



March 17, 2017

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

Attention: Fiduciary Rule Examination

Re: Definition of the Term "Fiduciary" – Proposed Delay of Applicability Date, RIN 1210-AB79 ("Proposed Delay"), 82 Fed. Reg. 12319 (Mar. 2, 2017) ("Release")

Dear Madam/Sir:

We¹ are writing to express our strong opposition to the Department of Labor's ("DOL") Proposed Delay in the applicability date of the fiduciary duty rule ("Rule").

The Rule is an extraordinarily important and thoroughly considered measure, carefully developed by the DOL over the course of a six-year rulemaking process. It is in fact long overdue, and any delay in its implementation will inflict enormous harm on the American public. With each passing day that the rule is put on hold beyond the initial applicability date of April 10, 2017, hard-working Americans will collectively lose millions of dollars in retirement savings. That damage comes in the form of poor investment returns coupled with the payment of bloated commissions and fees that line the pockets of financial advisers who are not yet required to give investment advice solely in their clients' best interest.

While delaying implementation of the Rule would allow adviser conflicts of interest to continue unabated, thus imposing huge daily costs on investors, it would serve no

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

legitimate purpose. Although the Release claims that the rationale for the delay is “to address questions of law and policy,” Release at 12319, the DOL has already exhaustively considered the questions of law and policy surrounding the Rule during the six-year rule-making process—including the three specific issues the new Administration apparently seeks to re-examine. *See* Memorandum for the Secretary of Labor, 82 Fed. Reg. 9,675 (Feb. 7, 2017) (“Presidential Memorandum”). The current rulemaking record has already convincingly established that the Rule is necessary to implement the Employee Retirement Income Security Act (“ERISA”) and the related provisions of the Internal Revenue Code as Congress intended, thus ensuring that conflicts of interest among advisers are no longer allowed to bleed off the retirement savings of American workers and retirees. The record also makes clear that the concerns raised in the Presidential Memorandum have no basis: The Rule will not restrict access to products or advice, unduly disrupt the retirement services industry, or spawn excessive litigation.

Moreover, three federal district courts have firmly rejected a wide variety of legal attacks filed against the Rule, including allegations that the Rule would cause the very harms cited in the Presidential Memorandum. And two of those courts have specifically rejected attempts to delay the Rule, holding that the public interest would suffer far greater harm than the regulated industry if the Rule were stayed or preliminarily enjoined pending litigation on the merits or pursuit of an appeal.²

Thus, on the current rulemaking record, and in light of the court decisions, no delay of the Rule can be justified.³ In summary, the Proposed Delay must not be implemented because—

1. it would unlawfully prolong a significant conflict between the DOL’s original rule and ERISA;
2. it would inflict enormous harm on the American public, causing them to continue losing millions of dollars per day in hard-earned retirement savings;
3. it would serve no legitimate purpose, since the re-examination of the Rule on which it is predicated is a pointless exercise;

² *See Mkt. Synergy Grp., Inc. v. U.S. Dep’t of Labor*, No. 16-CV-4083-DDC-KGS, 2016 WL 661592 (D. Kan. Feb. 17, 2017) (“*Market Synergy II*”); *Chamber of Commerce v. Hugler*, No. 3:16-cv-1476-M, 2017 WL 514424 (N.D. Tex. Feb. 8, 2017) (“*Chamber*”); *Mkt. Synergy Grp., Inc. v. U.S. Dep’t of Labor*, No. 16-CV-4083-DDC-KGS, 2016 WL 6948061 (D. Kan. Nov. 28, 2016) (“*Market Synergy I*”); *Nat’l Ass’n for Fixed Annuities v. Perez*, No. 16-1035-RDM, 2016 WL 6902113 (D.D.C. Nov. 23, 2016) (“*NAFA II*”); *Nat’l Ass’n for Fixed Annuities v. Perez*, No. 16-1035-RDM, 2016 WL 6573480 (D.D.C. Nov. 4, 2016) (“*NAFA I*”).

