



Financial Security...for Life.

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

Subject: RIN 1210-AB79 – Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24, and 86-128.

Greetings:

On behalf of the American Council of Life Insurers (“ACLI”)¹, we appreciate the opportunity to offer comment on the proposal by the Department of Labor (“Department”) to extend, for 60 days, the applicability date of the Department’s final regulation defining who is a “fiduciary” under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code. Specifically, the Department’s proposal would extend, for 60-days, the April 10, 2017 applicability date of the final *Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment Advice* (“Fiduciary Regulation”), published in the *Federal Register* on April 8, 2016, and associated prohibited transaction exemptions. The Department states that the proposed 60-day extension of the applicability date would make it possible for the Department to take additional steps (such as completing its examination, implementing any additional extensions(s), and proposing and implementing a revocation or revision of the rule) without the rule becoming applicable beforehand. ACLI strongly supports a delay in the Regulation’s applicability date.

¹ The American Council of Life Insurers (ACLI) is a Washington, D.C.-based trade association with 290 member companies operating in the United States and abroad. ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers’ products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 94 percent of industry assets and premiums. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

Further, given the extent and complexity of the revisions required to the final Regulatory Impact Analysis (RIA) supporting the Regulation and exemptions, and the Department's view that an additional delay may be needed, we are concerned that the proposed 60-day delay may not provide sufficient time for the Department to complete this important examination. Thus, we believe a longer delay is warranted, and support any additional delay required by the Department to comply with the President's February 3, 2017 Memorandum. As the Department has treated the Regulation and exemptions as one "broad regulatory package,"² we support a delay off all provisions of the Regulation and exemptions, and to avoid consumer confusion, urge the Department to announce any additional delay as far in advance as possible. Finally, we urge the Department to include, in any final rule delaying the applicability date of the Regulation, a corresponding delay in the transition period provided for in Section IX of the final Best Interest Contract Exemption ("BICE").

The Fiduciary Regulation Will Harm Retirement Savers

ACLI and its members strongly support a standard of care under which financial professionals are required to act in the best interest of consumers. However, as detailed in ACLI's comment letters and testimony in response to the proposed rule, the Fiduciary Regulation as currently written will have a negative impact on those it is purportedly designed to protect. Many people first learn of the benefits of guaranteed lifetime income provided by annuities from a life insurance agent or broker. It is critical that consumers have continued access to information and education regarding annuities. The Regulation will effectively limit or deny access to guaranteed income products that are increasingly important to millions of Americans who no longer have access to a traditional pension, including many middle and lower income investors. With so many Americans reaching retirement age each day, the decline of traditional employer-sponsored pension plans, and the increases in longevity, now more than ever, seniors need the income protection available only in income annuities and other guaranteed lifetime income products offered by America's life insurance industry.

Indeed, the Regulation, although not yet effective, has already harmed retirement savers. Since the Regulation was released, several large financial firms have exited the individual financial advice market completely, or significantly raised account minimums, dropped product lines, and moved clients to fee-based accounts. These changes limit choices available to savers planning for retirement and will especially harm low-and middle-income savers. Accordingly, we support a delay of the final Regulation's applicability date, to provide sufficient time for the Department to carefully and fully analyze the impact of the final Regulation on such retirement savers.

An Applicability Date Delay is Consistent with The President's February 3, 2017 Memorandum

A delay in the applicability date of the Fiduciary Regulation and related prohibited transaction exemptions is fully consistent with President Trump's February 3rd memorandum to the Secretary of Labor directing the Department to examine the Fiduciary Regulation to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of this examination, the Department is to prepare an updated economic and legal analysis concerning the likely impact of the Regulation, which shall consider, among other things, the following:

- (i) Whether the anticipated applicability of the Fiduciary Regulation 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;

² See 81 Fed. Reg. 20946, 20947 (Apr. 8, 2016).

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

(iii) Whether the Fiduciary Regulation 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.

