

## VIA ELECTRONIC MAIL

September 15, 2017

Employee Benefits Security Administration  
Office of Exemption Determinations  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption PTE 2016-01; PTE 2016- 02; and PTE 84-24 (RIN 1210-AB82)

Dear Deputy Assistant Secretary Hauser:

On August 31, 2017, the Department of Labor (DOL) published a proposed delay of the applicability date of the Fiduciary Rule's Best Interest Contract Exemption, Class Exemption for Principal Transactions, and PTE 84-24 until July 1, 2019. (Proposed Delay).<sup>1</sup> The Proposed Delay is intended to provide the DOL more time to conduct its reexamination of the Fiduciary Rule as directed by the Presidential Memorandum on February 3, 2017,<sup>2</sup> as well as to review comments received in response to the March 2, 2017 Request for Information.<sup>3</sup>

The Financial Services Institute<sup>4</sup> (FSI) and its members support the DOL's proposed delay of the applicability date of the remaining portions of the Fiduciary Rule. In our previous comments, we have requested a delay of the Fiduciary Rule's implementation for the very same reasons the DOL outlines in its Proposed Delay.<sup>5</sup> We agree that a delay is necessary and appropriate to allow careful consideration of comments, evaluate the rule's potential undue burden, and to identify potential alternatives that could reduce costs and increase benefits to affected parties without compromising investor protections. FSI also supports extending the temporary enforcement policy, during which the DOL will not pursue claims against investment

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<sup>1</sup> Best Interest Contract Exemption, etc.; Extension of Transition Period and Delay of Applicability Dates, 82 Fed. Reg. 41365 (Proposed August 31, 2017) available at: <https://www.federalregister.gov/documents/2017/08/31/2017-18520/best-interest-contract-exemption-etc-extension-of-transition-period-and-delay-of-applicability-dates>.

<sup>2</sup> Presidential Memorandum on Fiduciary Duty Rule, 82 Fed. Reg. 9675 (Feb. 7, 2017).

<sup>3</sup> U.S. Department of Labor, Request for Information, Definition of the Term Fiduciary (July 6, 2017) available at: <https://www.federalregister.gov/documents/2017/07/06/2017-14101/request-for-information-regarding-the-fiduciary-rule-and-prohibited-transaction-exemptions>.

<sup>4</sup> The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

<sup>5</sup> Letter from David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute, to the Employee Benefits Security Administration, U.S. Department of Labor (March 17, 2017)(commenting on the Proposed Delay of Applicability Date RIN 1210-AB79) available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01060.pdf>. Attached as Appendix.

advice fiduciaries who are working diligently and in good faith to comply, for the same period. Further, the Proposed Delay would allow for interagency coordination between the DOL, SEC, and other financial regulators on a uniform fiduciary standard of care applicable to all financial advisors providing personalized investment assistance to retail clients.

In response to the DOL's request for comment on several alternative approaches, such as a delay for a specified period after a certain DOL action, a tiered delay, or a conditional delay; FSI shares the DOL's concern that such a delay would harm consumers by adding uncertainty and confusion to the market, while providing insufficient certainty to industry stakeholders. As discussed in our previous comments, the Fiduciary Rule's increased compliance costs and litigation risk have caused firms to reduce their product and service offerings, depriving investors of vital personal retirement planning services.<sup>6</sup> Fortunately, we believe that this outcome is still avoidable. We are committed to constructive engagement in the regulatory process and welcome the opportunity to work with the DOL on this and other important regulatory efforts.

Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. T. Bellaire". The signature is fluid and cursive, with a large initial "D" and "T" and a stylized "Bellaire".

David T. Bellaire, Esq.  
Executive Vice President & General Counsel

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<sup>6</sup> Letter from David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute, to the Employee Benefits Security Administration, U.S. Department of Labor (August 7, 2017) (responding to Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions RIN 1210-AB82) available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00596.pdf>. Attached as Appendix.

## **Appendices**



VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS  
AND INDEPENDENT FINANCIAL ADVISORS

**VIA ELECTRONIC MAIL (e-ORI@DOL, e-OED@dol.gov)**

March 17, 2017

Employee Benefits Security Administration  
Office of Regulations and Interpretations  
Office of Exemption Determinations  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: Definition of the Term “Fiduciary” and Related Authority and Prohibited Transaction Exemptions – Proposed Delay of Applicability Date (RIN 1210-AB79)

Dear Acting Secretary Hugler:

On March 2, 2017, the Department of Labor (DOL) published its notice of proposed rulemaking regarding the delay of the April 10, 2017 applicability date (Applicability Date) regarding the revised definition of the term “fiduciary” under the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code of 1986 (Code) and related prohibited transaction exemptions (the Fiduciary Rule or the Rule). The DOL proposes to delay the Applicability Date of the Fiduciary Rule from April 10 until June 9, 2017, to facilitate its ability to respond to the President’s memo to DOL<sup>1</sup> which, among other things, requires the DOL to revisit the legal and economic analysis originally submitted with regard to the Fiduciary Rule to take into account certain core principles of financial regulation and related issues.

The Financial Services Institute<sup>2</sup> (FSI) appreciates the opportunity to comment on this proposal. We support the proposed delay as a responsible regulatory action in light of the February 3, 2017 Executive Order<sup>3</sup> and Presidential memo to the DOL (together, the Directive).

### **Background on FSI Members**

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the US, there are approximately 167,000 independent financial advisors, which account for approximately 64.5% percent of all

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<sup>1</sup> Presidential Memorandum on the Fiduciary Duty Rule, February 3, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule>.

<sup>2</sup> The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

<sup>3</sup> Presidential Executive Order on Core Principles Regulating the United States Financial System, February 3, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states>

producing registered representatives.<sup>4</sup> These financial advisors are self-employed independent contractors, rather than employees of the Independent Broker-Dealers (IBD).

FSI's IBD member firms provide business support to independent financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small-business owners with strong ties to their communities and who know their clients personally. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans. Their services include financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the financial assistance, products, and services necessary to achieve their investment goals.

FSI members make substantial contributions to our nation's economy. According to Oxford Economics, FSI members nationwide generate \$48.3 billion of economic activity. This activity, in turn, supports 482,100 jobs including direct employees, those employed in the FSI supply chain, and those supported in the broader economy. In addition, FSI members contribute nearly \$6.8 billion annually to federal, state, and local government taxes. FSI members account for approximately 8.4% of the total financial services industry contribution to U.S. economic activity.<sup>5</sup>

## **I. Summary of FSI's Position**

It is self-evident that a delay is essential to the DOL's study of the Rule. The Directive raises substantial issues of law and public policy, and the DOL's study will be a serious and involved undertaking. Public comments to inform that study are not due until April 17 – a week after the current Applicability Date – and, if past is prologue, will be voluminous and express a range of views. That commentary will include new and additional information, garnered from the experience over the last eleven months of implementing the Rule, which the DOL will need to consider. As the DOL stated in its March 2 preamble, the potential results of that study range from the Rule taking effect as written, to revocation or material modification of the Rule. If the Rule is allowed to take effect on April 10, any changes to the Rule after that date will cause confusion for retirement investors, disruption in the financial services industry, and more costs to the retirement system that ultimately will be borne by consumers. In these circumstances, there is only one appropriate course of action: responsible governance requires that the Applicability Date be delayed pending the outcome of the study. Furthermore, FSI supports a delay of more than 60 days -- and at least 180 days -- to allow adequate time for the DOL's study to be developed.

