Center for Clinical Programs

Mailing Address:
PO BOX 4037
Atlanta, GA 30302-4037
Phone: (404) 413-9270
Fax : (404) 413-9145

In Person:
85 Park Place
Atlanta, GA 30303

Georgia State University | COLLEGE OF LAW
Investor Advocacy Clinic

March 17, 2017

VIA EMAIL TO EBSA.FiduciaryRuleExamination@dol.gov

Re: Opposition to RIN 1210-AB79, Department of Labor Proposal to Delay Implementation of Fiduciary Rule

To Whom It May Concern:

Thank you for the opportunity to comment on RIN 1210-AB79, the proposal to delay the implementation of the fiduciary rule for sixty days. We are law professors who research and write about securities law.[1] We are also lawyers. Our research is informed by our work creating and running Investor Advocacy Clinics that serve investors unable to afford a lawyer. Unlike most lawyers, we do not charge our clients for our services. According to the FINRA Investor Education Foundation, which provided seed money to establish our clinics, we "help to fill the gap in legal representation for small investors" because "investors with relatively modest claims often cannot find an attorney to represent them on a contingency basis and they often cannot afford the hourly rate for representation."[2] In our experience, these "modest claims" include investment losses up to $100,000, a significant amount for most Americans. A loss of this magnitude in a retirement account is devastating with an impact radiating beyond the investor to the greater community, often resulting in increased need for social services. A common cause of these investors' losses is advice that does not meet the fiduciary standard: lack of communication, failure to disclose information, or advice that benefitted an investment professional at the investor's expense.

Based on our scholarship and experience working with real investors, we oppose delaying the implementation of the fiduciary rule for three reasons: (1) the fiduciary rule has been thoroughly researched and vetted with multiple opportunities for study and discussion; (2) the industry is prepared to begin implementing a rule with proven benefits to retirement savers; and (3) the examination required by the President's February 3, 2017 Memorandum will be best

---

[1] Professor Nicole G. Iannarone is an assistant clinical professor and director of the Investor Advocacy Clinic at Georgia State University College of Law, where she also teaches Business Arbitration Practicum, Professional Responsibility, Complex Litigation, and Civil Procedure. Professor Benjamin P. Edwards is an assistant professor of law at Barry University Dwayne O. Andreas School of Law where he teaches Business Organizations, Securities Regulation, and Professional Responsibility. Prior to joining Barry, he was the founding director of the Investor Advocacy Clinic at Michigan State College of Law. The comments in this letter represent the individual views of the signatories and are not intended to and do not reflect the views of their respective institutions.

[2] FINRA Investor Education Foundation, http://www.finrafoundation.org/grants/advocacy/ (last accessed Mar. 17, 2017).

accomplished by looking to actual experiences after the rule is implemented.

1. Years of Study, Listening, and Drafting Should Not Be Ignored.

The Department of Labor's fiduciary rule was not created overnight. It was implemented after significant study and substantial input from impacted constituents. Thousands registered well-reasoned thoughts representing voices from academics, advocates for retirees, the financial services industry, and American investors. Prior study and examination illustrates that conflicted advice takes a toll on Americans who are largely responsible for ensuring their own financial well-being in retirement. In February of 2015, the White House Council of Economic Advisers released a report on conflicted investment advice, conservatively estimating that "the aggregate annual cost of conflicted advice is about $17 billion each year" for retirement savers.[3] A significant investment of time and resources culminating in a rule that undisputedly benefits regular Americans should not be ignored to reexamine issues that have been previously addressed. The fiduciary standard should become applicable on April 10, 2017.

2. The Financial Services Industry is Prepared to Implement the Rule and Retirement Savers Will Benefit from its Implementation.

Investment professionals have had significant time to prepare for the fiduciary rule's implementation and are ready to comply now. Even those members of the industry who did not begin planning until the fiduciary rule became effective on June 7, 2016 will have had ten months to put in place the operational and supervisory structures to comply with the rule. These firms have invested resources to ensure they can adhere to the rule. In fact, due to these investments, many financial services firms will follow the fiduciary rule even if its implementation is officially delayed.[4] Should the rule be delayed, the only investments that will be harmed are those of American retirement savers. The notice seeking these comments demonstrates the harm: a mere 60-day delay is predicted to impact investor retirement accounts to the tune of an estimated $147 million in the first year and $890 million in ten years. Going forward with the rule will not harm a well-prepared industry but delaying its implementation will harm Americans planning for retirement.

