

consumer action

Education and advocacy since 1971

March 15, 2017

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

Re: RIN 1210-AB79 - Definition of the Term “Fiduciary,” Delay of Applicability Date

To whom it may concern:

Consumer Action¹ is writing to express our strong support for the Department of Labor (DOL) conflict of interest rule as adopted and to cite our strong opposition to the proposal to delay the rule’s applicability date. We applaud the many in the investment industry who are preparing to adhere to it. By delaying these new protections, financial advisers and their firms that do not understand the value of offering advice in the best interest of their clients will continue to provide conflicted advice. This, in turn, will jeopardize consumers’ hard-earned retirement savings. With the rule in place, retiree savers will have confidence that undue fees, commissions and other costs won’t drain their returns over time.

While RIN 1210-AB79 requires several pages to justify the need for the delay, we’d like to cut to the chase and state that you can study this all day long and you are not going to get a different outcome. The DOL already went through two significant advance rulemakings and we feel that is enough. Throughout that process, it became evident that conflicted advice can be a significant cause of lost assets and returns for retiree savers. We see no “alternative facts” to negate this conclusion! The DOL estimated that individual retirement account (IRA) owners who receive conflicted investment advice can expect their investments to underperform by an average of 50 to 100 basis points per year over the next 20 years. It concluded that the underperformance associated with conflicts of interest (in the mutual fund segment alone) could cost IRA investors between \$95 billion and \$189 billion over the next 10 years and between \$202 billion and \$404 billion over the next 20 years.

¹ Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A non-profit 501(c)(3) organization, Consumer Action focuses on consumer education that empowers low- and moderate-income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change.

Who is going to pick up the slack for these “lost monies” actually pocketed by greedy corporations? No doubt it will be the taxpayer. Not to mention the wasted taxpayer dollars from re-opening an open-and-shut case!

Can anyone in good conscience support delaying (or repealing) the rule that would prevent an ERISA plan investor who rolls his or her retirement savings into an IRA from losing 6-12 percent, and possibly as much as 23 percent, of the value of his or her savings over 30 years of retirement? This doesn’t even consider the ongoing sale of truly awful annuities and unregistered securities by investment advisers who pocket huge commissions and don’t really care what the future holds for people saving for retirement.

It’s not just IRA investors who would be harmed by a delay. Employee plan investors can experience losses as a result of conflicts of interest as well. In its Regulatory Impact Analysis (RIA), the DOL pointed to a GAO study that found that defined benefit pension plans using consultants with undisclosed conflicts of interest earned 1.3 percentage points per year less than other plans. And, a recent study by the Center for Retirement Research at Boston College found that mutual fund companies involved in retiree plan management often act in ways that appear to advance their own interests rather than those of plan participants.² The authors found that this bias is especially pronounced in favor of affiliated funds that delivered subpar returns over the preceding three years. The study also found that the lackluster past performance of these subpar funds usually doesn’t right itself in subsequent years. This leaves plan participants, who need investment advice that is in their best interest, in peril.

The DOL rule would directly address the problem of conflicted retirement investment advice in both plan and IRA contexts by requiring all financial advisers who provide retirement investment advice to serve their clients’ best interest, not their own self-interest. We are mystified as to why another study and a delay is justified unless it is purely for political reasons—a justifiable conclusion and a sad, terribly disappointing motive for agreeing to allow advisers to continue to offer conflicted advice.

