



March 17, 2017

Via: EBSA.FiduciaryRuleExamination@dol.gov

Timothy D. Hauser
Deputy Assistant Secretary for Program Operations
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW,
Washington, DC 20210

Re: RIN 1210-AB79
Fiduciary Rule Examination – Delay of Applicability Date

Dear Mr. Hauser:

AARP¹ strongly opposes the Department of Labor's (the Department) proposal to delay the applicability dates of the "Definition of the Term 'Fiduciary'; Conflict of Interest Rule – Retirement Invest Advice" (the Rule) and its related prohibited transaction class exemptions for a period of sixty days. The Department used a deliberative and inclusive process, including six years of review, four days of hearings, numerous meetings with interested stakeholders, over 375 pages of regulatory impact analysis, in excess of 3,000 public comments, and more than 375,000 petition signatures. This thorough, careful and thoughtful process resulted in a Final Rule that has withstood seven challenges to it. Four court decisions have ratified the Department's process, regulatory

¹ AARP is the largest nonprofit, nonpartisan organization representing the interests of Americans age 50 and older and their families. Nearly half of our members are employed full or part-time, with many of their employers providing retirement plans. A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. The shift from defined benefit plans to defined contribution plans has transferred significant responsibility to individuals for investment decisions that will directly impact the adequacy of the assets available to fund future retirement needs. AARP has enthusiastically supported the Fiduciary Rule as a necessary protection for participants when they make investment decisions concerning their retirement monies. Without this protection, it is difficult for an individual to plan for a secure and adequate retirement.

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analysis, and compliance with the Administrative Procedure Act. The time is now to protect hard-earned retirement savings of participants and beneficiaries.

One thing is clear. The financial services industry generally agrees that investment advice should be given in the best interests of the participant and retirement investor. A review of the 2015 public comment letters demonstrates the overwhelming consensus on the best interest standard. *E.g.*, SIFMA Comment Letter 506 (“The industry ... shares that goal” “to ensure financial services providers are looking out for their customer’s best interest”). Plan Sponsor Council of America Comment Letter 614 (“[W]e believe our retirement system will be greatly strengthened by ensuring that investment advice is provided in the recipient’s best interest consistent with those fiduciary standards and that any financial conflicts are disclosed.”); American Council of Life Insurers Comment Letter 621 (“We share the Department’s interest in seeing that plan sponsors, plan participants and IRA owners receive advice that is in their best interest.”); American Bankers Association Comment Letter 622 (“We agree with the Department that retirement service providers, when acting in their capacity as fiduciaries, should act in the best interest of customers and that such customers deserve to be protected from financial abuse.”); Insured Retirement Institute Comment Letter 626 (“Financial professionals should be held to a best interest standard when recommending investments to retirement savers.”); Business Roundtable Comment Letter 645 (“Financial professionals should be required to act in the best interests of employee benefit plan participants when providing investment advice to a retirement plan or its participants.”); Wells Fargo Comment Letter 647 (“[W]e remain supportive today of a “best interest” standard of care for clients.”). There should be no surprise about this consensus since these standards have been in place since the Employee Retirement Income Security Act (ERISA) was enacted in 1974. Indeed, treating those who provide investment advice for a fee as a fiduciary is consistent with both the statute and the common law of trusts upon which ERISA was based. The public record also demonstrated that many investment advisers have provided advice in the best interests of participants and retirement investors for decades. Significantly, although there have been attempts to weaken the rule requiring those who provide investment advice for a fee to be treated as a fiduciary, Congress has never agreed to do so. ERISA § 408(b)(14), 408(g)(8), as amended by Pension Protection Act, § 601(a)(1), (2). There is absolutely no reason to delay the applicability date for the best interest standard that has been in effect over 40 years.

A. Not Only Does The Cost Benefit Analysis Of The Proposed Rule Not Support A Delay, But The Analysis Supports Immediate Implementation Of The Rule.

AARP members are saving for retirement every day. Approximately ten thousand individuals retire every single day. Glenn Kessler, *Do 10,000 baby boomers retire every day?*, WASHINGTON POST (July 24, 2014), <https://www.washingtonpost.com/news/>

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fact-checker/wp/2014/07/24/do-10000-baby-boomers-retire-every-day/?utm_term=3bf021c251d3. They need to make decisions about their retirement investments. ICI Research Perspective, *The Role of IRAs in US Households' Saving for Retirement, 2016* at 14 (Jan. 2017), <https://www.ici.org/pdf/per23-01.pdf> (households transferred \$424 billion (\$35.3 billion monthly) from employer-sponsored retirement plans to traditional IRAs in 2014). The two primary sources that they consult in making their rollover decisions are financial services firms and professional financial advisers. *Id.* at 17-18. They can no longer wait to have investment advisors give them advice that is in their best interests. Significantly, the Department itself has admitted that the cost of the delay to investors is more significant than the cost to the financial services industry. Indeed, the Department indicated that the cost to investors might be even higher than it has estimated.

