

September 14, 2017

Office of Regulations and Interpretations  
Office of Exemption Determinations  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Via Email to [EBSA.FiduciaryRuleExamination@dol.gov](mailto:EBSA.FiduciaryRuleExamination@dol.gov)  
Re: RIN 1210-AB82, Fiduciary Rule Re Examination

Ladies and Gentlemen:

I write to express my individual views on the **Extension of Transition Period and Applicability Dates, et al.**

I strongly support the implementation of the current, Final (2016) DOL Conflict of Interest - Fiduciary Rule, (part of which was made applicable, on June 9, 2017) in full, undiluted and with no further delay, on January 1, 2018.

The new Administration's own motivations in re-examining the 2016 Final DOL Fiduciary Rule are suspect. They have stated they will eliminate regulation. But some regulation is strongly in the public interest. The DOL Final Fiduciary Rule falls into that category, as Courts have opined. If there was not rampant retirement investor abuse of Americans' retirement accounts, from which large portions of retirement investor's nest eggs are being systematically stolen because of non-fiduciaries' conflicts of interest, the 2016 Fiduciary Rule would not be necessary. While the Impartial Conduct Standards made applicable June 1 are very important, without the rest of the important investor protections of the Final Rule, investors are vulnerable to continued abuse.

#### **Fiduciaries Already Work in Investor's Best Interest**

There are already many fiduciaries at work in the best interest of investors. The 36.4 million investors who work with fiduciary Registered Investment Advisers (RIAs) already receive advice in their best interest, at a reasonable cost, from the 11,800-plus RIA firms that serve investors as fiduciaries – in all types and sizes of accounts – not only in retirement accounts. RIAs employ 781,000 individuals, and manage \$66.8 trillion, according to the Investment Adviser Association's 2016 Evolution Revolution<sup>1</sup> report.

RIA firms range from small to very large. If they can put fiduciary processes in place, as they have for decades, non-fiduciaries that wish to participate in the retirement sector should have no problem doing that.

Fiduciaries advocate and work on behalf of investors, not themselves. It's a healthy business model, built on integrity and service in the client's best interest, not "caveat emptor!" and deceptive sales practices in order to fleece investors.

**Can those who oppose the Fiduciary Rule say that? None that I can identify. In fact, those who oppose this rule all have financial axes to grind. When they complain about the "cost" of complying with the DOL Fiduciary Rule, aren't they actually saying that they overcharge investors?** Of course, they are.

To be clear, Registered Investment Advisers – already fiduciaries – stand to lose an important competitive distinction when all firms working with retirement investors are required to act as fiduciaries – as RIAs already do. But it is so important that every American who sacrifices to save for their own retirement should have advice that is in their best interest, it supersedes that competitive differentiator. Retirement investors need – and believe they are already getting – advice that is in their best interest. Nothing less will help them to achieve their goal of a secure retirement.

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<sup>1</sup> "Investment Adviser Association's 2016 Evolution Revolution Report"  
<https://www.investmentadviser.org/eweb/Dynamicpage.aspx?webcode=evrev>

Retirement investors do not in any way benefit from DOL's proposed extension. The reverse is true. Investors are harmed by any further extension. **If DOL actually permits this unnecessary delay to go through on top of the current extension that expires January 1, 2018, it can only mean the Department has decided to abandon retirement investors.** I know this is not the motivation of core DOL staff. But that is a side effect of the current Administration's priority of getting rid of regulations enacted by the prior Administration, no matter the consequences. DOL's The Extension says:

The Secretary of Labor has discretionary authority to grant administrative exemptions under ERISA and the Code on an individual or class basis, **but only if the Secretary first finds** that the exemptions are (1) administratively feasible, (2) **in the interests of plans and their participants and beneficiaries and IRA owners, and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners.** 29 U.S.C. 1108(a); see also 26 U.S.C. 4975(c)(2).

