



# FINANCIAL PLANNING COALITION

August 7, 2017

Office of Exemption Determinations  
Employee Benefits Security Administration  
Attention: D-11933  
[EBSA.FiduciaryRuleExamination@dol.gov](mailto:EBSA.FiduciaryRuleExamination@dol.gov)

United States Department of Labor  
200 Constitution Avenue, NW  
Suite 400  
Washington, D.C. 20210

***RE: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, RIN-1210-AB82***

Ladies and Gentlemen:

The Financial Planning Coalition (Coalition)<sup>1</sup> – comprised of Certified Financial Planner Board of Standards (CFP Board),<sup>2</sup> the Financial Planning Association® (FPA®),<sup>3</sup> and the National Association of Personal Financial Advisors (NAPFA)<sup>4</sup> – appreciates the opportunity to comment on the request for information (RFI RIN-1210-AB82)<sup>5</sup> by the Department of Labor, Employee Benefits Security Administration (Department) regarding substantive questions about potential further modification of the Department’s final fiduciary rule (Final Rule)<sup>6</sup> and certain Prohibited

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<sup>1</sup> The Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession.

<sup>2</sup> CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for over 80,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country. 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.

<sup>3</sup> 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. 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.

<sup>4</sup> NAPFA is the nation’s leading organization of fee-only comprehensive financial planning advisors with more than 3,000 members nationwide. NAPFA members are highly trained professionals who adhere to high professional standards. Each NAPFA advisor annually must sign and renew a Fiduciary Oath and subscribe to NAPFA’s Code of Ethics.

<sup>5</sup> Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31278 (July 6, 2017) (to be codified at 29 C.F.R. pt. 2509, 2510, and 2550), available at <https://www.federalregister.gov/documents/2017/07/06/2017-14101/request-for-information-regarding-the-fiduciary-rule-and-prohibited-transaction-exemptions>.

<sup>6</sup> See Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128, 82 Fed. Reg. 16902 (Apr. 7, 2017) (to be codified at 29 C.F.R. pt. 2510), available at <https://www.federalregister.gov/documents/2017/04/07/2017-06914/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice-best>; See also Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20945 (Apr. 8, 2016) (to be

Transaction Exemptions (PTEs) pursuant to the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC). The Coalition opposes any modification or elimination of the provisions of the Final Rule or PTEs. The Coalition believes that a strengthened fiduciary rule under ERISA and IRC is essential for America's retirement investors and is workable for advisers.<sup>7</sup> As the Coalition previously commented,<sup>8</sup> a meaningful, legally enforceable fiduciary standard that puts investors' interests first is the best way to strengthen Americans' retirement security. It takes decades for people to save for a comfortable and secure retirement; these savers deserve advice on growing their hard-earned assets under a fiduciary obligation. The Final Rule, including all of its exemptions, is fully consistent with the principles of a true fiduciary standard under ERISA and IRC. Modifying or eliminating the Final Rule and PTEs 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.<sup>9</sup> CFP® professionals hold registrations and licenses across business models as investment adviser representatives, as registered representatives of broker-dealers, and as 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 in applying the fiduciary standard across business and compensation models.

## I. Financial Services Professionals Recognize The Increasing Public Demand for Fiduciary Advice

A 2013 Aite survey for CFP Board found that most registered representatives and registered investment advisers agree that a fiduciary standard of care is appropriate for financial services providers who deliver personalized investment advice.<sup>10</sup> This finding cuts across a multitude of business models subject to different regulatory provisions. The Aite study surveyed financial professionals at various firm types, including broker-dealers, wirehouses, independent registered investment advisers, and online brokerage firms. Those surveyed cited *greater alignment among provider and investor interests* as the primary benefit of a uniform fiduciary standard.

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codified at 29 C.F.R. pts. 2509, 2510, and 2550), available at <https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>.

<sup>7</sup> 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.

<sup>8</sup> See generally Letter from Coalition to Office of Regulations and Interpretations, Employee Benefit Security Administration (EBSA), U.S. Dep't of Labor (July 21, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00233.pdf>; See also Letter from Coalition to Office of Regulations and Interpretations, EBSA, U.S. Dep't of Labor (Apr. 17, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01324.pdf>.

<sup>9</sup> 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>.

