



April 17, 2017

Via Electronic Mail to e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attention: Fiduciary Rule Examination

Re: Definition of the Term “Fiduciary” and Related Prohibited Transaction Exemptions
Issues Raised in the President’s Memorandum on the Fiduciary Duty Rule (RIN 1210-AB79)

Ladies and Gentlemen:

The Money Management Institute (“MMI”) appreciates the opportunity to provide its views on the issues raised in the President’s Memorandum to the Department of Labor (“DOL”) regarding the DOL’s amendments to its regulation defining the term “fiduciary” and the related prohibited transaction exemptions (the “Fiduciary Rule”).¹ We encourage the DOL to carefully and thoroughly examine and reconsider the Fiduciary Rule as required by the President’s Memorandum.²

Moreover, we believe the Department’s 60-day delay is wholly inadequate to accomplish this examination and request that the DOL provide a longer extension now. Though the DOL has delayed certain operational aspects of the Rule until January 1, 2018, the core elements of the Fiduciary Rule—including its expansive definition of fiduciary investment advices and the impartial conduct standards—are now slated to become effective on June 9, 2017. This means that, before the DOL finishes assessing the potential harms the Fiduciary Rule may have on retirement investors, the new definition of fiduciary investment advice will go into effect, along with its attendant risks, costs, and potential liability.

As we stated in our comment letter regarding the proposed delay of the applicability date, we remain concerned that the Fiduciary Rule will ultimately have the unintended consequence of harming investors saving for, approaching, or in retirement.³ The Fiduciary Rule includes several inconsistencies with the federal securities laws that will negatively impact sponsors, managers, and platform providers in the separately managed account market by

¹ MMI is the national organization for the advisory solutions industry, representing a broad spectrum of investment advisers that manage separate accounts, as well as sponsors of investment consulting programs. MMI was organized in 1997 to serve as a forum for the industry’s leaders to address common concerns, discuss industry issues, and work together to better serve investors. Our membership is comprised of firms that offer comprehensive financial consulting services to individual investors, foundations, retirement plans, and trusts; related professional portfolio management firms; and firms that provide long-term services to sponsor, manager, and vendor firms. MMI is a leader for the advisory solutions industry on regulatory and legislative issues.

² Memorandum of February 3, 2017, Fiduciary Duty Rule, 82 Fed. Reg. 9675 (Feb. 7, 2017).

³ See Letter from Craig Pfeiffer, President & CEO, Money Management Institute, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor (July 17, 2015), *available at* <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00427.pdf>.

unnecessarily increasing the compliance burdens and costs and risks of providing services to retirement plan and IRA clients. Further, the Fiduciary Rule brings with it substantial and unnecessary litigation risk as the DOL specifically designed and intended that the plaintiffs' bar would enforce the rule's provisions.

In connection with its reexamination, we strongly encourage the DOL to review and reconsider its Regulatory Impact Analysis (RIA). We note that many commenters on the proposed Fiduciary Rule noted gaps and deficiencies in the analysis and we are concerned that the DOL may not have adequately addressed these comments in the RIA supporting the final Fiduciary Rule. We further note that the DOL's cost estimates related to the rule did not take into account the potential costs associated with litigation, including class action settlements.⁴ A recent study estimated that the costs associated with class-action settlements related to the rule have been estimated at between \$70 million and \$150 million annually industry-wide, excluding attorneys' fees.⁵ We urge the DOL to consider this and other data related to the cost estimates for the Fiduciary Rule, including data previously provided in connection with the proposed rulemaking.

We believe the costs and risks associated with the Fiduciary Rule are causing, and will continue to cause, financial services firms to significantly cut back the types and levels of services they are willing to provide to retirement savers.⁶ This will result in investors having fewer choices and options for managing their retirement investments and harm their ability to achieve their retirement savings goals. While we and our members have long supported a fiduciary standard for investment advice provided to retail investors, the structure and implementation of the Fiduciary Rule is inhibiting, rather than encouraging, advice that is in investors' best interests.

We also note that the concern we have expressed regarding the fiduciary status of model managers has not been adequately addressed. The DOL helpfully clarified in its FAQs that model managers would not be deemed to be fiduciaries where the model provider fee is paid for by the overlay manager or program sponsor on a grossed-up basis and not specifically invoiced or applied to the underlying client account, then the model manager can avail itself of the sophisticated fiduciary exception under the Rule.⁷ But, based on this guidance, it appears that the exception is not available where the customer is charged, directly or indirectly, for the cost of the model under a cost-plus fee structure. It is also unclear at this point whether the mere disclosure with general specificity of the amount of the client program fee attributable to the model manager results in the exception not being available. We are concerned that this guidance will result in disparity among the fiduciary status of model managers based solely on the structure of their fees, and not on the nature of the advice they provide. We urge the DOL to clarify that the sophisticated investor exception is available to all model managers regardless of whether their fees are paid for by the overlay manager or program manager, or by the customer.

⁴ See ThinkAdvisor, *For Fiduciary Rule, Morningstar Sees Up to \$150M in Annual Class Action Settlements*, http://www.thinkadvisor.com/2017/03/16/for-fiduciary-rule-morningstar-sees-up-to-150m-in?page_all=1&slreturn=1491589989.

⁵ *Id.*

⁶ 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>; Greg Iacurci, *Merrill Lynch Eliminates Commission IRA Business in Response to DOL Fiduciary Rule*, INVESTMENTNEWS (Oct. 6, 2016), available at <http://www.investmentnews.com/article/20161006/FREE/161009942/merrill-lynch-eliminates-commission-ira-business-in-response-to-dol>.

⁷ Conflict of Interest FAQs (Part II - Rule), FAQ 29, U.S. Dept. of Labor—Employee Benefits Security Administration (Jan. 2017).

In light of these concerns, we welcome the President's memorandum requiring the DOL to examine the potential negative impacts of the Fiduciary Rule on retirement savers, including their access to investment advice, increased cost, and reduced product availability. We believe that this review will lead the DOL to conclude that the Fiduciary Rule will harm retirement savers. It might also help the DOL identify aspects of the Fiduciary Rule that should be rescinded or revised, or lead the DOL to decide the Fiduciary Rule should be rescinded in its entirety.

Finally, we strongly believe that the DOL should consider suspending the Fiduciary Rule to allow the SEC to take the lead in developing a uniform fiduciary standard that would apply to personalized advice that broker-dealers and investment advisers provide to all retail investors, regardless of whether their assets are held in a retirement account or a taxable account. This would reduce investor confusion and costs, facilitate compliance, promote holistic financial planning, and result in better investment and savings outcomes for all investors and accounts.

Thank you again for the opportunity to provide our views on the proposed rule to extend the Fiduciary Rule's applicability date. Should you have any questions or require additional information, please contact me directly at (646)-868-8501.

Respectfully submitted,



Craig Pfeiffer
President & CEO
Money Management Institute