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September 15, 2017

Filed Electronically

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D–11712, 11713, 11850
US Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

Re: RIN 1210-AB82; Proposed Rule; Extension of Transition Period and Delay of Applicability Dates

Dear Sir or Madam:

The Investment Company Institute[1] supports the Department of Labor's (the "Department") proposed 18-month delay[2] of the January 1, 2018 applicability date of certain aspects of its fiduciary rulemaking.[3] The delay is necessary for the Department to reexamine the fiduciary rulemaking, as

[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$20.4 trillion in the United States, serving more than 95 million US shareholders, and US$6.7 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

[2] 82 Fed. Reg. 41365 (August 31, 2017).

[3] The Department issued a final regulation defining who is a fiduciary of an employee benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA") or an individual retirement account (IRA) under section 4975 of the Internal Revenue Code ("Code"), as a result of giving investment advice to a plan or its participants or beneficiaries, or an IRA or IRA owner. 81 Fed. Reg. 20946 (April 8, 2016). All conditions of the Best Interest Contract ("BIC") Exemption and other related exemptions associated with the fiduciary rulemaking currently are scheduled to become applicable on January 1, 2018. During the transition period between June 9, 2017 and January 1, 2018 (the "Transition Period"), fiduciary

directed by the President.[4] It also is necessary to provide adequate time for the Department to work with the Securities and Exchange Commission (SEC) as it determines how to modify the rulemaking. Moreover, any investor losses that some have posited as theoretically possible from the delay are illusory and speculative. In fact, the delay would allow for a more orderly transition, which will inure to the benefit of investors. Further, a delay will allow financial services firms to avoid committing resources to comply with exemption conditions that ultimately are likely to be modified or repealed. Finally, a time certain delay of 18 months will best achieve the Department's goal of providing certainty to financial services firms and investors.[5] Each of these comments are explained in more detail below.

1. <u>The 18-month delay is necessary for the Department to reexamine the fiduciary rulemaking and to coordinate with the SEC.</u>

In several letters to the Department expressing support for delaying the January 1, 2018 applicability date,[6] we strongly supported the principle that advice providers should act in their clients' best interest. We cautioned the Department, however, that it must critically reexamine and modify its fiduciary rulemaking in order to assure that advice providers can do so. In this respect, the fiduciary definition is overbroad and convoluted—turning commonplace interactions into fiduciary relationships and severely reducing exchanges of information currently provided at no cost to millions of retirement savers through call centers, walk-in centers, and websites. Many financial professionals serving retirement investors find that the BIC Exemption is unworkable or too burdensome to continue to

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advisers can use the BIC Exemption and related exemptions if they meet the Impartial Conduct Standards described in the exemptions. The other conditions of those exemptions are not applicable prior to January 1, 2018.

[4] *See* White House memorandum to the Secretary of Labor, dated February 3, 2017 and published at 82 Fed. Reg. 9675 (February 7, 2017), available at https://www.gpo.gov/fdsys/pkg/FR-2017-02-07/pdf/2017-02656.pdf (President's Memorandum").

[5] As discussed below, the Department should clarify that the applicability date of any modified rule and exemptions will become effective no sooner than one year after finalization.

[6] We have submitted several letters to the Department expressing support for delaying the January 1, 2018 applicability date. *See* letter from Brian Reid and David W. Blass, to Office of Regulations and Interpretations, Employee Benefits Security Administration, US Department of Labor (March 17, 2017), available at https://www.ici.org/pdf/17_ici_dol_fiduciary_applicability_ltr.pdf ("ICI's March 17 Letter"); letter from Brian Reid and David Blass, to Office of Regulations and Interpretations, Employee Benefits Security Administration, US Department of Labor (April 17, 2017), available at https://www.ici.org/pdf/17_ici_dol_fiduciary_reexamination_ltr.pdf ("ICI's April 17 Letter"); letter from Dorothy M. Donohue and David M. Abbey to Office of Exemption Determinations, Employee Benefits Security Administration, US Department of Labor (July 21, 2017), available at https://www.ici.org/pdf/30795a.pdf ("ICI's July 21 Letter"); letter from Dorothy M. Donohue and David M. Abbey to Office of Exemption Determinations, Employee Benefits Security Administration, US Department of Labor (August 7, 2017), available at https://www.ici.org/pdf/17_ici_rfiresponse_ltr.pdf ("ICI's August 7 Letter").