While this may be "administratively feasible," **any further delay is definitely not "in the interests of plans and their participants and beneficiaries and IRA owners, and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners."**

**Therefore, since it is not in the public interest, I respectfully request that no delay be granted.**

IF any further delay is granted, **DOL should provide more protections to retirement investors by requiring a written agreement with acknowledgement that states, "We agree to abide by the Impartial Conduct Standards."** Without that, even though DOL mentions certain remedies, if the Rule is not enforced via all the important protections applicable on January 1, 2018, then retirement investors are not only left to fend for themselves, but worse off since they expect the rest of the rule's protections to be in force on January 1.

Opponents to the Rule, many of whom reportedly met with Secretary Acosta last week, have made many false claims to try to derail or kill the important 2016 DOL Fiduciary Rule. Those protesting its full applicability on January 1 include many of the worst actors. These firms (some cowering behind their lobbyists), are working to delay the Rule specifically in order to then dismantle, gut or kill this Rule. They will use any means, including deception – the same kind of deception they have used to bilk retirement investors of billions each year, for decades.

Of course, while claiming in ads that they always put investors first, these opponents disavow fiduciary duty in arbitration or court. They are working very hard to be able to continue robbing retirement investors of large portions of their nest egg. These same firms are campaigning SEC & Congress to provide a "uniform Fiduciary standard" that would change the meaning of "Fiduciary" to "Suitability, plus a little more disclosure; that's it." In other words, they do not want an extension of the Investment Advisers Act of 1940 or ERISA and the Final DOL Fiduciary Rule.

**Contrary to what those who oppose the DOL Rule say in comments or meetings, companies are well prepared for the Rule's full implementation and have been making preparations during the appropriate grace period since the Final Rule was published.** In fact, leaders of firms that have been critical in the run-up to the Final Rule and beyond have told their own shareholders they are ready for the rule. If they told shareholders they are ready, and they are not, that's a new regulatory problem. If are ready, and they've told DOL they are not ready, that's false.

Here are two excerpts from Sen. Elizabeth Warren's comment to Sec. Acosta. She cites firms' leaders telling investors they are ready for this rule to be fully applicable on January 1.

"As you know, the effective date was June 9, and our implementation work is going according to plan ... The early feedback we hear from advisers is, they feel well prepared for the transition and are seeing opportunities to win business based on our approach." - LPL Financial Holdings CEO, President, and Director Dan Arnold, July 27, 2017<sup>2</sup>

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<sup>2</sup>[https://www.warren.senate.gov/files/documents/2017\\_09\\_05\\_Letter\\_to\\_Acosta\\_Fiduciary\\_Rule.pdf](https://www.warren.senate.gov/files/documents/2017_09_05_Letter_to_Acosta_Fiduciary_Rule.pdf)

"With respect to the DOL, the June 9 implementation date was very positive in the respect that people had to come forward-our distribution partners came forward with their plans. And in this respect, we're very delighted. 90% of our distribution partners offered at least one, if not more, options for commissions and that's very helpful." - Lincoln Financial Corp. President, CEO, and Director Dennis Glass, August 3, 2017<sup>3</sup>

### **Clearly, there is no need for further delay.**

Indeed, my firm's own research survey<sup>4</sup> of intermediaries of all types, working directly with investors, also strongly contradicts the false and tired narratives of those opposing the DOL Rule when they assert they are not ready. This is the 5<sup>th</sup> survey of financial professionals who advise investors, across the spectrum of business models. This year, 777 financial professionals provided their views on 44 questions from March 24 to June 2<sup>nd</sup>. Survey respondents include Registered Investment Advisors/Investment Advisor Representatives, Broker-Dealer Registered Representatives, Dual Registrants (RIA/IAR-Registered Rep), Dual Registrants/Insurance License (Dual+Insurance), and Insurance Professionals (Producers and Consultants).

Please note: Contrary to opposition groups' "studies" in which they survey only a handful their non-fiduciary members, and will not share data or methodology, FiduciaryPath will be glad to in depth with the numbers and share our data and findings with DOL EBSA.

### **Key Findings:** Once the DOL Fiduciary Rule is in Effect:

- Most intermediaries project AUA in retirement plans and IRAs to remain steady or grow.
- They will continue to work with retirement investors and plans.
- It does not cost investors more for fiduciary advice.
- Fiduciary advice does not limit access to advice or products.
- Most firms set to comply with Fiduciary Rule or very close.