<sup>10</sup> Aite, "Fiduciary Study Findings for CFP® Board" (June 2013), available at <http://www.cfp.net/docs/public-policy/aite-fiduciary-study-june-2013.pdf>.

Additionally, the Aite study found that registered investment advisers experienced stronger client asset growth in the previous five years than registered representatives who did not deliver fiduciary services to a majority of clients. More than half of registered representatives who were financial planning fiduciaries generated double-digit asset growth and revenue growth in the previous five years. The survey takers who transitioned from a commission-based practice to a fee-based practice found that the impact of managing more client assets as a fiduciary resulted in gains in client wallet share and drove their practice to deliver more holistic advice. *Hence, a uniform fiduciary standard of care not only better protects clients but is also shown to increase business.*

More recently, in July 2015, Princeton Survey Research Associates International (PSRAI) conducted research for the Coalition in response to an SEC request for information regarding whether it should adopt a uniform fiduciary standard of care for broker-dealers and investment advisers when they provide personalized investment advice to retail customers.<sup>11</sup> The study surveyed 1,852 stakeholders from Coalition organizations, including professionals from broker dealers, registered investment advisers, and insurance companies.<sup>12</sup> The study found that almost nine out of 10 respondents agree with the statement that “a fiduciary standard of care is appropriate for all financial professionals who deliver personalized investment advice to retail investors.” Other key findings included:

- Forty-five percent of financial professionals surveyed say consumers are not adequately protected, while 36 percent say consumers are adequately protected.
- Two-thirds believe that a change to extend the fiduciary standard of care to broker-dealers would have a positive impact on investors.
- A substantial majority of all respondents believe that, if the SEC extended the fiduciary standard of care, the change would increase disclosure to clients regarding potential conflicts of interest (88%), better align adviser and investor interests (75%), and help enhance investors’ trust in financial services firms (64%).<sup>13</sup>

The Coalition believes, based on its experience applying the fiduciary standard to Certified Financial Planner™ professionals across business models, that the Final Rule is both workable and essential to protect America’s retirement savers. In fact, since applying a fiduciary standard to its own certificants,<sup>14</sup> CFP Board has seen an approximate 30% growth in the number of certified CFP® professionals.<sup>15</sup> In recent years, the public demand for fiduciary advice has increased dramatically and the market continues to move in the direction of providing fiduciary advice.

## **II. CFP’s Proposed *Standards* and Review Process Can Complement the Final Rule**

In recognition of the growing public demand for fiduciary advice, CFP Board of Standards in June issued for public comment proposed revisions to its *Standards of Professional Conduct (Standards)*, which set forth the ethical standards for CFP® professionals. The current *Standards*

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<sup>11</sup> Coalition, “Fiduciary Standard Survey,” Prepared by Princeton Survey Research Associates International (Revised July 2015), at p. 5, available at <http://financialplanningcoalition.com/wp-content/uploads/2015/07/Princeton-Research-Fiduciary-Study-Final.pdf>.

<sup>12</sup> *Id.*, at p. 8.

<sup>13</sup> *Id.*, at p. 6.

<sup>14</sup> CFP Board, “Standards of Professional Conduct,” at p. 8 (2009, Amended 2013) (“‘Certificant’ denotes an individual who is currently certified by CFP Board.”).

<sup>15</sup> Statement of the Coalition before the U.S. House of Representatives Education and the Workforce Committee, Subcommittee on Health, Employment, Labor, & Pensions, Hearing on “Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees,” (Dec. 2, 2015), at p. 3, available at [https://edworkforce.house.gov/uploadedfiles/marilyn\\_mohrman-gillis\\_testimony.pdf](https://edworkforce.house.gov/uploadedfiles/marilyn_mohrman-gillis_testimony.pdf).

require CFP® professionals to act in a fiduciary capacity only when providing financial planning services. If adopted, the proposed draft revision would broaden the application of the fiduciary standard, effectively requiring CFP® professionals to put a client’s interest first at all times.

