

James R. Sopha
President

March 15, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule Examination
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1210-AB79 - Proposal to Extend the Applicability Date of Certain New and Amended Definitions, Rules, and Prohibited Transaction Exemptions (the "Proposal")

To Whom it May Concern:

Jackson National Life Insurance Company ("Jackson") supports the Proposal to extend the application date of the extensive new and amended definitions, rules, and prohibited transaction exemptions adopted by the Department of Labor ("Department") a little more than nine months ago.¹

The new rules have a laudable aim: to ensure that retirement investors receive high quality, unbiased advice to help them save and plan for their retirement. Jackson supports this goal but believes that reasonable minds can differ on whether more than 1,000 pages of new, complex federal regulation is the best path forward.² Not surprisingly, the new rules, like many pieces of sweeping regulation, are having (and are expected to continue to have) significant predictable

¹ The Proposal proposes to extend the application date for the Definition of the Term 'Fiduciary'; Conflict of Interest Rule-Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); and Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128 (collectively referred to herein as "the new rules"). The new rules became "effective" on June 9, 2016 with an initial application date of April 10, 2017.

² See Lach, Patrick, "A Simple Alternative to the Fiduciary Rule," The Wall Street Journal, March 8, 2016 (<http://blogs.wsj.com/experts/2017/03/08/a-simple-alternative-to-the-fiduciary-rule/>).



and unpredictable effects. Some will be positive for consumers and our markets, but others will certainly be adverse.³ Jackson believes that additional time is needed:

- To give reasonable time to prepare;
- To respond to the President's directive to study the effects of the new rules and to evaluate whether better alternatives exist; and
- To prevent waste.

Jackson also believes that the Department should state clearly and plainly that neither the new rules, nor any potential successor to them, will apply to any investment advice given, or sales enacted, during the pendency of the delay.

Jackson is well-positioned to offer informed insight.

Jackson employs more than 4,500 workers, who manage more than \$181 billion in fixed and variable annuities for over 1.5 million investors, including approximately \$99 billion in annuities held in accounts that qualify as Section 408 Individual Retirement Annuities.

Jackson's insurance products are offered by more than 50,000 financial advisors affiliated with more than 600 independent broker-dealers, wirehouses, financial institutions and independent insurance agents. Jackson is also affiliated with four retail broker-dealers with more than 3,200 registered representatives, who deal directly with investors seeking advice. Thus, Jackson has a unique perspective as both a manufacturer and a retail distributor of retirement savings and income products.⁴

³ The market has already seen disruptions, including some broker-dealers abandoning annuity contract holders they do not wish to service, eliminating the option for retirement investors to pay for services through commissions (which could be less expensive for retirement investors than a fee-based payment option), and reducing or restricting access to certain investment products (including mutual funds) to retirement investors. See Iacurci, Greg, and Christine Idzelis. "Broker-dealers Split on Commissions in Wake of DOL Fiduciary Rule." *Investment News*. N.p., 30 Oct. 2016. Web. 13 Mar. 2017 (<http://www.investmentnews.com/article/20161030/FREE/161029902/broker-dealers-split-on-commissions-in-wake-of-dol-fiduciary-rule>); Leonhardt, Megan. "Why Edward Jones Won't Let Investors Buy Funds, ETFs in IRAs | Money." *Money*. Time, 22 Aug. 2016. Web. 13 Mar. 2017 (<http://time.com/money/4459130/edward-jones-bans-funds-etfs-in-iras/>); Schoeff Jr., Mark. "Investment Company Institute Says DOL Rule Is Already Depriving Investors of Financial Advice." *Investment News*. N.p., 8 Dec. 2016. Web. 14 Mar. 2017 (<http://www.investmentnews.com/article/20161208/FREE/161209936/investment-company-institute-says-dol-rule-is-already-depriving>). These and other limitations on investor access and choice need to be more fully researched and understood.

⁴ Jackson National Life Distributors LLC ("JNLD") and National Planning Holdings, Inc. ("NPH") are affiliates of Jackson. JNLD serves as the wholesale distributor of Jackson's variable annuity products, and is registered as a broker-dealer with the Securities and Exchange Commission ("SEC") under the Securities Exchange Act of 1934, and is a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"). NPH is a FINRA member broker-



Jackson is also a wholly owned subsidiary of Prudential plc, a financial services firm located in the United Kingdom (“UK”).⁵ Prudential has first-hand experience with the adverse consequences of comparable regulation adopted in the UK that eliminated commission payments from product providers to advisors and platforms and resulted in increased costs and a loss of access to professional investment advice for millions of UK citizens.⁶

A Delay is Necessary to Give Reasonable Time to Prepare.

The new rules represent one of the most significant regulatory restructurings of the investment advice market since the Great Depression. The new rules radically expand the application of the fiduciary standards under the Employee Retirement Income Security Act (“ERISA”) by revising the Department’s 40-year-old test for determining when a person giving advice about retirement savings is deemed a “fiduciary.” The prior test applied principally to interactions between representatives of retirement plans and advisors. The revised test extends ERISA’s reach to virtually every interaction between individual retirement savers and advisors. Jackson estimates that the new test extends the application of ERISA from only a small portion to approximately 70% of the retail advice market in a way that (i) effectively trumps the rules of the primary regulators of the securities and insurance markets for the last eighty years (the SEC, FINRA, and the states), (ii) leaves consumers virtually no option to obtain

dealer holding company, providing retail distribution of a broad variety of products and services to retirement investors.

