

VIA ELECTRONIC MAIL (EBSA.FiduciaryRuleExamination@dol.gov)

July 19, 2017

Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

RE: RIN 1210-AB82: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

On July 6, 2017, the Department of Labor (“Department”) published a request for information (“RFI”) in connection with its examination of the final rule defining who is a “fiduciary” as a result of giving investment advice for a fee or other compensation with respect to assets of a plan or IRA (“Fiduciary Rule”). The RFI seeks public input regarding the advisability of extending the January 1, 2018 applicability date of certain provisions in the Fiduciary Rule and its accompanying exemptions, including the Best Interest Contract Exemption and Prohibited Transaction Exemption 84-24.

Although I work at a financial services firm, I am responding personally to the Department’s RFI. I support a carefully-crafted, universal fiduciary standard of care that will be applicable to all professionals providing personalized investment advice to retail clients. However, I do not support the Fiduciary Rule and accompanying exemptions as currently written. The Fiduciary Rule is likely to reduce investors’ access to certain retirement product structures and related financial advice, result in disruptions within the retirement services industry that may adversely affect investors, and cause an increase in litigation which will result in an increase in the prices that investors and retirees must pay to gain access to retirement services.

I support a delay in the January 1, 2018 applicability date in order to allow the Department to conduct a detailed review of the Fiduciary Rule, its negative impact on investors’ access to retirement planning services, and new innovations and approaches that may alleviate many of these concerns.

Finally, I respectfully request an extension of the comment period for the RFI in order to allow industry participants sufficient time to thoughtfully and completely respond to the important questions posed by the RFI.

To be more specific, I feel the applicability date of the Fiduciary Rule should be delayed until April 10, 2019 and the Department should extend the comment period an additional 30 days for responses to the remaining questions in the RFI.

1. Investors are well protected by existing regulatory structures.
 - a. The sale of retirement savings products is already heavily regulated. My firm and its associated financial advisors are subject to comprehensive regulation and legal obligations under federal and state securities laws, rules, and regulations.
 - b. The SEC regulates my firm through its antifraud authority in the Securities Act of 1933 (“Securities Act”) and the Securities Exchange Act of 1934 (“Exchange Act”), and certain Exchange Act rules.¹ It similarly regulates investment advisers through the Investment Advisers Act of 1940 and related regulations.²
 - c. My firm and its financial advisors are also subject to FINRA rules, oversight, and frequent examinations.³ My firm may transact business only after it satisfies the membership requirements of FINRA for registered broker-dealers interacting with the public.⁴
 - d. FINRA rules require my firm to commit to observe just and equitable principles of trade and high standards of commercial honor.⁵ In addition, my firm is obligated to disclose certain material conflicts of interest to its customers, and federal securities laws and FINRA rules strictly prohibit my firm from participating in certain transactions that may present acute potential conflicts of interest.⁶
 - e. My firm has and enforces written supervisory procedures reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules as required by FINRA Rule 3110.⁷
 - f. My firm also has a system of supervisory control policies and procedures that test and verify that its supervisory procedures are reasonably designed and effective. My firm tests its policies and procedures and verify that they work or make necessary changes if they do not.⁸
 - g. Both the SEC and FINRA examine my firm for compliance.
 - h. My firm is further held accountable by an active plaintiff’s bar.
 - i. These regulatory structures and access to the courts serve as an important and effective mechanism to protect my firm’s clients planning for retirement and will remain operative should the Department choose to further delay the January 1, 2018 compliance deadline.

