access to financial advice would enable investors to save billions more.[5] Yet, the Department chose to

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[4] The narrow review of mutual fund performance was also, in itself, flawed. The Department's analysis of investors' experience with mutual funds (for the period 1993 through 2009) did not analyze actual holding periods, or even a full market cycle. Rather, the Department studied returns for the single year in which funds were purchased. One group of economists found this to be "not a minor 'detail' ... but a fundamental oversight that does not permit reliable conclusions to be drawn." "*Good Intentions Gone Wrong: The Yet-To-Be-Recognized Costs of the Department of Labor's Proposed Fiduciary Rule*," Economists Incorporated (Robert Litan and Hal Singer), July 2015, p. 22 (http://www.ei.com/wp-content/uploads/2015/07/LitanSingerFiduciary.pdf).

[5] Investment Advice-Participants and Beneficiaries, 76 Fed.Reg. 66135 (October 25, 2011) pp. 66152.

entirely ignore its prior work on the grounds that only advice from an individual labeled a "fiduciary" yielded these beneficial effects of advice, completely ignoring that many financial advisors offer comparable services and advice free of the conflicts that the new rules are intended to address.

A Delay Should Clearly Grandfather Advice Given During the Pendancy of the Delay.

The "grandfathering" provisions of the new rules have wrought confusion regarding their applicability to certain retirement investment advice and transactions. A delay in the new rules' applicability date is highly likely to exacerbate this confusion. The Department should preempt this confusion with clear guidance to the industry and consumers.

When finalizing the Proposal, the Department should state clearly and plainly that neither the new rules, nor any potential successor to them, will apply to any investment advice given, or sales enacted, during the period of delay of the applicability dates. This clear statement is a first step. NPH has additional views regarding grandfathering that we will incorporate into our comments relating to the Department's request for information contained in the proposed rule.

Conclusion

We support the Proposal for a sixty day delay in the Implementation Date, but believe that at least 240 days is warranted based upon the time and effort that is necessary for the Department to properly assess all potential impacts.

Thanks you for the opportunity to comment.

Sincerely,

Scott Romine
President/CEO