### **How Are Firms Preparing for the DOL Fiduciary Rule?**

**DOL has already provided an appropriate grace period for firms to put in place fiduciary compliance after announcing the final DOL Fiduciary Rule.** Intermediaries indicated that firms were, for the most part, ready.

The 2017 FP Fiduciary Standard Survey asked financial intermediaries: **"Which standard of care does your firm support?"** (check as many as apply). Overall, 75% of respondents report that their firm supports the ERISA fiduciary standard, 60% note their firms supports the Investment Advisers Act of 1940 fiduciary standard, and 41% say their firm supports the BD suitability standard.

**The survey asked, "How has your firm changed your practices in preparation for the DOL Fiduciary rule?"** (Select all that apply) The most typical changes firms are making to financial professionals' practices are in fiduciary process and fiduciary training, say 52%, and type of compensation, say 28%. Firms are also making changes to sales training, 16%, certification requirements, 16%; product training 14% and investment theory and portfolio diversification, 13%.

By compensation type, 72% of commission-only, 66% of fee/commission and 37% of fee-only financial professionals indicate their firm has made changes to fiduciary process and training. (most in the fee-only model are already fiduciaries so they have fewer changes to make to comply.)

Nearly half of those in the fee/commission model, 49%, and 32% in the commission-only model indicate changes in their type of compensation. Forty percent in the commission-only model and 24% in the fee/commission model also indicate changes in certification requirements. And 32% of commission-only and 20% of fee/commission intermediaries note changes in investment theory and portfolio diversification training.

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<sup>3</sup>[https://www.warren.senate.gov/files/documents/2017\\_09\\_05\\_Letter\\_to\\_Acosta\\_Fiduciary\\_Rule.pdf](https://www.warren.senate.gov/files/documents/2017_09_05_Letter_to_Acosta_Fiduciary_Rule.pdf)

<sup>4</sup> "New Survey: DOL Fiduciary Rule Does Not Cost Investors More or Limit Investor Access to Advice or Products; Firms Are Prepared." Kathleen M. McBride, AIFA © <https://www.linkedin.com/pulse/new-fiduciarypath-survey-dol-fiduciary-rule-does-cost-mcbride-aifa->

Many participants, 36%, selected “Other” and commented. A sampling of the prevalent themes is included below:

- Most comments: “No change needed, already fiduciary,” or “Slight tweaks to fiduciary process.”
- “Transitioning to all fee; low fee, NTF contracts.”
- “Refined standardized checklists for Rollover evaluations.”
- “Preparing to use BIC contract.”
- “Increased Conflict of Interest disclosures.”
- “More explicit handling of retirement plan rollovers to IRAs. Treating recommendations to rollover from plans as explicit Conflict of Interest requiring disclosure and managing this in the client’s favor.”

### **Findings on Compensation and Retirement Assets Under Final DOL Rule**

The Survey asked: **“Regarding assets held in qualified retirement plans subject to the DOL Rule, how do you expect to be compensated for advice you provide at the plan level – on selection of plan investment alternatives, such as which funds to include in the plan menu?”**

Most survey respondents, 68%, expect to be compensated as a level-fee (fee-only) fiduciary for plan-level advice on assets in to qualified plans. Another 9% expect a combination of level and non-level compensation arrangements, while less than 4% expect to receive variable (non-level, transaction-based) compensation as a fiduciary under the Best Interest Contract Exemption (BICE).

**“When you provide plan-level advisory services, will you act as a:”**

3(21) 50%

3(38) 15%

Other 16% Comments under “Other” indicate both 3(21) and 3(38); for example, 3(21) for plan menu recommendations and 3(38) if providing model allocation portfolios using plan alternatives.

**“When the DOL Rule is in full effect, will you provide advice to clients on IRA Rollovers?”**

**Yes, say 90% of financial professionals**, they will continue to provide advice to clients on IRA rollovers once the DOL Rule is in full effect: 63% expect to do so at about the same level as before. 19% expect to do so more frequently than before. Another 8% expect to do so, but less than before. Only 10% say no, they won’t provide advice to investors on rollovers.