Already we see the DOL rule transforming the way commission-based advice is offered, with enormous potential benefits for all investors, not just those saving for retirement. A number of major firms, including, among others, Schwab, BlackRock, Fidelity and Prudential, have announced plans to reduce costs on certain investment products, such as exchange-traded funds and mutual funds, at least in part to be more competitive under the DOL rule.³ And, large firms have announced that they are reducing advisory account minimums and costs as a result of the rule. For example, Edward Jones and LPL announced shortly after the DOL rule was finalized that they would lower the minimums on their fee accounts, to \$5,000 and

² Veronika K. Pool, Clemens Sialm, and Irina Stefanescu, “Are 401(k) Investment Menus Set Solely for Plan Participants?”, Center for Retirement Research Boston College,” August 2015, http://crr.bc.edu/wp-content/uploads/2015/08/IB_15-13.pdf

³ Consumer Federation of America, “The Department of Labor Conflict of Interest Rule is Already Delivering Benefits to Workers and Retirees: Delay Puts Those Benefits at Risk,” Jan. 31, 2017, http://consumerfed.org/wp-content/uploads/2017/01/1-31-17-DOL-Rule-Delivering-Benefits_Fact-Sheet.pdf

\$10,000 respectively.⁴ Schwab just announced a new advisory program with a minimum initial investment of \$25,000, all-in costs of between 0.36 percent and 0.52 percent, and comprehensive financial and investment planning from a CFP professional.⁵ Vanguard's Personal Advisor Services offers fee-based advisory and financial planning services, charging only 0.30 percent for accounts with \$50,000. This platform has gathered almost \$40 billion in less than two years.⁶

The financial industry has spent a considerable amount of time and money preparing for implementation of the rule. In response to a letter sent by U.S. Senator Elizabeth Warren, a number of firms, including Schwab, BBVA Compass, Capital One, John Hancock, U.S. Bancorp, Fidelity, RBC, Principal Financial Group, Prudential Financial, LPL Financial, Symetra Life Insurance, TIAA, Transamerica and Wells Fargo, told Sen. Warren that they had devoted time and resources to meeting the April 10 implementation date. All expressed confidence that they would be ready to comply.⁷

A delay threatens to halt the progress that has already been achieved from firms' efforts. Worse, it could result in firms rolling back pro-investor changes to recoup costs that they've spent to comply. We strongly believe that a delay in implementing the DOL rule would harm retirement savers.

The DOL economic analysis "supporting" the delay looks at only one segment of the market—mutual funds in IRAs. It ignores the costs that could accrue to retirement savers from other products, including various annuities and non-traded REITs, or the costs that could accrue to plan investors. We see this as a major deficiency in rationale.

Consumer Action opposes any delay. We see no downside to implementing the rule as planned. If opponents of the rule and a new administration wish to consider "improvements," we need only point to the careful and deliberative process the DOL undertook in promulgating the rule. An appropriate attempt to make the rule palatable to current opponents would take months, if not years, and we see no reason to delay protections for retirement savers while they play political football. The longer the rule is delayed, the more retirement savers will be harmed.

Consumer Action does not believe a delay in this important consumer protection is justified solely because of industry uncertainty about the rule in this current political climate. To us, the far stronger consideration is the future wellbeing of retirement savers and the taxpayer

⁴ Michael Wursthorn, "Brokerages Adapt to Pending Labor Rule," Wall Street Journal, March 16, 2016, <https://www.wsj.com/articles/brokerages-adapt-to-pending-labor-rule-1458151260>

⁵ Press Release, Schwab, "Schwab Announces Schwab Intelligent Advisory™," December 13, 2016, <http://pressroom.aboutschwab.com/press-release/schwab-investor-services-news/schwab-announces-schwab-intelligent-advisory>

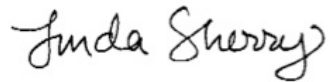
⁶ Vanguard, Personal Advisor Services, <https://investor.vanguard.com/advice/personal-advisor>

⁷ Letter from United State Senator Elizabeth Warren to Acting Department of Labor Secretary Edward Hugler, Feb. 7, 2017, http://www.warren.senate.gov/files/documents/2017-2-7_Warren_Ltr_to_DOL.pdf

interest in wasting funds for reexamination of the rule. Retirement savers need and deserve the protections of the rule without delay.

We urge you to reject any delay and implement the rule as planned beginning April 10.

Respectfully submitted,

A handwritten signature in black ink that reads "Linda Sherry". The signature is written in a cursive, flowing style.

Linda Sherry
Director of National Priorities