³ The Proposed Delay must be evaluated in light of the entire rulemaking record underpinning the Rule. Therefore, we hereby incorporate by reference, as if fully set forth herein, that entire rulemaking record, including, without limitation, the Rule and the accompanying Prohibited Transaction Exemptions (“PTEs”), the releases accompanying the Rule and the PTEs, the Regulatory Impact Analysis, the comment letters on the proposed Rule, and the testimony delivered at the four-day hearing convened by DOL in August of 2015. We also incorporate by reference, as if fully set forth herein, all of the decisions issued by the courts that have ruled on challenges to the Rule. *See* cases cited in text *supra*.

4. it suffers from numerous procedural flaws, including a comment period that is far too short; and
5. by virtue of all of the foregoing defects, it would violate the bedrock principle of administrative law embodied in the Administrative Procedure Act, which prohibits arbitrary and capricious agency action.

In our view, the Proposed Delay, if finalized substantially in its current form, would be vulnerable to a successful challenge in court seeking declaratory and injunctive relief.

COMMENTS

1. The Proposed Delay would prolong a significant conflict between the old fiduciary duty rule and applicable law.

A. In ERISA, Congress established a clear and simple test for applying the fiduciary duty to advisers.

The Proposed Delay suffers from a critical legal flaw that does not hinge on the scope, accuracy, or conclusions of any cost-benefit analysis: Any delay in the application of the new Rule would perpetuate a fundamental conflict that currently exists between the old fiduciary duty rule and the plain language and remedial purposes of ERISA. In ERISA, Congress used broad, clear, and unconditional wording to impose the fiduciary duty on any person that “renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property” of a covered plan. 29 U.S.C. § 1002(21).

ERISA also articulated the important purposes of the law, observing that “the continued well-being and security of millions of employees and their dependents are directly affected by” retirement plans; that “adequate safeguards” were not in place to protect those assets; and that it was therefore important to establish “standards of conduct, responsibility, and obligation for fiduciaries” of such plans. 29 U.S.C. § 1001(a), (b).

Congress did not condition the application of the fiduciary duty on any considerations surrounding the magnitude of the costs to the adviser industry of complying with the duty. Congress had already determined that retirement assets required the strongest possible protections under the law, regardless of the impact those protections might have on the regulated industry.⁴

⁴ See also *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 106 (2008) (“ERISA imposes higher-than-marketplace quality standards . . . requiring a plan administrator to ‘discharge [its] duties’ in respect to discretionary claims processing ‘solely in the interests of the [plan’s] participants and beneficiaries.’”).

B. The original DOL rule created a material conflict with ERISA, and the resolution of that conflict through implementation of the new Rule must not be delayed.

The DOL's original fiduciary duty rule, adopted in 1975, betrayed both the letter and spirit of these ERISA provisions. It established an elaborate five-part test that an adviser must satisfy before being subject to the fiduciary duty, including a requirement that advice be given on a regular basis. In the 1975 rule, the DOL thus in effect re-wrote the law and severely restricted its application to advisers. The new Rule resolves this conflict by voiding the old five-part test and replacing it with one that much more closely reflects and promotes the language and purposes of ERISA.

The provisions in the new Rule that ameliorate this conflict are scheduled to become applicable on April 10. But if the Proposed Delay goes into effect, then this significant regulatory deviation from the plain language of ERISA will continue. This is untenable, irrespective of any cost-benefit considerations.

C. Two recent court decisions confirm that the Rule will help eliminate this conflict with ERISA.

Challenges to the Rule have been filed in four federal courts. *See* cases cited *supra* at 2. All three courts that have reached the merits have thoroughly rejected every one of the plaintiffs' attacks on the Rule. In two of those cases, the courts have expressly found that the new Rule more closely adheres to ERISA than the old rule does. Specifically, in *NAFA II*, the federal district court in D.C. rejected the plaintiff's claim that the Rule exceeded the DOL's authority under ERISA by removing the five-part test and replacing it with a different interpretation governing when a person "renders investment advice" for purposes of being held to the fiduciary standard. *NAFA II* at *14-15. The court explained that the Rule is actually more in line with ERISA than the old rule: "**Indeed, if anything, it is the five-part test—and not the current rule—that is difficult to reconcile with the statutory text.** Nothing in the [statutory] phrase 'renders investment advice' suggests that the statute applies only to advice provided on a regular basis." *Id.* at *15 (emphasis added).