offer certain products and services. They simply cannot justify assuming the potential risk and liability, including the substantial threat of unwarranted litigation, for certain accounts. It is well understood now that the fiduciary rulemaking is causing dislocations and disruption within the financial services industry and limiting the ability of retirement savers to obtain the guidance, products, and services they need to meet their retirement goals.[7]

We appreciate, therefore, that the Department needs adequate time to carefully and thoughtfully review the comments it has received regarding the reexamination directed by the President's Memorandum.[8] It simply cannot ascertain the nature or extent of the modifications it will make to the rulemaking until it completes this reexamination. Our earlier comments stressed the importance of this review and emphasized the importance of the Department's completion of a new economic analysis as part of its reexamination.[9] A more balanced and comprehensive impact analysis will lead the

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[7] The failure of the BIC Exemption to meet its intended purpose of allowing commission-based models to continue has been well-documented in reports of intermediary actions regarding the rule. *See, for example,* "Edward Jones Shakes Up Retirement Offerings Ahead of Fiduciary Rule," *Wall Street Journal*, August 17, 2016, available at https://www.wsj.com/articles/edward-jones-shakes-up-retirement-offerings-ahead-of-fiduciary-rule-1471469692; "Fiduciary ready: Edward Jones Unveils Compliance Plans," *On Wall Street*, August 19, 2016, available at http://www.onwallstreet.com/news/fiduciary-ready-edward-jones-unveils-compliance-plans; and "JPMorgan Chase to Drop Commissions-Paying Retirement Accounts," Reuters, November 10, 2016, available at http://www.reuters.com/article/us-jpmorgan-wealth-compliance-idUSKBN1343LK. The rulemaking also has resulted in intermediaries "abandoning" a number of small-balance accounts. *See* ICI's April 17 Letter at pages 11-12. More recently, the Department received a number of new studies that demonstrate the ongoing harm of the rulemaking, including significant disruption and loss of services and loss of choice for retirement savers. *See, for example,* Appendix I of letter from Lisa Bleier, SIFMA, to US Department of Labor (August 9, 2017), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00599.pdf (study by Deloitte & Touche analyzing the impacts to retirement savers and financial institutions which resulted from decisions made and steps taken by the 21 financial institutions participating in the study); Appendix 2 of letter from David T. Bellaire, Financial Services Institute, to Employee Benefits Security Administration, Office of Exemption Determinations, US Department of Labor (August 7, 2017), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00596.pdf (Oxford Economics for the Financial Services Institute, Encouraging Market Alternatives to the Fiduciary Rule, based on survey of FSI members); Appendix B of letter from Richard Foster, Financial Services Roundtable, to Employee Benefits Security Administration, US Department of Labor (August 10, 2017), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00601.pdf (survey of a representative sample of all US financial professionals conducted by Harper Polling).

[8] The Department originally requested comments regarding the examination described in the President's Memorandum in March. *See* 82 Fed. Reg. 12319 (March 2, 2017). The Department also has received comments in response to its request for information published at 82 Fed. Reg. 31278 (Jul. 6, 2017), requesting input regarding potential changes to the rule and BIC Exemption, and potential new exemptions or streamlined exemptions.

[9] *See* ICI's April 17 Letter at pages 28-31, and Appendix B of ICI's August 7 Letter.

Department to conclude that a more targeted, principles-based approach to its rulemaking will better protect investors while ensuring the continuation of affordable access to financial guidance and products to help individuals prepare for a secure retirement.

Additionally, as the Department notes in the preamble to the 18-month delay proposal, the current timeframe would not accommodate the Department's desire to coordinate with the SEC in the development of a new proposal or changes to the rulemaking.[10] As we discussed in detail in ICI's August 7 Letter, we and many others believe that a Department-SEC coordinated approach to the fiduciary rulemaking will permit a more comprehensive and uniform regulatory environment that would better serve the interests of investors. In this respect, developing consistent standards that apply to retirement and non-retirement accounts presents a very clear path for reforming the Department's fiduciary rulemaking. A consistent approach will help all investors achieve better financial outcomes, increase efficiency, and preserve investor choice and access to advice. It ultimately will better enable financial services providers to deliver holistic investment advice and financial planning services to retail investors. ICI's August 7 Letter explains how the SEC and Department can accomplish these important objectives.[11] An 18-month delay will allow such a coordinated approach to be put in place with minimal disruption to financial services firms and investors.

