NAFA
National Association for Fixed Annuities
Securing the Future!

Submitted electronically: EBSA.FiduciaryRuleExamination@dol.gov

March 14, 2017

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

RE: **RIN 1210-AB79** – Extension of Applicability Date of the Fiduciary Duty Rule

Dear Acting Secretary Hugler:

The National Association for Fixed Annuities ("NAFA")[1] writes to comment in support of the Department of Labor's proposal to extend, by 60 days, the April 10, 2017 applicability date of the Fiduciary Duty Rule ("the Rule").[2]

NAFA will also be submitting a comment regarding the Department's examination of the Rule, as directed by the President in his February 3, 2017 White House Memorandum ("the Memorandum").[3] NAFA welcomes the President's directive to the Department to determine whether the Rule will adversely affect the ability of Americans to access retirement products and information, cause dislocations in the financial services marketplace, and cause increased litigation that will drive up the prices of retirement products and services. We believe the Department's examination will result in a resounding "yes" to all three questions and agree with the import of the Memorandum that the real-world effect of the Rule will be to limit American retirees' access to critical financial services.

In that regard, NAFA believes strongly that the Rule should ultimately be rescinded. However, this comment letter, while reiterating NAFA's deep conviction that the Rule will have a devastating impact on fixed annuity product distribution and the ability of

[1] Founded in 1998, NAFA is a trade association dedicated to educating and informing state and federal regulators, legislators, industry personnel, media, and consumers about the value of fixed annuities and their benefits to Americans in financial and retirement planning. NAFA's membership includes insurance companies, independent marketing organizations, and individual producers, representing every aspect of the fixed annuity marketplace and covering 85% of fixed annuities sold by independent agents, advisors, and brokers.
[2] 81 FR 20946, April 8, 2016, 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, 84-24 and 86-218.
[3] 82 FR 9675, February 7, 2017.

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consumers to save for retirement, is limited to the efficacy of the proposed delay of the applicability date.

Delaying the applicability date will allow the Department time to conduct its examination

NAFA strongly supports a proposed delay of the applicability date of the Rule. We are a mere 24 days out from April 10, 2017 – a point noted in the Department's March 2nd notice of proposed rulemaking (the "NPRM"). NAFA agrees that the Department needs more time to complete the President's mandated examination of the Rule. Indeed, we believe that the broad scope of the examination, the breadth of which the Department acknowledges by the long series of additional questions posed in the NPRM preamble, necessitates an extension of the applicability date. While we support the 60 day extension, NAFA believes firmly that is insufficient, and a further extension is needed *beyond* the proposed 60 days. Accordingly, NAFA urges the Department to adopt, at a minimum, a 180-day delay period to allow the Department to adequately fulfil its mandated examination pursuant to the Memorandum.

President Trump's Memorandum observed that the Fiduciary Duty Rule might not be consistent with the policies of his Administration, which include a priority to "empower Americans to make their own financial decisions [and] to facilitate their ability to save for retirement…" Accordingly, the President directed the Department to examine the Rule to determine if it might have an adverse effect on the ability of Americans to gain access to retirement information and financial advice and to prepare an updated economic and legal analysis of the Rule's likely impact. As part of this examination, the Department is directed to consider, among other things, the following:

- Whether the anticipated applicability of the 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;
- Whether the anticipated applicability of the Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
- Whether the 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.

NAFA welcomes the President's directive to the Department to prepare an updated economic and legal analysis of the Rule's likely impact, as we believe that the original Regulatory Impact Analysis (the "RIA") published on April 8, 2016 in support of the Rule is deeply flawed and misleading. These flaws are acute with respect to its consideration of fixed annuity products in the retirement/IRA marketplace and in relation to the Rule's likely business impact on independent insurance agents and independent marketing

organizations. This failure to conduct a meaningful impact analysis with respect to the fixed annuity industry is a primary basis of NAFA's legal challenge to the Rule.[4]