An economic impact analysis also justifies that delay. For the reasons discussed more fully below:

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<sup>4</sup> 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, or a dual registrant. The use of the term "investment adviser" or "adviser" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

<sup>5</sup> Oxford Economics for the Financial Services Institute, The Economic Impact of FSI's Members (2016), available at [http://www.financialservices.org/uploadedFiles/FSI\\_Content/Advocacy\\_Action\\_Center/DOL/FSI-OE-Economic-Impact-Study.PDF](http://www.financialservices.org/uploadedFiles/FSI_Content/Advocacy_Action_Center/DOL/FSI-OE-Economic-Impact-Study.PDF)

- A delay would avoid expending additional unnecessary costs in the event there is an ultimate change in the Rule;
- A delay would avoid or reduce start-up costs, in general;
- A delay would avoid additional related costs; and
- The costs to consumers of delay are overstated.

## II. Cost-Benefit Justifications for the Delay

The DOL invited comments as to whether the benefits of the proposed 60-day delay, including the potential reduction in transition costs should the DOL ultimately revise or rescind the Fiduciary Rule, justify any costs such as potential losses to affected retirement investors. A delay of the current implementation date is, on balance, not only justifiable, but absolutely imperative, for three key cost-related reasons: the potential for unnecessary outlays given the uncertainty surrounding the status of the Rule; the extraordinary start-up costs associated with meeting the Applicability Date; and the outsized costs that our members currently face during the initial days of implementation of the Rule.

### A. Delay Avoids Expending Additional Unnecessary Costs in the Event of an Ultimate Change in the Rule

Our members are currently in an untenable position with respect to their business planning; the lead time to bring relationships with representatives and product providers, compensation and compliance systems, technology and other business processes into line with the Fiduciary Rule is substantial, and the costs greatly exceed the DOL's projections in the Regulatory Impact Analysis (RIA).

Our members are incurring substantial costs which may prove unnecessary depending on the ultimate outcome of the Rule. The costs incurred already are substantial, and will continue to accumulate through 2017 absent a further extension.

- The DOL itself, in its RIA, estimated the cost to comply with the Rule will be between \$10 billion and \$31.5 billion over ten years, with the most likely figure being \$16.1 billion. The DOL itself expects **\$5 billion in first-year costs** and \$1.5 billion in annual costs after that.
- The Oxford Economics report commissioned by FSI (Oxford Report) and submitted to the DOL last fall warned that the DOL's RIA "dramatically underestimated" the cost to comply with the Fiduciary Rule and that smaller firms would find it difficult to stay in business once the Rule takes hold.<sup>6</sup>
- The Oxford Report estimated that the Rule would result in startup costs ranging from **\$1.1 million to \$16.3 million per IBD firm**, depending on firm size. Broker-Dealers and investment advisors would be forced to either substantially change

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<sup>6</sup> See Oxford Economic Report on the impact of the DOL Fiduciary Rule, available at [http://www.financialservices.org/uploadedFiles/FSI\\_Content/Advocacy\\_Action\\_Center/DOL/FSI-OE-Economic-Impact-Study.PDF](http://www.financialservices.org/uploadedFiles/FSI_Content/Advocacy_Action_Center/DOL/FSI-OE-Economic-Impact-Study.PDF). Note, FSI and Oxford Economics will be updating this data for the economic analysis ordered by the Presidential directive.

their current business models or navigate the challenging demands of a best interest contract exemption per the report.<sup>7</sup>

Even the Oxford Report underestimated the actual start-up costs, which are staggering. As reported in industry media:

- One national broker-dealer spent **\$28 million** in its 2016 fiscal year on compliance with the Fiduciary Rule.<sup>8</sup>
- Another national firm with a network of 10,000 financial advisors spent **\$11 million** on compliance activities during the first half of 2016 alone.<sup>9</sup>
- A major financial services enterprise with substantial broker-dealer operations commented that it will likely spend **between \$18 million and \$24 million over 2016 and 2017**, and then an additional \$5 million to \$10 million, once the Rule is fully in effect.<sup>10</sup>
- Another independent broker-dealer with over 2,000 independent registered representatives expects to spend **\$10 million** by April 2017 if there is no delay.<sup>11</sup>
- Other firms reported spending **millions of dollars each quarter, starting in 2016**, to become compliant.<sup>12</sup>

#### **B. Delay Avoids or Reduces Start-Up Costs, in General**

The DOL correctly noted that a 60-day delay could defer or reduce start-up compliance costs, particularly in circumstances where more gradual steps toward preparing for compliance are less expensive. The DOL requested comment, including data that would contribute to estimation of such impacts. The following costs could be reduced or eliminated by the delay:

- **Best Interest Contract Exemption (BICE) Transition Notices:** Many of our members have not yet sent out BICE transition notices because of the uncertainty surrounding the future of the Rule. If there is no delay, they will have to incur greatly increased last-minute mailing costs – in some cases, exceeding \$1 million per firm. If there is no delay, and if there is a subsequent change to the Fiduciary Rule by the DOL, the entire industry will need to expend the costs to send out transition or other notices about that change.
- **Outside Contractors for BICE Compliance:** Members are hiring outside consultants, legal advisors, and contractors to enable them to meet the extremely tight timeframe they have been given to come into compliance. With a delay, providers may be able to spread these costs out or avoid them entirely.
- **Training and Educational Programs:** Because the Fiduciary Rule sets forth a new standard for many financial advisors, our members have been working on developing training programs. They have also been developing materials to help financial advisors explain the changes to their retirement clients. To date, many of our

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<sup>7</sup> *Id.*

<sup>8</sup> <http://www.investmentnews.com/section/video?playerType=INTV&bctid=5288954879001&date=20170126>

<sup>9</sup> <https://www.finextra.com/blogposting/13139/what-it-costs-to-comply-with-the-dol-fiduciary-rule>

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

members have experienced client frustration or outright resistance to these changes, particularly when a financial advisor recommends that the client move a retirement account from a commission-based account to an advisory arrangement. More time for education of plan sponsors and retirement investors thus is critical. These changes are even more substantial for those members contemplating the use of the BICE, as training and education must include new policies, procedures, business relationships, and methods of compensation.

- BICE Compliance Officer: Some members are in the process of hiring new individuals to fill the role of BICE compliance officer. A delay avoids this expenditure unless and until necessary.

More generally, IBD firms will continue to incur start-up costs throughout 2017. As representatives of the DOL have acknowledged in public comments about the “compliance assistance” approach it will initially follow,<sup>13</sup> compliance with the Rule is a process that will continue beyond the Applicability Date. That in part reflects the Rule itself; as intended, many of our members are planning to make use of the transition period under the BICE (Transition Period) to fully build out compliance processes and systems. It also reflects the financial and practical impossibility for some of our members of coming into full compliance with every aspect of the Rule in the time allowed. We anticipate that spending in the industry on compliance with the Rule will continue at substantially the same pace in 2017 as in 2016. That is, our members’ costs are not fully “sunk.”

### **C. Delay Avoids Additional Costs**

The DOL correctly noted that beyond start-up costs, the delay would likely relieve the industry of relevant day-to-day compliance burdens. In the absence of a delay, general compliance costs must begin by the Applicability Date and will be ongoing. This is a certainty. Even more costly, however, are the potential costs of class action ERISA litigation, which can be anticipated to begin shortly after the Applicability Date, with further litigation costs mounting if and when the requirements of the BICE later take effect.

