ALTERNATIVE & DIRECT INVESTMENT SECURITIES ASSOCIATION
Education ▲ Networking ▲ Advocacy

10401 North Meridian Street
Suite 202
Indianapolis, IN 46290

317.663.4180 *main*
317.815.0871 *fax*
866.353.8422 *toll free*

www.adisa.org

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VIA eRulemaking Portal http://www.regulations.gov *at Docket EBSA-2017-0004*

Office of Exemption Determination, EBSA (Attn: D-11712, 11713, 11850)
US Department of Labor
200 Constitution Ave, NW, Ste 400
Washington, DC 20210

Re: RIN 1210-AB82

Dear Sir or Madam:

We write in regard to the Department of Labor's recently published proposal to extend until July 1, 2019, the special transition period created by the Department with specific reference to Prohibited Transaction Exemptions 2016-1, 2016-2 and 84-24 (the "Exemptions"), promulgated under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Currently, the special transition period created with respect to these Exemptions is set to expire on January 1, 2018.

The Alternative and Direct Investment Securities Association ("ADISA"),[1] has provided commentary to the Department both in letters and in person on aspects of the Fiduciary Rule.[2] Representatives of ADISA also appeared before the Office of Management and Budget and presented evidence and research as to the immediate problems and potential harmful unintended consequences of the Fiduciary Rule as it has been proposed.

ADISA's role among the many organizations which represent the financial services space is to address concerns specifically expressed by those operating in the non-traded investment area. We share most of the overall concerns which the financial services industry at large has voiced about the Fiduciary Rule, and we review here in summary only those aspects which uniquely impact our subset of the space.

ADISA wants to go on record as supporting the proposed extension of the special transition periods currently applicable to the Exemptions. Without this extension, the Department would

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[1] ADISA is the nation's largest trade association for the non-traded alternative investment space. ADISA represents over 4,000 financial industry members, reaching over 220,000 finance professionals, with sponsor members having raised in excess of $200 billion in equity in serving more than 1 million investors.

[2] ADISA letter of July 21, 2015 (http://www.adisa.org/news/current-news/dol_fiduciary_comment_letter) provides arguments and research data; its *Alternative Investment Quarterly* Fall 2016, pp 2-3, summarizes current research related to the issue (online version at http://www.adisa.org/publications/aiq).

not necessarily be able to conduct the multi-faceted appraisal of the Fiduciary Rule and the Exemptions required by the President's February 3, 2017 Memorandum. Any changes that the Department finds warranted by its appraisal, including amendment to or even rescission of the Fiduciary Rule and/or any Exemption, would necessarily require further research and analysis. This would also allow those affected by the Fiduciary Rule and the Exemption's provisions time to re-adjust or even make wholesale changes to policies and procedures established or adopted to ensure compliance with the Fiduciary Rule and Exemptions as adopted in April 2016.

In ADISA's view, there is little provable downside or loss associated with the proposed delay. In the first place, and as noted in the Department's notice of the proposed extension, persons who are fiduciaries within the meaning of ERISA's revised definition thereof still have to meet the "Impartial Conduct Standards." This requirement can and does go a long way toward ensuring that retirement savers are provide with investment advice designed to allow them to meet their goals for retirement and otherwise.

Moreover, as it has stated elsewhere, ADISA believes that the Fiduciary Rule initiative was not founded on adequate research into the effects of so-called "conflicted advice." The original rationale for the Department's approach to the Fiduciary Rule was founded on dubious data -- the 2015 White House Council of Economic Advisers report on "conflicted" investment advice.[3] From that report came the number, much used at the time, of $17 billion of annual brokerage costs to investors for "conflicted" advice. This estimate of $17 billion was derived by saying that there were $1.7 trillion of assets in IRAs, and that the CEA believed that broker-sold funds were underperforming no-load funds by 1%.

There have been many refutations of the $17 billion assumption and corrections to the math by some of those upon whose research the CEA originally relied (Professor Jon Reuter, author of one of the original studies used by the CEA revised the loss figure to 0.18% instead of 1%,[4] a difference of about $14 billion from the original annual figure, even if the approach is accepted a priori). Further, the original estimate failed to asset-weigh the performance of the funds studied. Professor Craig Lewis (Vanderbilt University and the SEC's former chief economist) points this out most succinctly in his questioning of the original data assumption published by Forbes.[5] We mention this about the original data premise because it is important. In a search based on what is best for investors in the aggregate, we must strive to look at the balance of the studies and discern real effects from real numbers based on actual investor behavior. Current behavioral finance research tells us that investors are interested in the bottom line results, not in how fees are configured.