As is noted in the NPRM, the economic analysis of the RIA was based primarily on data derived from one economic market segment: IRA investments in front-load mutual funds. The Department's extrapolation from that segment to the entire financial services industry was flimsy at best. The Department did not include in its economic analysis a genuine appraisal of the potential impact of the Rule on other retirement products. Most notably for NAFA, the RIA did not include any disciplined analysis of the performance of fixed annuity products in the retirement savings marketplace. No credit or recognition was given to fixed annuity products, or their providers, for the positive effects of moving many consumers from lower earning or more volatile vehicles to annuity products that provide opportunity for growth while at the same time providing peace of mind in unstable markets. Nor does the RIA support its dubious claim that conflicts of interest are the cause of economic losses for retirement investors who purchase fixed annuities. Had the Department performed a more balanced and comprehensive RIA, NAFA is confident the cost-benefit analysis would not have supported or justified promulgation of the Rule under the Regulatory Flexibility Act.

Essentially, the Memorandum directs the Department to get the regulatory impact analysis correct this time. Delaying the applicability date of the Rule will allow the Department to take the time necessary to prepare the updated economic and legal analysis concerning the likely impact of the Rule, as directed by the President. While NAFA is doubtful that 60 days is sufficient time to perform a reliable and thorough analysis, given the complexity of these matters, NAFA is hopeful that the additional two month time period will at least be sufficient for the Department to expose and document the obvious flaws of the original RIA and provide necessary justification to prevent the Rule from becoming operational.

<u>Delaying the applicability date will mitigate ongoing compliance costs</u>

As the Department makes clear in the NPRM, an extension of the Rule's applicability date will spare industry – for NAFA membership, particularly annuity product manufacturers and distributors including many individual insurance agents and many small and medium sized agencies – the risk and expense of facing two major changes in the regulatory environment, should the outcome of the Department's examination result in the Rule's rescission or revision.

In the absence of a delay – and should the Department, at a minimum, modify the Rule – the financial services industry would incur ongoing unrecoverable costs first to meet the compliance requirements of this Rule and, later, to meet the modified requirements of a subsequent version of the Rule. In the alternative, should the Department later propose to

[4] See Civil Action No: 1:16-CV-01035, *National Association for Fixed Annuities v. United States Department of Labor et al*, filed June 7, 2016.

rescind the Rule, without a delay industry will have been forced to commit to ongoing unrecoverable expenses to comply with a rule that is ultimately repealed. Either way, these ongoing, unnecessary, and unrecoverable costs create a hardship on all affected businesses, large and small, including many who are NAFA members. The costs are especially acute for “small businesses” (as classified by the Small Business Administration[5]) which covers over 90% of all broker-dealers, registered investment advisers, insurance companies, insurance agents, and consultants, according to the NPRM.

A delay in the applicability date is essential to provide relief for businesses and individuals in the financial and retirement services sector so that they may prepare only one time, if at all, with the compliance requirements of a new fiduciary duty rule. To do otherwise will result in the squandering of resources and added costs all of which ultimately is passed onto and is detrimental to interests of the American consumer saving for retirement.

The uncertain fate of the Insurance Intermediary Exemption makes the April 10 applicability date blatantly unfair and unworkable

Recognizing that the Rule as published in April 2016 failed to account for the distribution model that exists in the fixed annuity marketplace, the Department issued a new prohibited transaction exemption to the Rule. The proposed Best Interest Contract Exemption for Insurance Intermediaries was published January 19, 2017 (82 FR 7336). This proposed new wrinkle on the Rule, which, it must be noted, was released over eight months after insurance intermediaries first asked the Department for exemptive relief, creates even greater uncertainty regarding the Rule’s impact on the fixed annuity industry and on Americans’ access to retirement information and financial advice. The Department has yet to finalize this latest exemption such that the final contours of the exemption remain unknown, even as the applicability date fast approaches absent a delay.