#### **1. Ongoing Compliance Costs**

Compliance with the Fiduciary Rule will require ongoing expenditures. These include, but are not limited to the following costs:

- Record keeping costs (including the six-year retention requirement contained in the BICE);
- Implementation costs of Best Interest Contracts for both new and existing clients;
- Supervisory, compliance and legal oversight costs;
- Systems development and maintenance costs;
- Ongoing training, education, and licensing costs;
- Increased costs associated with litigation risk management.

The DOL estimates associated savings of \$42 million during a 60-day delay. These savings are substantially derived from forgone on-going compliance requirements related to the

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<sup>13</sup> See generally Field Assistance Bulletin 2017-01 (March 10, 2017) available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-01>



transition notice requirements for the BICE, data collection to demonstrate satisfaction of fiduciary requirements, and retention of data to demonstrate the satisfaction of conditions of the exemption during the Transition Period. Similarly, the DOL estimates that small entities would save approximately \$38 million in compliance costs due to the proposed 60-day delay of the Applicability Date for the final Fiduciary Rule and exemptions.

Even by the DOL's estimates, a delay in the Fiduciary Rule would be cost effective. However, reported ongoing compliance costs numbers present an even stronger case for delay:

- Implementing the DOL's new fiduciary rule for retirement accounts will cost the brokerage industry \$11 billion in revenue over the next four years, according to a recent study from A.T. Kearney, a consultant.<sup>14</sup>
- Hardest hit will be IBDs, who stand to lose \$4 billion in revenue, or 22%, of the industry's total, per the study, which was released in August. IBDs are also expected to see a decline of \$350 billion in client assets, or 11% of the industry's total.<sup>15</sup>
- The Oxford Report estimated that the Rule would cost IBD firms and clients nearly \$3.9 billion in total startup costs. SIFMA estimated that compliance costs for their members could range from \$240 million to \$570 million per year over ten years, or \$2.4 billion to \$5.7 billion.<sup>16</sup>
- According to a published report, one national broker-dealer expects to spend between **\$4 million and \$5 million every year** to keep compliant with the Rule, in addition to the \$8 million in start-up costs it expects to incur by the end of 2017.<sup>17</sup>

## 2. Additional Costs

In addition to the savings on compliance costs, the delay avoids costly consequences for IBD firms, financial advisors, and their clients, which would be unnecessary in the event the Fiduciary Rule is eventually modified or revoked.

*Industry Restructuring.* The industry is already restructuring due to the Rule, with firms consolidating or discontinuing operations because of the costs and exposures created by the Rule.<sup>18</sup> Jobs will be lost – financial advisors will leave the business due to reduced incomes or liability exposure, small firms will be particularly at risk, and financial services innovation (and the job creation it engenders) will be stifled.

Even before the Applicability Date, the Fiduciary Rule has been changing the marketplace for investment services to retirement investors. The investment services available to small retail investors are already shrinking, and will continue to contract.<sup>19</sup> These systemic changes, which

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<sup>14</sup> See <http://www.investmentnews.com/article/20160921/FREE/160929978/dol-fiduciary-rule-to-cost-the-securities-industry-11b-by-2020-study>

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See <https://www.finextra.com/blogposting/13139/what-it-costs-to-comply-with-the-dol-fiduciary-rule>

<sup>18</sup> See, e.g., <http://www.investmentnews.com/article/20151118/FREE/151119912/dol-fiduciary-rule-could-decimate-number-of-ibds>.

<sup>19</sup> See, e.g., <http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-%E2%80%93-CoreData-Research.pdf> (study indicated Fiduciary Rule will leave mass market investors stranded).

have already been seen in the industry but are expected to continue, should be avoided, particularly when the future of the Fiduciary Rule is uncertain.

*Litigation Costs.* As the Rule clearly is intended to be enforced through private litigation, the DOL requested comments on class action lawsuits, and in particular, their potential for abuse and the outcome of such cases for plan participants. As a point of reference, ERISA class action litigation has been increasing in recent years, and even meritless suits are expensive to defend. A February 2017 study prepared by the Lockton Companies indicated that the costs to get through a motion to dismiss range from \$500,000 - \$750,000. Beyond that, discovery costs alone can reach between \$2.5 million and \$5 million.<sup>20</sup> With these costs, it may make financial sense for a company to settle even where there has been no wrongdoing. Without a delay, our members will be exposed to the costs of ERISA class actions, particularly devastating to small firms with more limited resources, before the DOL has had the opportunity to address the Directive, and even greater litigation costs later if and when the BICE's requirements take effect.

The BICE would subject financial advisors to a myriad of actions and potential remedies under the various laws of fifty different states. This contrasts with ERISA's carefully reticulated preemption structure which is intended to avoid subjecting parties to this very issue. Securities laws have similar remedial structures to prevent this result. This problem is directly within the purview of the Directive and therefore presents an additional compelling reason for the delay.

*Effects on the Capital Markets.* The Rule already is having and will continue to influence our national capital markets – a shortening of the shelf of products and services available to retirement investors, a shift away from classes of appropriate retirement investments that are creating a greater risk of fiduciary exposure, an acceleration in the trend towards passive management of investments, and (as noted above) further consolidation in the financial services industries.<sup>21</sup> These effects have costs that should more fully be understood before the Rule becomes legally applicable.

#### **D. Consumer Costs of Delay are Overstated**

The estimated costs to clients of the delay are derived from the estimated gains for these consumers as a result of the Fiduciary Rule. The DOL solicited comments on the degree to which this basis results in an overstated or understated concern about the potential negative effect of the proposed delay on retirement investors.

The DOL correctly notes that the estimated cost to consumers of the delay is entirely speculative, while the costs to the industry are a relative certainty. In addition, we question the ability to use the predicted long-term gains, even if reliable (which as explained below they are not), to extrapolate gains for a 60-day period. This is simply because:

- Investment gains and losses are fluid and not fixed, and in the short-term are unpredictable; and

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<sup>20</sup> Available at <http://www.lockton.com/insights/post/fiduciary-liability-claim-trends>.

<sup>21</sup> See, <http://www.business2community.com/brandviews/seismic/now-dol-fiduciary-rules-stakeholders->

- The long-term consequences of the Rule for retirement investors projected in the RIA, even if correct, will not be realized in the second quarter of 2017, due to the BICE transition period and the ongoing process of the industry coming into full observance of the Rule.

In addition, as explained in our comment letters to the Rule's proposal, the Oxford Report noted several analytic flaws in the RIA that result in overestimates of the estimated gains to clients by the proposal. FSI will address the RIA in more detail during the 45-day comment period, but the following points are particularly relevant to the overestimate of the potential costs to consumers of the proposed delay:

- The RIA relies on questionable academic studies to support overall gains on more than a trillion dollars in assets invested in a non-homogeneous way;
- It also fails to consider any economic benefit that investors receive by using investment professionals; and
- It does not consider quantitative and qualitative costs on consumers because of the Fiduciary Rule. In particular, it did not consider increased pass-through costs to consumers, the elimination of investor choices, homogenization of investing strategies that will create greater risk for investors and loss of access to commission based accounts that are more appropriate for some clients than fee-based accounts and products.

With predicted gains to clients unquantified – even the March 2 preamble characterizes the data on which the RIA rests as “uncertain and incomplete” – there can be no justification for the continued expenditure of known compliance costs for a Rule which may see substantive changes or outright repeal.