**“How do you expect to be compensated for advice you provide regarding IRA accounts subject to the DOL Rule?”**

Most financial professionals, 65%, expect to be compensated as a level-fee fiduciary when they provide advice regarding IRA accounts subject to the DOL Rule. Another 13% expect to act as a fiduciary under a combination of level and non-level compensation arrangements, while 7% plan to be compensated as a fiduciary who receives variable (non-level, transaction-based) compensation under the Best Interest Contract Exemption (BICE).

**“When the new fiduciary rule goes into effect, any advice to a participant about whether they should keep money in plan, roll to another plan, roll to an IRA or cash out is considered a fiduciary act. Do you have a process in place for advising 401(k) plan investors about these decisions?” (Choose one)**

**Nearly all survey respondents, 95%, have a process in place or are working on a process to provide fiduciary advice to 401(k) participants about whether it is in the participant’s best interest to remain in the 401(k) or roll out to an IRA.** That advice is now a fiduciary act under the DOL Rule. Nearly 54% have a manual process in place; 23% have a technology driven process in place and another 18% are working on a process for advising investors about these decisions.

**Survey findings indicate that,**

- 1) the DOL Fiduciary Rule will not impede investor access to advice and investment products, and**
- 2) fiduciary advice to investors, including retirement investors does not cost more than non-fiduciary recommendations, and according to survey respondents, often will cost less, all-in, and include more services.”**

So, when opponents to the DOL Rule claim there they are undergoing a “costly and disorderly transition,” **their claim is categorically false.**

### **Declines in Sales of Harmful Products**

Since the 2016 Final Rule was announced, **there has been a widely-reported decline in sales of the most harmful and costly Variable and Fixed Indexed Annuities** (also known by other names). **That has been an extremely laudable effect of the transition to the DOL Rule.** If the transition is further delayed, this may reverse, causing material harm to retirement investors. Unfortunately, this is what many opponents of the DOL Fiduciary Rule would like.

Why? Because those companies and reps make enormous amounts of money on these types of severely harmful annuities, resulting directly in harm to retirement investors. They are sold deceptively and with massive psychological manipulation and fear-mongering. **Because of this, DOL should not delay applicability of the full force of PTE 84-24 as expressed in the 2016 Final Rule.**

**The deliberately misleading and manipulative sale of harmful products to retirement investors is not a business model DOL should support.** Any further delay of the important protections in Rule provisions scheduled for January 1 will result in irreparable harm to retirement investors, the very individuals DOL is supposed to protect. DOL should not be in the business of catering to the false claims of those who oppose the regulation.

In the Extension Proposal DOL opines:

Department believes that **investor losses associated with this proposed extension would be relatively small.** The fact that the Fiduciary Rule and the Impartial Conduct Standards are now in effect makes it likely that retirement investors will experience much of the potential gains from a higher conduct standard and minimizes the potential for an undue reduction in those gains as compared to the full protections of all the PTE conditions as discussed in the 2016 Regulatory Impact Analysis.

How can this be the case if the further delay comes without the enforceable protections in the second phase of the Final DOL Rule, which should be applicable January 1, 2018? It is a false assumption. In addition, the reasons given for the proposed delay are untrue. What opponents really want is this delay so they, with Congress and SEC if necessary, can kill or weaken the Rule.

### **Class Litigation**

The Transition Proposal notes that those who oppose the DOL Rule say they specifically fear class litigation. However, **class litigation is only an issue when firms display a pattern of egregious harm to investors.** If they are harming investors, then they are not abiding by the DOL Rule in the first place. **Class litigation is a powerful deterrent to wrongdoing.** Waivers of investor recourse, such as class litigation, should not be permitted.

In a recent article in *The Wall Street Journal*, Sen. Lindsey Graham (R-SC), spoke about financial firms’ abuses on consumers: “arbitration is ‘a windfall for the companies in terms of how you settle their cheating.’” He continued: “You’ve had banks and credit-card companies nickel-and-dime consumers, and **one of the things that makes them think twice is the idea of a massive lawsuit,**” Sen. Graham said.<sup>5</sup> The analogy here is obvious.