¹ U.S. SECURITIES AND EXCHANGE COMMISSION, STUDY ON INVESTMENT ADVISERS AND BROKER–DEALERS at iii (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

² *Id.*

³ See U.S. SECURITIES AND EXCHANGE COMMISSION, GUIDE TO BROKER–DEALER REGISTRATION (Apr. 2008) <http://www.sec.gov/divisions/marketreg/bdguide.htm>; U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker–Dealers (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

⁴ U.S. SECURITIES AND EXCHANGE COMMISSION, STUDY ON INVESTMENT ADVISERS AND BROKER–DEALERS 14 (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

⁵ See U.S. SECURITIES AND EXCHANGE COMMISSION, STUDY ON INVESTMENT ADVISERS AND BROKER–DEALERS at iii (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

⁶ See, e.g. FINRA Rule 5121 (a), (f)(5).

⁷ See FINRA Rule 3110 available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11345.

⁸ See FINRA Rule 3120 available at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=15447&element_id=11346&highlight=supervisory+control#r15447.

2. Investors are further protected by the application of the Impartial Conduct Standards.
 - a. During the transition period from June 9, 2017, through January 1, 2018, my firm and its financial advisors are relying on the Best Interest Contract Exemption (“BICE”) and must adhere to the Fiduciary Rule’s Impartial Conduct Standards.
 - b. These Impartial Conduct Standards require my firm and its financial advisors to provide advice in the retirement investors’ best interest, charge no more than reasonable compensation for their services, and to avoid misleading statements.
 - c. My firm has already implemented procedures to help ensure that we are meeting these new obligations. These new procedures include changes to its compensation structures, restrictions on the availability of certain investment products, improvements to its due diligence review of products and service providers, enhancements to efforts to monitor the sales practices of its affiliated financial advisors, and the creation and maintenance of books and records sufficient to demonstrate compliance with the Impartial Conduct Standards.
 - d. Thus, investors are already benefitting from stronger protections since the Fiduciary Rule became partly applicable on June 9, 2017.
 - i. The Department appears to acknowledge as much, saying in the supporting release to the final Fiduciary Rule extending the applicability date that the Impartial Conduct Standards help “ensure that investment recommendations are not driven by adviser conflicts, but by the best interest of the retirement investor” and that much of harm the Department claims is happening to investors “could be avoided through the imposition of fiduciary status and adherence to basic fiduciary norms, particularly including the Impartial Conduct Standards.”⁹
 - e. As a result, any harm to investors caused by further delay of the additional requirements is greatly reduced by the application of the Fiduciary Rule’s Impartial Conduct Standards and my firm’s compliance with them.
3. Investor access to retirement planning services can be preserved by cutting the costs associated with the Fiduciary Rule.
 - a. The Department’s Regulatory Impact Analysis (“RIA”) estimated costs for large firms to be \$5 million to start and \$2 million per year thereafter, with medium-sized firms incurring 13.3% of the cost to large firms and small firms incurring 4.8% of the cost to large firms.
 - b. The RIA identified four areas of compliance costs for firms:
 - i. Firm Costs
 - ii. Errors & Omissions Insurance
 - iii. Switching/Training Costs
 - iv. Additional PTE/Exemption Costs
 - c. My firm has invested significant hours and costs in regard to the four areas of compliance identified in the RIA, including some incurred costs that were not anticipated in the RIA.
 - d. Over time, these increased costs will likely be passed along to my firm’s financial advisors and their clients.

⁹ Definition of the Term “Fiduciary”, 82 Fed. Reg. 16903, 16,905 (April 7, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-04-07/pdf/2017-06914.pdf>.

