



April 17, 2017

2016-2017 BOARD OF DIRECTORS

OFFICERS

President

Chris Foster, CLU, ChFC, CFBS, AEP
Greensboro, NC

Immediate Past President

Mark B. Murphy, CLU, ChFC
Roseland, NJ

President-Elect

Richard A. DeVita, CLU, ChFC
Charlotte, NC

Vice President, Treasurer & Secretary

David F. Byers Jr, J.D, LLM
Birmingham, AL

Chief Executive Officer

David J. Stertzner
Washington, DC

DIRECTORS

Raymond L. Bening

Kay Dempsey, CLU, ChFC, CLTC

Richard C. Maus, LUTCF, CAP

David M. Morris, JD, CLU, ACFBA

Jason M. O'Dell, MS, CWM

Carl J. Peterson, CLU, ChFC, CLTC

Julie Schneider

Chet Schwartz

Jeri L. Turley

Richard P. Van Benschoten

Russell Vandavelde, IV

Jim Waggoner

John C. Watson, III, CLU, ChFC, AEP, RFC

Submitted Electronically – EBSA.FiduciaryRuleExamination@dol.gov

TO:

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Fiduciary Rule Examination
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

**Re: Definition of the Term “Fiduciary”—Additional Comments
Regarding the Economic Impact of the Rule and Associated Exemptions
(RIN 1210-AB79)**

Ladies and Gentlemen:

We are writing on behalf of our members to provide additional information about the impact of the Department of Labor (“Department”) regulation redefining fiduciary investment advice and its related prohibited transaction exemptions (collectively, the “Fiduciary Rule”)¹ in response to the information request contained in the proposed regulation delaying the applicability date of the Fiduciary Rule (the “Delay Rule”).²

As we have consistently informed the Department, the economic analyses accompanying the Fiduciary Rule and the Delay Rule were fundamentally flawed, overstating the benefits and dramatically understating the costs, especially with respect to insurance-based financial products and services. These estimates were not based on empirical evidence, but on extrapolated results from narrow academic studies examining one primary type of investment and distribution method.³

There is good reason to question one of the key underlying studies the Department and the President’s Council of Economic Advisors (“CEA”) relied on, especially in the context of insurance products.

¹ 81 Fed. Reg. 20,945 – 21,221 (Apr. 8, 2016).

² 82 Fed. Reg. 12,319 (Mar. 2, 2017).

³ For AALU’s full comments on the Department’s proposal, see Letter from David J. Stertzner, Chief Executive Officer, AALU, to Office of Regulations and Interpretations, Employee Benefits Security Administration, DOL (July 21, 2015) available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00696.pdf>; see also Letter from David J. Stertzner, Chief Executive Officer, AALU, to Office of Regulations and Interpretations, Employee Benefits Security Administration, DOL (September 24, 2015) available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/03102.pdf>; see also Statement of Caleb Callahan, Senior Vice President and Chief Marketing Officer, ValMark Securities, Inc. On behalf of the Association for Advanced Life Underwriting (AALU), Public Hearing on Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice and Related Proposed Prohibited Transaction Exemptions Before the Department of Labor (August 12, 2015) available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/1210-AB32-2-WrittenTestimony25.pdf>.

As a former Securities and Exchange Commission chief economist has noted, the research relied on by the Department did not analyze the performance of mutual funds held in annuities, the data was about 15 years old, and the author of one of the key studies later revised his work to show the “cost” of conflicts was about 1/6th of the amount originally estimated.⁴

While the Department has made reference to the length and amount of paperwork comprising the economic analyses and supporting documentation, we must point out that is it not the quantity of the paper, but the quality of the analysis that is at issue. When the theoretical predictions of previous years are not borne out by the current facts of implementation, the facts must prevail over the theories—however long the theories’ academic justifications.

It was never appropriate to assume, as the Department did, that these studies properly measured the effect of the rule on the entirety of all available investments and distribution methods across the roughly \$15 trillion held by plans and IRAs. In particular, the Department’s analytical methods did not capture the reality of insurance-based investments and financial services. Especially since we now have a year of concrete evidence to gather and measure, showing how insurance carriers, producers, brokers, and others responded to the rule as they attempted to comply, and showing what negative effects such compliance efforts have already had on plan participants and IRA owners, the Department is obligated to survey the marketplace to more accurately revise these estimates.