In order for individuals to receive CFP® certification from CFP Board, they must agree to meet high standards for competency and ethics. CFP Board’s *Code of Ethics* and *Standards of Conduct* benefit and protect the public, provide standards for delivering financial planning, and advance financial planning as a distinct and valuable profession. Compliance with the *Code* and *Standards* is a requirement of CFP® certification that is critical to the integrity of the CFP® mark. CFP Board periodically reviews the *Standards* to maintain the value, integrity and relevance of the CFP® certification. In December 2015, CFP Board announced the formation of a Commission on Standards to review and recommend to the Board of Directors proposed changes to the *Terminology, Code of Ethics and Professional Responsibility, Rules of Conduct, and Financial Planning Practice Standards* sections of the *Standards*. To assist in the process of proposing updates to the *Standards*, CFP Board formed a Commission on Standards, comprised of 14 members drawn from the financial services industry and including one former securities regulator and one investor advocate.<sup>16</sup>

Before the Commission on Standards began its work, CFP Board sought input from CFP professionals and the public on the issues that should be addressed in the process of updating the *Standards*. Public forums were held across the country in the first quarter of 2016 to gather comments. The Commission then met to review the initial comments and to begin the process of developing updated and revised *Standards* to be presented to the CFP Board of Directors. The CFP Board of Directors finalized and released a draft of the proposed revisions on June 20, 2017, and announced a 60-day public comment period. In addition to accepting written comments, CFP Board received comments on the proposed revised *Standards* during eight public forums held across the country during the week of July 24, 2017. CFP Board is accepting public comments on the proposed revisions through August 21, 2017.<sup>17</sup>

The proposed *Standards* combine four sets of rules into one streamlined document. The most significant proposed revision concerns Rule 1.4, which currently calls for a fiduciary standard “[w]hen the certificant provides financial planning or material elements of financial planning.” The proposed *Standards* would trigger a continuous fiduciary standard of care: “A CFP® professional must at all times act as a fiduciary when providing Financial Advice to a Client, and therefore, act in the best interest of the Client.”<sup>18</sup> The fiduciary duty includes a duty of loyalty, a duty of care, and a duty to follow client instructions. The term “financial advice” is broadly defined and has no exceptions or exemptions,<sup>19</sup> although it would exclude items that a reasonable person would not

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<sup>16</sup> CFP Board, “Commission on Standards,” available at <https://www.cfp.net/about-cfp-board/commission-on-standards#members>.

<sup>17</sup> CFP Board, “Comments Form,” available at <https://www.cfp.net/about-cfp-board/proposed-standards/comments-form-proposed-changes-to-cfp-board-standards-of-professional-conduct>.

<sup>18</sup> CFP Board, Draft Proposal of “Code of Ethics and Standards of Conducts,” at p. 1, available at <https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/2017-proposed-standards/final-standards-for-public-comment.pdf?sfvrsn=2> (emphasis added).

<sup>19</sup> *Id.*, at pp. 16-17. The proposed *Standards* define “Financial Advice” as the following:

- A. A communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the Client take or refrain from taking a particular course of action with respect to:
  1. The development or implementation of a financial plan addressing goals, budgeting, risk, health considerations, educational needs, financial security, wealth, taxes, retirement, philanthropy, estate, legacy, or other relevant elements of a Client’s personal or financial circumstances;
  2. The value of or the advisability of investing in, purchasing, holding, or selling Financial Assets;
  3. Investment policies or strategies, portfolio composition, the management of Financial Assets, or other financial matters;

view as financial advice such as incidental services, marketing or financial education materials, or general financial communications.

Coalition partners FPA® and NAPFA, whose memberships include CFP® certificants, are reviewing the proposed revised *Standards* and will submit comments to CFP Board during the public review process.

### **III. New Exemptions or Revisions to Final Rule and PTEs Will Leave Consumers Unprotected**

Prior to the Final Rule, the Department's five-part test<sup>20</sup> permitted regulatory loopholes to exist to the detriment of retirement investors.<sup>21</sup> The prior regulatory framework allowed advisers to make 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 the underperformance associated with conflicts of interest – in the mutual fund segment alone – could cost Individual Retirement Account (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.<sup>22</sup> The Department also found that retirement investors “could lose 6 to 12 and as much as 23 percent of the value of their savings by accepting conflicted advice.”<sup>23</sup>

In the Preamble to the Final Rule, the Department stated it was replacing the prior five-part test under ERISA “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.”<sup>24</sup>