### **III. Additional Comments Supporting the Proposed Delay**

#### **A. Failure to Delay Will Result in Client Confusion**

Some members have been hesitant to continue expenditures on compliance after the Directive, not only because of the costs but because of the risk of confusion to clients. A delay during the pendency of the DOL's review will serve to minimize market disruptions caused by the changing regulatory structure.

- As previously discussed, minimum account balances in advisory accounts are rising and consumers' access to investment advisers is being limited – investors with low account balances are being moved to different account types;
- Investment products and compensation structures are being revised to make it easier for companies to comply with the Fiduciary Rule – these efforts will continue and will need to be finalized if the Rule goes into effect, and possibly revised once again;
- Many of our members have not yet communicated changes that will be brought on by the Fiduciary Rule. It is easy to see how the average client will be confused by correspondence announcing changes to their investment products and business relationship (if the Rule becomes applicable), followed by correspondence announcing additional changes being made for yet another new regulatory scheme (if the Rule is rescinded or revised).

## **B. The DOL's January 2017 FAQ's Created Unanticipated Compliance Challenges.**

The breadth and depth of the sub-regulatory frequently asked questions guidance (FAQ) already issued by the DOL only highlights the substantive questions about the Rule that are still outstanding at this late date. As FSI and several other organizations consistently noted during the initial rulemaking process, our members would require a minimum 36 months between the date of publication of the Rule and the Applicability Date to properly implement such a complex new compliance scheme. Notwithstanding meaningful uncertainties, our members currently become legally accountable for implementation of the Rule on the April 10 Applicability Date, and subject to review by arbiters other than the DOL. Further time for the DOL to provide guidance on the Rule and for the industry to operationalize that guidance is more than justified.

More specifically, two positions taken by the DOL in its January 2017 FAQs were unexpected in the industry and, if allowed to stand, create substantial compliance challenges that cannot possibly be addressed by April 10:

- The position in FAQ 4 that assistance with the investment of a required minimum distribution, which by definition occurs outside of any retirement plan setting and after income taxes on the distribution have been paid, can be fiduciary advice even though communications about the distribution itself are not; and
- The position in FAQ 9 and 10 that communications encouraging plan participants to increase contributions can also be fiduciary investment advice.

In addition, the position in the DOL's FAQs for Exemptions, FAQ 12, that certain types of recruitment compensation arrangements may raise issues under the BICE, is problematic not only because of existing contractual obligations but also because there is insufficient time for firms to undertake a total revamping of their recruitment programs.

## **C. The Delay Should Be Applicable to All Provisions and Exemptions**

The DOL asked for comments on an alternative approach of delaying certain aspects of the Fiduciary Rule (e.g., notice and disclosure provisions) while permitting others (e.g., the impartial conduct standards set forth in the exemptions) to become applicable on April 10, 2017. A partial delay will result in the same costs and confusion as no delay. With the status of the Fiduciary Rule itself in question, if for example, the impartial conduct standard goes into effect April 10, and is later replaced with a different standard, financial advisors will be subject to multiple changing standards of care within a short period. This would be senseless and confusing, particularly because the differences in various standards and where each standard applies may be subtle. In any event, our members would still be forced to restructure their sales and distribution practices to comply, then restructure once again.

It is critically important to note also that if the definitional rule takes effect without corresponding exemptive relief, the retirement services industry will simply come to a standstill. Both the definitional rule and all related new amendments to existing exemptions must also be withdrawn for the duration of the delay. This approach avoids the same duplication of costs and compliance efforts on our members, and the negative impact on investors and the retirement industry as a whole that will otherwise take place.

#### **D. The DOL Needs More Time to Adequately Respond to the President's Directive**

The DOL also invited comments regarding whether the delay is necessary or if a different delay period would best serve the interests of investors and the industry. FSI strongly agrees that the DOL will need more time – well beyond the April 10 Applicability Date – to respond to the President's Directive. Given the scope of the Directive, the DOL cannot be expected to conduct the comprehensive analysis and report necessary to respond before April 10.

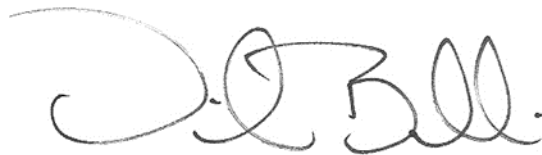
For the DOL's reconsideration of the Rule to be meaningful, an extension of at least 180 days is needed. This delay permits the DOL to review comments that might help inform updates to its legal and economic analysis, including any issues that the public believes were inadequately addressed in the RIA, before the Rule goes into effect. As the DOL has suggested in the March 2 preamble, this delay should be effective immediately upon publication in the Federal Register. If the publication date is after April 10, the delay should apply retroactively. This structure would address the issue identified above concerning potential liability for any gap period between April 10 and the publication date, although it would not prevent the ongoing accumulation of unrecoverable compliance costs before the delay is finalized.

#### **Conclusion**

Since 2009, FSI has publicly supported a carefully-crafted, uniform fiduciary standard of care applicable to all financial advisors providing personalized investment assistance to retail clients.<sup>22</sup> This standard of care would require financial advisors to act in the best interest of their clients, consistent with the DOL's intent. FSI supports the creation of a uniform fiduciary standard of care that is a correct and workable standard, reflecting input not only from the DOL but also the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA). We believe a delay in the Applicability Date for the Rule is necessary and appropriate to achieve that objective. We look forward to working collaboratively with the DOL during this process to ensure access to retirement products and services for all investors.

Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,



David T. Bellaire, Esq.  
Executive Vice President & General Counsel

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<sup>22</sup> See, e.g., Letter from David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission (Jul. 5, 2013) (commenting on Duties of Brokers, Dealers, and Investment Advisors, Release No. 34-69013; IA-3558; File No. 4-606), available at <https://www.sec.gov/comments/4-606/4606-3138.pdf>.



VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS  
AND INDEPENDENT FINANCIAL ADVISORS

## VIA ELECTRONIC MAIL

July 7, 2017

Employee Benefits Security Administration  
Office of Exemption Determinations  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Suite 400  
Washington, DC 20210

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

Dear Deputy Assistant Secretary Hauser:

On July 6, 2017, the Employee Benefits Security Administration of the Department of Labor (DOL) published a request for information (RFI) in connection with its examination of the final rule defining who is a “fiduciary” of an employee benefit plan for purposes of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (IRC), as a result of giving investment advice for a fee or other compensation with respect to assets of a plan or IRA (Fiduciary Rule).<sup>1</sup> The RFI seeks public input regarding the advisability of extending the January 1, 2018 applicability date of certain provisions in the Fiduciary Rule and its accompanying exemptions, including the Best Interest Contract Exemption and Prohibited Transaction Exemption 84-24.

The Financial Services Institute<sup>2</sup> (FSI) appreciates the opportunity to respond to this important request for information. While FSI strongly supports the implementation of a uniform fiduciary standard of care,<sup>3</sup> we have long expressed significant concerns with the DOL’s Fiduciary Rule because we believe it will harm the very investors it hopes to protect by reducing investor access to retirement advice, disrupting the retirement services industry, and causing a surge in unnecessary litigation.

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<sup>1</sup> U.S. Department of Labor, Request for Information, Definition of the Term Fiduciary (July 6, 2017) available at: <https://www.dol.gov/sites/default/files/ebsa/temporary-postings/definition-of-the-term-fiduciary-request-for-information.pdf>.