The Flawed Economic Analysis is Driving Flawed Policy Conclusions

We stress that this is not an academic exercise—the results of the economic analyses of the Fiduciary Rule and the Delay Rule have had a fundamental effect on the policy decisions of both the Obama Administration and the Trump Administration. Precisely because the real world effects of the Fiduciary Rule—reduced access to investment advice, higher costs for such advice, and increased frivolous litigation risks—are at odds with the Department’s predictions, President Trump ordered a review of the Fiduciary Rule in his February 3 Presidential Memorandum.

Unfortunately, the Department has not followed the intent of this order—rather than reviewing the Fiduciary Rule and then deciding how to proceed, delaying the applicability date throughout the review, the Department decided to partially implement the rule before it completes the review.

This is a policy decision driven by the flawed prior economic analysis methodologies, and is contrary to the President’s Memorandum and the Department’s statements that it does not want to implement policies only to change them later, disrupting the marketplace and confusing retirement investors.⁵ Yet that is exactly what is likely to occur if the Department does not further delay the applicability date beyond June 9th, 2017 to provide enough time to complete the review ordered by President.

Accordingly, we urge the Department to further extend the applicability date of the entirety of the Fiduciary Rule from June 9th until such time as it has completed its review and determined its final policy. To partially implement the Fiduciary Rule is a disservice to the very retirement savers the Department ostensibly seeks to protect, as they will face higher costs from multiple rounds of regulatory change.

⁴ See Craig M. Lewis, “An Inflated \$17 Billion Talking Point from DOL,” *Forbes* (Dec. 16, 2015).

⁵ 82 Fed. Reg. at 12,320, “Additionally, absent an extension of the applicability date, if the examination prompts the Department to propose rescinding or revising the rule, affected advisers, retirement investors and other stakeholders might face two major changes in the regulatory environment rather than one. This could unnecessarily disrupt the marketplace, producing frictional costs that are not offset by commensurate benefits.”

New Empirical Evidence and New Research Must Be Taken Into Account

In the year since the Fiduciary Rule was released, it is clear that the availability of investment advice will be restricted by the rule, and the cost of such advice is increasing. Reports already show that a number of financial firms are reducing service to average retirement savers as a result of this rule—or entirely ceasing to provide advice—and that the cost estimates for implementation were significantly underestimated.⁶ A CoreData Research survey of financial advisors from October found that 71% of advisors planned to disengage from smaller, mass market investors, and that as much as 25% of their current mass market clients will no longer be serviced.⁷ LIMRA forecasts that variable annuity sales will drop a further 20-25% in 2017 once the Rule takes effect.⁸

- **Investor Access to Insurance Products and Services Particularly Affected**

This is a particular problem for the insurance industry as the Fiduciary Rule will prevent some insurance agents from being able to offer some investment products on any terms, removing a valuable source of information and assistance to retirement savers. Beginning January 1, 2018, only the Best Interest Contract Exemption (“BIC Exemption”) will be available for annuities that are not fixed-rate annuities.

Only banks, registered investment advisors, insurance carriers, and broker-dealers are eligible to be financial institutions, leaving independent insurance agents that do not also have a securities license with no means to sell fixed index annuities under the Fiduciary Rule (as insurance carriers are unlikely to enter into the liability risks imposed by the BIC Exemption for agents they do not supervise).

While the changes to the transitional Prohibited Transaction Exemption 84-24 offer short term mitigation of this problem, they will only apply for seven months. Further, while there is a pending insurance intermediary class exemption that would allow a small number of entities to be financial institutions modeled on the BIC Exemption (though with many additional and controversial conditions), the Department has announced no plans to grant a workable class exemption or otherwise address the issue.⁹

- **New Research Shows Value of Investor Access Regardless of Compensation Method**

One of the key problems in the Department’s analyses is that they focus on certain compensation methodologies without measuring the full value provided by all financial professionals. By simply focusing on the way a professional is paid, the Department is discounting the greater harm to investors that is caused by a loss of access to professional financial advice. Several new studies quantify the value of investor assistance regardless of the compensation arrangement.