The Final Rule was slated for implementation in April 2017, but was delayed by 60 days and most of its provisions went into partial effect on June 9, 2017. Studies estimated that this 60-day delay cost retirement investors billions of dollars over the life of their investments. The Economic Policy Institute concluded that for “every seven days that the fiduciary rule's applicability [was] delayed, it...cost retirement savers \$431 million over the next 30 years. Thus, the costs of a 60-day delay to retirement savers is \$3.7 billion.”<sup>25</sup> The Department recently issued RFI RIN-1210-AB82,<sup>26</sup> seeking comments on whether or not to delay the January 1, 2018 applicability date of certain PTEs, which contain much-needed enforcement mechanisms. These PTEs were originally scheduled to be implemented on June 9, 2017. The cost to retirement savers of this nearly seven-month delay is estimated to be \$3.9 billion dollars over the next 30 years.<sup>27</sup> Each additional year

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4. The selection and retention of other persons to provide financial or Professional Services to the Client; or

B. The exercise of discretionary authority over the Financial Assets of a Client.

<sup>20</sup> See 75 Fed. Reg., at 65270 (Oct. 22, 2010); See also 29 CFR 2510.3–21(c); And See Definition of the Term “Fiduciary,” 40 Fed. Reg. 50842 (Oct. 31, 1975).

<sup>21</sup> Nick Thornton, “DOL proposal would redefine fiduciary test,” benefits PRO (Apr. 17, 2015), available at <http://www.benefitspro.com/2015/04/17/dol-proposal-would-redefine-fiduciary-test>.

<sup>22</sup> U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, at 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> (2016 RIA).

<sup>23</sup> See 81 Fed. Reg., at p. 20949, *supra*, n. 6.

<sup>24</sup> See 81 Fed. Reg., at p. 20946, *supra*, n. 6.

<sup>25</sup> Letter from Heidi Shierholz, Director of Policy at the Economic Policy Institute, to Office of Regulations and Interpretations, EBSA, U.S. Dep't of Labor (Mar. 17, 2017), available at <http://www.epi.org/publication/epi-comment-on-the-proposal-to-extend-the-applicability-date-to-the-fiduciary-rule/>.

<sup>26</sup> See n. 5, *supra*.

<sup>27</sup> Economic Policy Institute, “EPI comment on extending the applicability date of portions of the fiduciary rule” (July 21,

of delay would lead to \$7.3 billion lost over the next 30 years.<sup>28</sup> As AARP testified in Congress recently, “[c]onflicted advice is not free.”<sup>29</sup> If the Final Rule or PTEs are eliminated or weakened through modification or elimination, the costs incurred by retirement investors could increase exponentially.

#### **IV. Consumer Confusion Will be Exacerbated**

Confusion among retail retirement investors will continue if the Final Rule and PTEs are not fully implemented and enforced as scheduled. 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 IRAs, Americans increasingly are responsible for making investment decisions that will, in large part, determine their financial security in retirement. Many Americans now rely on savings vehicles such as 401(k) plans, which did not exist when the ERISA originally went into effect in 1974, and IRAs, which contained only \$3 billion in aggregate assets at that time.<sup>30</sup> This is a huge departure from the current landscape, where, at the end of the first quarter of 2015, assets in IRAs totaled \$7.6 trillion and 401(k) plan assets totaled \$6.8 trillion. Yet even with this transformation in the way Americans save and invest for retirement, a recent AARP survey found that almost half of respondents said they were not too confident or not at all confident that they will have enough money to live comfortably in retirement, while only 14% said they were very confident.<sup>31</sup>

Facing growing responsibility for their own retirement savings and an increasingly complex universe of financial products and services, Americans today must depend upon competent and ethical advisers to help make decisions critical to their financial security. When they seek financial advice, however, 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.

A landmark 2008 study sponsored by the U.S. Securities and Exchange Commission (SEC) and conducted by the RAND Center for Corporate Ethics, Law, and Governance found that “[e]xisting studies suggest that investors do not have a clear understanding about the distinction between broker-dealers and investment advisers and their different levels of fiduciary responsibility.”<sup>32</sup> Subsequent studies confirm persistent and pervasive consumer confusion about financial industry titles and standards of conduct. A study conducted by InfoGroup, on behalf of the Coalition, Consumer Federation of America (CFA), AARP, and the North American Securities Administrators Association (NASAA), found that three out of five U.S. investors mistakenly think

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2017), available at <http://www.epi.org/publication/epi-comment-on-extending-the-applicability-date-of-portions-of-the-fiduciary-rule/>.