**It should be noted that when RIA firms advise** retirement plans and investors (as well as their clients’ taxable assets), as fiduciaries, *there is no evidence of rampant class action lawsuits.*

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<sup>5</sup> GOP Effort to Overturn Arbitration Rule at Risk From GOP Defectors <https://www.wsj.com/articles/gop-effort-to-overturn-arbitration-rule-at-risk-from-republican-defectors-1502020803>

In fact, whether in retirement plans or taxable assets, fiduciary advice, such as that from RIA firms, driven by loyalty to the client and prudent, documented decisions and actions, generates little in the way of court actions. A prudent, documented fiduciary process is actually a very good defense in court. Even better, it serves as a reminder of why the prudent decisions were made, as well as the circumstances, so that issues seldom rise to the level of court. Many RIA service agreements with clients offer them the choice of arbitration as an option to settle a dispute, but do not make it mandatory.

DOL's 2016 Final "Fiduciary Rule will stem the losses retirement savers are suffering," according to consumer advocates.<sup>6</sup> **But all of the protections – and remedies – afforded in the final Fiduciary Rule need to be applicable on schedule, January 1, 2018,** in order to prevent investor harm that comes from firms that still want to skirt their fiduciary duty to place the investor's interests before their own. **These remedies include the all-important right of private action for IRA advice and investment management and the ability for investors to form a class and file suit when firms show a pattern of self-serving, abusive behavior that harms retirement investors.**

**Arbitration is not enough of a deterrent.**

A word about class litigation: Those firms that are the most afraid of class actions are, sadly, often the ones who have caused investors the most harm. It's actually quite difficult to form a class. Firms have little to worry about unless they demonstrate a pattern of wrongdoing toward clients. (And, if these firms decide not to work with retirement investors, those investors will be much better off and there are plenty of fiduciaries who would be glad to advise them.) Why?

**What's the Harm in a Delayed Transition?**

If anyone needs to be reminded of the what happens to retirement investors without the strong provisions of the 2016 DOL Final Rule in full effect, here are some examples. This harm was caused by several of the most vocal opponents to the DOL Rule. It is notable that many of the firms named by FINRA below have needed much better processes in place, even under suitability!

But it is also very sobering to think that DOL would allow this to continue by delaying the Rule's full implementation for so much longer.

June 6, 2014 FINRA Announcement<sup>7</sup>

**FINRA Fines Merrill Lynch \$8 Million; Over \$89 Million Repaid to Retirement Accounts and Charities Overcharged for Mutual Funds**

WASHINGTON — The Financial Industry Regulatory Authority (FINRA) announced today that it has fined Merrill Lynch, Pierce, Fenner & Smith, Inc. \$8 million for failing to waive mutual fund sales charges for certain charities and retirement accounts. FINRA also ordered Merrill Lynch to pay \$24.4 million in restitution to affected customers, in addition to \$64.8 million the firm has already repaid to disadvantaged investors.

Mutual funds offer several classes of shares, each with different sales charges and fees. Typically, Class A shares have lower fees than Class B and C shares, but charge customers an initial sales charge. Many mutual funds waive their upfront sales charges for retirement accounts and some waive these charges for charities.

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<sup>6</sup> Consumer Federation of America, M Hauptman, <http://216.30.191.148/RetirementRipoff/>

<sup>7</sup> <http://www.finra.org/newsroom/2014/finra-fines-merrill-lynch-8-million-over-89-million-repaid-retirement-accounts-and>

From July to October 2015, FINRA ordered eight broker/dealer and insurance firms to pay a total of \$55 million back to 75,000 retirement accounts and charitable organizations.

October 27, 2015 FINRA Announcement:<sup>8</sup>

**FINRA Orders an Additional Five Firms to Pay \$18 Million in Restitution to Charities and Retirement Accounts Overcharged for Mutual Funds**

WASHINGTON — The Financial Industry Regulatory Authority (FINRA) announced today that it has ordered five firms to pay restitution estimated at more than \$18 million, including interest, to affected customers for failing to waive mutual fund sales charges for eligible charitable organizations and retirement accounts. The following firms were sanctioned.