We believe it essential and appropriate that the Department conduct this examination and review and revise its final RIA. As detailed in ACLI's comment letters and testimony, as well as in ACLI's complaint, filed on June, 8, 2016, in the U.S. District Court, Northern District of Texas,³ the Department's RIA is significantly flawed and provides no support for the promulgation of the Fiduciary Regulation or related exemptions.

As noted in ACLI's July 21, 2015 comment letter, several Executive Orders⁴ mandate that federal agencies must "...propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs."⁵ The Department, in promulgating the final Fiduciary Regulation and associated exemptions, failed to comply with this requirement, especially with respect to guaranteed lifetime income products, such as variable and fixed index annuities.

The final RIA failed to justify the extraordinary burdens imposed by the Regulation on truthful, non-misleading, non-fiduciary speech about suitable retirement products. The RIA substantially overstated any possible benefit of the Regulation, while wholly ignoring the significant ongoing costs the Regulation will impose on providers of annuities and by extension, on retirement savers who would benefit from guaranteed lifetime income products.

The RIA's primary focus on studies about front-end load mutual fund fees is flawed and renders the RIA's quantitative assessment wholly unreliable with regard to any offerings that do not involve front-end load mutual funds or this type of fee. Specifically, these flaws include, but are not limited to:

- The Department's quantification of the Regulation's purported benefits in only one segment of the IRA market: front-end load mutual funds. The Department did not – and has never – purported to measure the benefit of the proposed Regulation to other retirement products, including annuity products.
- The Department's reliance on data from nine academic studies, all of which pre-date full implementation of enhanced regulations. None of the studies examines the performance of variable annuities following implementation of these enhanced regulations. Further, the studies' outdated data failed to capture recent changes in the market for fund sales and performance.
- The Department's failure to analyze other relevant bodies of work, such as studies demonstrating the overwhelming benefits provided by financial advisors to retirement savers.

Yet, inexplicably, the Department relies on this same limited data to estimate the potential investor losses associated with the proposed delay, stating that "the estimates of potential investor losses presented in this illustration are derived in the same way as the estimates of potential investor

³ See Civil Action No: 1;16-CV-1530, *ACLI et. al. V. United Department of Labor*, filed on June 8, 2016. On February 9, 2017, the U.S. District Court, Northern District of Texas denied ACLI's motion for summary judgment and granted the Department of Labor's motion for summary judgment. On February 28, 2017, ACLI filed a Notice of Appeal in this matter.

⁴ See Executive Order 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981); Executive Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993); Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

⁵ Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

gains that were presented in the RIA of the final rule and exemptions.”⁶ However, in doing so, the Department admits that “relative to the actual impact of the proposed delay on retirement investors, which is unknown, this illustration is uncertain and incomplete.”⁷ The Department explains that the illustration is uncertain because it assumes the final rule and exemptions would entirely eliminate the negative effect of load sharing on mutual fund selection, and that the proposed delay would leave that negative effect undiminished an additional 60 days. The Department explains that the illustration is incomplete because it represents only one negative effect (mutual fund performance) of one source of conflict (load sharing) in one market segment (IRA investments in front-load mutual funds). The scope of the Rule is far greater, and the Department provides no information to support a conclusion that these effects are applicable to any other area of the retirement market.

Accordingly, the Department, in its own words, admits that the method and basis it used to estimate the potential investor gains in the RIA supporting the Final Regulation and exemptions was both “uncertain” and “incomplete.” This admission alone requires that the Department prepare an updated RIA, and the proposed delay will provide time for the Department to do so.

Further, we find it astounding that the Department continues to cite, as “economic evidence that conflicts erode retirement savings”, a 2015 study by the President’s Council of Economic Advisors that attributed IRA investor losses of \$17 billion to advisory conflicts. Even when limited to this single part of the retirement market, this study is not supported by sound economic analysis,⁸ and indeed, the Department did not rely on it in its own estimation of the costs and benefits associated with the Final Regulation.