<sup>28</sup> Economic Policy Institute, “Further delay of full applicability of the fiduciary rule would cost retirement savers in every state” (July 21, 2017), available at <http://www.epi.org/publication/further-delay-of-full-applicability-of-the-fiduciary-rule-would-cost-retirement-savers-in-every-state/>.

<sup>29</sup> U.S. House of Representatives, Financial Services Committee, Capital Markets, Securities, and Investment Subcommittee Hearing entitled, “Impact of the DOL Fiduciary Rule on the Capital Markets” (July 13, 2017), available at <https://democrats-financialservices.house.gov/calendar/eventsingle.aspx?EventID=400645>.

<sup>30</sup> ICI, Research Perspective, “The Evolving Role of IRAs in U.S. Retirement Planning,” Nov. 2009, Vol. 15, No. 3, available at <https://www.ici.org/pdf/per15-03.pdf>.

<sup>31</sup> AARP, Ad Council, “AARP-Ad council Saving for Retirement Campaign – Retirement Attitudes Survey Annotated Questionnaire,” at p. 2 (June 2017), available at [http://www.aarp.org/content/dam/aarp/research/surveys\\_statistics/econ/2017/ace%20retirement-release-survey-annot.pdf](http://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2017/ace%20retirement-release-survey-annot.pdf).

<sup>32</sup> Angela Hung, et al., RAND Corp., “Investor and Industry Perspectives on Investment Advisers and Broker-Dealers,” Sponsored by the United States Securities and Exchange Commission (2008), available at [https://www.sec.gov/news/press/2008/2008-1\\_randiabreport.pdf](https://www.sec.gov/news/press/2008/2008-1_randiabreport.pdf) (SEC Study).

that “insurance agents” have a fiduciary duty to their clients; two out of three U.S. investors are incorrect in thinking that stockbrokers are held to a fiduciary duty; and three out of four investors are wrong in believing that “financial advisors” – a ubiquitous term used by financial services and insurance firms to describe their salespersons – are held to a fiduciary duty.<sup>33</sup> The study also found that 75 percent of investors incorrectly believed that the fiduciary standard is already in place for “financial planners.”<sup>34</sup>

A disclosure-only regime is insufficient to remedy investor confusion and, perhaps more importantly, investor harm as a result of conflicted advice. Solely relying on disclosures is inconsistent with the SEC’s mission of investor protection and contradicts prior SEC research showing that disclosures alone are ineffective.<sup>35</sup> Massachusetts Commonwealth Secretary William Galvin, who oversees that state’s Securities Division, also disagrees with the view that disclosures alone are an adequate response to the problem the Final Rule addresses. Citing “the real abuses in the area of retirement account rollovers,” Galvin wrote that current boilerplate disclosures “have not protected retirement investors...”<sup>36</sup> He added that although “good disclosure is crucial for all participants in the financial markets,” disclosure alone provides inadequate protection because “such disclosure is often written in ponderous, hard-to-understand language, so it often promotes confusion rather than well-informed investment decisions.”<sup>37</sup>

The Final Rule and PTEs provide retirement investors, for the first time, a guarantee that they can receive transparent, conflict-free, fiduciary-level advice to protect their hard-earned nest eggs.

## V. The Final Rule and PTEs Were Subject to Robust Rulemaking Under the APA

Under the Administrative Procedure Act (APA) and related executive orders, the Department is obligated to engage in a comprehensive rulemaking process that allows substantial time for a meaningful opportunity to comment; and to seriously consider public comments, mathematical/statistical analyses, or other relevant materials.<sup>38</sup> The Department did exactly that when it issued the Final Rule – a product of years of substantive negotiations, multiple hearings, and thorough analyses. Modifying or eliminating the Final Rule or PTEs would ignore both the law and the well-founded, reality-based research supporting the provisions contained in the Final Rule and PTEs.

As the expert agency, the Department engaged in a rulemaking process that worked precisely as intended. The first iteration of the Final Rule was proposed in October 2010 and was met with 202 public comments.<sup>39</sup> Approximately six months later, in March 2011, the Department held a hearing on that version of the rule.<sup>40</sup> Based, in part, on the 114 public comments generated by

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<sup>33</sup> InfoGroup, *U.S. Investors and the Fiduciary Standard*, Sept. 15, 2010, <http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf>.