2. <u>The delay would allow financial services firms to avoid unnecessary implementation costs, outweighing any costs of the delay.</u>

While the benefits of a delay to both the industry and retirement investors are clear, the costs of a delay are illusory or negligible at best. Absent a delay, service providers will continue to spend significant amounts preparing for January 1, 2018, the vast majority of which will be spent implementing the more cumbersome and technically complicated aspects of the BIC Exemption conditions. As the Department acknowledges, "the proposed delay avoids obligating financial services providers to incur costs to comply with conditions, which may be revised, repealed, or replaced, as well as attendant investor confusion."[12] The Department further explains that the proposed delay "would avert the possibility of a costly and disorderly transition from the Impartial Conduct Standards to full compliance with the exemption conditions" and that "investor losses from the proposed transition period extension could be relatively small" because the fiduciary rule and the Impartial Conduct Standards are already applicable, "which the Department believes will largely protect the investor gains

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[10] 82 Fed. Reg. 41365, at 41371.

[11] *See* ICI's August 7 Letter at pages 7-14.

[12] 82 Fed. Reg. 41365, at 41371.

estimated in the 2016 RIA."[13] Finally, the Department concludes that the reexamination will help identify alternatives that could reduce costs and increase benefits to all affected parties, without compromising protections for retirement investors.

We agree with the Department's assessment of the costs and benefits of a delay.[14] In addition to the cost savings the Department describes, our analysis shows that the Department's prior estimates of the cost of delay were speculative and illusory and that the tangible benefits of delaying the January 1, 2018 applicability date far outweigh any speculative costs of delay.[15] As widely reported, intermediaries have announced a variety of changes to service offerings, including no longer offering mutual funds in brokerage IRA accounts and raising account minimums or discontinuing advisory services and commission-based arrangements for lower balance accounts. Our estimates indicate that investors could lose $109 billion over 10 years due to the effects of these changes. This would amount to $780 million per month in losses to investors.[16]

Further, as we note in ICI's July 21 Letter,[17] the Department's previous calculation of benefits to investors associated with its fiduciary rulemaking does not factor in the current applicability of the Impartial Conduct Standards and is based on a mathematical error resulting in the Department's benefits estimates to be overstated by about 15 to 50 times.[18] The Administrative Procedure Act ("APA") does not "lock" the Department into its flawed impact analysis, but, rather, obligates it to depart from it.[19]

For the reasons discussed above, the impact calculation weighs heavily in favor of delaying the January 1, 2018 applicability date so that the Department can reexamine the fiduciary rulemaking and

[13] *Id.* at 41371-41372.

[14] The Department's assessment is consistent with the analysis set forth in ICI's July 21 Letter. *See* ICI's July 21 Letter at pages 8-15.

[15] *Id.* at pages 3-4 and 8-13.

[16] *See* ICI's March 17 Letter at pages 18-19.

[17] *See* ICI's July 21 Letter at page 8-13.

[18] *See* ICI's April 17 Letter at pages 18 through 28. The Department's impact analysis supporting the rule was flawed, exaggerating potential harm to investors if the rule was not made effective. ICI has repeatedly provided clear explanation showing that there simply is no basis for the Department's conclusion. These speculative benefits described by the Department will not offset the harm to investors caused by the rule.

[19] *See* Appendix B of ICI's August 7 Letter at pages B-7 to B-9, which explains that, under the APA, not only is the Department permitted to depart from its earlier analysis for appropriate reasons, it is obligated to do so when—as is the case here—new evidence or further analysis shows those conclusions to be wrong.

determine what modifications are necessary to protect retirement savers' access to guidance, products, and services—particularly lower- and middle-income savers with smaller account balances.

3. <u>A time-certain delay of 18 months will provide needed certainty to financial services firms and investors.</u>

The Department requests comments on how best to structure the delay of the applicability date, noting the following options: (1) a delay set for a time certain, (2) a delay that ends a specified period after the occurrence of a specific event (*e.g.*, the end of the Department's reexamination), and (3) a tiered approach where the delay is set for the earlier of or the later of a time certain and the end of a specified period after the occurrence of a specific event.[20]

We strongly support a time-certain delay of 18 months, particularly given the Department's statement that it anticipates finalizing its reexamination and proposing any amendments prior to the end of the 18-month delay period.[21] We also note that it is important that the Department signal its intention to provide adequate time for the industry to comply with any changes that the Department implements.[22] The Department should clarify that it will provide a period of at least one year following the finalization of any modifications, and more time, depending on the nature of modifications made and the resultant lead time required to meet any attendant compliance requirements. Finally, any conditions beyond the Impartial Conduct Standards and any changes to the fiduciary rule and related exemptions should be applicable on the same date to avoid operational complexity and investor confusion.