The federal district court in Texas was equally emphatic in ruling that the new Rule "better comports with the text, history, and purposes of ERISA." Specifically, in *Chamber*, the court rejected the plaintiffs' claim that ERISA requires regular contact between an investor and an adviser to trigger the fiduciary duty:

Plaintiffs argue the DOL's interpretation of what it means to render investment advice is entitled to no deference, because ERISA requires regular contact between an investor and a financial professional to trigger a fiduciary duty. **If anything, however, the five-part test is the more difficult interpretation to reconcile with who is a fiduciary under ERISA.** The broad and disjunctive language of ERISA's three prong fiduciary definition suggests that significant one-time transactions, such as rollovers, would be

subject to a fiduciary duty. Under the five-part test, however, such a transaction would not trigger a fiduciary duty. This outcome is seemingly at odds with the statute's text and broad remedial purpose An interpretation covering such transactions better comports with the text, history, and purposes of ERISA.

Chamber at *13 (emphasis added).

D. The Proposed Delay would also violate Executive Order 12866.

Executive Order 12866 established the principles and specific requirements that all executive branch agencies, including the DOL, must follow in the rulemaking process. Exec. Order No. 12866, Regulatory Planning and Review, September 30, 1993, 58 Fed. Reg. 51735 (Oct. 4, 1993) ("E.O. 12866"). It expressly obligates agencies to ensure that their regulations are "**consistent with applicable law.**" *Id.* at § 2(a) (emphasis added); *see also* Preamble at 1 ("the regulatory process shall be conducted so as to meet applicable statutory requirements"). By seeking to delay the applicability date of the new Rule, the DOL is acting in direct conflict with its duty under E.O. 12866, as any delay will allow a clear, judicially-recognized conflict between the old rule and applicable law (ERISA) to persist.

2. The Proposed Delay would impose enormous costs on millions of Americans, under the most conservative metrics, and those costs would overwhelm the speculative and amorphous industry benefits cited in the Release.

A. The harm to investors would dwarf the benefits to industry, based on the most conservative estimates.

The vast rulemaking record compiled by the DOL over the past six years, including the Regulatory Impact Analysis ("RIA"), makes abundantly clear that delaying the beneficial protections of the Rule would do far more harm than good. The Release acknowledges the significant threat to investors. For example, the Release repeatedly notes that "delay could lead to losses for retirement investors who follow affected recommendations . . ." Release at 12320; *see also id.* ("The negative consequence of [delay] is the potential for retirement investor losses from delaying the application of fiduciary standards to their advisers").

Drawing on the RIA, the Release then provides quantified estimates of costs to investors that are nearly four times the savings that the industry is expected to derive from the delay. The DOL projects that a 60-day delay could lead to a reduction in estimated investment gains of \$147 million in the first year and \$890 million over 10 years using a three percent discount rate. In contrast, the DOL projects cost savings to firms of \$42 million during those 60 days. Release at 12320-21. There is no credible evidence in the record to counter these projections showing the vastly greater harm that delay will inflict on retirement savers relative to the industry.

On the basis of this cost-benefit analysis alone, the Proposed Delay cannot be justified. And it certainly fails the test set forth in E.O. 12866, which provides that each agency shall “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” *See* E.O. 12866 at § 1(b)(6).

B. The many unquantified benefits of the Rule highlight the additional harm that delay will cause.

The foregoing cost-benefit analysis actually underestimates the deeply negative impact of the Proposed Delay. The DOL’s RIA in support of the Rule has always been extraordinarily conservative, focusing solely on one type of conflict of interest, in recommendations for one type of product, as applied to one type of account (IRA owners). Without question, conflicts of interest have a much broader and deeper impact on retirement savers, and any delay in the application of the new Rule would pose a commensurately greater threat to investors. These additional losses are enormous, not just minor adjustments to the estimates already used to quantify the benefits of the Rule. The Release itself aptly describes the litany of additional investor losses that would have to be evaluated and quantified to achieve anywhere near a complete cost-benefit analysis of the Proposed Delay:

The illustration [of investor losses] is incomplete because 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 conflicts, such as revenue sharing, or mark-ups in principal transactions, other effects of conflicts such as excessive or poorly timed trading, and other market segments susceptible to conflicts such as annuity sales to IRA investors and advice rendered to ERISA-covered plan participants or sponsors.