<sup>34</sup> *Id.*

<sup>35</sup> See SEC Study, at p. 19, *supra*, n. 32 (“[T]he majority of interviewees expressed...that disclosures do not help protect or inform the investor, primarily because few investors actually read the disclosures...The way that they are written is not easily understandable to the average investor.”).

<sup>36</sup> Letter from William F. Galvin, Secretary of the Commonwealth, to Timothy D. Hauser, Deputy Assistant Secretary for Program Operations, Office of Exemption Determinations, EBSA, U.S. Dep’t of Labor, at p. 2 (July 28, 2017), available at <http://www.sec.state.ma.us/sct/sctpdf/Hauser0001.pdf>.

<sup>37</sup> *Id.*, at pp. 2-3.

<sup>38</sup> 5 U.S.C. § 553.

<sup>39</sup> Letter from Congress of the United States to Office of Regulations and Interpretations, EBSA, U.S. Dep’t of Labor (July 21, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00244.pdf>.

<sup>40</sup> *Id.*

the public hearing, the Department decided in September 2011 to withdraw the rule.<sup>41</sup> The Department 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 in August 2015 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.<sup>42</sup>

As a result of this thorough and evidence-intensive rulemaking process, the Final Rule and PTEs address issues raised by firms, industry organizations, and consumer and public interest organizations concerning the Department's fiduciary rule proposal published in 2015.<sup>43</sup> Consistent with the APA and pertinent executive orders, the Department listened to and addressed these concerns before issuing 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. For instance, the Coalition engaged in a back-and-forth dialogue with the Department regarding specific regulatory language during the rulemaking process. This engagement resulted in clearer regulatory mandates and more practicable Departmental directives directly applicable to real-world issues.<sup>44</sup>

The process worked as it should have. Companies and organizations that were initially skeptical later stated publicly that the Department listened carefully to and responded to their concerns.<sup>45</sup> The Department received more than 3,000 individual comment letters and more than 300,000 submissions as part of 30 separate petitions on the 2015 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."<sup>46</sup> The Department also "held numerous meetings with interested stakeholders at which the Regulatory Impact Analysis was discussed."<sup>47</sup> Throughout the comment process, the former Labor Secretary 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.

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<sup>41</sup> *Id.*

<sup>42</sup> See 81 Fed. Reg., at p. 20958, *supra*, n. 6.

<sup>43</sup> Definition of the Term "Fiduciary," 80 Fed. Reg. 21928 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2510).

<sup>44</sup> Financial Planning Coalition, Coalition Efforts, "Significant Changes in Final DOL Fiduciary Rule" (Apr. 18, 2016), available at <http://financialplanningcoalition.com/wp-content/uploads/2015/07/DOL-Rule-vF.pdf> (For example, one comment the Coalition raised with the Department concerning the proposed rule was that the "contract requirement is too restrictive and could prevent normal pre-contract communications." After the Department considered the Coalition's comment, the Department modified the Final Rule and PTEs to state that "for new clients, the contract may be signed at any time before the transaction, as long as it applies retroactively to any advice provided up to that point.").

<sup>45</sup> See, e.g., NAIFA, Fiduciary (Retirement Accounts), available at [http://www.naifa.org/advocacy/federal-issues-positions/fiduciary-\(retirement-accounts\)](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 Institute (FSI), Final DOL Fiduciary Rule Summary, available at [http://www.financialservices.org/uploadedFiles/FSI\\_Content/Docs/DOL/Final\\_DOL\\_Fiduciary\\_Rule\\_Summary.pdf](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.").

<sup>46</sup> See 81 Fed. Reg., at p. 20958, *supra*, n. 6.

<sup>47</sup> See 2016 RIA, at p. 7, *supra*, n. 22.



That the rulemaking process was sound and well-reasoned is underscored by the fact that current Labor Secretary Acosta could not support further delay this year, admitting that, “[w]e have carefully considered the record in this case, and the requirements of the [APA], and have found *no principled legal basis* to change the June 9 [partial effective] date.”<sup>48</sup> Because the underlying basis for the Final Rule and PTEs was the result of a lengthy, well-established, and respected rulemaking process, the Coalition strongly urges the Department to oppose modification or elimination of the Final Rule and PTEs.

