

April 17, 2017

VIA ELECTRONIC MAIL (EBSA.FiduciaryRuleExamination@dol.gov)

Acting Secretary Edward Hugler
The Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
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)

Dear Acting Secretary Hugler:

HD Vest Investment Services® (“HD Vest”) appreciates the opportunity to provide additional comments on the Department of Labor’s (“Department”) final rule that redefines the term “fiduciary” and its related prohibited transaction exemptions (collectively, the “Fiduciary Rule”).¹ This letter supplements HD Vest’s previous comments regarding the proposal to extend the applicability date 60 days² by substantively commenting on several questions presented by the President’s Memorandum³ and the Department.⁴ At the outset, please note that HD Vest supports the positions submitted by SIFMA and FSI through their comment letters addressing the Fiduciary Rule.⁵ We hope that the Department will consider HD Vest’s

¹ Definition of the term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8, 2016).

² HD Vest Investment Services Comment Letter re: Definition of the term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice; Extension of Applicability Date (Mar. 15, 2017) (“HD Vest Comment Letter re: Delay Proposal”) available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00926.pdf>.

³ 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> (“Presidential Memorandum”).

⁴ Definition of the term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice; Extension of Applicability Date, 82 Fed. Reg. 12319 (Mar. 2, 2017) (“Fiduciary Rule Delay Proposal”).

⁵ See generally, SIFMA Comment Letter re: Definition of the term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice; Extension of Applicability Date (Apr. 17, 2017) (“SIFMA Comment Letter re: Delay Proposal”); see generally, FSI Comment Letter re: Definition of the term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice; Extension of Applicability Date (Apr. 17, 2017) (“FSI Comment Letter re: Delay Proposal”).

and the securities industry trade groups' comments constructively, and rescind or, alternatively, significantly alter the Fiduciary Rule.

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. HD Vest financial advisors⁶ care deeply about helping investors achieve their financial goals, including, but not limited to, retiring with financial dignity.

Executive Summary

On April 4, 2017, in response to the Presidential Memorandum, the Department extended the applicability date of the Fiduciary Rule by 60 days (to June 9, 2017)⁷ so that it can examine the rule to both determine whether the rule may adversely affect the ability of Americans to gain access to retirement information and financial advice and also to publish an updated economic and legal analysis concerning the likely impact of the rule (hereinafter, the "Fiduciary Rule Re-evaluation Study").⁸ The President also directed the Department to determine whether the Fiduciary Rule is consistent with one of his Administration's significant priorities: "to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies."⁹ We respectfully posit that, the Department will not be able to complete a comprehensive Fiduciary Rule Re-evaluation Study by the scheduled applicability date, June 9, 2017.

There is ample evidence in the record to warrant materially revising or rescinding the Fiduciary Rule, and it is entirely possible that the Fiduciary Rule Re-evaluation Study will clearly articulate the need to modify the current form of the Fiduciary Rule or eliminate it all together. Despite the Fiduciary Rule's uncertain fate, the Department finds it necessary to deem financial institutions and advisors fiduciaries by fiat, which, among other things, invites unprecedented litigation exposure and forces financial institutions to make immediate, harmful, and sweeping changes to their businesses, operations, and compliance policies and procedures. The Department's hasty approach to rulemaking in this regard is counterintuitive and irresponsible, and may cause irreparable harm.

⁶ The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, a dual registrant, an insurance company, a bank or similar financial institution. The use of the term "financial advisor" or "advisor" is synonymous with the Department's use of the word "Adviser" in the various Fiduciary Rule proposals. See, e.g., Best Interest Contract Exemption, 81 Fed. Reg. 21003, fn. 2 (Apr. 8, 2016).

⁷ See Definition of the term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice; Extension of Applicability Date, 82 Fed. Reg. 16902 (Apr. 7, 2017) ("Fiduciary Rule Delay Announcement").

⁸ See Fiduciary Rule Delay Proposal, *supra* note 4.

⁹ See Presidential Memorandum, *supra* note 3.

As explained further herein, the Fiduciary Rule will not achieve the Department's stated goals. On the contrary, we believe it will:

- harm retirement investors due to reduced access to retirement products and services;
- create unnecessary disruption in the financial services industry in a way that harms retirement investors;
- increase the prices that investors and retirees must pay to gain access to retirement products and services; and
- cause an increase in litigation through an "enforcement by litigation" regime controlled by private litigants through plaintiffs lawyers, not securities regulators.

