Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

**Attention: Fiduciary Rule Examination, RIN 1210-AB79**

To the Department of Labor:

We are writing to express our strong support for the scheduled April 10, 2017, applicability date of the Department of Labor's fiduciary rule. We are opposed to any delay. As the department notes, retirement savers and other investors would be harmed by the delay, while the financial industry would benefit. Crucially, the costs to savers of a delay far outweigh any benefits to the financial industry. The department should conclude that the delay is unjustified.

Most savers do not know that it is currently legal in many cases for financial professionals to recommend higher-cost investment products that provide financial advisers with a higher commission but provide lower returns to advisers' clients. Most people do not understand that, unlike lawyers and doctors, all financial advisers are not required to act in their clients' best interests. The fiduciary rule would require that financial advisers provide retirement investment advice that is in the best interest of their clients. People who have worked hard to save for retirement need and deserve these common sense protections—protections that most people are shocked to discover aren't already in place.

The proposal to delay these important protections is simply unjustified.

The regulatory impact analysis (RIA) of the proposed delay utterly fails to establish that the benefits of delay outweigh the costs. The RIA acknowledges that the delay could lead to losses for retirement investors who follow affected recommendations. The RIA estimates that those losses could amount to $147 million in the first year and $890 million over 10 years using a three percent discount rate, with an equivalent annualized loss of $104 million. However, the

estimates of these losses miss important effects and necessarily lead the RIA to underestimate the losses. The RIA notes that the estimate is incomplete because, among other reasons, “it represents only one negative effect (poor mutual fund selection) of one source of conflict (load sharing), in one market segment (IRA investments in front-load mutual funds). Not included are additional potential negative effects of the proposed delay that would be associated with other sources of potential conflict.” For example, in addition to IRAs, the fiduciary rule also applies to 401(k)s, and the impact of delaying the rule in that nearly $5 trillion market segment is not taken into account in the department’s estimates.

The RIA notes that the losses to retirement investors would “continue to accrue until affected investors withdraw affected funds or reinvest them pursuant to new recommendations“ and that losses up to that point “would not be recovered, and would continue to compound, as the accumulated losses would have reduced the asset base that is available later for reinvestment or spending.” In other words, if there is a delay, losses to retirement investors will persist and compound long after the delay ends. This provides a powerful incentive to financial firms to use a delay period to recommend investment products with long surrender periods and high surrender fees. This means that the current measures of underperformance of conflicted funds may understate the underperformance during a delay, and thus the cost to retirement investors of a delay may be even further underestimated.

Additionally, the RIA does not even attempt to make the case that the potential reduction in compliance costs or any other industry costs associated with the delay offset the enormous costs to investors. Indeed, such a comparison would lead to the conclusion that the losses to investors far outweigh the reduction in compliance costs. The only estimate in the RIA of cost reduction to businesses is a $42 million reduction in day-to-day compliance burdens during the 60-day delay; an equivalent annualized value is $8 million using a three percent discount rate. This amounts to just 7.6 percent of the RIA’s estimated annualized potential losses to retirement investors as a result of the delay, $104 million.

Further, while acknowledging substantial uncertainty in its quantitative estimates, the RIA nevertheless fails to make any qualitative case that benefits to the industry meet or exceed losses on the part of retirement investors. The department simply does not provide anywhere near enough information for it to conclude that the benefits of the proposed delay justify its costs to retirement

investors. It would be arbitrary and capricious to move forward with the delay using only the information available in the RIA. On the other hand, if the department receives a great deal of additional information during the comment period upon which it believes it could potentially base a decision that the benefits of delay outweigh the costs to retirement investors, it would be required to issue another notice of proposed rulemaking (NPRM) with a complete RIA incorporating the new information that the public could comment on.

We have constructed an estimate of the reduction in gains to retirement investors as a result of the delay that takes into account not just front-load mutual funds, as the RIA estimate does, but also other types of load mutual funds and variable annuities held in IRAs. It should be noted, however, that our estimate is still a substantial underestimate because it leaves out all the other sources of potential conflict (for example, like the department's estimate, our estimate does not take into account 401(k)s). A detailed methodology for our estimate is attached. A benefit of our methodology is that it allows us to calculate the cost of a delay of any length, not just 60 days. The 60-day number in the NPRM appears to be pulled out of thin air, which is in itself arbitrary and capricious. An analysis should be based on the reasonably anticipated length of delay, not an arbitrary period.

