VIA ELECTRONIC MAIL

April 17, 2017

Edward Hugler
Acting Secretary
Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Re: RIN 1210-AB79 the Delay of File Number 29 CFR Parts 2509 and 2510 Definition of the Term "Fiduciary"; Conflict of Interest Rule--Retirement Investment Advice; DOL Fiduciary Rule

Dear Acting Secretary Hugler:

On February 3, 2017, President Trump issued a memorandum regarding the Department of Labor's ("DOL") Fiduciary Rule ("Fiduciary Rule"), instructing the DOL to examine the rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice.[1] The Memorandum stressed that the guiding principles for financial services regulation was to empower Americans to make their own financial decisions and to facilitate their ability to save for retirement. The Memorandum directs the DOL to examine the Fiduciary Rule to determine if investors will be harmed by reducing their access to certain retirement savings products and services while simultaneously increasing the price they may pay to gain access to those services. On April 4, 2017 The Department of Labor extended for 60 days the applicability date of the final regulation, published on April 8, 2016, defining who is a "fiduciary" under the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986. It also extends for 60 days the applicability dates of the Best Interest Contract Exemption and the Class Exemption for Principal Transactions.

The original proposal called for a 60-day delay of the fiduciary rule to give the department time to collect and consider information related to issues raised in President Trump's initial request.

[1] See "Presidential Memorandum" at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

HISTORY OF THE INVESTMENT PROGRAM ASSOCIATION

The Investment Program Association ("IPA") was formed in 1985 to provide proactive national leadership for the direct investment industry. The IPA supports individual investor access to a variety of asset classes not correlated to the traded markets. These investment opportunities have historically been available primarily to institutional investors. The funds that invest in these asset classes include publicly registered, non-listed real estate investment trusts ("NL REITs"), publicly registered, non-listed business development companies ("NL BDCs"), and other publicly registered, non-listed direct participation programs ("Other DPPs," and collectively with NL REITs and NL BDCs, "Public Programs"). In addition, the IPA along with the Financial Services Institute ("FSI") represents Independent Broker-Dealers ("IBD") firms who provide business support to financial advisors who are self-employed independent contractors. Independent financial advisors are small-business owners with strong ties to their communities and know their clients personally. For over 30 years the IPA has successfully championed the continued growth of our industry, best practices and regulations that effectively serve the investing public. These offerings have become increasingly important to financial professionals and investors alike. Public Programs have been held in more than 3 million investor accounts. Today, Public Programs function as a critical component of effectively diversified investment portfolios and serve an essential capital formation function for national, state, and local economies.

Discussion

The IPA appreciates the opportunity to comment on the directive issued through the Presidential Memorandum. The IPA supports a carefully crafted, Securities Exchange Commission (SEC) driven uniform fiduciary standard of care that would be applicable to all professionals providing personalized investment advice to retail clients. However, we respectfully submit that the Fiduciary Rule is based on flawed assumptions thereby creating a new regulatory regime that is far too complex, too cumbersome, and too costly to manage. Firms were provided just 12 months to develop policies, procedures, and educational materials to meet the requirements while reconfiguring revenue models, compensation structures and creating the necessary technology, electronic systems, and operational infrastructure to support these massive changes. The IPA continues to believe that the Fiduciary Rule's applicability date of June 9, 2017 would prove inadequate because our members would need more time to put the rule's requirements into place to effectively serve the investing public.

Previously, the DOL has provided much more time for the industry to prepare for less complex rulemaking. For example, the time between the publication of the Department's interim final guidance under ERISA section 408(b)(2) (a far more modest rule relating to the disclosure of fees) and the effective date of the final regulations was two years.[2] The Department recognized the need for this extended implementation period even though the substance of the section 408(b)(2) rules changed very little between the interim final rule and the final rule. The DOL Fiduciary Rule is far more complex, impacting all aspects of the financial services industry and our nation's capital markets than the section 408(b)(2) guidance.