As explained in NAFA’s February 17, 2017 comment letter regarding this proposed exemption, a significant component of NAFA’s membership consists of insurance intermediaries (“Independent Marketing Organizations,” or “IMOs”), ranging across the spectrum in business size and scope. Those IMOs account for the distribution of over 60% of fixed indexed annuities. Yet the “fix” embodied in the proposed exemption merely exacerbates problems inherent in the underlying rule by adopting completely unrealistic and highly discriminatory standards for IMOs as compared to other segments of the financial services industry. Based on the capital requirements of the proposed exemption, it is likely only a mere handful out of the approximately 200 IMOs operating in the United States could satisfy the compliance requirements, thus rendering the proposed exemption like the Rule itself nothing less than an assault on the fixed annuity industry that will result in heavy loss of jobs and denial of products and services to American consumers.

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[5] Small businesses in the Finance and Insurance Sector are defined by the Small Business Administration as businesses with up to $38.5 million in annual receipts. 13 CFR 121.201 (as referenced in the NPRM, 82 FR 12322).

Even in the best of circumstances, it would be wholly unrealistic for an entire industry to reshape itself to come into compliance under the Rule by the current April 10th applicability date. But this task is made impossibly difficult when the Department has yet to finalize the proposed new exemption for insurance intermediaries, thus leaving business entities that are integral to our industry in a state of complete limbo. Here, too, fairness demands an extension of the Rule's applicability date by at least the 60 days proposed in the NPRM, and in true fairness to the fixed annuity industry by one year or more beyond the date on which a reasonable insurance intermediary exemption is adopted by the Department should this Rule ever become operational.

Ongoing legal challenges to the Rule necessitates delay

In addition to the time required to conduct a meaningful examination of the Rule as directed by the President, delay of the applicability date of the Rule is also necessary to allow existing legal challenges to the Rule to be addressed and resolved. There can be no question that those challenges have raised serious issues about the constitutionality and validity of the Rule. While initial court decisions have ruled in favor of the Department, it is well known that those decisions are being appealed, and that the critical issues raised in those cases will get resolved in the appellate courts and possibly by the Supreme Court. Among the issues being raised are whether the Rule is contrary to Congressional intent, whether the Rule is in conflict with ERISA, whether the Rule violates constitutional constraints by limiting free speech or violating due process with vague requirements on reasonableness of fees, whether the Rule contains an impermissible private right of action, and whether the Rule's manner of adoption was arbitrary and capricious.

These are weighty issues, and should the courts ultimately strike down the Rule, it would be very costly for industry to reverse or recover heavy compliance costs and it would be highly detrimental to consumers to be subjected to such erratic regulation. The better course is for the Department to postpone the Rule indefinitely - if not repeal it outright - to avoid great cost, confusion, and inconvenience that would result from an adverse court decision striking down the Rule.

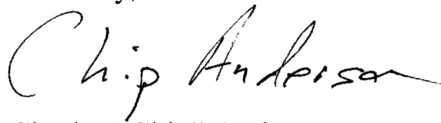
Conclusion

NAFA agrees with the assessment of the acting head of the Securities and Exchange Commission who observed the Rule was adopted for political reasons and will mainly benefit trial lawyers. It will, as the White House has stated, limit Americans' access to critical financial services and products. It will especially harm the ability of low- and middle-income Americans to save for their retirement. NAFA supports any delay in the implementation of this flawed rule and urges the Department to repeal the Rule because in the final analysis NAFA believes the Rule is plainly inconsistent with the Administration's priorities to empower Americans to make their own financial decisions, to facilitate their ability to save for their retirement, and to build individual wealth.

NAFA respectfully requests the Department to delay for *at least* 180 days the applicability date of the Rule while it conducts a full examination of the Rule and its effects, as directed by the President. In so doing, NAFA would also request the Department delay indefinitely the January 1, 2018 implementation date.

NAFA appreciates the opportunity to submit these comments. Please do not hesitate to contact me if additional information or clarification is needed.

Sincerely,



Charles "Chip" Anderson
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