**We estimate that every seven days that the fiduciary rule's applicability is delayed would cost retirement savers $431 million over the next 30 years. Thus, the costs of a 60-day delay to retirement savers is $3.7 billion, and each additional 30-day delay will add $1.85 billion to that estimate.** Given the large, persistent losses to retirement investors of even a weeklong delay, we oppose a delay of any length of the applicability date of the fiduciary rule.

Retirement investors need and deserve to receive the protections of the fiduciary rule without delay. The department should conclude that the proposed delay is unjustified and that the fiduciary rule should become applicable on April 10, 2017, as scheduled.

Sincerely,

Heidi Shierholz
Director of Policy at the Economic Policy Institute, and former Chief Economist at the Department of Labor

**Addendum: Methodology for estimating the losses to retirement investors of fiduciary rule delay**

Our methodology and assumptions were adapted from the 2015 report *The Effects of Conflicted Investment Advice on Retirement Savings* by the White House Council of Economic Advisers (CEA). The findings of the CEA report were cited extensively by the Department of Labor when the final Conflict of Interest Rule was published in April of 2016. The report finds that savers receiving conflicted advice earn annual returns that are roughly 1 percentage point lower each year than returns that savers would have earned if they had not received conflicted advice, and that an estimated $1.7 trillion of IRA assets are invested in products in which savers receive conflicted advice. These two estimates together yield an aggregate annual cost of conflicted advice to savers of about $17 billion each year.

The CEA report focuses only on IRA assets. Their “middle estimate,” which is what we base our main estimates on, focuses even more narrowly on load mutual funds and variable annuities held in IRAs. But the fiduciary rule also applies to other plans subject to Section 4975 of the Internal Revenue Code, including Keogh plans, as well as 401(k)s and other plans governed by the Employee Retirement Income Security Act. In 2015, there was a total of $4.7 trillion held in 401(k)s alone.[1] Moreover, the assets in retirement plans covered by the fiduciary rule and potentially affected by conflicted advice are not limited to load mutual funds and variable annuities, but also include, for example, fixed annuities. Therefore, the CEA estimate considers only a subset of assets potentially affected by the rule. Despite the fact that the CEA’s approach thus generates a substantial underestimate of the total costs of delay, we follow their approach.

In developing the estimate of the cost to retirement savers of a 60-day delay of the fiduciary rule, we believe that looking at the entire stock of IRA assets that are invested in products in which savers receive conflicted advice is inappropriate, due to inertia on the part of savers. It is unlikely that a meaningful share of savers who already hold IRA assets for which they received conflicted advice would move their investments into lower cost funds during those 60 days. Instead, we focus on *new* investments rolled over into IRAs during the 60-day delay that are potentially affected by conflicted advice.[2]

In 2014, $429.6 billion was rolled over into Traditional and Roth IRAs[3]. Rollovers have been increasing steadily over time; for example, between 2000 and 2014, rollovers into traditional IRAs increased by 4.6 percent annually on average (and increases were even greater in the later part of that period). Applying the growth rate of 4.6 percent to IRA rollovers, we estimate that at least $491.8 billion will be rolled over into IRAs in 2017. This annual figure is equivalent to $80.8 billion every 60 days.

Following the methodology in the CEA paper, and using updated numbers where available, we assume that somewhere between 14 percent and 47 percent of that $80.8 billion in new IRA rollovers will be subject to conflicted investment advice, with a middle estimate of 22 percent. Putting these together, we estimate that during the 60-day delay, somewhere between $10.9 billion to $37.9 billion will be newly rolled over in IRAs in which savers receive conflicted advice, with a middle estimate of $18.1 billion.

To estimate the cost to investors, we assume that the amount rolled over to IRAs and invested in assets affected by conflicts of interest is drawn down over 30 years. The 30-year horizon is based on the approximate life expectancy of investors and their spouses who roll over funds into IRAs. The average age of these investors is 58.[4] The remaining life expectancy of 58-year-olds is 27.0 years and the life expectancy of the longest-surviving spouse of a 58-year-old couple is 33.7 years.[5] Our 30-year assumption is conservative since it is likely that more than half of savers engaging in rollovers are married and many of them have somewhat younger spouses. Moreover, many IRA investors take only required minimum distributions beginning at age 70 rather than drawing down their savings over their remaining life expectancy, which roughly half of them will outlive. The empirical evidence suggests that the draw-down rate is much lower than we assume in our model.[6] We also assume that rolled-over funds remain in underperforming assets.[7]