To comply with the Fiduciary Rule, the financial services industry has had to substantially change their business practices and spend significant time and money becoming compliant. The vast projects they have undertaken as a result of the Fiduciary Rule include drafting client contracts, creating enormously complex policies and procedures, reengineering compensation structures, creating new pricing models, updating contracts with product manufacturers, creating and implementing financial advisor training courses, drafting client communications and educational documents, changing guidelines for the management of existing accounts, developing elaborate web site disclosures, printing and distributing mass quantities of the required documents and disclosures and much more.

Increased Litigation

The Presidential Memorandum instructed the DOL to determine whether the Fiduciary Rule would "cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services."[3] There will be an increase in litigation and an increase in the cost for investors to gain access to retirement services.

Regulators have publicly stated that the BICE is constructed to use private litigation as the primary, if not sole, means of enforcement.[4] Using private litigation (or the threat thereof) as the primary enforcement mechanism by requiring that fiduciaries execute a contract, including required contractual warranties is an ineffective method of regulation. Allowing courts to interpret ERISA fiduciary standards of care is contrary to congressional intent as reflected in ERISA § 514(a) and is likely to result in inconsistent interpretation. The burden of such litigation will only further increase compliance costs and directly impact the cost of advice to retirement investors. Increased litigation will further diminish investor access to professional financial advice as independent broker dealers that initially opt to continue to service their retirement investor clients are forced by economic realities to re-evaluate the risks and potential liabilities, as many already have.

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[2] See Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 75 Fed. Reg. 41600 (July 16, 2010); Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure; Final Rule, 77 Fed. Reg. 5,632 (Feb. 3, 2012) (with final effective date of July 1, 2012).

[3] *See "Presidential Memorandum" at* https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

[4] *See DOL Rule will have substantial effect, available at* http://thetrustadvisor.com/news/department-of-labors-fiduciary-rule-will-have-substantial-effect

Acting SEC Commissioner Michael Piwowar, has publicly stated concerns that the rule is about one thing, “enabling trial lawyers to increase profits”.[5] According to the Oxford Economics study, the greatest concern of broker-dealers concerning the Fiduciary Rule is the potential costs of litigation.[6] PIABA, the association for plaintiff’s attorneys in the securities industry, has met with the DOL and continues to be a very vocal supporter of the rule.[7] While the Fiduciary Rule allows for arbitration of individual disputes, it also exposes firms to potential class-action liability.

As a result of unclear standards, the industry has already seen increased litigation surrounding the DOL Rule providing unlimited opportunities for plaintiff lawyers with limited benefits to the investing public. The vague “best interest” and “reasonable compensation” standards that the DOL left unclear, will encourage plaintiff’s attorneys to pursue frivolous and unsubstantiated litigation. The threat of class action lawsuits will also rise due to similar sentiments. Class actions are complex and expensive to litigate often ending in settlements to mitigate costs. This only benefits plaintiff’s lawyers and will severely damage the professional financial services industry and investors the rule is intended to protect.

As an example, the ambiguity of the “reasonable” rate of compensation as required by the BICE has caused widespread confusion among the industry. In response to comments requesting a definition of what constitutes ‘reasonable compensation’ under the Fiduciary Rule, the Department repeatedly pointed to ERISA and the body of guidance surrounding it as having established such a definition. While this is true in that ERISA establishes a facts and circumstances based standard, the DOL has declined to issue advisory opinions addressing how that standard is met. During the interviews conducted as part of a Duke University study on class action procedures, companies expressed concern regarding a wide number of such questions and expressed profound concern about the potential litigation (particularly nuisance class action lawsuits) that may result.[8] Furthermore, any effort by the industry to collect information and data to determine what may constitute “reasonable compensation” could quickly run afoul of anti-trust regulations. This leaves the industry in an untenable position with no real guidance from the DOL on what will be considered “reasonable compensation” and no real ability to develop an industry standard or even collect the data needed to create one.

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[5] See “*Remarks at the “SEC Speaks” Conference 2017: Remembering the Forgotten Investor*” available at https://www.sec.gov/news/speech/piwowar-remembering-the-forgotten-investor.html.