- e. Complying with the BICE requirements results in a certain fixed cost per account. With fee-based revenue limited by the small account size, the fixed cost of servicing the account will exceed revenue that will be earned, and my firm may therefore need to only offer them robo-investing type advice or ask them to move their accounts elsewhere.
 - f. While the definition of a small investor varies among firms, the general estimate is that the break-even point for servicing an investment account ranges from \$35,000 to \$75,000 in assets.¹⁰
 - g. Since the median IRA balance has ranged from \$23,785 to \$33,185 between 2010 and 2014, it is clear that without significant changes, the Fiduciary Rule will have a devastating impact on investor access to retirement planning services.¹¹
4. New product innovations are necessary and need more time.
- a. The Department has discussed the potential of new product innovations that may allow firms to achieve compliance with the Fiduciary Rule at a lower cost to firms and investors. My firm intends to use these new innovative products.
 - b. However, these new innovative products take time to develop and become available. I am concerned that they will not be available in time for the January 1 applicability date.
 - c. For example, American Funds, Janus, and Columbia Threadneedle are reported to be developing “clean” shares¹² of their mutual funds.¹³
 - d. Once these clean shares are fully developed, my firm will need to integrate the necessary trading, surveillance, commission, and other systems to support their use.
 - e. My firm’s financial advisors will also need to be trained on the use of the new shares and the new corresponding policies and procedures. My firm’s Supervision staff will need to be trained on proper supervision of the sales. All of this training will need to be developed before it can take place.
5. Failure to delay will result in client confusion.
- a. A delay during the pendency of the Department’s review will serve to minimize market disruptions caused by the changing regulatory structure.
 - b. As a result of the Fiduciary Rule, my firm is reviewing investment products and compensation structures and planning revisions designed to make it easier to comply with the Fiduciary Rule.
 - c. My firm continues these efforts to comply with the Fiduciary Rule, and they will need to be finalized and communicated to its financial advisors and clients prior to the January 1 deadline.

¹⁰ Id.

¹¹ “Individual Retirement Account Balances, Contributions, Withdrawals, and Asset Allocation Longitudinal Results 2010-2014: The EBRI IRA Database” (January 17, 2017) available at https://www.ebri.org/pdf/briefspdf/EBRI_IB_429_IRA-Long.17Jan17.pdf.

¹² As described in a 2017 SEC staff interpretive letter, clean shares are a class of shares of a mutual fund without any front-end load, deferred sales charge, or other asset-based fee for sales or distributions. See Capital Group, SEC Staff Letter (Jan. 11, 2017), www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm.

¹³ Greg Iacurci, Investment News, “In new fiduciary rule FAQs, DOL gives quasi-endorsement of clean shares” (May 23, 2017) available at <http://www.investmentnews.com/article/20170523/FREE/170529973/in-new-fiduciary-rule-faqs-dol-gives-quasi-endorsement-of-clean>.

- d. A delay will allow my firm to avoid communicating one set of compliance policies, account minimums, and other changes to financial advisors and investors that will have to be revised as a result of the possible changes to the final rule.
 - e. The average client will be confused by correspondence announcing changes to their investment products and business relationship (if the Fiduciary Rule becomes applicable), followed by correspondence announcing additional changes being made for yet another new regulatory scheme (if the Fiduciary Rule is rescinded or revised).
6. An extension of the comment period for the RFI is needed to ensure meaningful input from stakeholders.
- a. The 30-day comment period will significantly impact stakeholders' abilities to gather meaningful data that is responsive to the remaining questions in the RFI.
 - b. The Department should extend the comment period for questions 2 through 18 to 60 days so that commenters are afforded sufficient time to gather evidence and respond to the RFI in a meaningful way.

While existing regulatory structures and the June 9, 2017 application of the Impartial Conduct Standards provide substantial investor protections, the full application of the current Fiduciary Rule will greatly increase costs for my firm and financial advisors and will result in reduced access to retirement planning services. It is therefore essential for the Department to consider whether new products can eliminate or reduce negative consequences. My firm and its financial advisors will need to communicate with their existing clients well in advance of the deadline so a significant delay can avoid investor confusion by eliminating the need for my firm and its financial advisors to send multiple communications reflecting changing requirements. The Department should delay full implementation of the Fiduciary Rule until April 10, 2019 to provide the industry the full 36 months it said at the outset was necessary to fully comply. The Department should also extend the comment period for questions 2 through 18 of the RFI to allow firms and other interested parties sufficient time to gather useful data to craft a meaningful response to the request.

Respectfully submitted,



Mark Lasswell