Release at 12320-21.

And the Proposed Delay threatens yet further qualitative harms that are not reflected in the DOL’s analysis. E.O. 12866 makes clear that such unquantifiable costs or benefits are “essential to consider,” and it requires agencies to evaluate them in any cost-benefit analysis. E.O. 12866 at § 1(a). In this context, the non-monetary costs of delaying implementation of the Rule include a wide variety of very real and damaging effects on quality of life arising from a shortage of adequate resources in retirement. Among them are poor nutrition; loss of access to medical care and medication; anxiety and depression; impaired self-esteem; guilt and remorse stemming from reliance on family members for basic needs; substandard housing; inadequate day-to-day care that is commonly essential in the later years of life; and many others.

These costs would likely befall many investors even after a relatively short delay in the Rule. For example, a single financial transaction, such as a rollover of all retirement savings at the end of a career, can have long-lasting and extremely damaging effects on investment returns if prompted and guided by an adviser with conflicts of interest. And to the extent that the Proposed Delay actually portends a series of additional delays, as suggested in the Release, the harm to investors will be that much greater. *See* Release at 12325 (noting that the DOL may issue a further extension of the applicability date).⁵

C. The court decisions remove any doubt that delay cannot be justified under a “balance of harms” test.

Two courts have recently rejected attempts to enjoin the Rule, holding that the harm to investors from a delay in implementation would far exceed the benefits to the complaining industry. For example, in *Market Synergy I*, the Kansas federal district court concluded that **“Any injunction will produce a public harm that outweighs any harm that plaintiff may sustain from a rule change.”** *Market Synergy I* at *30 (emphasis added). The court went on to emphasize the absence of any basis in the administrative record for questioning the DOL’s conclusion that the Rule would produce valuable net benefits:

The DOL has determined that the rule changes will benefit retirement investors throughout the United States by requiring investment advisers to act in the best interest of those investors. Congress authorized the DOL to evaluate these competing interests and it has concluded that significant public interests favor the proposed regulatory changes. **As already explained, evidence in the administrative record supports the DOL’s determination and the court finds no basis for contradicting those findings.”**

Id. (emphasis added).

In *NAFA I*, the D.C. district court squarely rejected all of the plaintiff’s claims against the Rule. The plaintiff then sought a stay pending appeal, and the court rejected that request as well in *NAFA II*, with a special focus on the need to ensure that the “core protections” in the Rule go into effect no later than April of 2017:

Second, this [is] not a case in which other interested parties or the public will suffer “little if any harm” if the new rules are enjoined pending appeal. The fundamental premise of the challenged rules is that those who provide investment advice to ERISA plans and IRAs on a commission basis have a conflict of interest that, absent further protections, the plan and IRA owners

⁵ The Release seems to portray the Proposed Delay as offering benefits to investors: “advisers, **investors**, and other stakeholders would be spared the risk and expenses of facing two major changes in the regulatory environment.” Release at 12320 (emphasis added). As framed, this purported benefit to investors is irrational and unsupported, constituting an arbitrary and capricious assessment of the impact on investors stemming from a delay of the Rule.

who they advise will suffer economic losses. It was for this reason that the [DOL] rejected requests—similar to the request that NAFA now makes—that the transition period extend over a period of two to three years. [citations omitted] Although the Department did agree that certain requirements would not take effect until January 1, 2018, it required that “certain core protections”—most notably, the requirement that financial institutions and advisers abide by the duties of prudence and loyalty—go into effect on April 20, 2017, in order to address “concerns about ongoing harm to [r]etirement [i]nvestors.”

NAFA II at *3.

Similarly here, the administrative record contains nothing that justifies a delay in the applicability dates of the Rule, and it is imperative that its “core protections” go into effect as scheduled in April.

D. If confronted during the pending comment period with new evidence of industry harm absent delay, the DOL must carefully evaluate the legitimacy of such evidence, and counter it by fully quantifying all of the additional harms that a delay would inflict on retirement savers.

