Institute *for* Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

September 15, 2017

VIA ELECTRONIC SUBMISSION

Attn: Office of Exemption Determinations

Re: Docket ID No.: EBSA 2017-0004; ZRIN 1210-ZA27; RIN 1210-AB82

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] submits the following comments on the Department of Labor's ("the Department") proposal to issue an "Extension of Transition Period and Delay of Applicability Dates" in the Fiduciary Rule, ("Proposed Stay"), 82 Fed. Reg. 41,365 (Aug. 31, 2017).

Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. We write to make the following comments:

1. The Department does not have statutory authority to issue the Proposed Stay of the Fiduciary Rule.
2. The Proposed Stay is arbitrary and capricious because the Department failed to adequately assess the forgone benefits that would be caused by delaying the Fiduciary Rule's enforcement provisions and failed to explain the Department's change in position on the crucial nature of those provisions.

I. The Department Does Not Have Statutory Authority for the Proposed Stay

The Department does not have statutory authority for the Proposed Stay. The Department has asked whether it should issue (1) an 18-month stay, (2) a delay that is timed to end "after the occurrence of a specific event" or (3) a tiered approach.[2] Because the Department does not have authority to delay the Fiduciary Rule's compliance deadlines, each of these options would be illegal.

[1] This document does not purport to present New York University School of Law's views, if any.

[2] 82 Fed. Reg. at 41,371.

A. The Department's Failure to Cite Statutory Authority for the Proposed Stay Renders the Stay Illegal

The Department is required to include "reference to the legal authority under which the rule is proposed."[3] As the D.C. Circuit recently made clear when vacating a stay issued by the U.S. Environmental Protection Agency, agencies do not have "inherent authority" to stay rules.[4] Instead, the Department "must point to something" that authorizes a stay in either the Administrative Procedure Act (APA) or another relevant statute.[5]

Here, the Department has made only a passing reference to acting under 29 U.S.C. § 1108,[6] but that provision authorizes the agency to grant exemptions, not administrative stays. Under ERISA, fiduciaries must adhere to duties of prudence and loyalty.[7] In addition, fiduciaries must avoid conflicts of interest when providing advice.[8] Plan participants and beneficiaries are authorized to bring actions to enforce these obligations and prohibitions.[9] Given the breadth of these protections, Congress authorized the Department to grant exemptions to an individual fiduciary or to fiduciaries on a class-wide basis, if the Department finds that the exemption is:

(1) administratively feasible,
(2) in the interests of the plan and of its participants and beneficiaries, and
(3) protective of the rights of participants and beneficiaries of such plan.[10]

Stays in contrast, put off the enforceability of a regulation either for a period of time or indefinitely, effectively lifting the regulatory restrictions while still retaining the regulation on the books.[11]

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[3] 5 U.S.C. § 553(b)(2).
[4] *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017); *see also Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (rejecting the contention that the Department of Energy had "inherent power" to suspend a duly promulgated rule where no statute conferred such authority).
[5] *Clean Air Council*, 862 F.3d at 9.
[6] 82 Fed. Reg. at 41,370.
[7] 29 U.S.C. § 1104. The duty of loyalty requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." *Id.* § 1104(a)(1). The duty of prudence requires a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B).
[8] 29 U.S.C. § 1106.
[9] *Id.* § 1132(a)(2)-(3), (5).
[10] *Id.* § 1108(a)(1)-(3).
[11] *See e.g.*, *Envt'l Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 818 (D.C. Cir. 1983); *NRDC v. EPA*, 683 F.2d 752, 763 (3rd Cir. 1982); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 27 (D.D.C. 2012).

The Department's proposed action here is titled an "extension" and a "delay," not an exemption. In addition, the substance of the proposed action demonstrates that it is a stay, not an exemption. The Department proposes to lift the enforcement provisions, for either a specific 18-month period or a longer undefined period, while considering whether to repeal the Fiduciary Rule or not. That proposed action can only be described as an administrative stay. For these reasons, § 1108 is inapplicable and the Department must justify the action as a stay.[12]

Even if 29 U.S.C. § 1108 authorized the Department to take this action, the Department has not explained whether it has complied with the requirements that govern its decisions under that exemption provision.[13] Because the Department has not explained how it has authority to issue the Proposed Stay, the Proposed Stay would be illegal.

B. The Department Does Not Have Authority Under Section 705 of The Administrative Procedure Act to Issue the Proposed Stay

Section 705 of the Administrative Procedure Act provides agencies with authority to stay a duly promulgated regulation, but the Department has not proposed to rely on § 705 to issue this Stay. Even if the Department did rely on § 705, that provision includes important limitations that preclude its use here. For example, § 705 does not allow an agency to stay a rule after its effective date has passed. In applying this provision, the D.C. Circuit has squarely rejected an attempt by an agency to "postpone the effective date" of an already effective rule pursuant to § 705.[14] Once an effective date has passed, industry, states, and the public should be able to count on the agency's new regulatory structure remaining relatively stable, unless and until the agency can justify a repeal or revision.[15]

Here, the effective date of the Fiduciary Rule was June 7, 2016—a date that is long past. Thus, § 705 is not available to stay the Fiduciary Rule.

