

AMERICAN ACTION FORUM

March 16, 2017

The Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule Examination
U.S. Department of Labor
200 Constitution Avenue, N.W. Room N-5655
Washington, DC 20210

Re: RIN 1210-AB79

Dear Mr. Campagna:

The American Action Forum (“AAF”) appreciates the opportunity to submit comments on the Department of Labor’s (“DOL”) proposed delay in the implementation of the redefinition of the term “fiduciary” under the Employee Retirement Income Security Act of 1974 (“ERISA”) and section 4975(e) of the Internal Revenue Code of 1986, as amended, and in the implementation dates of the exemptions granted within the final rule. We hope that these comments will be helpful to explain why a delay in the implementation of the rule is in the best interest not only of retirement savers but also in the best interest of American taxpayers.

AAF is an independent, nonprofit 501(c)(3) organization that is not affiliated with or controlled by any political group. Its focus is to educate the public about the complex policy choices now facing the country and explain as cogently and forcefully as possible why solutions grounded in the center-right values that have guided the country thus far still represent the best way forward for America’s future.

We write today in support of the delay in implementing DOL’s fiduciary rule. Substantively, AAF believes that the fiduciary rule will end up harming the very retirement savers that it intends to help. [Our research has found](#) that almost all retail investors will see their costs increased by 73 to 196 percent due to a mass shift toward fee-based accounts. Further, firms providing investment advice will see an average of \$21.5 million in initial compliance costs and \$5.1 million in annual maintenance costs. Even worse, up to 7 million Individual Retirement Accounts (IRAs) would fail to qualify for an advisory account due to the balance too low to be sustainable for the advisor. In the shorter term, we found that the fiduciary rule, as written, [will result in over \\$1500](#) of duplicative fees charged per household retirement account.

As such, AAF believes that DOL should delay the rule until it is better able to assess its consequences. DOL and the former administration cited multiple, flawed statistics in analyzing the fiduciary rule, whereas the current administration has issued a Presidential Memorandum requiring further review of these statistics. We address these concerns in the remainder.

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1. DOL cited flawed statistics in its analysis of the impacts of the fiduciary rule. A delay in its implementation provides DOL time to perform a more accurate analysis.

DOL's cost analysis is flawed on two accounts. First, DOL states that the fiduciary rule will save retirement savers \$17 billion a year. It came to this conclusion by taking a uniform 1 percent off of the total amount of assets in IRAs in the United States. From a statistical standpoint, DOL failed to take into account the asset-weighted performance of funds. [Craig Lewis of Vanderbilt's Owen School of Business provides an example](#) of how this skews an analysis: "[A] non-asset weighted study examining nine funds each with \$1 million invested yielding a 1 percent return and one fund with \$10 million invested yielding a 10 percent return would show an average return of 1.8 percent. But, an asset-weighted study looking at the same 10 funds would show an average return of 5.7 percent. By ignoring which funds investors actually invest in, the report fails to achieve its stated objective of measuring the market-wide impact of conflicted advice in retirement accounts."

Second, DOL vastly underestimated the costs of compliance with the fiduciary rule. DOL estimated total startup compliance costs at \$5 billion and ongoing costs of \$1.5 billion. Even if true, these would make the fiduciary rule one of the most expensive regulations in history, but the costs are much higher than DOL's original estimates.

[AAF found that the fiduciary rule would cost \\$31.5 billion](#) in total costs and \$2 billion in annual burdens, making it the most expensive rule of 2016 and the second most expensive non-EPA rule since 2005. Now, even though the rule is less than a year old, AAF found that three major companies have already left part of the brokerage business, and an additional six are drawing down their business or switching to a fee-based arrangement, depriving more consumers of investment advice. AAF also found reported compliance costs of more than \$106 million in 2016, representing up-front compliance costs of just four companies. In addition to these impacts, the fiduciary rule has affected 92,000 investment advisors, \$190 billion in assets, and at least 2.3 million consumers.

At some point DOL must perform a realistic cost-benefit analysis of the rule to ensure that the costs to consumers and to advisors do not outweigh any benefits that the rule may provide. Undergoing a delay will provide DOL ample time to do just that.

2. The White House issued a Presidential Memorandum requiring DOL answer a specific set of questions about the fiduciary rule. A delay in its implementation allows DOL time to study the rule and answer those questions appropriately.

On February 3, the President signed a memorandum directing DOL to "examine the Fiduciary Duty Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice." As part of the examination DOL is required to

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“prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Duty Rule, which shall consider...

(i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans’ access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;

(ii) Whether the anticipated applicability of the Fiduciary Duty rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

(iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.”

The Memorandum then directs DOL to publish a proposed rescission or revision of the rule if it makes an affirmative determination to any of the three considerations above. AAF believes that for DOL to be able to appropriately assess these considerations as required by the President, DOL must delay the implementation of the rule by at least 60 days, if not more. Not doing so would be reckless and would be in direct defiance of the Presidential Memorandum.

It is for the aforementioned reasons that AAF supports a delay of the implementation of the fiduciary rule and encourages DOL to take into consideration the comments received throughout the duration of this comment period. AAF stands ready to provide additional research and assistance to DOL or any interested parties as needed.

Sincerely,

Doug Holtz-Eakin
President
American Action Forum

Meghan Milloy
Director, Financial Services Policy
American Action Forum