The Department should act responsibly and immediately delay both of the scheduled applicability dates (*i.e.*, June 9, 2017 and January 1, 2018) for at least one year. Such an extended delay will provide the Department with a meaningful opportunity to perform a comprehensive Fiduciary Rule Re-evaluation Study, and it will allow the President, and the Secretary of Labor (who may not be confirmed until May 2017) and his appointed staff an opportunity to fully and carefully review the record underlying the report and decide on next steps.

I. The Department Should Complete its Fiduciary Rule Re-evaluation Study Before it Requires Financial Institutions and Advisors to Comply with the Fiduciary Rule.

By the Department's own admission, it will likely take longer than 60-days to review the many thousands of comments and questions submitted to it and to perform a thorough Fiduciary Rule Re-evaluation Study.¹⁰ "As of the close of the first comment period on March 17, 2017, the Department had received approximately 193,000 comment and petition letters expressing a wide range of views on whether the Department should grant a delay and the duration of any delay."¹¹ Considering the scope of the President's Memorandum, it will likely take the Department several months to prepare its Fiduciary Rule Re-evaluation Study.

Several commenters maintain that all issues identified by the President's Memorandum must be resolved before any aspect of the Fiduciary Rule becomes applicable "to avoid the possibility of investor confusion and needless or excessive expense as financial institutions build systems and compliance structures that may ultimately be unnecessary or mismatched with the Department's final decisions on the issues raised by the Presidential Memorandum."¹² Many commenters also suggest that a longer delay would obviate the need to "grant a series of short extensions, which would produce serious frictional costs, protracted uncertainty (for

¹⁰ See Fiduciary Rule Delay Announcement, *supra* note 7 at 16905. ("any such review is likely to take more time to complete than a 60-day extension would afford.")

¹¹ *Id.*, *supra* note 7 at 16903.

¹² *Id.*, *supra* note 7 at 16905.

advisors, financial institutions, and retirement investors), wasted expenses on interim and conditional compliance efforts, and unnecessary market disruption.”¹³ Despite the practical benefits that would come from delaying the Fiduciary Rule for an appropriate time frame (as provided in the record before the Department), the Department has made a hasty and irresponsible decision to allow major aspects of the rule to become applicable (*i.e.*, adhering to the Impartial Conduct Standards and implementing significant business, operations and compliance changes) before meaningfully complying with the President’s directive.

HD Vest recognizes that the Department has put forth a significant effort to create and promote the Fiduciary Rule over the past seven years; however, the Department should not put its interests above the President’s and force *any* aspect of the rule to become applicable before the Fiduciary Rule Re-evaluation Study has been completed. The President, and the Secretary of Labor and his appointed staff must have a reasonable opportunity to fully and carefully review the record underlying the Fiduciary Rule Re-evaluation Study and decide on next steps. Put simply, it is unreasonable to require financial institutions and advisors to undertake any fiduciary obligations when it is entirely possible that the Fiduciary Rule may be materially revised or rescinded.

In its justification for only issuing a 60-day delay and requiring adherence to the Impartial Conduct Standards during the Transition Period (from June 9, 2017 to December 31, 2018), the Department continues to rely on its outdated and inaccurate Regulatory Impact Analysis Conduct Standards.¹⁴ There are several reasons to suggest that the Department’s reliance on its Regulatory Impact Analysis is misplaced.¹⁵ For example, the Department continues to rely upon the outdated and misapplied research found in its 2015 cost study, data that has been undercut and challenged by later studies.¹⁶ Moreover, there is no factual basis in the record to support the Department’s belief that “[I]osses arising from a delay of longer than 60 days would quickly overshadow any additional compliance cost savings.”¹⁷ This statement is far from definitive considering the Department goes on to suggest, “the predicted cost savings and investor losses associated with this extension may increase or decrease depending on the information and data received in response to the comment solicitation contained in the March 2017 NPR.”¹⁸ Thus, the Department lacks a compelling basis to require financial institutions and advisors to adhere to the Impartial Conduct Standards

¹³ *Id.*

¹⁴ *Id.* (“For all the reasons detailed in the preambles for the Fiduciary Rule and PTEs and in the associated Regulatory Impact Analysis, the Department concluded that much of this harm could be avoided through the imposition of fiduciary status and adherence to basic fiduciary norms, particularly including the Impartial Conduct Standards.”)

