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Invested in America

September 15, 2017

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US Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Reference: RIN 1210-AB82

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to respond to the Department of Labor's ("Department") Extension of Transition Period and Delay of Applicability Dates ("Extension").[2] We support the Department's proposed 18-month delay of the January 1, 2018 applicability date of the provisions in the Best Interest Contract Exemption, the Principal Transaction Class Exemption, and Prohibited Transaction Exemption 84-24 (together, the "Exemptions") relating to the redefinition of the term "fiduciary" under section 3(21) of ERISA and section 4975(e) of the Code (the "Rule") that are not now in effect, along with the other amended exemptions as part of this rulemaking.

The Delay Will Provide Additional Certainty

As we made clear in our letters of July 14, 2017[3] and August 10, 2017,[4] we believe a significant delay, designed to cover the period it takes for the Department to complete the review required by the President's February 3 memorandum, to propose revisions to the Rule and any necessary Exemptions, and to permit the industry and consumers to make appropriate adjustments after the Rule and Exemptions are finalized, is critical. Such a delay would provide certainty to investors and the financial services industry, and would prevent the continued expenditure of significant

[1] SIFMA represents the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.
[2] Dept. of Labor Notice of proposed amendments to PTE 2016-01, PTE 2016-02, and PTE 84-24, 82 Fed Reg. 41365 (August 31, 2017).
[3] https://www.sifma.org/resources/submissions/the-delay-of-the-january-2018-applicability-date/
[4] https://www.sifma.org/resources/submissions/request-for-information-regarding-the-fiduciary-rule-prohibited-transaction-exemptions/

amounts for systems, products or processes required by a Rule and Exemptions that almost certainly will undergo significant changes.

We appreciate the Department's request for comments on various delay approaches that, in whole or in part, would be tied to the occurrence of certain events, such as the completion of the President's required study or the publication date of a final Rule and Exemptions, as well as on "tiered" approaches that would tie the delay to the earlier or later of several dates or events.

We believe that a tiered approach extending the delay to the later of the 18-month period the Department proposed and a period ending 24 months after the completion of the review and publication of final rules will best avoid the confusion, uncertainty and cost associated with continued piecemeal delays. We believe a tiered approach that adopts a date certain but extends to a period that will be needed after a new Rule and Exemptions ultimately are adopted is the best way to assure the industry and retirement investors that they will not have to adjust to a set of regulations that likely will never come into effect and that they will have sufficient time to make whatever adjustments ultimately will be needed. We believe an approach that tied a delay to the ***earlier*** of two dates likely would have exactly the opposite effect, and would create a circumstance where industry and retirement investors always had to plan for the earliest possible applicability date (since they would never know when the event triggering the earlier date might occur). Our experience so far in assessing the time necessary to implement changes to the Rule proposed by the Department informs our belief that we will need at least 24 months after the Rule and Exemptions are finalized to be prepared for implementation, and we believe extending the delay to cover that period will provide sufficient certainty to the industry and retirement investors that after final rules are adopted there will sufficient time to thoughtfully implement them and that there will not be a continued series of starts and stops and piecemeal delays.[5]

Notwithstanding that we believe implementing the Rule and Exemptions once they are finally proposed will take time, we believe the industry and retirement investors will benefit from knowing the rules that govern their relationships as soon as possible (consistent with the Department's adequately completing the reassessment of the Rule and Exemptions as required by the President's February 3, 2017 memo). Toward that end, we hope the Department's decision to propose an 18-month delay reflects its sincere commitment to, and a belief that it will, complete its work before July 1, 2019 so that additional delays (at least before it proposes a new Rule and Exemptions) will not be needed. While we support the Department's effort to adhere to a July 1, 2019 timetable, we believe it will take at least that much time to complete the work directed by the President, to undertake meaningful coordination efforts with the SEC and other regulators and to propose necessary changes to the Rule and the Exemptions. We also anticipate that, in conjunction with any proposed new Rule and Exemptions, the Department will

[5] Some commenters have argued that the Department does not make a rational case that the delay will be necessary. This project was commenced in 2010 and it is not yet completed. The latest rule was proposed in 2015 and not final until 2017. We think there is a high probability that it will take a minimum of 18 months for the review mandated by the President, issuance of proposed changes, an appropriate comment period, and then issuance of a final rule.

propose for public comment new effective and applicability dates that take into account the changes and the need for an orderly and cost-effective implementation and compliance process. Once it is clear how the Rule is amended, and once the conditions to any new Exemptions are known, we will assess the Rule and the Exemptions and will provide comments to the Department regarding the time necessary to fully implement the Rule and Exemptions. If certain aspects of the Rule or the Exemption require less (or more) implementation and/or compliance efforts, then we could work with the Department on a shorter (or longer) applicability date for those aspects.

If the Department moves forward and adopts the 18-month delay it proposed instead of adopting the tiered approach we suggest, it will be important for it to extend that delay again, well in advance of July 2019, if it determines it will not complete its rulemaking and coordination efforts by that date. Moreover, we would urge the Department to clearly indicate when it adopts the delay that it intends to extend the delay if it is not able to complete its work by July 2019 in order to minimize the impact of the additional uncertainty created by repeated delays.

The Temporary Enforcement Policy Should Also be Extended

In footnote 32 of the proposed extension, the Department asks whether the temporary enforcement policy should be extended. We strongly believe that the Department should have made it clear that the non-enforcement policy was also being extended, and in support of that proposal, noted that the cost of enforcement actions in the face of the uncertainty in the language of the exemptions' impartial conduct standards makes it critical that the non-enforcement policy coincide with the end date of the Extension.