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[12] *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (holding that courts are required to "judge the propriety of [agency] action solely by the grounds invoked by the agency").

[13] 29 U.S.C. § 1108(a) ("The Secretary may not grant an exemption under this subsection unless he finds that such exemption is--(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.").

[14] *Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324, at *2-3 (D.C. Cir. Jan. 19, 1996) (per curiam); *accord Becerra v. United States Dep't of the Interior*, No. 17-CV-02376-EDL, 2017 WL 3891678, at *9 (N.D. Cal. Aug. 30, 2017)

[15] *See Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 445-46 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983) ("The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal"); *Pub. Citizen v. Steed*, 733 F.2d 93, 102 (D.C. Cir. 1984) ("Without showing that the old policy is unreasonable, for NHTSA to say that no policy is better than the old policy solely because a new policy *might* be put into place in the indefinite future is as silly as it sounds.").

C. The Department Does Not Have General Rulemaking Authority to Issue the Proposed Stay

Additionally, once a rule's effective date has passed and § 705 is no longer available, an agency cannot rely on general rulemaking authority—under, for example, ERISA or the Internal Revenue Code—as authorization for an administrative stay. Agencies may not use their general rulemaking authority to override more specific statutory directives.[16] The D.C. Circuit has held, for instance, that the EPA cannot use the Clean Air Act's "general grant of rulemaking power" to stay regulations that could not be delayed using the agency's explicit—but tightly circumscribed—stay power under § 307 of that statute.[17]

In § 705 of the APA, Congress expressly restricted the ability of agencies to administratively stay their finalized and effective regulations in an effort to promote regulatory certainty and predictability. The Department may not circumvent the requirements of that specific stay provision by claiming that its general rulemaking authority under other statutes gives it broad, implicit power to suspend or delay a final and effective regulation. To allow the Department to issue a stay that did not comply with § 705's strict limits would render those limits meaningless.

D. Undergoing Notice and Comment Rulemaking Does Not Cure the Illegality of the Proposed Stay

The mere fact that the Department has provided notice and an opportunity to comment on the Proposed Stay does not cure the stay's illegality. Even when agencies go through notice-and-comment, they still need statutory authority to take the proposed final action, whether it be a repeal, revision, or a stay.

The D.C. Circuit explained this principle in *Nat. Res. Def. Council, Inc. v. Reilly*. In that case, EPA had undergone notice and comment rulemaking, but following those procedures did not enlarge the agency's stay authority beyond that provided by § 307 of the Clean Air Act.[18] Here, too, procedural formalities cannot compensate for the absence of a statutory provision granting the Department power to issue the Proposed Stay.

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[16] *Nat'l Min. Ass'n v. U.S. Dep't of the Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997) ("general rulemaking provisions . . . do not . . . permit [an agency] to trump Congress's specific statutory directive"); *see also Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

[17] *Nat. Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992).

[18] *Id.*

II. The Department Has Failed to Provide a Reasoned Justification for the Proposed Stay

Even if there were an adequate statutory basis for the Proposed Stay, it would nevertheless be arbitrary and capricious. When an agency decides to change course by suspending a regulation, the agency must "'cogently explain'" the basis for suspension, under the same standard that applies to ordinary rulemaking.[19] Under that standard, an agency must (1) "examine the relevant data" and (2) "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[20] The Department did not comply with this requirement.

A. The Department Fails to Provide a "Cogent Reason" for Changing Its Conclusion that Enforcement Provisions Are Necessary to Achieve Desired Benefits

In June 2017, advisors became subject to the Impartial Conduct Standards, which require them to "make recommendations that are in the customer's best interest," charge no more than reasonable compensation for their services, and make no misleading statements.[21] In January 2018, advisors must comply with a series of operational requirements, which would make the Impartial Conduct Standards enforceable ("enforcement provisions").[22]

The Proposed Stay would delay the enforcement provisions for eighteen months after January 2018. In order to justify this Proposed Stay, the Department claims that "investor losses from the proposed transition period extension could be relatively small."[23] According to the Department, firms have complied with the Impartial Conduct Standards and thus "a substantial portion of the investor gains" that the Department predicted in the original Fiduciary Rule "would remain intact."[24] On the other side of the equation, the Department made detailed calculations regarding the cost savings that the Proposed Stay would provide.[25]

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[19] *Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (*quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* ("State Farm"), 463 U.S. 29, 48 (1983)).
[20] *State Farm*, 463 U.S. at 43 (internal quotation marks omitted); *see also* F.C.C. v. Fox Television Stations, Inc. ("Fox"), 556 U.S. 502, 515 (2009).
[21] 82 Fed. Reg. at 16,905.
[22] *Id.* at 16,906.
[23] 82 Fed. Reg. at 41,372.
[24] *Id.*
[25] *Id.* at 41,372-73.