¹⁵ *See, e.g.*, Litan, R., & Singer, H. (2015). Good Intentions Gone Wrong: The Yet-To-Be-Recognized Costs of the Department Of Labor’s Proposed Fiduciary Rule. *Report prepared by Economists Incorporated for the US Department of Labor*; Berkowitz, J., Comolli, R., & Conroy, P. (2015). Review of the White House Report Titled “The Effects of Conflicted Investment Advice on Retirement Savings”; *see* SIFMA Comment Letter re: Delay Proposal, *supra* note 5 at 28-33; *see* FSI Comment Letter re: Delay Proposal, *supra* note 5 at 2, 5-12.

¹⁶ *See* FSI Comment Letter re: Delay Proposal, *supra* note 5 at 8-11.

¹⁷ Fiduciary Rule Delay Announcement, *supra* note 7 at 16906.

¹⁸ *Id.*

beginning on June 9, 2017 and before the Fiduciary Rule Re-evaluation Study is complete and the President, and the Secretary of Labor and his appointed staff have the opportunity to fully and carefully review the record underlying the report and decide on next steps.

In addition, in its Fiduciary Rule Re-evaluation Study, among other things, the Department is required to review two of the core elements of the Rule: (i) the definition of a fiduciary which essentially makes most client interactions fiduciary in nature, and (ii) the Impartial Conduct Standards. The Department claims to have “concluded that it would be inappropriate to broadly delay application of the fiduciary definition and Impartial Conduct Standards for an extended period in disregard of its previous findings of ongoing injury to retirement investors;”¹⁹ however, these so-called findings regarding two of the core elements of the Fiduciary Rule are hardly conclusive, as they are based on questionable academic and empirical work on advisor’s conflicts of interest. Accordingly, a failure to substantively re-evaluate each of these core elements is in direct contravention of the President’s order.

Because any harm that could result from extending the applicability dates is speculative at best whereas the harm of hasty implementation is well documented, HD Vest strongly urges the Department to extend the applicability date for a period of at least one year. This will provide the Department with the opportunity to (i) meaningfully address the flaws in its Regulatory Impact Analysis;²⁰ (ii) issue additional, comprehensive interpretive guidance (*e.g.*, additional FAQs); (iii) save financial institutions valuable time and money from implementing solutions that are subject to change if the rule is materially revised or rescinded; (iv) prevent financial institutions from prematurely altering their business models; (v) provide financial institutions with additional time to prepare customers for changes they will experience; and (vi) give market participants the opportunity to evaluate the flood of new products that are being introduced in the industry.²¹

II. The Fiduciary Rule Harms Retirement Investors Due to Reduced Access to Retirement Products and Services and Creates Unnecessary Disruption in the Financial Services Industry in a Way that Harms Retirement Investors.

Perhaps the foremost reason the Fiduciary Rule adversely affects the ability of Americans to gain access to retirement information and financial advice is due to the Department’s belief that commission-based broker-dealers and advisors are hurting their clients.²² HD Vest fundamentally disagrees with the Department’s sweeping assessment in this regard. Despite the Department’s bias in favor of investment advisory products, HD Vest

¹⁹ *Id.*, *supra* note 7 at 16905.

²⁰ See SIFMA Comment Letter re: Delay Proposal, *supra* note 5 at 28-33; see FSI Comment Letter re: Delay Proposal, *supra* note 5 at 2, 5-12.

²¹ HD Vest Comment Letter re: Delay Proposal, *supra* note 2 at 1.