<sup>2</sup> The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

<sup>3</sup> FSI believes the SEC must be involved in promulgation of any uniform fiduciary standard because DOL can only regulate a portion of the market for investment advice. The SEC are the expert regulator on the financial services industry and could create a workable standard that applies to all financial services firms, advisors, clients and accounts.

Further, FSI supports a delay in the January 1, 2018 applicability date to allow the DOL to conduct a detailed review of the Fiduciary Rule, its negative impact on investors' access to retirement planning services and new innovations and approaches that may alleviate many of these concerns.

Finally, we respectfully request an extension of the comment period for the RFI to allow industry participants sufficient time to thoughtfully and completely respond to the important questions posed by the RFI.

### **Background on FSI Members**

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the U.S., there are approximately 167,000 independent financial advisors, which account for approximately 64.5% percent of all producing registered representatives.<sup>4</sup> These financial advisors are self-employed independent contractors rather than employees of Independent Broker-Dealers (IBD).

FSI member firms provide business support to financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small-business owners who typically have strong ties to their communities and know their clients personally. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations and retirement plans with financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their investment goals. Most clients of FSI member firms have investment assets in both tax-qualified (employer-sponsored retirement plans and/or IRAs) and non-qualified accounts. They typically seek holistic financial advice covering all of their investment assets and needs.

FSI members make substantial contributions to our nation's economy. According to Oxford Economics, FSI members nationwide generate \$48.3 billion of economic activity. This activity, in turn, supports 482,100 jobs including direct employees, those employed in the FSI supply chain, and those supported in the broader economy. In addition, FSI members contribute nearly \$6.8 billion annually to federal, state, and local government taxes. FSI members account for approximately 8.4% of the total financial services industry contribution to U.S. economic activity.<sup>5</sup>

### **Discussion**

On April 4, 2017, the DOL finalized the delay of the applicability date of its Fiduciary Rule to June 9, 2017 to conduct a study of the Rule's impact responsive to the February 3, 2017, Presidential Memorandum.<sup>6</sup> While FSI appreciates the DOL's delay of the implementation of the

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<sup>4</sup> 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, or a dual registrant. The use of the term "investment adviser" or "adviser" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

<sup>5</sup> Oxford Economics for the Financial Services Institute, *The Economic Impact of FSI's Members* (2016).

<sup>6</sup> See "Presidential Memorandum" at <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule>.

Fiduciary Rule, the 60-day delay was an insufficient amount of time to conduct the required study. Indeed, we understand the DOL is still in the process of reviewing and analyzing comments received in response to its request for comments on issues raised in the Presidential Memorandum.<sup>7</sup> As noted in the comments that we have furnished responding to earlier DOL requests, innovations in products and services are underway that create the opportunities to simplify and streamline the regulatory requirements associated with the Fiduciary Rule and better accomplish its stated goals. Because full implementation of the Fiduciary Rule without giving these innovations sufficient time to be operationalized will greatly reduce investor access to retirement planning services, we believe it is wise to further delay the full application of the Fiduciary Rule.

We also respectfully request an extension of the comment period for the RFI to allow industry participants sufficient time to thoughtfully respond to the important questions posed therein.

We explain our reasons for suggesting further delay of the Fiduciary Rule and our request for an extension of the RFI comment period in greater detail below.

## **I. The Applicability Date Should Be Delayed Until April 10, 2019.**

In FSI's comments on the proposal that became the Fiduciary Rule, we explained that our members would need, at minimum, 36 months to comply.<sup>8</sup> The final Fiduciary Rule was published on April 8, 2016, with an initial applicability date of April 10, 2017, giving the industry one year to make the sweeping changes required. On April 7, 2017, the DOL further delayed the applicability of all but the Impartial Conduct Standards of the rule until January 1, 2018. Although our members are working diligently and in good faith to comply with their fiduciary duties and to meet the conditions of the PTEs, they report that it will be extremely challenging or even impossible to achieve full compliance with the Fiduciary Rule by that time. This is due to the complexity inherent in the Fiduciary Rule, the sequential nature of many of the work streams necessary to develop required systems and a desire by firms to make use of recent, but not yet widely available, innovations in the financial services industry to facilitate compliance. Therefore, for the reasons explained more fully below, we suggest that the applicability date of the rule be delayed until April 10, 2019 to provide the industry the full 36 months we said at the outset was necessary to fully comply with the Fiduciary Rule.<sup>9</sup>

### **A. Investors are well protected by existing regulatory structures.**

The sale of retirement savings products is already heavily regulated. IBDs and independent financial advisors are subject to comprehensive regulation and legal obligations under federal and state securities laws, rules, and regulations. The SEC regulates broker-dealers through its antifraud authority in the Securities Act of 1933 (Securities Act) and the Securities

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<sup>7</sup> U.S. Department of Labor, Request for Information, Definition of the Term Fiduciary (July 6, 2017) available at: <https://www.dol.gov/sites/default/files/ebsa/temporary-postings/definition-of-the-term-fiduciary-request-for-information.pdf>.

<sup>8</sup> Letter from David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute, to DOL Employee Benefits Security Administration (July 21, 2015), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00724.pdf>.

<sup>9</sup> By way of comparison, the time between the publication of the Department's interim final guidance under ERISA section 408(b)(2) and the effective date of the final regulations was two years. The Fiduciary Rule is far more complex and larger in scope than the section 408(b)(2) guidance and is deserving of a longer implementation period.



Exchange Act of 1934 (Exchange Act), and certain Exchange Act rules.<sup>10</sup> It similarly regulates investment advisers through the Investment Advisers Act of 1940 and related regulations.<sup>11</sup> Under these rules, broker-dealers are required to deal fairly with their customers while investment advisers are subject to a fiduciary duty and extensive disclosure obligations.<sup>12</sup> Although broker-dealers are generally not subject to a fiduciary duty under the federal securities laws, courts have found broker-dealers to have a fiduciary duty in certain circumstances.<sup>13</sup>

As IBDs and financial advisors, our members are also subject to self-regulatory organization (SRO) rules, oversight, and frequent examinations.<sup>14</sup> A broker-dealer may transact business only after it satisfies the membership requirements of an SRO, which is typically the Financial Industry Regulatory Authority, Inc. (FINRA).<sup>15</sup> SRO rules require broker-dealers to observe just and equitable principles of trade and high standards of commercial honor.<sup>16</sup> In addition, broker-dealers are obligated to disclose certain material conflicts of interest to their customers, and federal securities laws and FINRA rules strictly prohibit broker-dealers from participating in certain transactions that may present acute potential conflicts of interest.<sup>17</sup>

IBD firms are required by FINRA Rule 3110 to develop and enforce written supervisory procedures reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.<sup>18</sup> IBD firms must also establish, maintain, and enforce a system of supervisory control policies and procedures that test and verify that the member's supervisory procedures are reasonably designed. They are also required to create additional or amend existing supervisory procedures where the need is identified by testing and verification.<sup>19</sup> Both the SEC and FINRA diligently pursue non-compliance through vigorous enforcement efforts and the industry is further held accountable by an active plaintiff's bar.

These regulatory structures and access to the courts serve as an important and effective mechanism to protect Americans planning for retirement and will remain operative should the DOL choose to further delay the January 1, 2018 compliance deadline.