[6] *Id.*

[7] See PIABA meeting available at https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1210-AB79&meetingId=2412&acronym=1210-DOL/EBSA

[8] *Id.*

Increased Fees and Fewer Investment Options

Litigation and compliance costs will rise significantly and these costs will result in higher fees or a reduction in services or investment options for investors. The Department of Labor has estimated the cost to comply with the Fiduciary Rule will be between $10 billion and $31.5 billion over ten years, with the most likely figure being $16.1 billion. The Department expects $5 billion in first-year costs and $1.5 billion in annual costs after that.[9] The Oxford Economics report warned that the DOL has "dramatically underestimated" the cost to comply with the new rule and that smaller firms would find it difficult to stay in business. The Oxford Economics study estimates the Fiduciary Rule will result in startup costs ranging from $1.1 million to $16.3 million per firm, depending on firm size. The study also found that because of the cost burdens, firms will shift their business model towards fee-based advising and create a minimum balance for client accounts. These account minimums will effectively force smaller investors into self-advised or robo-advice accounts. As compliance costs rise, fees for investors and account minimums rise, causing middle and lower class investors to be priced out of professional investment advice. The impact of being priced out of professional investment advice will have a permanent, long-term impact on investor's retirement savings.

Due to the cost of complying with the Fiduciary Rule, firms have begun to shift their business model towards fee-based advice, creating a minimum asset threshold for accepting client accounts or substantially increasing their fees. These results will harm investors by reducing their access to retirement advice for those whom a fee-based option is not affordable. In addition to the likely cost increases on retirement products and advice that retail investors will see, the research conducted by Oxford Economics shows that the higher cost estimates discussed above will result in the regulatory burden falling disproportionately on smaller firms who cannot take advantage of scale. IBD members serve many low and middle income Americans, and the DOL Rule will cause these types of clients to be priced out of access to professional retirement advice. Because of these unintended consequences, IPA maintains that the Fiduciary Rule will indeed cripple the retirement savings industry by altering the business models of industry participants and disenfranchise those investors it intended to protect.

Reduced Investment Options

Firms have announced that the DOL Fiduciary Rule will force them to alter their business strategies in ways that would limit the investment options currently available to investors. For example, the DOL Fiduciary Rule has caused firms to eliminate share classes of certain offerings, which severely limits investors' ability to make the personalized investment choices that are best for them by presenting fewer options in

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[9] See "Fiduciary Rule hits BDs Budgets" *available at* http://www.thinkadvisor.com/2016/08/18/dol-fiduciary-rule-hits-bds-it-budgets-product-lin

the market. Many firms are moving away from the direct and Public Program business because of compliance costs related to the Fiduciary Rule.[10]

Conclusion

The Presidential Memorandum directed the DOL to examine whether the Fiduciary Rule will result in harm to investors due to a reduction of Americans' access to certain retirement savings products and services, dislocations or disruptions within the retirement services industry. It is our assertion that the Fiduciary Rule does not satisfy each of these tests and will have a devastating, long term impact on retirement investors' access to professional guidance and access to valuable retirement products and services.

The Fiduciary Rule will restrict investors' access to savings offerings, product structures, retirement savings information and professional financial advice, severely limiting their ability to properly plan for retirement. The Fiduciary Rule will disrupt the retirement services industry and negatively impact investors by limiting their choices among investment products, retirement planning services, compensation, and investor access. This disruption will force the industry to consolidate and to offer less personalized investment advice, leading to less competition in the industry, less qualified financial advisors entering the industry, less access to advice and investment options for investors and significantly higher costs. All of this will result in the reduction of investors' access to professional retirement advice, which research has shown investors who work with professional financial advisors save more, are better prepared for their retirement and have greater confidence in their retirement planning resulting in less reliance on social programs.

Because of this, the IPA is unable to support the Fiduciary Rule in its current form. The Fiduciary Rule should be significantly delayed and subsequently revised or rescinded as appropriate.

Thank you for considering the IPA's comments. Should you have any questions, please contact me at (469) 916-0212.

Respectfully submitted,

Anthony Chereso
President & CEO, Investment Program Association

[10] See "LPL to End Direct Fund Business" *available at* http://www.fa-mag.com/news/lpl-to-end-direct-fund-business-26636.html