[3] Council of Economic Advisers, The Effects of Conflicted Investment Advice on Retirement Savings 2 (Feb. 2015).
[4] *See* Michael Wursthorn, *Merrill Lynch to End Commission-Based Options for Retirement Savers*, Wall Street Journal (Oct. 6, 2016), available at https://www.wsj.com/articles/merrill-lynch-to-end-commission-based-options-for-retirement-savers-1475784928 (last accessed Mar. 17, 2017) ("Merrill Lynch will no longer give retirement savers the option of paying a commission for trades, a wholesale exit from the traditional Wall Street sales model in accounts that stand to be affected by new conflict-of-interest rules on retirement accounts."); *See also* Carmen Germaine, *Delayed Fiduciary Rule Faces Host of Obstacles to Repeal*, Law360 (Jan. 23, 2017), available at https://www.law360.com/articles/883632/delayed-fiduciary-rule-faces-host-of-obstacles-to-repeal (last accessed Mar. 17, 2017) ("many of the largest players in the industry have already nearly finished adjusting their models and systems to comply, and are unlikely to halt or dismantle their progress."), Liz Skinner, *New Fintech Tools for DOL Fiduciary Rule Launched Despite Questions of a Trump Delay*, InvestmentNews (Nov. 16, 2016), available at http://www.investmentnews.com/article/20161116/FREE/161119946/new-fintech-tools-for-dol-fiduciary-rule-launched-despite-questions (last accessed Mar. 17, 2017) ("The advisory world is moving toward a fiduciary standard with or without the DOL rule, financial technology firms contend.").

3. Delaying the Fiduciary Rule's Implementation Will Adversely Impact the Examination of the Fiduciary Rule's Impact.

A delay will undercut the Department of Labor's ability to assess the impact of the fiduciary rule as required by the President's Memorandum because timely implementation will provide the best data set. The answers to the Memorandum's proposed inquiry may be unknowable because the complex, manmade financial services system intelligently and rapidly evolves in unpredictable ways in response to regulatory changes.[5] It is therefore essential that actual experiences and data, as opposed to projections and predictions, be used to evaluate the impact of the fiduciary rule.

For example, the President's Memorandum directs the Department of Labor to examine the impact of legal costs resulting from the fiduciary rule. Without knowing how the industry will provide advice and oversee compliance and supervisory structures pursuant to the rule, it is impossible to know if investors can use a class action device to enforce violations of the rule. Indeed, individual issues may predominate and undercut the ability of investors to press class action claims. These matters are only ascertainable after the rule's implementation.

Moreover, the President's Memorandum directs the Department of Labor to evaluate whether the fiduciary rule results in diminished access to financial advice. Here again, real world experience offers better data than projections. For example, both Australia and the United Kingdom have implemented more extensive reforms—outright banning commission compensation for personalized financial advice to retail customers. While it remains early, their markets have continued to function and it has not grown unduly difficult to find a financial adviser in those nations.[6]

The Department of Labor should remain appropriately skeptical about industry claims of disruption because the financial industry continues to profit with the status quo.[7] This creates a strong incentive to exaggerate the potential risks of any proposal that would reduce costs for consumers. The Department should keep in mind that if the rule is implemented as anticipated on April 10, it will have real data to use in undertaking the examination ordered by the President.

In conclusion, delaying the implementation of a rule that has been years in the making harms Americans attempting to plan for retirement. Implementing the rule will not harm the industry, will benefit the American people, and will result in real, not theoretical, data for the President's

---

[5] *See* Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUDIES 351 (2014) ("An important new rule will change the system beyond our calculative powers. Instead of weighing costs and benefits, financial regulation necessarily is based on a series of trade-offs of normatively derived values, which may entail principles of pragmatic design").
[6] *See* Jeremy Burke & Angela A. Hung, FINANCIAL ADVICE MARKETS: A CROSS COUNTRY COMPARISON 10, 14, 24 (Apr. 21, 2015).
[7] *See* Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 635 (2015) ("this Article illustrates the (rather obvious) point that the greater the economic stake of financial intermediaries, the more skeptical policymakers should be of their assertions about the potential costs or risks associated with a proposed policy change").

analysis. Thank you for the opportunity to share our comments, and we would be pleased to answer any questions or provide additional information.

Best regards,

/s/ Nicole G. Iannarone	*/s/ Benjamin P. Edwards*
Professor Nicole G. Iannarone	Professor Benjamin P. Edwards