²² See, *e.g.*, DOL, *Fiduciary Investment Advice: Regulatory Impact Analysis* at 7 (“A wide body of economic evidence supports a finding that the impact of these conflicts of interest on investment outcomes is large and negative.”), available at <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>; *Id.* at 94 (“In sum, the weight of the evidence supports the finding that biased advice, rather than unobserved benefits, is the primary cause of the inferior returns suffered by IRA investors in conflicted load/distribution channels.”).

believes that commission-based products provide smaller investors with an affordable way to receive valuable products and services. Although investment advisory products may be appropriate for certain investors, other investors may have different needs. The Department has deliberately created a compliance regime through a set of impractical exemptions that makes it practically impossible (and very risky) for broker-dealers to provide retirement investors with commission-based products and services to investors who may need them. HD Vest (like many industry commenters) believes this approach is misguided and it will lead to several unintended consequences. For example, several industry commenters maintain that there will be reduced availability of advice to participants with small account balances, such as young savers; inappropriate increases in fee-based accounts and passive investments; reduced commission-based products; reduced competition among investment products and providers; less innovation; and, a harmful exit of advisors from the marketplace.²³ HD Vest does not believe these concerns are overstated.

HD Vest and most independent broker-dealers that are trying to preserve commission-based business models face the greatest disruption as a direct result of the Fiduciary Rule. The Best Interest Contract (BIC) exemption is perhaps the only realistic way broker-dealers can offer commission-based products to retirement investors and comply with the Fiduciary Rule; however, the BIC exemption is extremely challenging to deal with due to various separate requirements, any one of which, if not complied with, can trigger the loss of the exemption, reversal of the transactions dependent on the exemptions, payment of an excise tax under the prohibited transaction provisions of the Internal Revenue Code, and exposure to a private class action lawsuit.²⁴

The structural changes financial institutions have made (or will make) to either take advantage of the BIC exemption or avoid it at all costs highlight the kind of disruption in the financial services industry that concerns the President. For example, in order to take advantage of the BIC exemption, financial institutions with commission-based business need to modify their business models across various investment platforms, create entirely new compliance and operational procedures, invest significant amounts of time and money in technology and training to meet the Fiduciary Rule's sales and supervision requirements, change the way retirement investors pay for products and services, and change the way financial institutions pay their advisors.²⁵ Essentially, if financial institutions wish to preserve investor choice and provide various investment options for retirement investors, they need to revamp the way they currently conduct retirement business and create a new, workable business model.

Several financial institutions have already announced that they are fundamentally altering their business models to comply with the Fiduciary Rule, with some financial

²³ See Fiduciary Rule Delay Proposal, *supra* note 4 at 16904.

²⁴ See SIFMA Comment Letter re: Delay Proposal, *supra* note 5 at 22.

²⁵ See generally, Liz Skinner, *Figuring out Fiduciary, Now Comes the Hard Part*, INVESTMENTNEWS (May 9, 2016) available at <http://www.investmentnews.com/article/20160509/FEATURE/160509939/the-dol-fiduciary-rule-will-forever-change-financial-advice-and-the>

institutions eliminating commission-based products for retirement investors and switching to only fee-based advice, thereby avoiding the BIC exemption.²⁶ Nearly every financial institution that has disclosed its plans publicly will be changing products and services available to retirement investors, restricting choices, and changing pricing.²⁷ In addition, some financial institutions are considering other sweeping changes to their business models to comply with the Fiduciary Rule, *e.g.*, limiting or eliminating customer access to certain application-way business (*i.e.*, direct-to-fund accounts and annuities). 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 and services. Additionally, recent studies report that the DOL fiduciary rule already has affected 92,000 financial advisors and up to 14 million customers, with total compliance costs of \$31.5 billion.²⁸ These changes provide ample evidence that the Fiduciary Rule has already created significant disruption in the financial services industry.²⁹ These disruptions will continue to evolve and accelerate after the Fiduciary Rule becomes applicable.

Although HD Vest regularly evaluates its product line-ups and pricing, its approach to compensating advisors and its relationship with product providers, the motivation underlying any potential changes in these areas is mostly related to the Fiduciary Rule. Because HD Vest endeavors to provide its customers a wide variety of investment products and services, developing ways to comply with the Fiduciary Rule has proven extremely challenging and disruptive to its business.³⁰ Compliance with the prohibited transactions exemptions across several investment platforms (*i.e.*, brokerage, advisory, direct-to-fund, and annuities) in-and-of-itself is particularly challenging, but the compressed time frame between the effective date and applicability dates makes this challenge even greater.

Notwithstanding issues with the BIC exemption, the Department continues to make compliance with the Fiduciary Rule a moving target with its published rule releases and

²⁶ 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>; see also SIFMA Comment Letter re: Delay Proposal, *supra* note 5 at 10-11.