As the Department stated in its Temporary Enforcement Policy on Fiduciary Duty Rule[6], the Department has made compliance assistance for plan fiduciaries and other services providers a high priority, rather than focusing on costly investigations and assessing violations. The Policy states, "The Department has repeatedly said that its general approach to implementation will be marked by an emphasis on assisting (rather than citing violations and imposing penalties on) plans, plan fiduciaries, financial institutions, and others…." Thus, it is surprising, having issued the Temporary Enforcement Policy, and made the findings that underpin it, that the Department asked for comment on extending the policy, rather than simply announcing, as it did when it was issued, that the Temporary Enforcement Policy would be in effect. In any event, the Department should extend the Temporary Enforcement Policy concurrent with the end date of any extension of the transition period. Further, we urge the Department to coordinate with the Treasury Department and the IRS to confirm that, for purposes of applying IRS Announcement 2017-4, the extension of the Department's temporary enforcement policy will constitute "other subsequent related enforcement guidance."

[6] https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02

Any New Exemptions Should Be Broad-Based

While we appreciate the questions on which the Department has asked for comment, we are concerned that the Department continues to look at creating new exemptions based on particular recent "innovations" that the Department prefers. Further, we do not believe the Department should condition delays upon adoption of any specific "innovations" by entities that rely on the transition relief during the Transition Period. In the request for comments on the proposed delay, the Department highlights one commenter's views about conditioning the granting of an exemption upon "showing that it has, or a promise that it will, take steps to harness recent innovations in investment products and services, such as 'clean shares.'"[7] As the industry has made clear, it has worked diligently to comply with the existing rules and it will do so with respect to the new rules. Denying relief to a company because it has failed to adopt "recent innovations" favored by the Department is simply not appropriate and surely would be unprecedented.

In addition, as we have noted in the past, exemptions should be generally applicable to many different business models, and not simply the business model that the Department prefers. The new exemptions should be broad-based, readily understood and implemented, and not dependent on selling a particular kind or class of security. Thus, an exemption only for the use of T shares or clean shares is too narrow; a principal exemption that covers only the products that the Department thinks are most appropriate for IRAs is too narrow. The reason for our continued position that the SEC should take the lead on a standard of conduct is that its rules do not try to remake the market, or limit the product offerings in the market. A broad, principles based (rather than product based or business model based) exemption would provide the best path forward to allow for future innovations.

Amendment Needed to the Principal Transaction Exemption Immediately

We urge the Department to amend the Principal Transaction Exemption for the transition period to remove the limits on products that can be traded on a principal basis, and allow those products that have historically been traded in the principal market to continue to be bought and sold by IRAs and plans, including, but not limited to, foreign currency, municipal bonds, and equity and debt IPOs. The transition rule for BIC allows any product to be traded by plans and IRAs so long as it was, prior to June 9, generally traded on a riskless principal basis. The same construct should apply to the principal transaction exemption. In addition, for the transition period, relief should be provided in the Principal Transaction Exemption from the prohibitions of section 406(b)(3) and section 4975(c)(1)(F) to allow the purchase of securities in an underwriting where the financial institution is in the underwriting syndicate.

[7] Dept. of Labor Notice of proposed amendments to PTE 2016-01, PTE 2016-02, and PTE 84-24, 82 Fed Reg. 41365 (August 31, 2017) at 41371

No Harm in Delaying

We would also use this opportunity to address the question of the potential harm to investors if the Department was to move forward with this delay. We would refer the Department back to our comment letter of August 9, 2017 as we prepared for the June 9th implementation date. In that letter, we refute the supposed harm to investors if the rule is delayed, while also showing the harm if the Department actually moves forward with the current rule unchanged. We were concerned then, and are even more concerned now, that some of the changes that have taken effect in order to comply with this rule, will make it more difficult for investors to save. We believed that this rule would limit product choice, decrease access to one-on-one advice, increase costs, and lead to the abandonment of smaller accounts. Our study, detailed in our August 9th letter shows these impacts.[8] Those impacts will become even greater if the rest of the rule goes into effect as finalized. If these Rules go into full effect, they will continue to cause significant disruption, loss of services and loss of choice for retirement savers, as described in our market impact study, but also other comments and studies provided to the Department since March 2017. The negative consequences outlined in detail in these submissions, including the cutbacks in products and services to retirement accounts that have occurred since April will be exacerbated if the exemptions, as finalized in April 2016, take effect on January 1, 2018. We urge the Department to carefully review the data that has been collected that supports the conclusion that the Rule has resulted in significant harm to retirement savers.

Further, supporters of the current version of the rule are concerned that this rule must be fully in effect for it to have an impact. That is simply not true. As the Department stated in the original delay published April 7, 2017, since the Impartial Conduct Standards are in force they already help "ensure that retirement investors experience 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 prohibited transaction exemption conditions."[9]

We would also take issue with commenters who argue that the investors will be harmed based on the now repudiated studies that lead to the Department's erroneous cost analysis and failed to recognize the changes in the industry, announced or implemented, that will increase costs to retirement savers, not reduce them. Our study highlighted the many changes that have occurred in the industry, which shows that previous cost analyses may now be out of date.

[8] https://www.sifma.org/resources/submissions/deloitte-study-on-the-dol-fiduciary-rule-august-2017/

[9] 82 Federal Register 66, p. 16912 (April 7, 2017)

Conclusion

We continue to encourage the Department to work closely with the SEC and FINRA to develop a rule that best serves the needs of retirement savers as the Department continue to move forward on this regulatory project.

We ask the Department to act quickly in finalizing this extension to provide certainty to the market and minimize risk of customer confusion.

Sincerely,

Lisa J. Bleier
Managing Director & Associate General Counsel