## **VI. Federal Courts Have Consistently Upheld The Rulemaking Process Supporting the Final Rule and PTEs**

Multiple federal courts repeatedly have upheld the Department’s rulemaking process in crafting the Final Rule and PTEs. These rulings, from across the federal court landscape, support their conclusions that the Department engaged in sound and careful rulemaking, and that the Department acted properly within the scope of its authority under ERISA. Eliminating or modifying the Final Rule and PTEs would unnecessarily reverse the courts in their meticulous and independent examinations and conclusions confirming the legal validity of the Final Rule and PTEs.

At least three courts in various jurisdictions have affirmed the Department’s decision-making process throughout the rulemaking and promulgation periods.<sup>49</sup> The Department’s imperative is to respect the rule of law and refrain from eliminating or modifying the Final Rule and PTEs. As the D.C. Circuit recently ruled, a lengthy delay or stay of an administrative regulation, such as two years, would be “tantamount to amending or revoking a rule.”<sup>50</sup> In this case, revocation of the Final Rule and PTEs would endanger billions of dollars in retirement investments, causing further investor harm.

## **VII. The Department Should Continue to Incent the Marketplace to Innovate and Adapt to the Final Rules and PTEs**

In anticipation of a 2017 implementation deadline, many firms already have established compliance processes for the Final Rule and PTEs. Modifying or eliminating the Final Rule and PTEs would remove incentives for further innovation and adaptation, as well as punish those firms that “did the right thing” by taking early steps to comply. Although the Final Rule has been in partial effect for only two months and detailed impact analysis is limited, early signs show that the industry is adjusting well. A recent Aite Group survey<sup>51</sup> found that 71% of respondents’ firms have

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<sup>48</sup> Alexander Acosta, “Deregulators Must Follow the Law, So Regulators Will Too,” *The Wall Street Journal* (May 22, 2017), available at <https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029> (emphasis added).

<sup>49</sup> The Coalition acknowledges that a federal court in Minnesota is adjudicating a separate lawsuit brought by another industry stakeholder. See generally *Thrivent Financial for Lutherans v. Perez*, Civ. Action No. 16-cv-3289, D. Minn. (Compl. filed Sept. 29, 2016). The Coalition also is aware that the U.S. Department of Justice, representing the Department in litigation, will no longer defend the Final Rule’s provision allowing for private class-action lawsuits as an enforcement mechanism. *Thrivent Financial for Lutherans v. Perez*, Civ. Action No. 16-cv-3289, at p. 2, D. Minn. (Def. Reply Mem. filed Dec. 23, 2016) (“DOL therefore exceeded its authority under the APA in adopting the BIC Exemption’s anti-arbitration condition. That invalid condition should be severed from the BIC Exemption.”). However, the Department specifically supported the remainder of its claims, writing that, “DOL agrees that severance is the appropriate remedy if the anti-arbitration condition is deemed invalid.” *Id.*, at n. 1, p. 2.

<sup>50</sup> *Clean Air Council v. Pruitt*, No. 17-1145, at p. 6, D.C. Cir. (July 3, 2017), available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/A86B20D79BEB893E85258152005CA1B2/\\$file/17-1145-1682465.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/A86B20D79BEB893E85258152005CA1B2/$file/17-1145-1682465.pdf).

<sup>51</sup> Aite Group, “DOL Fiduciary Rule: Survey on Financial Advisor Sentiment” (June 22, 2017), available at <http://www.aitegroup.com/report/dol-fiduciary-rule-survey-financial-advisor-sentiment>.

done well or extremely well in deciding on a course of action to comply with the Final Rule. Approximately 71% of respondents said their firms did well or extremely well in making technology or automation improvements to comply with the Final Rule, and 72% said their firms are doing well or extremely well in maintaining their product/pricing mix. About 76% of respondents said their firms are doing well or extremely well in keeping clients unaffected by fee changes.