²⁷ Michael Wursthorn, *A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'*, WSJ. (Feb. 6, 2017) available at <https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491>; Greg Iacurci, *How Insurers are Losing When it Comes to Variable Annuities*, *Investmentnews.com*. n.d. <http://www.investmentnews.com/article/20160830/FREE/160839998/how-insurers-are-losing-when-it-comes-to-variable-annuities>

²⁸ See Sam Batkins, *Fiduciary Rule Has Already Taken Its Toll: \$100 Million In Costs, Fewer Options*, American Action Forum (Feb. 22, 2017), available at <https://www.americanactionforum.org/insight/fiduciary-rule-already-taken-toll-100-million-costs-fewer-options/>

²⁹ See *id.* ("For Metlife, AIG, and Merrill Lynch, the Fiduciary Rule was not just a matter of compliance costs, it concerned legal and future regulatory risk. Rather than try to comply with the complicated new rule, these companies simply left the market, moves that affect billions of dollars in assets, thousands of employees, and countless more consumers.")

³⁰ HD Vest Comment Letter re: Delay Proposal, *supra* note 2 at 3.

guidance. The Department issued two sets of FAQs very late in 2016, some of which include novel interpretations of the Rule.³¹ Even the delay notice included some new interpretations with regard to compliance during the transition period (*i.e.*, how the Department expects financial institutions to implement and supervise for adherence to the Impartial Conduct Standards). Short of the Fiduciary Rule being materially revised or rescinded, the complexities, ambiguities, and uncertainties associated with the rule and its exemptions should be significantly revised, and the Department needs to issue a significant amount of interpretive guidance and provide financial institutions additional time to implement solutions to comply with the rules.

Compliance is also particularly challenging considering the lack of robust innovation from product sponsors. It is axiomatic that financial institutions need product sponsors to create products that will enhance compliance with the rule.³² However, product sponsors have not had a sufficient opportunity to create and launch new products, and financial institutions and advisors need sufficient time to evaluate any new products that may become available for investors.

HD Vest noted in its recent comment letter that as a result of the Fiduciary Rule, several mutual fund companies have registered (or intend to register) a new type of share class – T shares.³³ Estimates previously suggested that fund companies will introduce 3,800 T shares this year³⁴ and a number of fund companies are looking to introduce “clean” shares.³⁵ However, despite the optimism that these new share classes could help financial institutions comply with the Fiduciary Rule, **neither T shares nor clean shares are available to investors.** These new types of shares are in various stages of development, including some awaiting SEC approval. Because these types of shares are not currently offered to investors, financial institutions will need sufficient time to add new products to their platforms and

³¹ See, e.g., FAQ 12 in the Conflict of Interest FAQs, Part I Exemptions, U.S. Department of Labor, Employee Benefits Security Administration (Oct. 27, 2016) (“financial institutions generally may not enter into such [back-end award] arrangements under the full BIC Exemption.”) available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-1.pdf>

³² John Waggoner, *Clean Shares Could Revolutionize the Fund Industry*, INVESTMENTNEWS (Feb. 2, 2017) available at <http://www.investmentnews.com/article/20170202/FREE/170209977/clean-shares-could-revolutionize-the-fund-industry> (“In recent years, fund companies have trotted out fund shares with various levels of trailing fees and commissions, leaving intermediaries to sort out which share classes offer the right mix of compensation for themselves and the appropriate burden for investors. The Department of Labor’s new fiduciary rules could make that sorting process all the more important — and difficult.”)

³³ HD Vest Comment Letter re: Delay Proposal, *supra* note 2 at 4.

³⁴ 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>

³⁵ 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\[email\]=6ddb7ee998666dacf227cd48125ec0cc29fc749292f9530a0762584ae0cef504%40investmentnews](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]=6ddb7ee998666dacf227cd48125ec0cc29fc749292f9530a0762584ae0cef504%40investmentnews)

implement all of the operational aspects that are inherent with adding new products will need to follow.³⁶

The proposed T share compensation structure may help financial institutions comply with the Fiduciary Rule, but, at present, it lacks certain traditional features common to other mutual fund share classes, *i.e.*, no rights of accumulation. Thus, T shares may aid financial institutions with their compliance efforts, but it is unclear whether this share class, as it is currently structured, will be in the best interests of retirement investors. Although the Department predicts that “the T-share approach will yield to clean shares” and that clean shares may become “the preferred long-term solution”³⁷, it is premature to tell which solutions, if any, financial institutions will adopt to help compliance with the Fiduciary Rule and serve retirement investors. Importantly, clean shares and T shares are obviously limited to the sale of mutual funds and, even if such solutions are adopted by financial institutions, they can only potentially serve as a limited solution for a single product category. In sum, it is entirely unknown whether T shares, clean shares, or any new mutual fund product will be an acceptable solution for retirement investors. It is clear, however, that the industry has not coalesced around any workable investment product solutions—and the Department should not assume that solutions will be available by the applicability dates.