Such a time certain delay and indication of intent to provide adequate time to implement the new requirements will provide a clear roadmap as to how the Department intends to execute the reexamination and will provide needed certainty to financial services firms and investors.

4. <u>The Department should not impose additional conditions during the delay.</u>

The Department also requests input regarding other commenters' suggestion that the Department condition any delay of the Transition Period on the behavior of the entity seeking relief under the

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[20] 82 Fed. Reg. 41365, at 41371

[21] *Id.* at 41373.

[22] Absent this signaling, some financial services firms may feel the need to keep working toward implementation of the rulemaking, in anticipation of the remainder of the BIC Exemption and Principal Transaction Exemption becoming applicable on July 1, 2019.

Transition Period (*e.g.,* on a Financial Institution's showing that it will take steps to harness recent innovations).[23] The Department concludes that such conditions are inappropriate and not germane in the context of a decision whether to extend the Transition Period.[24] Further, the Department believes that the Impartial Conduct Standards as currently in effect will protect retirement investors and achieve the Department's goal for the rulemaking.[25]

We agree. The Department will not be able to determine the exact nature of modifications to the rulemaking until it completes the reexamination.[26] Therefore, the Department should not obligate financial services providers to comply with conditions that ultimately may be revised or repealed. Further, it would be inappropriate for the Department to only apply the delay to those who take steps to harness recent innovations. Some financial institutions may opt against using such innovations at this time for good reason—given the current regulatory uncertainty and their assessment of customer preferences. The Department simply is not in a position to prescribe specific products, services, and compensation structures that merit special treatment at this time.

5. The Department should extend its current temporary enforcement policy.

Finally, the Department also requests comment on whether, in connection with the delay, it should extend its current temporary enforcement policy covering the Transition Period.[27] Under this policy, the Department announced that, until January 1, 2018, it "will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions."[28]

The Department should extend this temporary enforcement policy for the same period covered by any new Transition Period. In conjunction with this extension, the Department should coordinate with the Treasury Department and the Internal Revenue Service (IRS) to confirm that, for purposes of applying IRS Announcement 2017-4,[29] the extension of the Department's temporary enforcement policy will

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[23] 82 Fed. Reg. 41365, at 41371.

[24] *Id.*

[25] *Id.* at 41373.

[26] *Id.* at 41371.

[27] *See* 82 Fed. Reg. 41365, at 41370, footnote 32.

[28] Field Assistance Bulletin (FAB) 2017-02 (May 22, 2017).

[29] IRS Announcement 2017-4 provides relief from the excise taxes under § 4975 of the Code that apply when a prohibited transaction occurs, and any related reporting requirements, to conform to the temporary enforcement policy described by

constitute "other subsequent related enforcement guidance." Extending the temporary enforcement policy is consistent with the Department's general approach to implementation, which emphasizes compliance assistance (rather than citing violations and imposing penalties).[30]

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The record strongly supports the Department delaying the January 1, 2018 applicability date for 18 months to allow it sufficient time to complete the reexamination of its fiduciary rulemaking. Such a delay ultimately will lead to the adoption of a best interest standard that better serves the interests of retirement investors. If you have any questions regarding our comments, or would like additional information, please contact Dorothy Donohue at 202-218-3563 or ddonohue@ici.org or David Abbey at 202-326-5920 or david.abbey@ici.org.

Sincerely,

/s/ Dorothy M. Donohue

Dorothy M. Donohue
Acting General Counsel
Investment Company Institute

/s/ David M. Abbey

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the Department in FAB 2017-01. In the announcement, IRS made clear that this relief also will extend to "other subsequent related enforcement guidance," which includes FAB 2017-02.

[30] *See* FAB 2017-02 and Question 15 of Conflict of Interest FAQs (Transition Period), issued May 2017, available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period-1.pdf.