- Edward D. Jones & Co., L.P. – \$13.5 million in restitution
- Stifel Nicolaus & Company, Inc. – \$2.9 million in restitution
- Janney Montgomery Scott, LLC – \$1.2 million in restitution
- AXA Advisors, LLC – \$600,000 in restitution
- Stephens Inc. – \$150,000 in restitution

These sanctions and \$18 million in restitution are in addition to more than \$30 million in restitution that FINRA ordered three other broker/dealers to pay back to investors, in July 2015<sup>9</sup>. The firms are:

- Wells Fargo -- \$15 million in restitution
- Raymond James -- \$8.7 million in restitution
- LPL -- \$6.3 million in restitution

May 5, 2016 FINRA Announcement<sup>10</sup>

**FINRA Sanctions MetLife Securities, Inc. \$25 Million for Negligent Misrepresentations and Omissions in Connection With Variable Annuity Replacements  
Largest FINRA Fine Relating to Variable Annuities**

WASHINGTON — The Financial Industry Regulatory Authority (FINRA) announced today that it has fined MetLife Securities, Inc. (MSI) \$20 million and ordered it to pay \$5 million to customers for making negligent material misrepresentations and omissions on variable annuity (VA) replacement applications for tens of thousands of customers. Each misrepresentation and omission made the replacement appear more beneficial to the customer, even though the recommended VAs were typically more expensive than customers' existing VAs. MSI's VA replacement business constituted a substantial portion of its business, generating at least \$152 million in gross dealer commission for the firm over a six-year period.

November 2, 2016<sup>11</sup>

**FINRA Fines Eight Firms a Total of \$6.2 Million for Supervisory Failures Related to Variable Annuity L-Shares; Five Firms Ordered to Pay More than \$6 Million to Customers**

WASHINGTON — The Financial Industry Regulatory Authority (FINRA) announced today that it has fined eight firms, including VOYA Financial Advisors, five broker-dealer subsidiaries of Cetera Financial Group, Kestra Investment Services, LLC, and FTB Advisors, Inc., a total of \$6.2 million for failing to supervise sales of variable annuities (VAs). FINRA also ordered five of the firms to pay more than \$6 million to customers who purchased L-share variable annuities with potentially incompatible, complex and expensive long-term minimum-income and withdrawal riders.

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<sup>8</sup> <http://www.finra.org/newsroom/2015/finra-orders-5-firms-pay-18-million-failing-waive-fund-sales-charges>

<sup>9</sup> <http://www.finra.org/newsroom/2015/finra-sanctions-wells-fargo-raymond-james-and-lpl-30-million>

<sup>10</sup> <http://www.finra.org/newsroom/2016/finra-sanctions-metlife-securities-inc-25-million-negligent-misrepresentations-and>

<sup>11</sup> <http://www.finra.org/newsroom/2016/finra-fines-eight-firms-total-62-million-supervisory-failures-related-variable-annuity>

FINRA imposed sanctions against the following firms.

- VOYA Financial Advisors Inc., of Des Moines, IA, was fined \$2.75 million.
- Cetera Advisor Networks LLC of El Segundo, CA, was fined \$750,000.
- Cetera Financial Specialists LLC of Schaumburg, IL, was fined \$350,000.
- First Allied Securities, Inc. of San Diego, CA, was fined \$950,000.
- Summit Brokerage Services, Inc. of Boca Raton, FL, was fined \$500,000.
- VSR Financial Services, Inc. of Overland Park, KS, was fined \$400,000.
- Kestra Investment Services, LLC of Austin, TX, was fined \$475,000.
- FTB Advisors, Inc. of Memphis, TN, was fined \$250,000.

FINRA ordered the firms to pay the following to investors.

- Voya was ordered to pay at least \$1.8 million to customers in this category.
- Cetera Advisors Networks, First Allied, Summit Brokerage Services and VSR were collectively ordered to pay customers at least \$4.5 million.

November 28, 2016<sup>12</sup>

### **FINRA Fines VALIC Financial Advisors, Inc. \$1.75 Million for Failure to Prevent Conflicts of Interest in its Compensation Policy and for Other Supervisory Failures Related to Variable Annuity Sales**

WASHINGTON — The Financial Industry Regulatory Authority (FINRA) announced today that it has fined Houston-based VALIC Financial Advisors, Inc. (VFA), a total of \$1.75 million for failing to identify and reasonably address certain conflicts of interest in the firm’s compensation policy for instances when customers elected to move assets out of their VALIC variable annuities (VA), many of which were held in retirement plan accounts. The firm also failed to adequately supervise its VA business, including the sale of VAs with multiple share classes.