An agency's stay of a regulation is subject to the arbitrary and capricious standard of review under the Administrative Procedure Act (APA).[26] When an agency has relied on cost-benefit analysis in supporting a rule, courts examine whether the agency's analysis was reasonable and reverse where "'there is such an absence of overall rational support as to warrant the description 'arbitrary or capricious.'"[27] And it is arbitrary and capricious for an agency to delay a rule without assessing the costs of its action, in the form of the forgone benefits.[28]

Here, instead of calculating the forgone benefits, the Department relies on guesswork to conclude that investors will receive a "significant portion of the estimated gains" from the original Fiduciary Rule, "[i]f [financial firms] fully adhere" to the Impartial Conduct Standards.[29]

But the proposal provides no reasonable basis to believe that firms will fully adhere to the Impartial Conduct Standards. As explanation, the Department notes that comments received from financial institutions suggest that "many" have largely completed procedures to achieve compliance with the Impartial Conduct Standards, but the Department does not cite those comments or explain or analyze how representative or reliable this information might be.[30] Nor does the Department provide estimates or a representative sample of such companies to support the claim that "many" have come into compliance with the Impartial Conduct standards. In contrast to the inadequate assessment of the costs of the Proposed

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[26] *Clean Air Council*, 862 F.3d at 8–9; *see also Sierra Club*, 833 F. Supp. 2d at 18; *Perez v. Mortgage Bankers Association*, 135 S.Ct. 1199, 1206, (2015) ("[T]he D.C. Circuit correctly read § 1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.").

[27] *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1370 (D.C. Cir. 1985); *see also Chamber of Commerce of the U.S. v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (agency was required to consider the "economic consequences of a proposed regulation" in order to comply with the statutory requirement to consider the public interest and the Administrative Procedure Act's requirement of a satisfactory explanation); *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321 (D.C. Cir. 1992) (agency was required to explain whether safety concerns outweighed benefits of energy savings in new fuel economy standards); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1200 (9th Cir. 2008) ("NHTSA's decision not to monetize the benefit of carbon emissions reduction was arbitrary and capricious."); Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 Geo. Mason L. Rev. 575, 591 (2015) (cataloging and analyzing cases involving judicial review of agency cost-benefit analysis).

[28] *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (emphasizing that courts should pay attention to the "disadvantages of agency decisions"); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039 (D.C. Cir. 2012) (finding that the agency properly calculated the costs of amending a regulation); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (considering the costs of a repeal "is common sense and settled law."); Executive Order No. 12,866 §(1)(b)(6), 58 Fed. Reg. 51,735 (Sept. 30, 1993) (instructing agencies to consider the costs of a rule in order to make "a reasoned determination that the benefits of the intended regulation justify its costs").

[29] 82 Fed. Reg. at 41,372.

[30] *Id.* at 41,372.

Stay, in the form of forgone benefits, the Department provides clear numbers for the cost savings of the Proposed Stay. That kind of lopsided analysis is classic arbitrary and capricious rulemaking: it is well-settled that an agency "cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs" or vice versa.[31]

But even if the lopsided quality of the Department's analysis were acceptable, the Department's guesswork is contradicted by logic and the Department's prior statements. Whatever goal the agency might have, "some means of coercive enforcement is usually needed to accomplish regulatory objectives."[32] The Department recognized this principle when it issued the original Fiduciary Rule. After finding that "[t]he final rule and exemptions have the potential to deliver large gains to retirement investors . . . which, in the Department's view, will more than justify its costs,"[33] the Department found that investor benefits calculated in the 2016 RIA were based on the implementation of the *entire* final rule, including the enforcement provisions. Indeed, in the original RIA the Department assessed various alternatives to the Fiduciary Rule, including a proposal for a best interest standard without accompanying enforcement provisions.[34] The Department concluded that this option would not "properly incentivize[]" financial adviser compliance and would therefore not "adequately protect retirement investors . . . from harmful conflicts of interest."[35] The Department also determined that the enforceability of the best interest standard "is critical to the safeguards afforded by the [Best Interest Contract]

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[31] *See Ctr. for Biological Diversity*, 538 F.3d at 1200; *Competitive Enter. Inst.*, 956 F.2d at 326-27 ("The requirement of reasoned decisionmaking . . . prevents officials from cowering behind bureaucratic mumbo-jumbo"); *New York v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992) (remanding rule where agency failed to explain how economic benefits would justify forgoing promised air benefits); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (holding, with respect to an environmental impact statement, that when an agency "trumpet[s]" the economic benefits of a project, it must also disclose costs, and that "logic, fairness, and the premises of cost-benefit analysis, let alone NEPA, demand that a cost-benefit analysis be carried out objectively"); *Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983) (remanding an environmental study because it made "no mention" of a crucial factor that would make the action net costly).