Following the methodology in the CEA paper, we assume that savers receiving conflicted advice earn returns that are roughly 1 percentage-point lower each year than they would have been without the conflicted advice. In particular, we assume that savers receiving conflicted advice earn 3 percent per year in real terms, and savers who do not receive conflicted advice earn 4 percent per year in real terms. We find that the $18.1 billion invested in IRAs in which savers receive conflicted advice during the 60-day delay will yield $3.7 billion less (in inflation-

adjusted terms) when drawn down over 30 years than if those same savers had not gotten conflicted advice.[8] [9]

***In other words, we find that the cost of a 60-day delay to retirement savers is $3.7 billion dollars over 30 years. Every additional week of delay will increase that figure by $431 million and every additional 30 days of delay will increase that figure by $1.85 billion.***

1. Investment Company Institute, "2016 Investment Company Fact Book," (http://www.icifactbook.org/ch7/16_fb_ch7), Figure 7.9.
2. Note that rollovers into Traditional and Roth IRAs do not capture all new investments in a given period. Our focus on just Traditional and Roth IRAs is one of the ways in which our estimates are conservative.
3. Investment Company Institute, "The US Retirement Market, Third Quarter 2016" (https://www.ici.org/research/stats), Tables 9 and 10.
4. Figure 19 in Craig Copeland, "2014 Update of the EBRI IRA Database: IRA Balances, Contributions, Rollovers, Withdrawals, and Asset Allocation" (https://www.ebri.org/pdf/briefspdf/EBRI_IB_424.Aug16.IRAs.pdf), Employee Benefit Research Institute Issue Brief, 2016. The average age of rollovers is a weighted average, weighted by total rollover amounts by age.
5. Source for individual life expectancy: Internal Revenue Service, "Distributions from Individual Retirement Arrangements," Appendix B, Table 1 (https://www.irs.gov/publications/p590b/). Source for joint life expectancy: "Male/Female Joint Life Expectancies Based on Annuity 2000 Mortality Table" (https://www.pgcalc.com/pdf/twolife.pdf).
6. According to Figure 27 in Craig Copeland, "2014 Update of the EBRI IRA Database: IRA Balances, Contributions, Rollovers, Withdrawals, and Asset Allocation" (cited earlier), the median withdrawal rate from an IRA is 5.8 percent, not counting those not taking withdrawals, while our method results in an average draw-down rate of close to 15 percent.
7. It is possible that savers will shift toward better-performing funds rather than leaving the same amount in underperforming funds for 30 years—that is, that inertia on the part of savers isn't as strong as we are assuming. However, if we were to take into account reduced inertia in this context, we would also have to revisit our earlier assumption of full inertia vis-à-vis the entire stock of IRA assets held in conflicted accounts. There we assume that inertia on the part of savers means that savers who already hold IRA assets for which they received conflicted advice would not be more likely to move their investments into lower-

cost funds if the fiduciary rule were implemented without delay. Relaxing the inertia assumption could substantially *increase* our cost estimates, since there is more than $1.5 trillion held in conflicted IRA accounts.

**8.** These figures are adjusted for expected inflation over the next 30 years. However, they do not account for the possibility that people may discount future income relative to current income due to the opportunity cost of forgoing investment earnings or for other reasons. If future income is discounted by assumed rates of return, the cost of a 60-day delay to retirement savers is $2.1 billion and every additional 30-day delay will increase that figure by $1.06 billion.

**9.** There are several differences between the methodology used in the Department of Labor's (DOL's) Regulatory Impact Analyses (RIA) and EPI's methodology, including different time horizons and discount rates. The analyses also differ in the assets that are assumed to have worse performance net of fees as a result of conflicts of interest disallowed by the rule. For example, the DOL only considers front-end-load mutual funds, whereas our estimate (based on the CEA's "middle" estimate) includes all load mutual funds and variable annuities. Because the scope of DOL's analysis is limited to front-end load funds, its methodology can be tailored to investor losses on these funds based on the direct and indirect effect of such loads on net investor returns, taking into account turnover rates. The DOL also assumes that the fiduciary rule would take effect gradually and that there are declining costs even in the absence of the rule, whereas the CEA methodology that we base our estimates on assumes, based on a broad review of the literature, that conflicted advice reduces net returns on affected funds by 100 basis points annually.