Among the innovations spurred by the Final Rule and PTEs are T-shares and clean shares. These new investment vehicles “may reduce conflicted advice and therefore could also reduce other costs for investors and improve outcomes,” and “potentially save some investors money on commissions” and “further enhance transparency for investors.”<sup>52</sup> T-shares, which allow the sale of mutual funds on uniform commissions, “will likely save some investors money immediately” and could benefit low- and middle-income investors with less money to invest in IRAs because they would be more likely to pay the maximum front-end loads for T shares that are lower than most maximum loads associated with Class A shares, which traditionally have been purchased by most individual investors through a broker.<sup>53</sup> Pruning product shelves of A shares that often involve costly selling incentive payments for “shelf space” may further benefit consumers and usher in the full adoption of T shares, which are free of such arrangements. Morningstar found that “[t]he T share structure thus compels distributors to consider funds based purely on their investment merits rather than any revenue they might receive from the fund manufacturer.”<sup>54</sup> The study found that “the quickest way to prune a product shelf is to cut funds with higher-than-average expenses, and we expect this will compel mutual fund companies to rationalize their lineups and focus on fewer, proven strategies.”<sup>55</sup>

Similarly, clean shares will help better align the interests of consumers and financial services professionals. Clean shares leave to distributors the determination of how much to charge investors for any services rendered, and would allow firms to qualify as level fee fiduciaries so long as third-party payments of any kind are stripped away.<sup>56</sup> Clean shares would allow unbundling and produce greater competition, while at the same time leaving investors “better positioned to ask how much they pay to whom for what, enhancing consumer scrutiny that tends to drive prices down.”<sup>57</sup>

Unfortunately, as positive as such innovations promise to be, some may be shelved as a result of the uncertainty surrounding the Final Rule and PTEs. In mid-June, at least one news report found that “[t]he brokerage industry is still up in the air about how to levelize mutual fund compensation in order to comply with the pending DOL rule.”<sup>58</sup> With regard to T shares, “[u]ncertainty over the final status of the DOL rule, and questions about whether the new share class is really best for clients, has caused the idea to fall by the wayside.”<sup>59</sup> Until the Department conveys strong and resounding support for the Final Rule and PTEs as written, firms will continue in limbo on whether to initiate these and other innovations.

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<sup>52</sup> Aron Szapiro and Paul Ellenbogen, “Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors,” Morningstar (April 2017), available at <https://corporate1.morningstar.com/ResearchLibrary/article/802119/early-evidence-on-the-department-of-labor-conflict-of-interest-rule/>.

<sup>53</sup> *Id.*, at p. 5.

<sup>54</sup> *Id.*, at p. 6.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*, at p. 7.

<sup>57</sup> *Id.*, at p. 8.

<sup>58</sup> Dan Jamieson, “American Funds, Others, Back Off T Shares As B-D’s Face DOL Uncertainty,” Financial Advisor (June 16, 2017), available at <http://www.fa-mag.com/news/industry-struggles-with-mutual-fund-pay-under-dol-rule-33304.html>.

<sup>59</sup> *Id.*

In addition to innovative share classes, firms have been changing the way they do business in other ways. Firms have also started rolling out new technology platforms to accommodate standardization and eliminate perceived conflicts of interest.<sup>60</sup> Financial services adaptations and innovations should be encouraged, not just for the sake of increased profits but also to protect retirement investors. Full implementation of the Final Rule and PTEs as written will provide firms regulatory incentive to innovate. The Department must encourage these innovations by promptly implementing the Final Rule and PTEs as written.

### VIII. Conclusion

The Coalition urges the Department to implement and enforce the Final Rule and PTEs as currently written and according to the originally set deadline of January 1, 2018. Eliminating or modifying the Final Rule and PTEs would prevent the Department from taking critically needed steps to enhance protections for retirement investors, including much-needed enforcement mechanisms. 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.

The Coalition believes that requiring an adviser to work in the retirement investor's best interest, with proper enforcement and accountability regimes under the applicable exemptions, is an essential and long overdue reform. Retirement accounts are where most Americans, particularly middle income Americans, have a majority of their investments. Early evidence clearly shows the Final Rule is benefitting retirement investors, even the smallest accountholders, by reducing conflicts, lowering investment costs, and preserving access to advice under a variety of business models. We urge the Department to move forward expeditiously with the timely implementation of the Final Rule and PTEs as written.

The Coalition appreciates the opportunity to comment on the Department's RFI RIN-1210-AB82. 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](mailto:MThompson@cfpboard.org).

Sincerely,



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<sup>60</sup> Greg Iacurci, "LPL to roll out new mutual fund platform as DOL fiduciary rule takes effect," InvestmentNews (July 13, 2017), available at <http://www.investmentnews.com/article/20170713/free/170719970/lpl-to-roll-out-new-mutual-fund-platform-as-dol-fiduciary-rule-takes>.