[32] David L. Noll, Regulating Arbitration, 105 Cal. L. Rev. 985, 1010 (2017); *see also* Mathew D. McCubbins, Roger G. Noll and Barry R. Weingast Source: Journal of Law, Economics, & Organization, Vol. 3, No. 2 (Autumn, 1987), 243, 263 ("Procedures will only have their desired effect if their requirements are enforced.").

[33] Regulating Advice Markets: Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions at 328 (April 2016) ("RIA"). The Department quantified a subset of the projected benefits (only those accruing to front-load mutual funds IRA investors) and found that they ranged from $33 billion to $36 billion and that they outweighed the *total* projected costs of the final rule and exemptions (ranging from $10.0 billion and $31.5 billion). The Department noted that its $33 to $36 billion benefits estimate "dramatically understate[d] the total gains expected under the final rule and exemptions" because the "unquantified harm from advisory conflicts" (and the benefits associated with avoiding that harm) were "large." RIA at 305.

[34] RIA at 288-290.

[35] *Id.*

exemption."[36] The enforceability of terms ensure that the policies and procedures enacted by firms "are more than window-dressing."[37]

The Department has also asked for comments on whether it should issue a delay that is timed to end "after the occurrence of a specific event" or a tiered approach.[38] Either of those two approaches would essentially put off compliance with the enforcement provisions indefinitely. Given the Department's previous finding that the enforcement provisions are crucial to ensuring that investors reap the benefits of the Fiduciary Rule, if the Department opts for either of these two options, it would be even more unlikely that firms would come into compliance with the Impartial Conduct Standards.

In sum, the Department's proposal that the benefits would remain intact even with the postponement of the enforcement provisions is at odds with its earlier analysis of the necessity of these provisions. When an agency decides to suspend a regulation, and its "new policy rests upon factual findings that contradict those which underlay its prior policy[,] . . . a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[39] The Department has provided no explanation for reaching a different conclusion regarding the ability of Impartial Conduct Standards by themselves to provide the full benefits of the Fiduciary Rule.[40]

B. The Department's Cost Savings Estimates Contradict the Claim that Investor Gains Will Remain Intact with the Proposed Stay

The Proposed Stay's calculations of the cost savings also contradicts the Department's assumption that the investor gains will be retained. In calculating the cost savings, the Department included zero compliance expenditures for the duration of the Proposed Stay.[41] But the Department had rested its conclusion that the Proposed Stay will result in "relatively small" losses to investors on the assumption that financial institutions are currently modifying their "compliance infrastructure" in order to comply with the Impartial

[36] "Making all the Impartial Conduct Standards required contractual promises for dealings with IRAs and other non-ERISA plans creates the potential for contractual liability, incentivizes Financial Institutions to comply, and gives injured Retirement Investors a remedy if those Financial Institutions do not comply. This enforceability is critical to the safeguards afforded by the exemption." *See* Best Interest Contract Exemption, 81 Fed. Reg. 21,002, 21,009.
[37] *Id.* at 21,008.
[38] 82 Fed. Reg. at 41,371.
[39] *Fox*, 556 U.S. at 516.
[40] *Pub. Citizen*, 733 F.2d at 105 ("The agency did not 'cogently explain' why suspension was necessary when the old system could have been retained while improvements were developed.").
[41] 82 Fed. Reg. at 41,372-73 & n.38 ("The Department notes that firms may be incurring some costs to comply with the impartial conduct standards; however, it has no data to enable it to estimate these costs.").

Conduct Standards (such as by “drafting and implementing training for staff, drafting client correspondence and explanations of revised product and service offerings, negotiating changes to agreements with product manufacturers as part of their approach to compliance”).[42] Training staff, corresponding with clients, and negotiating agreements all impose real, ongoing, costs on institutions. None of these listed compliance measures were included in the Department’s discussion of compliance cost savings. The Department’s position that many institutions have adopted these procedures is thus at odds with the Department’s calculation of the ongoing compliance costs during the delay period.

Conclusion

The Department lacks the authority to implement the proposed Stay and, furthermore, has failed to articulate a satisfactory explanation for forgoing the Fiduciary Rule’s substantial benefits.

Respectfully,

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[42] *Id.* at 41,372.