Congress of the United States
Washington, DC 20510

September 15, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712, 11713, 11850
U.S. Department of Labor
200 Constitution Avenue, NW
Suite 400
Washington, DC 20210

Re: Extension of Transition Period (RIN 1210-AB82)

Dear Secretary Acosta:

As we wrote in our July 21, 2017 comment to the Department of Labor's (the "Department" or "DOL") Request for Information ("RFI") in connection with its examination of the final rule defining who is a "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), we strongly oppose any delay in the January 2018 applicability date of certain provisions of the final rule. Any delay will weaken protections, cause confusion, and harm Americans saving for retirement. Moreover, an 18-month delay seems unreasonable given the lack of justification and the speed with which it was proposed. Simply, there is no evidence to support such a delay.

We remind you that further delay serves neither the interests of industry nor investors. The constant uncertainty makes it difficult for industry to properly plan for compliance, and it causes confusion for retirement savers as to what protections they are afforded while temporary enforcement policies remain in place.[1] The delay is particularly puzzling given the first partial effective date in June, which, contrary to concerns, did not send the financial services industry into a tailspin. In fact, the head of client experience and growth at Wells Fargo Advisors stated that "[i]t went very smoothly...[and she] would liken it to Y2K: We did a lot of preparation and a lot of work for a day that ended up feeling a lot like any other day."[2]

We also reiterate our concern that the Department's dilatory actions are merely a pretext for weakening retirement investor protections in the final rule. The Department's actions thus far support our concerns, as it has now sought comments regarding delays on three separate occasions: (1) the initial applicability delay from April 10, 2017 to June 9, 2017; (2) the RFI on the January 1, 2018 applicability date; and (3) the proposed 18-month delay for the January 1,

[1] Department of Labor, "Field Assistance Bulletin No. 2017-03," (Aug. 30, 2017) ("[T]he Department of Labor will not pursue a claim against any fiduciary based on failure to satisfy the BIC Exemption or the Principal Transactions Exemption, or treat any fiduciary as being in violation of either of these exemptions if the sole failure of the fiduciary to comply with either the BIC Exemption or the Principal Transactions Exemption, is a failure to comply with the Arbitration Limitation in Section 11(f)(2) and/or Section II(g)(5) of the exemptions."). This represents the third announcement of a temporary enforcement policy related to the fiduciary rule.

[2] David Nicklaus, "Despite complaints, fiduciary rule phase-in is going smoothly," *St. Louis Post-Dispatch* (June 18, 2017), http://www.stltoday.com/business/columns/david-nicklaus/despite-complaints-fiduciary-rule-phase-in-is-going-smoothly/article_d0dfd00a-4706-5d87-b8a9-029a7cfee9da.html.

2018 applicability date. The Department has spent considerable resources in a short period of time on delaying the rule, rather than studying its substance and impact.

For example, on August 31, 2017, the Department proposed extending the transition period and granting an 18-month delay for certain applicability dates.[3] This proposal comes just 41 days after the closure of the comment period regarding the January 1, 2018 applicability date, and 24 days after the deadline for comments on all other requests in the RFI.[4] In response to the RFI, there were 643 public comments and 9 petitions representing 71,579 individual comments listed on the Department's website. While it is unclear if these numbers represent all comments received, it does suggest an accelerated review of such comments.[5]

Earlier this year, in a *Wall Street Journal* op-ed, you acknowledged that "[a]gency heads have a legal duty to consider all the views expressed before adopting a final rule."[6] We urge you to follow the law and carefully and critically review not only the public comments, from which there is no new information to support weakening protections for retirement savers, but also the industry's reactions to the partially implemented rule. Simply because the President asked the Department to review certain cost-benefit analyses, it does not justify substantially altering a rule that will help millions of Americans save for retirement.[7]

We continue to support the rule as finalized and urge you to proceed with the January 1, 2018 applicability date for the remaining provisions of the rule.

Sincerely,

Patty Murray
Ranking Member,
Senate HELP Committee

Ron Wyden
Ranking Member,
Senate Finance Committee

[3] Department of Labor, "Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption (PTE 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries, and Employee Benefit Plans and IRAs (PTE 2016-02); Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (PTE 84-24), 82 Fed. Reg. 41,365 (Aug. 31, 2017).
[4] Department of Labor, "Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions," 82 Fed. Reg. 31,278 (July 6, 2017).
[5] It is difficult to determine the total number of comments submitted for the RFI. On the Federal Register website, it indicates that no comments were submitted. *See* https://www.federalregister.gov/documents/2017/07/06/2017-14101/request-for-information-regarding-the-fiduciary-rule-and-prohibited-transaction-exemptions. However, if you click that link, it takes you to regulations.gov, which reports receiving 147 comments. *See also* https://www.regulations.gov/document?D=EBSA-2017-0004-0001. It is unclear whether the DOL's website reflects these comments. *See* https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79-and-1210-AB82.
[6] Alexander Acosta, "Deregulators Must Follow the Law, So Regulators Will Too," *Wall Street Journal* (May 22, 2017), https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029.
[7] Presidential Memorandum on Fiduciary Duty Rule, 82 Fed. Reg. 9,675 (Feb. 3, 2017) (instructing DOL to "[p]repare an updated economic and legal analysis concerning the likely impact of the Fiduciary Rule" and specifying three questions to consider).

Sherrod Brown
Ranking Member,
Senate Banking, Housing, and
Urban Affairs Committee

Robert C. "Bobby" Scott
Ranking Member,
House Committee on Education
and the Workforce

Maxine Waters
Ranking Member,
House Financial Services Committee