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<sup>10</sup> U.S. SECURITIES AND EXCHANGE COMMISSION, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS at iii (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209 (2d Cir. 1987) (holding broker-dealer was fiduciary due to role as plan investment manager).

<sup>14</sup> See U.S. SECURITIES AND EXCHANGE COMMISSION, GUIDE TO BROKER-DEALER REGISTRATION (Apr. 2008) <http://www.sec.gov/divisions/marketreg/bdguide.htm>; U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

<sup>15</sup> U.S. SECURITIES AND EXCHANGE COMMISSION, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS 14 (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

<sup>16</sup> See U.S. SECURITIES AND EXCHANGE COMMISSION, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS at iii (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

<sup>17</sup> See, e.g. FINRA Rule 5121(a), (f)(5).

<sup>18</sup> See FINRA Rule 3110 available at

[http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=11345](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11345).

<sup>19</sup> See FINRA Rule 3120 available at

[http://finra.complinet.com/en/display/display.html?rbid=2403&record\\_id=15447&element\\_id=11346&highlight=supervisory+control#r15447](http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=15447&element_id=11346&highlight=supervisory+control#r15447).

**B. Investors are further protected by the application of the Impartial Conduct Standards.**

During the transition period from June 9, 2017, through January 1, 2018, financial institutions and financial advisors relying on the Best Interest Contract Exemption (BICE) must adhere to the Fiduciary Rule's Impartial Conduct Standards. These Impartial Conduct Standards require financial institutions and advisors to provide advice in the retirement investors' best interest, charge no more than reasonable compensation for their services and to avoid misleading statements. As a result, firms that are relying on the BICE have already implemented procedures to ensure that they are meeting these new obligations. These new procedures may include changes to the firms' compensation structures, restrictions on the availability of certain investment products, reductions in the overall number of product and service providers, improvements to their due diligence review of products and service providers, additional surveillance efforts to monitor the sales practices of their affiliated financial advisors for compliance and the creation and maintenance of books and records sufficient to demonstrate compliance with the Impartial Conduct Standards. Thus, investors are already benefitting from stronger protections since the Fiduciary Rule became partly applicable on June 9, 2017. The DOL acknowledges as much saying in the supporting release to the final rule extending the applicability date that the Impartial Conduct Standards help "ensure that investment recommendations are not driven by adviser conflicts, but by the best interest of the retirement investor" and that much of the harm the DOL claims is happening to investors "could be avoided through the imposition of fiduciary status and adherence to basic fiduciary norms, particularly including the Impartial Conduct Standards."<sup>20</sup> As a result, we believe any harm to investors caused by further delay of the additional requirements, to the extent it exists, is greatly reduced by the application of the Fiduciary Rule's Impartial Conduct Standards.

**C. Investor access to retirement planning services can be preserved by cutting the costs associated with the Fiduciary Rule.**

In 2015, FSI engaged Oxford Economics to Conduct a study on the "Economic Consequences of the DOL Fiduciary Rule" (2015 Oxford Economics Study). The study estimated the Fiduciary Rule would result in startup costs ranging from \$1.1 million to \$16.3 million per firm, depending on firm size.<sup>21</sup> The 2015 Oxford Economics Study indicates that its estimates exceed the DOL's totals by significantly larger margins for small and medium sized firms – specifically, 4.6-5.1 times as high; as for large firms – 3.3 times as high. This is due to the DOL's inaccurate estimate of costs for small and medium-sized firms. Where the DOL estimates that medium firms' costs will be only 13.3%, and small firms only 4.8% of large firms' costs, Oxford estimates they will be significantly larger at 20.6% and 6.9%, respectively.<sup>22</sup> The 2015 Oxford Economics Study went on to warn that the DOL "dramatically underestimated" the cost to comply with the Fiduciary Rule and that smaller firms would find it difficult to stay in business once it took hold.

In 2017, FSI engaged Oxford Economics to conduct another study, "How the Fiduciary Rule Increases Costs and Decreases Choice" (2017 Oxford Economics Study) to update its

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<sup>20</sup> Definition of the Term "Fiduciary", 82 Fed. Reg. 16903, 16,905 (April 7, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-04-07/pdf/2017-06914.pdf>.

<sup>21</sup> See Oxford Economics Study, available at [http://www.financialservices.org/uploadedFiles/FSI\\_Content/Advocacy\\_Action\\_Center/DOL/FSI-OE-Economic-Impact-Study.PDF](http://www.financialservices.org/uploadedFiles/FSI_Content/Advocacy_Action_Center/DOL/FSI-OE-Economic-Impact-Study.PDF).

<sup>22</sup> *Id.*

economic analysis on the impact of the final Fiduciary Rule.<sup>23</sup> The findings of the 2017 Oxford Economics Study are based on the actual experience of FSI member firms implementing measures to comply with the Fiduciary Rule, not assumptions or projections, which makes these figures far more reliable than the DOL's Regulatory Impact Analysis' (RIA) figures. This new report found that even Oxford's own 2015 predictions of the cost of the Fiduciary Rule were significantly underestimated, as FSI members had already spent nearly half of the predicted \$400 million implementation cost.<sup>24</sup> More specifically, the 2017 Oxford Economics Study found that FSI members have already spent \$190 million preparing for Rule implementation and will continue to spend an additional \$205 million in preparation costs if the entire Fiduciary Rule was to go into effect.<sup>25</sup> This means that start-up costs of the regulation are roughly 20 times higher than even the updated DOL RIA estimated.<sup>26</sup> Whether because DOL's 2016 revisions to their 2015 proposed rules were not as effective at cost reduction as it thought, or because Oxford's original cost estimates were too low, the new estimates of total start-up costs are roughly 1.8 to 3.0 times higher than the DOL's most recent estimates.<sup>27</sup> If the FSI members' experiences were extrapolated to the universe of all broker-dealers, the total implementation costs to the industry will likely approach \$1.8 billion.<sup>28</sup> Once implemented, these firms expect to pay an additional \$230 million per year in recurring costs complying with the DOL requirements.<sup>29</sup> DOL's revised RIA did not provide a new detailed estimate of recurring costs, relying on the 2015 RIA, while Oxford estimates the actual recurring costs to be 16.4 to 41.5 times higher than what the DOL has estimated.<sup>30</sup> Based on these results for startup and recurring costs, Oxford calculated the total 10-year costs of the Fiduciary Rule to be approximately \$14.2 billion.<sup>31</sup>

This research, which is summarized in the table below, demonstrates that the costs of complying with the Fiduciary Rule are not only higher than what the DOL predicted, but are significantly higher than what the industry originally predicted. As a result, one must conclude that the RIA was considerably flawed.