Various scandals, such as those involving the manipulation of LIBOR interest rates and foreign currency markets, underscore the imperative that such advice is independent and free from conflicts of interest, and that the standards governing industry practices involving the provision of investment advice are fair, clear and easy to understand. The general public agrees. In an AARP 2013 survey of over 1,400 adults who had money saved in either a 401(k) or a 403(b) plan, more than nine in ten (93%) respondents favored requiring retirement advice to be in their sole interest, and fewer than four in ten (36%) respondents indicated they would trust the advice from an adviser who is not required by law to provide advice that is in their best interests. AARP, *Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants* (Sept. 2013), <http://www.aarp.org/research/topics/economics/info-2014/fiduciary-duty-and-investment-advice---attitudes-of-401-k--and-4.html>. A survey taken after the Rule was promulgated demonstrated that an overwhelming percentage of respondents were in favor of the Rule. S. Kathi Brown, *Attitudes Toward the Importance of Unbiased Financial Advice* 4, 6 (May 2016), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2016/attitudes-unbiased-fin-advice-rpt-res-econ.pdf.

Of particular concern to AARP is the potential negative impact of conflicts on the retirement security of our members and other older Americans. For example, the Government Accountability Office (GAO) estimated that \$20,000 in a 401(k) account that had a one-percentage point higher fee for 20 years would result in an over 17% reduction — over \$10,000 — in the account balance. U.S. Gen. Accounting Office, GAO-07-21, *Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 7 (2006). We estimate that over a 30-year period, the account would be about 25 percent less. Even a difference of only half a percentage point — 50 basis points — would reduce the value of the account by 13 percent over 30 years. In short, conflicted advice resulting in higher fees and expenses (or lower returns) can have a huge impact on retirement income security levels.

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The Department found that generally risks caused by conflicted investment advice are increasing as the baby boomers retire and they move their money from protected ERISA plans to IRAs. Indeed, the Department found that advice from conflicted investment advisers could cost retirees between 12 to 24% of their retirement savings over thirty years. The Department found that IRA investors tend to be older as they are close to or at retirement. These IRA investors are more vulnerable to the negative impact of conflicted advice because the amount of assets available for rollover are large, many older investors do not have strong financial literacy skills, and they are making significant and often one-time decisions to move their retirement savings from more protected employer based plans into significantly less protected (and often more costly) IRAs.

The Department also found that following conflicted advice results in costs and losses other than direct higher fees and expenses. For example, investors may choose poorer and/or riskier performing investments, they may trade too much and incur excessive transaction costs, or they may inappropriately chase higher returns. Moreover, the Department found that not only does conflicted advice give rise to additional costs to investors, but also the advice frequently leads to the purchase of investments that underperform the market. As the Department points out, there is a significant cost to the individual — as well as the national economy — because the investor has less money to spend.

The Department also stated that “small savers” (that is, those with low balances or those with modest means) are most negatively impacted by the detrimental effects of conflicted advice. Those with small accounts have fewer economic resources — any additional costs or losses diminish what little savings they have worked so hard to amass.

A recent survey by the AARP Fraud Watch Network finds that the individuals who are the most susceptible to investment fraud typically exhibit an unusually high degree of confidence in unregulated investments and tend to trade more actively than the general investor population. Doug Shadel and Karla Pak, *AARP Investment Fraud Vulnerability Study* 5-6 (2017), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2017/investment-fraud-vulnerability-study-res-econ.pdf.

AARP reminds the Department that many organizations within the financial sector have made significant financial investments to install new systems, establish revised policies and procedures, amend service provider, record keeping, and participant agreements, and change their marketing in order to meet the requirements of the Rule by the applicability date of April 10, 2017. These organizations and the investment advisors employed by them have generally determined that providing retirement investment advice in the best interests of their clients is the right thing to do for their clients. See, e.g., Michael Wursthorn, *Wealth Adviser Daily Briefing: Trump Begins Roll Back of Fiduciary Rule*, WALL STREET JOURNAL (Feb 6, 2017),

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<http://blogs.wsj.com/moneybeat/2017/02/06/wealth-adviser-daily-briefing-trump-begins-roll-back-of-fiduciary-rule/> (listing Merrill Lynch, Morgan Stanley, Wells Fargo Advisors, LPL Financial Holdings, Raymond James Financial, J.P. Morgan Chase, Edward Jones as companies that would comply with the Rule); Financial Engines and Betterment Comment Letters to Proposed Rule to Delay. It seems unfair to penalize them for their good faith efforts to achieve compliance in a timely fashion, but reward those organizations that have thumbed their noses at the Department's Rule and have done nothing to meet the applicability date. Indeed, delaying the applicability date will be one of the most disruptive and divisive moves that the Department can do to the financial services industry, and will cause more confusion for retirement investors. We also note that the bulk of costs to the financial service industry are one-time start-up costs. A large majority of organizations have already made these expenditures.