From October 2011 through October 2014, VFA created a conflict of interest by providing registered representatives a financial incentive to recommend that customers move their funds from VALIC variable annuities to the firm’s fee-based platform or into a VALIC fixed index annuity. VFA further incentivized the conflict by prohibiting its registered representatives from receiving compensation when moving customer funds from a VALIC VA to non-VALIC VAs, mutual funds or other non-VALIC products. During 2012 and 2013, FINRA found there was significant volume of assets moving from VALIC VAs to the advisory platform. Also, in a seven-month period after the compensation policy was amended to include the proprietary fixed index annuity, sales of that product grew more than 610 percent.

### **These firms and/or their lobbying organizations have campaigned against the DOL Fiduciary Rule.**

DOL and investment leaders say conflicts of interest can cost retirement investors 28% to 50% of their retirement nest egg. These conflicts have been routine for non-fiduciaries in the retirement segment of financial services. For decades. **This underscores the need for the Final DOL Fiduciary Rule to be fully implemented as is on January 1, 2018.** The failures of these firms – and others that oppose the Final Fiduciary Rule – means that DOL should ensure that these firms cannot continue to harm investors. **Delay past January 1 will harm investors.**

Several court cases were brought by industry groups and firms that wish to continue a status quo that is indisputably harmful to Americans saving and investing for their retirement, no further delay of implementation of any part of this Final Fiduciary Rule is necessary. In fact, in his opinion on a case that requested injunction to delay the Fiduciary Rule from becoming applicable, Kansas U.S. District Court Judge Daniel Crabtree said, “*An injunction will lead to confusion about the law and likely produce unwarranted delay. This is not in the public’s interest. Any injunction thus will produce a public harm that outweighs any harm that plaintiff may sustain from the rule change.*”<sup>13</sup>

<sup>12</sup> <http://www.finra.org/newsroom/2016/finra-fines-valic-financial-advisors-inc-175-million-failure-prevent-conflicts>

<sup>13</sup> Kansas Court Case 5:16-cv-04083-DDC-KGS Document 59 Filed 11/28/16  
<https://assets.documentcloud.org/documents/3226360/Market-Synergy-DOL-20161128.pdf>



## **Better Retirement Investor Outcomes Are Strongly in the Public Interest.**

This Administration's own Memo on February 3<sup>rd</sup> has led to some confusion. The steady effect of confirmation that all DOL Fiduciary Rule provisions will apply on January 1, 2018 will eliminate this self-created issue. **The Administration should not be permitted to sabotage this important Rule that is in the public interest.**

There is no reasonable or justifiable basis for any delay or any watering down of any provision in the Fiduciary Rule. In fact, the DOL has already conducted a full review and justification including a legal and economic analysis, concluding that the Rule is necessary in order for Americans to save and invest for retirement. Numerous Courts have supported the Rule.

*Any further delay of the Fiduciary Rule would be arbitrary and capricious. In addition, any delay or derailment would be unlikely to withstand legal scrutiny.*

## **Clean Shares and Compliance**

It should be noted that in the grace period after the Final Fiduciary Rule was released in April 2016, up until the Administration's Feb 3 proclamation that the Rule should be examined, "clean shares," and other viable products were being created at a rapid clip. Low-cost investing via fund groups such as Vanguard, and low-cost automated investment firms like Betterment, both of which are providing investment allocation and portfolio management advice at a nominal cost, are thriving.

And, of course, Fiduciary RIA firms have always been able to find no-load, reasonable cost investment products to serve investor goals.