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<sup>23</sup> Oxford Economics 2017 Report, "How the Fiduciary Rule Increases Costs and Decreases Choice" (April 2017), available at [http://www.financialservices.org/uploadedFiles/FSI/Advocacy\\_Action\\_Center/The\\_Fiduciary\\_Rule\\_Increases\\_Costs\\_And\\_Decreases\\_Choice.pdf](http://www.financialservices.org/uploadedFiles/FSI/Advocacy_Action_Center/The_Fiduciary_Rule_Increases_Costs_And_Decreases_Choice.pdf).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

## Comparison of Cost Estimates

	Per-firm costs			Total BD industry costs
	Small BD	Medium BD	Large BD	
Industry size (DOL)	2,320	147	42	2,509
<b>Start-up costs</b>				
DOL original estimates (Apr 2015)	\$53,000	\$145,000	\$1,091,000	\$190,097,000
DOL "high" estimates (Apr 2015)	\$242,000	\$663,000	\$5,000,000	\$868,901,000
OE/FSI 2015 report (Aug 2015)	\$1,118,000	\$3,350,000	\$16,266,000	\$3,769,382,000
DOL adjusted estimates (Apr 2016)	\$556,301	\$1,777,688	\$7,366,036	\$1,861,311,968
Current estimates (Apr 2017)	\$911,000	\$3,787,000	\$13,105,000	\$3,220,619,000
Ratio of current estimate to 2015 DOL estimate	17.2	26.1	12.0	16.9
Ratio of current estimate to 2016 DOL estimate	1.6	2.1	1.8	1.7
<b>Recurring costs</b>				
DOL original estimates (Apr 2015)	\$21,000	\$58,000	\$436,000	\$75,558,000
DOL "high" estimates (Apr 2015)	\$97,000	\$265,000	\$2,000,000	\$347,995,000
DOL adjusted estimates (Apr 2016)				\$413,000,000
Current estimates (Apr 2017)	\$344,000	\$2,407,000	\$7,375,000	\$1,461,659,000
Ratio of current estimate to 2015 DOL estimate	16.4	41.5	16.9	19.3
Ratio of current estimate to 2016 DOL estimate				3.5

Source: Oxford Economics and DOL Regulatory Impact Analyses

As these compliance and other costs rise, firms will likely be forced but to pass at least some of portion along to investors. New studies demonstrate the Fiduciary Rule will end up increasing consumer costs by \$46.6 billion, or \$813 annually per account, in addition to \$1,500 in duplicative fees for retirement savers that have already paid a fee on their commission-based accounts, but will be moved to new share classes to ensure compliance. Furthermore, these studies indicate that the Fiduciary Rule could force 28 million Americans out of managed retirement accounts completely. Even if firms were willing to accept accounts above a minimum account balance of just \$5,000, over 13 million would lose access to managed retirement accounts.<sup>32</sup> Our members report similar impacts on investors. For example, one consequence of the Fiduciary Rule for clients of IBD firms is that the economics of managing small accounts will cause these investors to lose access to retirement planning services and investment education. Complying with the BICE's compliance requirements results in a certain fixed cost per account. With fee based revenue limited by the small account size, the reality is that for many small accounts, the fixed cost of servicing the account will exceed revenue that will be earned. As a result, most firms indicate that smaller investors will be offered robo-investing type account services or be asked to move their accounts. These small account holders (often entry level, novice investors) would lose access to the personalized retirement planning services to which they have become accustomed. While the definition of a small investor varies among our member firms, they generally estimate that the break-even point for servicing an investment account ranges from \$35,000 to \$75,000 in assets.<sup>33</sup> Since the median IRA balance has ranged from \$23,785 to \$ \$33,185 between 2010

<sup>32</sup> Meghan Milloy, "The Consequences of the Fiduciary Rule for Consumers" (April 2017) available at <https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/>.

<sup>33</sup> Id.

and 2014, it is clear that, without significant changes, the Fiduciary Rule will have a devastating impact on investor access to retirement planning services.<sup>34</sup>

**Figure 3  
 Average and Median IRA Balances, by IRA Type, Age, and Gender, 2010-2014**

	Average					Median				
	2010	2011	2012	2013	2014	2010	2011	2012	2013	2014
All	\$91,864	\$87,668	\$105,001	\$119,804	\$127,583	\$25,296	\$23,785	\$27,987	\$32,179	\$33,185
Type										
Traditional-Conts.^	88,403	78,051	97,286	112,943	120,163	29,756	24,721	32,161	37,611	39,389
Roth	24,798	25,741	31,288	37,010	39,544	11,471	11,344	12,796	15,190	15,847
Traditional-Rolvsr^	123,426	110,918	134,354	150,261	157,277	38,138	31,944	39,172	43,535	43,598
SEP/SIMPLE	55,733	56,479	67,457	79,424	84,599	15,471	15,711	17,794	20,257	20,604
All Traditional	103,346	98,797	118,645	134,791	142,780	32,647	28,457	35,803	40,996	42,157
Unknown	96,441	83,062	60,212	66,950	70,508	18,815	21,982	6,443	6,318	6,241
Age										
Under 25	21,986	11,434	11,165	13,103	13,264	5,782	3,238	3,360	3,708	3,433
25-29	10,290	12,278	11,009	12,537	12,552	4,769	4,488	4,721	5,000	4,826
30-34	16,236	18,106	17,704	20,456	21,120	7,229	6,612	7,036	7,661	7,531
35-39	25,683	27,664	29,202	33,784	34,903	10,819	10,072	11,003	12,325	12,138
40-44	36,968	38,354	42,826	49,948	52,582	14,745	13,751	15,770	17,745	17,864
45-49	50,998	51,006	59,471	68,683	72,177	19,329	18,312	21,463	24,264	24,564
50-54	74,046	66,771	80,525	91,976	96,726	24,505	23,216	28,056	31,692	32,639
55-59	92,196	86,572	108,074	122,957	130,459	31,762	29,080	36,363	41,149	42,950
60-64	129,976	116,415	147,739	165,139	175,418	42,998	38,838	49,899	55,807	59,138
65-69	170,672	145,575	191,208	212,812	224,144	58,965	50,122	66,852	75,277	79,928
70 or older	162,857	144,252	192,961	219,790	232,389	56,198	49,994	65,419	75,627	80,500
Unknown	108,765	280,290	160,233	126,759	177,699	35,255	116,475	43,666	45,801	44,692
Gender										
Female	71,112	66,529	81,700	96,339	94,774	23,246	21,642	27,826	30,660	29,651
Male	120,719	114,745	139,467	160,589	153,649	32,752	30,704	40,103	43,449	41,057
Unknown	85,037	76,604	85,230	91,853	128,631	22,820	19,916	26,589	23,576	30,923

Source: EBRI IRA Database.  
 ^ Traditional-Conts.=Traditional-Originating from Contributions, Traditional-Rolvsr=Traditional-Originating from Rollovers. Both of these accounts could have received contributions or rollovers after their origination, so these are NOT proxies for employment-based dollars versus IRA only dollars. The Traditional-Originating from Rollovers do provide an estimate of the dollars that have been moved into a new IRA.

Source EBRI.org “Individual Retirement Account Balances, Contributions, Withdrawals, and Asset Allocation Longitudinal Results 2010-2014: The EBRI IRA Database” (January 17, 2017).

We share the DOL’s enthusiasm for the potential of new product innovations, engagement and coordination with the SEC and other approaches that may allow it to achieve the Fiduciary Rule’s goals at a lower cost to firms and investors. Unfortunately, these efforts will take considerable time to come to fruition. For example, American Funds, Janus and Columbia Threadneedle are reported to be the only companies to issue “clean” shares<sup>35</sup> of their mutual funds thus far.<sup>36</sup> Due to the sequential nature of the various intermediaries’ development of the necessary trading, surveillance, commission and other systems to support their use, it is doubtful that clean shares, or other new share classes, can be fully operationalized for at least 18 – 24 months. In addition, we believe efforts to coordinate the SEC and DOL’s regulatory efforts have the potential to reduce cost, preserve investor access to advice and develop a more comprehensive best interest standard that will apply to financial advice rendered in connection with all of the investment assets of retirement savers, not just those that are tax-qualified. Secretary Acosta recently told members of Congress that he has asked the new SEC chair whether the SEC will work with the DOL on reviewing the Fiduciary Rule and that Chairman Clayton has

<sup>34</sup> “Individual Retirement Account Balances, Contributions, Withdrawals, and Asset Allocation Longitudinal Results 2010-2014: The EBRI IRA Database” (January 17, 2017) available at [https://www.ebri.org/pdf/briefspdf/EBRI\\_IB\\_429\\_IRA-Long.17Jan17.pdf](https://www.ebri.org/pdf/briefspdf/EBRI_IB_429_IRA-Long.17Jan17.pdf).