One of the key problems in the Department’s analyses is that they focus on certain compensation methodologies without measuring the full value provided by all financial professionals. By simply focusing on the way a professional is paid, the Department is discounting the greater harm to investors that is caused by a loss of access to professional financial advice. Several new studies quantify the value of investor assistance regardless of the compensation arrangement.

⁶ See, e.g., Sam Batkins, *Fiduciary Rule Has Already Taken Its Toll: \$100 Million in Costs, Fewer Options*, Insight, February 22, 2017. Accessed March 17, 2017. Available at: <https://www.americanactionforum.org/insight/fiduciary-rule-already-taken-toll-100-million-costs-fewer-options/>.

⁷ See CoreData Research, *The Fiduciary Rule* (Oct. 2016).

⁸ See, e.g., Greg Iacurci, *Department of Labor's Fiduciary Rule Blamed for Insurers' Massive Hit on Variable Annuity Sales*, Investment News, March 28, 2017. Accessed March 30, 2017. Available at: <http://www.investmentnews.com/article/20170328/FREE/170329922/departament-of-labors-fiduciary-rule-blamed-for-insurers-massive-hit>.

⁹ 82 Fed. Reg. 7,336 (Jan. 19, 2017).



For example, a Vanguard study from last September shows that having a financial professional's assistance can increase compound annual returns by 300 basis points, fully half of which is due not to investment selection, but to teaching better saving habits and other behavioral changes.¹⁰ Another paper discusses factors the Department did not consider in its analysis, showing the effects a financial professional has in encouraging increased savings and financial discipline.¹¹

These studies show that the Department underestimated the costs and overestimated the gains of the rule for individual retirement investors—when these investors lose access to financial professionals, regardless of how they are paid, they lose valuable financial assistance causing real harm.

Accordingly, the Department should conduct its own surveys and gather the new evidence now available to determine the Fiduciary Rule's actual impact on retirement savers, as opposed to relying on the predictions of theoretical models from over 2 years ago. To do otherwise is to remain willfully blind to the realities of the Fiduciary Rule's effect, placing theory ahead of the real world.

Who We Are

AALU is the leading organization of life insurance professionals who are a trusted voice on policy issues impacting Americans' financial security and retirement savings. Our 2,200 members are primarily engaged in sales of life insurance and annuities used as part of estate, charitable, retirement, and deferred compensation and employment benefit services.

As life insurance industry professionals, we work in the best interest of savers every day, enabling individuals and families from all economic brackets to maintain independence in the face of potential financial catastrophe and to secure their retirement. The products that our industry provides guarantee the delivery of financial security at precisely the moment it is needed, while contributing significantly to the nation's storehouse of savings and investment capital.

Conclusion

The evidence shows the Fiduciary Rule will negatively impact the very retirement investors it is intended to help, despite the academic predictions of the past. The methodologies used by the Department were particularly inappropriate to estimate the effects of the rule on the millions of retirement investors who rely on insurance-based investment products and services to guarantee or provide for their retirement security. The Department must reevaluate the Rule, gathering and taking into account new evidence and new research showing the true impact of the rule, to accurately inform its policy decisions. As a result, the Department should delay the applicability date beyond June 9th until it has completed its review to avoid harming the retirement investors it sought to help. Given the extensive amount of work facing the Department to review the Fiduciary Rule and to address matters like the insurance intermediary class exemption, a period of at least one year would seem appropriate.

Sincerely,

David J. Stertzer
Chief Executive Officer AALU

¹⁰ Francis M. Kinniry, Jr., Colleen M. Jaconetti, Michael A. DiJoseph, Yan Zilberging and Donald G. Bennyhof, "Putting a value on your advice: Quantifying Vanguard Advisor's Alpha." Vanguard Research, September 2016.

¹¹ Claude Montmarquette and Nathanlie Viennot-Briot. "The Gamma Factor and the Value of Financial Advice." Scientific Series 2016s-35, Cirano, August 2016.