Even assuming product sponsors create products that are designed to help financial institutions comply with the Fiduciary Rule, introducing new products to the market without an opportunity for practical evaluation of them by financial institutions, advisors, and clients creates significant regulatory uncertainty. Moreover, financial institutions should have the opportunity to receive the necessary guidance from the securities regulators regarding offering these products to retirement investors. The securities regulators have not had a sufficient opportunity to evaluate how any of the newly proposed product solutions will operate in the marketplace.

Considering the infancy of these new products, the lack of assurance that these new products will even be introduced to the marketplace, and questions over whether they will be beneficial to retirement investors (let alone endorsed by securities regulators), and the rapidly approaching scheduled applicable date (June 9, 2017), the Department should also delay the applicability date by one year so all new products can be properly created, vetted and incorporated into financial institutions operational and compliance procedures before being offered to retirement investors.

III. The Fiduciary Rule Increases the Prices that Investors and Retirees Must Pay to Gain Access to Retirement Products and Services

For financial institutions and advisors operating under the BIC exemption, the Department has deliberately designed an “enforcement by litigation” regime in that it requires financial institutions to enter into a written contract with retirement investors, allowing the

³⁶ See SIFMA Comment Letter re: Delay Proposal, *supra* note 5 at 9-12.

³⁷ Fiduciary Rule Delay Announcement, *supra* note 7 at 16911.

standard of care and warranties to be enforced through private litigation and expressly permitting class action litigation. This kind of enforcement paradigm really only incentivizes a “cottage industry” of plaintiffs lawyers who will feverishly embrace private securities litigation. SEC Acting Chairman Michael Piowar recently highlighted this concern by stating, “[f]or me, [the Fiduciary] rule was never about investor protection. It was about enabling trial lawyers to increase profits.”³⁸

At its core, the structure of the BIC enforcement regime is a transparent effort to dissuade financial institutions and advisors from operating under the BIC exemption and push them toward level fee investment advisory retirement business. This is underscored by the Department’s failure to explain why its chosen enforcement regime is a better alternative for retirement investors than a traditional regulatory enforcement regime – when on its face, it is not. If the Department were to examine the history of ERISA class action lawsuits, the plaintiffs lawyers always win big, while investors (to the extent they prevail or settle litigation) receive little.³⁹

Financial institutions relying on the BIC exemption now face unprecedented litigation exposure on every transaction, regardless of whether any mistake was made. Thus, it is only logical to conclude that an “enforcement by litigation” regime can only lead to an increase in litigation, regardless of whether any potential case has merit. Clearly retirement investor litigation is inevitable and prone to abuse. As a result, costs will substantially rise for products and services to reflect the risks and expenses associated with the “enforcement by litigation” regime.⁴⁰

HD Vest respectfully submits that, the Department’s Fiduciary Rule Re-evaluation Study should demonstrate how retirement investors will be better served through an “enforcement by litigation” regime as opposed to a traditional regulatory enforcement regime.

IV. Additional Problems with the Fiduciary Rule

While HD Vest is willing to support a best interest standard where financial institutions and advisors are providing individualized advice to retirement and non-retirement investors if crafted the right way, there are significant parts of the Fiduciary Rule that are not consistent with other financial regulation, impractical, not capable of ready compliance, and not realistic. Several of these problems are addressed in this letter and in the securities industry trade group comment letters. HD Vest comments on two of these specific problems below.

³⁸ Mark Schoeff Jr., Pinowar Blasts DOL Fiduciary Rule, Says SEC Should Have Comprehensive Discussion of Advice Standards, INVESTMENTNEWS (Mar. 2, 2017) (quoting Commissioner Pinowar’s speech at the Investment Advisor Association compliance conference) *available at* <http://www.investmentnews.com/article/20170302/FREE/170309975/piowar-blasts-dol-fiduciary-rule-says-sec-should-have-comprehensive>

³⁹ See SIFMA Comment Letter re: Delay Proposal, *supra* note 5 at 15.