<sup>35</sup> As described in a 2017 SEC staff interpretive letter, clean shares are a class of shares of a mutual fund without any front-end load, deferred sales charge, or other asset-based fee for sales or distributions. See Capital Group, SEC Staff Letter (Jan. 11, 2017), [www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm](http://www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm).

<sup>36</sup> Greg Iacurci, Investment News, “In new fiduciary rule FAQs, DOL gives quasi-endorsement of dean shares” (May 23, 2017) available at <http://www.investmentnews.com/article/20170523/FREE/170529973/in-new-fiduciary-rule-faqs-dol-gives-quasi-endorsement-of-dean>.

indicated a willingness to do so.<sup>37</sup> However, the SEC has only recently initiated “an updated assessment of the current regulatory framework, the current state of the market for retail investment advice, and market trends” that is essential to the SEC’s ability to evaluate the range of potential regulatory actions relevant to the standards of conduct applicable to investment advisers and broker-dealers, and related matters.<sup>38</sup> We believe a delay of the Fiduciary Rule’s full implementation would create an opportunity for fulsome discussions among the DOL, SEC, industry and investors about new approaches to achieve the DOL’s goals without reducing investor access to retirement planning services.

Simply stated, we fear the cost and other impacts of full implementation of the Fiduciary Rule will have dire consequences for investors who benefit from and value personal retirement planning services. It is clear that the DOL, SEC, the industry and investors need more time to consider regulatory options and product innovations that may reduce costs and preserve investor access to retirement planning services while navigating any necessary changes through the Administrative Procedures Act’s rulemaking process. This simply can’t be completed by January 1, 2018 and, therefore, a delay is essential to protect investor access to retirement planning services.

#### **D. Failure to delay will result in client confusion.**

A delay during the pendency of the DOL’s review will serve to minimize market disruptions caused by the changing regulatory structure. As a result of the Fiduciary Rule, firms are reviewing investment products and compensation structures and planning revisions designed to make it easier to comply with the Fiduciary Rule. Minimum account balances in advisory accounts are being revised upwards and consumers’ access to retirement planning services will be limited by these changes as investors with low account balances are being moved to different account types, or are being asked to move accounts elsewhere. These, and other efforts to comply with the Fiduciary Rule continue and will need to be finalized and communicated to investors prior to the January 1, 2018 deadline. However, a delay will allow firms to avoid communicating one set of compliance policies, account minimums and other changes to investors that will have to be revised as a result of the possible changes to the final Fiduciary Rule. The average client will be confused by correspondence announcing changes to their investment products and business relationship (if the Rule becomes applicable), followed by correspondence announcing additional changes being made for yet another new regulatory scheme (if the Rule is rescinded or revised). As a result, we believe it is clear that a delay of the January 1, 2018 deadline is necessary to avoid customer confusion.

#### **E. Summary.**

In conclusion, we believe existing regulatory structures and the June 9, 2017 application of the Impartial Conduct Standards provide substantial investor protections. There is clear

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<sup>37</sup> See the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies hearing to Review of the FY2018 Budget Request for the U.S. Department of Labor (June 27, 2017) available at <https://www.appropriations.senate.gov/hearings/review-of-the-fy2018-budget-request-for-the-us-department-of-labor>.

<sup>38</sup> Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers (June 1, 2017) available at <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31>.



evidence that full application of the current Fiduciary Rule will greatly increase costs for firms and financial advisors and result in reduced access to retirement planning services. Therefore, we believe it is essential for the DOL to consider whether new products, close coordination between the DOL and SEC or other measures can eliminate or reduce these negative consequences. Since firms and financial advisors will need to communicate with their existing clients prior to the deadline, a significant delay can avoid investor confusion by forestalling the need to send multiple communications reflecting changing regulatory requirements. Therefore, FSI urges the DOL to delay full implementation of the Fiduciary Rule until April 10, 2019 to provide the industry the full 36 months it said at the outset was necessary to fully comply.

**II. An extension of the comment period for the RFI is needed to ensure meaningful input from stakeholders.**

As noted earlier, FSI appreciates the opportunity to respond to the DOL's RFI and looks forward to providing substantive comments and data in response to the important questions contained therein. However, the 30-day comment period will significantly impact our ability to gather meaningful data that is responsive to these questions. For example, FSI intends to engage with Oxford Economics to prepare research and analysis directly relevant to the DOL's RFI. We planned to include new information from our member firms that would shed light on the key issues being considered by the DOL. Unfortunately, we have been informed by Oxford and our members that it is unlikely that this study can be completed in the time allotted without significantly narrowing our scope. This unfortunate circumstance, which we anticipate will similarly impact other commenters, means the DOL will be deprived of important data relevant to its decision. As a result, we respectfully request that the DOL extend the comment period for questions 2 through 18 to 60 days so that commenters are afforded sufficient time to gather evidence and respond to the RFI.

**Conclusion**

FSI supports a carefully crafted, uniform fiduciary standard of care applicable to all financial advisors providing personalized investment assistance to retail clients.<sup>39</sup> This standard should support investor access to retirement planning services, but the current Fiduciary Rule does not. In addition, the study of the Rule's impact required by the February 3, 2017 Presidential Memorandum, along with innovative product developments and renewed opportunity for the DOL and SEC to collaborate, provides an important opportunity to preserve investor access to these services. Therefore, we urge the DOL to delay the January 1, 2018 effective date until April 10, 2019 to provide the industry the full 36 months it said at the outset was necessary to fully comply with the Fiduciary Rule and provide the time necessary to consider other options to achieve the DOL's goals while preserving investor access to retirement planning services.

In addition, we urge the DOL to extend the August 5, 2017 comment deadline for the RFI by an additional 30 days to allow industry participants an opportunity to gather important data that is responsive to the DOL's questions.

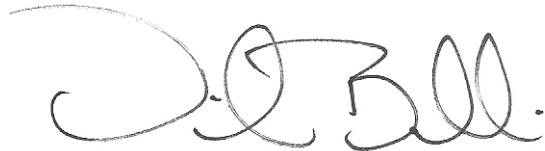
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<sup>39</sup> See, e.g., Letter from David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission (Jul. 5, 2013) (commenting on Duties of Brokers, Dealers, and Investment Advisors, Release No. 34-69013; IA-3558; File No. 4-606), available at <https://www.sec.gov/comments/4-606/4606-3138.pdf>.

We are committed to constructive engagement in the regulatory process and welcome the opportunity to work collaboratively with the DOL and others to ensure access to retirement products and services for all investors.

Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. T. Bellaire". The signature is fluid and cursive, with a large initial "D" and "T" followed by "Bellaire".

David T. Bellaire, Esq.  
Executive Vice President & General Counsel