But, confusion and uncertainty after the Administration's Feb 3<sup>rd</sup> memo temporarily put a damper on new development and we would not want to see that kind of administrative sabotage lead to any delay in the applicability date of the rest of the provisions of the Fiduciary Rule. When the June 9<sup>th</sup>/January 1 applicability dates were announced, that helped momentum with these products. This Transition Delay announcement was not helpful. And, again, **this Administration cannot be allowed to sabotage regulation that is so strongly in the public interest, such as this Rule.**

**It is also very alarming to investor and consumer advocates that the wording in parts of the Transition Extension includes much that appears to indicate that the only "stakeholders" are non-fiduciary firms, without considering how the delay would harm investors.** Firms' "uncertainty" was caused by this Administration's own attempt to sabotage a Rule that was already law. And, "costly and disorderly transition" – how about the cost and disorder to retirement investors when they are harmed by this delay with wrongdoing like that cited above?

Likewise, many **firms that had the most changes to implement in order to conform to the Fiduciary Rule were largely finished and were testing, or close to finished as the April Applicability date rolled closer.** The Final Rule effective date in April 2016, with a two-part grace period until April 2017 and Jan 2018 for applicability, was a sufficient amount of time for any firm that is serious about serving retirement investors as fiduciaries to get their compliance and processes in order.

And, most BDs, (including insurance, fund and bank-affiliates) already have an RIA arm. Moving from the RIA processes that already should be present under the Investment Advisers Act of 1940 to the DOL Fiduciary Rule requirements is certainly doable in the original DOL timeframe.

**There is no reason to delay implementation of the balance of the Fiduciary Rule to wait for more products.** Products already exist that can readily be used to fulfil client goals on a fiduciary basis. RIAs have used them for decades. More are being developed. This is not an issue.

Vanguard, Schwab, Betterment, WealthFront and others offer inexpensive investment management for very low cost with very low account minimums: \$5,000 minimum at some, no minimum at others. Some automated investment firms offer their services for \$0 until an account grows to a certain level.

Some fiduciaries, such as Financial Engines, one of the largest RIAs in the US, have tackled both the “accumulation” phase as well as the “decumulation” phase, assisting plan participants with withdrawal plans at the same cost as their reasonable cost for the accumulation phase. Instead of rolling over from a plan into an IRA (with potentially higher costs), or a variable, fixed or fixed indexed annuity (with typically much, much higher costs and considerable, irreparable harm to the investor), a participant can stay in the plan and receive regular monthly or quarterly distributions from the plan. So, if a participant pays, for example, .50 basis points annually for professional investment management in the plan, they pay the same amount for the investment management and distributions during the decumulation phase.

I am not advocating any one firm here, but it’s important to note that this kind of continuous care model for accumulation and decumulation at very reasonable cost is a good thing for many investors and it’s something that ought to be encouraged.

## **Conclusion**

The Fiduciary Rule strengthens protections for retirement savers by requiring financial advisers and their firms to provide retirement investment advice that is in their clients’ best interests.

**Opponents to the 2016 Final DOL Fiduciary rule are specifically trying to further delay its applicability for one specific reason, and one only, and it is not to make preparations to comply.** Opponents want this further delay so they can kill, gut or make this Final Rule so weak as to be useless to investors and harmless to their firms.

I hope DOL is too smart to fall for this ploy.

As someone whose job it is to help fiduciaries improve their fiduciary processes, I know that compliance to the DOL Fiduciary Rule is achievable for any company that wishes to stay in the retirement segment of the industry. It should be their minimum barrier to entry. DOL should not bend the compliance date or weaken the Rule’s provisions or PTEs to accommodate firms that want only to continue to harm investors for as long as possible, and want time to kill or neuter the Rule.

Further delaying implementation or weakening these new protections would allow non-fiduciaries and their firms to continue to engage in harmful conflicts of interest that threaten the retirement security of American retirement investors as well as the American economy.

If the current Administration’s DOL decides to further delay or weaken the rule, it would be taking the position that those who oppose the Fiduciary Rule, whose model is, instead, to act in their own interests – should prevail, rather than American retirement savers’ interests in receiving the critical protections from the rule.

Retirement savers need and deserve to receive the protections that the current DOL Conflict of Interest - Fiduciary Rule provides, without further delay. The DOL should conclude that the rest of the 2016 Final DOL Conflict of Interest - Fiduciary Rule, undiluted, and all PTEs, should be implemented no later than Jan 1<sup>st</sup>, 2018.

Sincerely,

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