⁴⁰ *Id.*

A. The Fiduciary Rule Creates a Bifurcated and Disjointed Regulatory Regime for Financial Institutions

HD Vest has long supported establishing a uniform fiduciary standard jointly crafted by the Securities and Exchange Commission (“SEC”) and Financial Industry Regulatory Authority (“FINRA”) that would apply equally to all investors, including those who are saving for retirement outside tax-advantaged retirement accounts. Respectfully, “[t]he SEC is the appropriate and primary regulator with the authority to create a standard protecting all investment accounts, not just the retirement accounts regulated by the DOL’s flawed rule.”⁴¹ Financial institutions are gravely concerned about being governed in the bifurcated and disjointed regulatory scheme created by the Department, especially without any coordination with the SEC and FINRA. The Fiduciary Rule was not jointly crafted with the SEC’s and FINRA’s input, and it does not contemplate that any securities regulator has the authority to enforce the rule; instead, as discussed above, enforcement of the rule is left to private litigants.

HD Vest respectfully submits that the Department should defer to the SEC and allow it to create a uniform fiduciary standard and accompanying rules so the industry can avoid creating conflicting standards of care incumbent upon financial institutions serving retirement investors.⁴²

B. The “Hire Me” and “Education” Exceptions Are Unworkable

The “hire me” and “education” exceptions have pitfalls that would allow simple, everyday circumstances to trigger fiduciary liability for financial institutions and advisors. For example, if a plan participant is speaking with an advisor who is operating under the participant education exception and the participant does not understand certain financial attributes of the available mutual funds or investment options, the advisor is not permitted to educate the participant about the differences among the funds, as this could be considered a recommendation outside of the exceptions and would trigger fiduciary liability.⁴⁴ Additionally, if an advisor is discussing the potential rollover options available to an investor and says anything in addition to “hire me” – such as describing the pros and cons of taking distributions from a plan – the advisor could be found to be making an investment recommendation on how to invest or manage plan or IRA assets thereby triggering fiduciary liability.⁴⁵ Thus, taking advantage of these exceptions requires an advisor to be unreasonably constrained in his or her presentation of information to a retirement investor. More disturbingly, it actively discourages

⁴¹ Mark Schoeff Jr., *Fate of Fiduciary Rule Rides on Regulators Political Savvy*, INVESTMENTNEWS (Feb. 27, 2017) (quoting Statement of SIFMA President and Chief Executive Officer Kenneth E. Bentsen Jr.) available at <http://www.investmentnews.com/article/20170227/BLOG07/170229934/fate-of-fiduciary-rule-rides-on-regulators-political-savvy>

⁴² See also, United States House of Representatives Committee on Financial Services Comment Letter re: Definition of the term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice; Extension of Applicability Date (Mar. 17, 2017)

⁴⁴ See SIFMA Comment Letter re: Delay Proposal, *supra* note 5 at 16-19.

⁴⁵ *Id.*

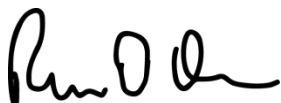
advisors from helping participants truly understand the options available to them with any level of specificity. Practically speaking, these exceptions are unworkable.

* * *

The reasons outlined in this letter strongly support delaying the scheduled applicability date for the Fiduciary Rule at least one year. As explained above, such an extended delay will provide the Department with ample time to perform a comprehensive Fiduciary Rule Re-evaluation Study, and it will allow the President, and the Secretary of Labor (who may not be confirmed until May 2017) and his appointed staff an opportunity to fully and carefully review the record underlying the report and decide on next steps. It will also (1) provide commenters with a meaningful opportunity to supply the Department with additional comments; (2) provide the Department time to develop and issue additional interpretive guidance; (3) save financial institutions valuable time and money from implementing solutions that are subject to change if the rule is materially revised or rescinded; (4) prevent financial institutions from prematurely altering their business models; (5) provide financial institutions 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 the industry.

Thank you for considering HD Vest's comments.

Sincerely,



Bob Oros
Chief Executive Officer