Industry proponents of delay can be expected to submit comment letters offering supposedly fresh evidence that the benefits of the Proposed Delay would actually outweigh the costs. Often, such evidence is wholly unreliable, coming in the form of biased, paid-for studies; based on selective and incomplete data sets; and relying on hidden or erroneous assumptions. If the record in this rulemaking is similarly cluttered with bogus support for delay, the DOL must closely scrutinize it and discount it wherever appropriate.

Furthermore, to appropriately counterbalance any evidence of industry harm presented during this comment phase, the DOL must fully examine, describe, and quantify **all** of the investor harms that would flow from a delay, in addition to the damaging effects on IRAs already examined at length in the RIA and recapitulated in the Release. Such an analysis would have to include a quantified assessment of all costs associated with all types of conflicts of interest, exacted from all types of retirement accounts, from the sale of all types of investment products. Only then will the DOL have a sufficiently complete and accurate cost-benefit analysis with which to evaluate any delay of the Rule.⁶

⁶ In addition, because the Proposed Delay has been correctly classified as economically significant under Section 3(f)(1) of E.O. 12866, the DOL must also develop and provide to OIRA an “assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation . . . and an explanation why the planned regulatory action is preferable to the identified potential alternatives.” E.O. 12866 at § 6(3)(C)(iii). The Release does not currently reflect that analysis.

3. The Proposed Delay would serve no legitimate purpose because the re-examination is a pointless exercise.

A. The rulemaking record has already addressed the concerns identified in the Presidential Memorandum, as have the judicial decisions.

The DOL has proposed the delay as a result of the Presidential Memorandum directing the DOL to re-examine several aspects of the Rule, including whether it will restrict investors' access to financial products or advice, unduly disrupt the retirement services industry, or generate excessive litigation to the detriment of investors. The Release explains that the delay is necessary to prevent market disruptions that could arise if the re-examination required by the Presidential Memorandum prompts the DOL to rescind or revise the Rule. Release at 12320.

In reality, however, the re-examination of the rule has no basis whatsoever, and the delay therefore lacks any legitimate purpose or rationale. All three of the issues cited in the Presidential Memorandum were thoroughly examined by the DOL during the rulemaking process. The Release itself makes the point and the judicial decisions remove any doubt.

The Release reviews several key findings in the rulemaking record, including the RIA, directly related to the issues raised in the Presidential Memorandum. For example, with respect to the potential for market disruption, the Release observes that the RIA "examined a variety of potential and anticipated market impacts" and concluded that "the final rule and exemptions would move markets toward a more optimal mix of advisory services and financial products." Release at 12323. The Release also reviews the findings of the RIA with respect to the impact the Rule may have on access to advice. It notes that according to the RIA, "quality, affordable advisory services would be available to small plans and IRA investors under the final rule and exemptions," and that "the final rule and exemptions would foster competition to innovate in customers' best interest." *Id.*

The judicial decisions rejecting the Rule challenges confirm that the questions raised in the Presidential Memorandum have already been addressed. For example, in the *Chamber* case, the court found that the DOL had "assessed the Plaintiffs' concerns that the rules would decrease access to investment advice." *Chamber* at *34. The court further held that "after analyzing the relevant evidence," the DOL had reasonably concluded that "fewer conflicts of interest, more transparency, and a more efficient market would 'increase the availability of quality, affordable advisory services for small plans and IRA investors,' and that [the Rule] would not have 'unintended negative effects on the availability or affordability of advice.'" *Id.* (citing to and quoting from the administrative record). The court also found that the DOL had addressed issues surrounding potential litigation liability, as well as allegations that the Rule and the exemptions would prove to be unworkable and therefore disruptive for the industry. *Id.* at *31, *34 (finding that DOL had reasonably considered and addressed concerns about litigation liability and the potential for more class action lawsuits); *19 (finding that the DOL had addressed ways the industry could adapt to the BICE); *30 (finding

that the DOL had discussed the various ways IMOs and independent agents could respond to the new rules); *32 (finding that the DOL had “considered the relevant factors for BICE’s workability, addressed commenter concerns, and reasonably justified its conclusions, thereby satisfying the APA’s requirements”).