AARP believes that the economic analysis in support of the Rule delay does not support the delay in the applicability date of the Rule. There is no support as to why a delay would benefit the public, participant and beneficiaries, and the retirement investor. Indeed, this analysis does not focus on the heavy burden that those entities asking for a delay must meet. Given the significant, careful, thoughtful, and thorough regulatory analysis for the Rule that the Department previously produced, this analysis pales by comparison. All of the arguments against the Rule were previously presented to, and already analyzed by, the Department. The Department took them into consideration and made changes accordingly. See *Withdrawal of 2010 proposed rule*. There should be no delay of the applicability date of the Fiduciary Rule.

B. Delay Of The Rule And Reinstitution Of The Old Five-Part Test Is Inconsistent With ERISA Itself.

The U.S. District Court for the District of Columbia stated “. . . it is the five-part test—and not the current rule—that is difficult to reconcile with the statutory text.” *Nat'l Ass'n for Fixed Annuities v. Perez*, 2016 U.S. Dist. LEXIS 153214, 50-51 (D.D.C. Nov. 4, 2016). The U.S. District Court for the Northern District of Texas agreed, finding:

[T]he [old] 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 onetime 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 its broad remedial purpose, especially given today's market realities and the proliferation of participant-directed 401(k) plans, investments in IRAs, and rollovers of plan assets to IRAs. An interpretation covering such transactions better comports with the text, history, and purposes of ERISA.

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Chamber of Commerce of the United States v. Hugler, 2017 U.S. Dist. LEXIS 17619, 38-39 (N.D. Tex. Feb. 8, 2017). The judge went on to state that “[t]he DOL's new rules comport with Congress' expressed intent in enacting ERISA.” *Id.* at 42. Consequently, delay of the Rule and reinstatement of the five-part test under the 1975 fiduciary rule is inconsistent with ERISA itself.

C. The Public Has Demanded The Protections Of This Rule And Delay Of The Rule's Protections Will Undermine Participants' Expectations.

AARP members and the public generally have demanded and supported the protections of this Rule. An overwhelming majority of retirement account holders (88% of those surveyed) ages 25+ express support for the Fiduciary Rule and believe it is important for financial advisors to give financial advice in a client's best interests. S. Kathi Brown, *Attitudes Toward the Importance of Unbiased Financial Advice* 4, 6 (May 2016), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2016/attitudes-unbiased-fin-advice-rpt-res-econ.pdf.

There have been too many horror stories about individuals being placed into “suitable” investments that are both not in their best interests and unsuitable. See, e.g., Bob Egelko, *Judge orders ING to pay \$36.8 million to Fireman's Fund employees*, SAN FRANCISCO CHRONICLE (Oct. 31, 2014), <http://www.sfgate.com/bayarea/article/Judge-orders-ING-to-pay-36-8-million-to-5861719.php> (Fireman's Fund employees and retirees placed their pensions, 401(k) plans and other funds in investments that advisers assured them were safe, but turned out to be speculative private placements, losing significant amounts of retirement monies).

Moreover, personal finance writers have touted the beneficial effects of the Rule. They have informed their readers of the Rule's requirements and protections. Many of them have provided their readers with questions to ask their advisers to ensure that they are fiduciaries. Moreover, a significant number of major players in the financial services industry have already promised that they will comply with the Rule.

The timing of this delay is particularly concerning. Many retirement investors wait to make their IRA contributions right before the April 15 tax deadline to take advantage of the tax deferral that Congress granted for these plans, or to use their tax refund to fund their IRA. The delay of this Rule will lead to confusion among retirement investors and may even deter some of them saving for retirement — exactly the opposite result that anyone in this field desires.

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For all the above reasons, we urge you to reject any delay in the applicability date of the rule. If you have any questions, please feel free to contact me or Jasmine Vasquez of our Government Affairs office at 202-434-3711.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner
Legislative Counsel and
Legislative Policy Director
Government Affairs