Perhaps the most glaring example of the RIA’s failure to consider the Final Regulation’s impact on annuities is the Department’s recently proposed “Best Interest Contract Exemption for Insurance Intermediaries.”⁹ Such an exemption is purportedly required due to the Department’s last minute, and unsupported, requirement that sales of Fixed Index Annuities (FIAs) be subject to the BICE, rather than PTE 84-24 – coupled with the fact that insurance intermediaries were deemed unable to assume the status of a “financial institution” under the BICE. Although the Department acknowledged in the proposed exemption that, in 2015, 63 percent of all fixed indexed annuities were sold through independent agents, it failed to account for or consider this important distribution channel in the RIA supporting the Final Regulation and BICE, thereby depriving retirement investors the ability to access these important guaranteed income retirement savings products. Yet, the Department proposed this exemption in the 11th hour, less than 90 days prior to the effective date of the Final Regulation and exemptions.

In summary, as discussed above, and as detailed in ACLI’s two comment letters and testimony in response to the proposed regulation and exemptions, the Department’s RIA justifying the Final Regulation and exemptions is significantly flawed, as, among other issues, it fails to identify or account for the loss retirement investors will incur as a result of their inability to access meaningful guidance and advice about retirement options, including guaranteed lifetime income options. ACLI therefore strongly supports the Department’s proposal to delay the April 10, 2017 applicability date of the Final Regulation and associated exemption to provide the Department sufficient time to prepare an updated economic

⁶ 82 Fed. Reg. 12319, 12320 (March 2, 2017).

⁷ *Id.*

⁸ See Litan, Robert and Singer, Hal, *Good Intentions Gone Wrong: the Yet-To-Be-Recognized of the Department of Labor’s Proposed Fiduciary Rule*, July 2015; Testimony of Brian Reid, Chief Economist, Investment Company Institute, Hearing on “Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees” Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and the Workforce, United States House of Representatives, June 17, 2015.

⁹ 82 Fed. Reg. 7344, (Jan. 19, 2017).

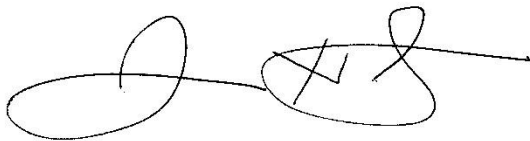
and legal analysis, and determine, as directed by the President, whether the rule may adversely affect the ability of Americans to gain access to retirement information and financial advice. Further, as stated by the Department, ACLI agrees that absent an extension of the applicability date, if the examination prompts the Department to propose rescinding or revising the rule, retirement investors and other stakeholders might face two major changes in the regulatory environment, rather than one. Such a result could, as the Department states, be disruptive to the marketplace and produce frictional costs that are not offset by commensurate benefits. Therefore, ACLI agrees that the Department has good cause to implement a delayed applicability date immediately upon publication of a final rule in the Federal Register.

ACLI urges the Department to specifically include, in the final rule delaying the applicability date of the Fiduciary Regulation and related exemptions, a corresponding delay in the transition period provided for in Section IX of the final Best Interest Contract Exemption. Failure to include such a corresponding delay would result in a significantly reduced transition period.

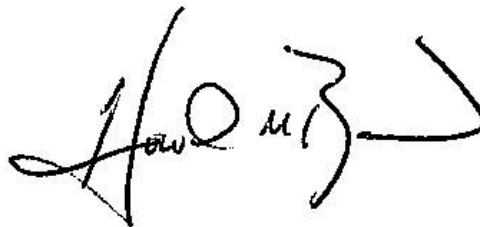
Finally, ACLI asks the Department to indicate in the preamble to the final rule that its examination will include the extent to which the Regulation should apply prospectively to fiduciary advice with respect to retirement accounts opened or insurance contracts issued after the Regulation's applicability date.

On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in productive dialogue with the Department on this Proposal. ACLI remains committed to work with the appropriate federal and state regulators in furtherance of public policies that help Americans achieve their financial and retirement security goals.

Respectfully,



James H. Szostek



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