All of these sources show that the three questions raised in the Presidential Memorandum have all been answered. This constitutes another reason why the Proposed Delay should be withdrawn, as it serves no legitimate purpose.

B. The Presidential Memorandum offers no new evidence supporting a re-examination of any aspect of the Rule.

The Presidential Memorandum provides nothing concrete that could justify any re-examination of the Rule. It offers no new, more recent evidence showing or even suggesting that the three concerns highlighted in the Memorandum might be real or that the DOL’s previous analysis of them might be inaccurate or incomplete. Nor does it address much less refute the findings and rulings of the courts that have upheld the Rule against allegations directly related to the three questions raised in the Memorandum.

The re-examination of the Rule ordered by the President appears to be simply a pretext for dismantling it. Whether or not the Administration may lawfully alter the Rule in any way following the required rulemaking process under the APA remains to be seen. But what is undoubtedly true at this stage is that during any re-examination of the Rule or any subsequent rulemaking, no delay in the application of the Rule is warranted absent an analysis showing that the delay serves a rational purpose and that the costs of delay justify the benefits. No such analysis exists, and the Proposed Delay must therefore be withdrawn.

4. The Proposed Delay is fatally flawed on procedural grounds.

A. The comment period of 15 days is too short, and the DOL should extend it by at least 45 days.

The Proposed Delay is materially defective from a procedural standpoint. It provides for a mere 15 days of public comment on a proposal that would cost American savers well over a hundred million dollars in lost retirement savings over just 60 days. Such a brief comment period is simply inadequate to allow everyone with a stake in the Rule to develop and submit meaningful and comprehensive input on the Proposed Delay, which is fraught with deficiencies. It also conflicts with E.O. 12866, which obligates agencies to “afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include **a comment period of not less 60 days.**” E.O. 12866 at § 6(a)(1) (emphasis added).

B. The comment period for submission of views on the three issues raised in the Presidential Memorandum and other aspects of the Rule is also too short.

The Proposed Delay invites comment not only on the three substantive issues raised in the Presidential Memorandum, but also on virtually every other aspect of the Rule and the RIA: “The Department invites comments that might help inform updates to its legal and economic analysis, including **any issues** the public believes were inadequately addressed in the RIA and particularly with respect to the issued identified in the President’s Memorandum.” Release at 12324 (including a full page of specific questions) (emphasis added).

Similarly, the Presidential Memorandum invites the DOL to consider an open-ended set of issues encompassing virtually every aspect of the Rule:

If you make an affirmative determination as to any of the [three] considerations identified [above]—or if you conclude **for any other reason** after appropriate review that the Fiduciary Duty Rule is inconsistent with the priority identified earlier in this memorandum—then you shall publish for notice and comment a proposed rule rescinding or revising the Rule as appropriate and consistent with law.

Presidential Memorandum at 1 (emphasis added).

The Release and the Presidential Memorandum thus essentially reopen the entire Rule to re-evaluation and comment, yet the Proposed Delay provides for only a 45-day comment period. That is woefully inadequate to allow meaningful public input on such a broad range of complex issues. It is also grossly out of proportion to the extensive comment period that the industry opponents of the Rule insisted upon, and that the DOL provided, after it proposed the Rule. *See, e.g.*, Letter dated Apr. 20, 2015, from the Financial Services Institute to DOL (requesting, at a minimum, an additional 45 days in which to comment on the proposed Rule, to allow for a comment period totaling 120 days, given the “size, scope, and importance of the Proposal” and its “momentous effect on a large swath of the financial services industry”).

Because virtually the entire Rule and RIA are now the subject of a re-examination, and because the outcome of that process is likely to have a “momentous” impact on retirement savers as well as the financial adviser industry, the DOL should extend the comment period for at least another 75 days, to make it more commensurate with the comment period established for the proposed Rule itself.

5. The Proposed Delay would be arbitrary and capricious under the APA and subject to challenge in the courts.

For all of the foregoing reasons, finalizing the Proposed Delay would constitute arbitrary and capricious agency action, warranting a challenge in court and the issuance of declaratory and injunctive relief under the APA.

CONCLUSION

Thank you for the opportunity to submit our initial views on the Proposed Delay.

Sincerely,



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