In our view, the brief analysis underpinning the Fiduciary Rule allowed the Department to draw broad conclusions from relatively meager data focusing on one sub-set of the investment

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[3] The (Obama) White House Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings*, https://obamawhitehouse.archives.gov/blog/2015/02/23/effects-conflicted-investment-advice-retirement-savings , February 23, 2015.
[4] Reuter, J. *Revisiting the performance of Broker-sold Mutual Funds*, Boston College; National Bureau of Economic Research, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685375 November 2, 2015.
[5] Lewis, C. *An Inflated $17 Billion Talking Point from the DOL*, Forbes Opinion, https://www.forbes.com/sites/realspin/2015/12/16/an-inflated-17-billion-talking-point-from-the-dol/#4be735782831 December 16, 2015.

spectrum – broker-sold mutual funds – and did not support the Department's wide-ranging rule-making. It is not appropriate to have this unsubstantiated harm serve as a basis for not further delaying the full applicability of the Exemptions, as proposed, especially when this vague threat of loss is combined with the obvious and demonstrable costs that will be imposed on the financial services industry if it is required to effectively implement the Fiduciary Rule. A considerable delay in the implementation of the Exemptions will allow the math and facts ample opportunity to come forth and demonstrate more clearly the proper direction the government should take in regards to a fiduciary standard.

As an example of new data coming forth, we point to the Financial Services Roundtable research project in July of 2017 to evaluate the opinions of advisors nationwide (ADISA assisted with this effort)[6]. From a universe of well over 50,000 registered financial advisors, a representative sample was drawn to yield statistically valid (MOE ±4%) data on the developing behavior and opinions of the advisement sector involved with retirement savings. The results indicate the following for those advising investors:

- Three main changes advisors foresee with the implementation of the DOL Fiduciary Rule and associated Exemptions:
    - Increased paperwork (72%)
    - Taking on fewer small accounts (62%)
    - Limiting the investment products offered (54%)
- Over 9% of advisors (as of July 2017) indicate that they are already seeing increased paperwork and a reduction of types of investment product offered. This is before the Rule and Exemptions go into full effect.
    - Advisors working for larger firms are more likely to say that the Rule and Exemptions will limit the investment products they offer.
- The overwhelming majority of advisors (81%) "always" discuss how the investment products relate to pay for the advisors. 27% of advisors say that investors ask on occasion.
- Many advisors, 47%, note that higher compliance costs in the form of additional fees may be passed on to clients.

In examining the preliminary FSR data, we saw no significant demographic differences among regions or self-reported ethnic groups or gender. It does appear, however, that lower balance savers will experience higher fees, according to the responses. Lack of advice and lack of access to a wide range of investment products suggests that there will follow a decrease in the level of diversification in retirement saver portfolios. From ADISA's point of view, this would constitute a significant detriment attributable directly to the implementation of the Fiduciary Rule. Research on a large scale has indicated that advised investors have more diversified portfolios – they own twice as many asset classes, have more balanced portfolio asset allocations and use more products for equity exposure compared with non-advised investors.[7] Past research

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[6] Financial Services Roundtable, *Department of Labor Fiduciary Rule: National Survey of Financial Professionals,* conducted July 7-12, 2017, by Harper Polling, http://www.fsroundtable.org/wp-content/uploads/2017/08/17.07-FSR-Presentation-1.pdf

[7] Oliver Wyman, *The Role of financial advisors in the US retirement market*, July 2015, http://dol.gov/ebsa/pdf/1210-AB32-2-00515.pdf

has shown, in short, that advice helps investors grow their savings; it is now being shown that the Fiduciary Rule will have the unintended consequence of limiting advice.

We understand the Department's original concerns regarding conflicted advice, and share its desire to engender clear standards around investment advice. Adequate time for the various agencies of government (e.g., the Securities and Exchange Commission) to cooperate with the Department in reaching a better and more comprehensive approach to fiduciary issues can only serve the industry and investors better. The proposed delay will, if adopted, provide the Department with time to consider these issues in a thoughtful way and to obtain commentary and analysis from the financial services industry and to coordinate with other agencies and interested parties in connection with that process.

ADISA appreciates the work the Department carries out. We stand ready, along with other groups, to help in this process, and will endeavor to support the Department's efforts with appropriate research and expert perspective. We would be happy to discuss our comments in person or by phone at your convenience.

Sincerely,

John H. Grady
President

cc: Catherine Bowman, ADISA Legislative & Regulatory Committee Chair