⁵ Prudential plc (NYSE: PUK) is a company incorporated in England and Wales. Prudential plc is not affiliated in any manner with Prudential Financial, Inc., a company whose principal place of business is in the United States of America.

⁶ Three years ago, the United Kingdom adopted the Retail Distribution Review (“RDR”), which “aimed to improve the level of professionalism within the intermediary sector, remove the potential for commission bias and enhance consumers’ understanding of the services they were receiving.” *Financial Advice Market Review, Final Report*, issued by HM Treasury in March 2016, p.3 (<https://www.fca.org.uk/publication/corporate/famr-final-report.pdf>).

In a report published last year, following an eight-month review of the effects of the RDR and other regulation, HM Treasury observed:

[The] drive to higher standards ... has, however, contributed to a reduction in adviser numbers. The move to fee-based advice on retail investment products has improved transparency and ended conflicts of interest caused mainly by a commission-driven model. However, advice is expensive and is not always cost-effective for consumers, particularly those seeking help in relation to smaller amounts of money or with simpler needs.

Id., p. 5. See also, Deloitte, “*Bridging the Advice Gap: Delivering Investment Products in a Post-RDR World.*” A Deloitte Insights Report. (2012) (<https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/deloitte-uk-fs-rdr-bridging-the-advice-gap.pdf>).



investment advice from a financial representative or advisor who is not a fiduciary⁷, and (iii) exposes businesses to enormous compliance costs and risks of private and class action litigation.

The requirements and conditions of the new rules are exceedingly complex and require changes in training, forms, disclosures, technology, compensation, operations, marketing, legal, compliance, and governance.⁸ Virtually no part of a financial institution is unaffected, and Jackson's assessment is that many industry participants are not yet fully prepared. For example, Jackson has active selling agreements with 624 broker-dealers. Under the new rules, each of them must ensure that they charge no more than "reasonable compensation" to retirement investors. For the last ten months, the industry, as well their law firms and consultants, have been attempting to evaluate what will be deemed "reasonable" in light of variable levels of service, complexity of products offered, services desired by the consumer, and anticipated holding periods, among other things. As of the date of this letter, 46 (7.3%) of the broker-dealers with which Jackson has selling agreements have communicated to Jackson definitively where they have set "reasonable compensation" within their organization. This means that many broker-dealers are still deliberating and that Jackson still has a significant amount of work to do to implement the instructions that it expects to receive from more than 575 broker-dealers.

The very aggressive implementation timeline adopted by the Department is too short for such a radical change and is inconsistent with the Department's past practices for new regulations. For example, the Department provided a two-year implementation period in connection with section 408(b)(2) regulations that were initially adopted in 2010. That regulation was 40 pages in length. By comparison, the industry was given just 12 months (20 months for certain elements) to meet the far more challenging and complex requirements under the more than 1,000 pages of the new rules. For this reason, the Department should finalize the Proposal and, consistent with the precedent established with the 408(b)(2) regulations, implement a delay of 240 (not 60) days.

⁷ See Maxey, Daisy and Dagher, Veronica, "Meet the Retirement Savers Who Oppose the Fiduciary Rule," The Wall Street Journal, February 15, 2017 (<https://www.wsj.com/articles/meet-the-retirement-savers-who-oppose-the-fiduciary-rule-1487168986>).

⁸ Amidst the struggle to prepare for the implementation of more than 1,000 pages of new regulation, the Department has issued two sets of guidance (in October 2016 and January 2017) that address some questions but create others.



A Delay Is Necessary to Respond to the President.

On February 3, 2017, President Trump issued a memorandum that set forth several goals of the current Administration that relate to retirement planning. The President also instructed the Department to undertake a comprehensive review of the expected impact of the new rules, which are currently scheduled to go into effect on April 10, 2017. Allowing the new rules to apply while simultaneously undertaking the comprehensive analysis ordered by the President would undermine the President's legitimate mandate to the Department and potentially expose retirement investors and the industry to the whipsaw effect of new rules that apply, then are delayed, and then apply again after the delay.⁹

Jackson supports the Proposal for the simple fact that it is inconceivable that the Department will be able to comply with the President's instructions without delaying the application date, which is now less than one month away. Performing this work in a thorough, valid, and evidence-based manner will require time. The Proposal itself gives the public 45 days to comment on a lengthy and substantial list of questions derived from the issues raised in the President's memorandum. Gathering and analyzing all of this information, while also conducting the required review, will easily consume weeks or months beyond a 60-day delay in the applicability dates.

A Delay is Necessary to Prevent Waste.

If the new rules are going to be studied further, then delaying the date they become applicable is sensible and prevents waste.

Jackson is expending considerable resources every day to prepare for the application date of the new rules. We have multiple workstreams, staffed by scores of our associates and outside advisors, working to implement the technological, operational, reporting, training, procedural, financial, governance, legal, and compliance changes needed to comply with the new rules. If there is even a remote possibility that the new rules are going to be changed, then Jackson and other industry members should immediately be granted permission to pause their implementation efforts. If and when the implementation of the new (or revised) rules is resumed and the path forward is clear, then the Department should grant an additional reasonable period of time to adapt or resume preparations.

⁹ As the Department noted in the Proposal, over 90% of the industry affected by the new rules and the Proposal are "small businesses" according to the Small Business Administration size standards.



The Benefits of a Delay will Outweigh the Costs.

Jackson believes that the economic assumptions on which the new rules were based are fatally flawed and not entitled to consideration. The purported economic benefits of the new rules were based upon a single factor related to one class of investment product (front-end load mutual funds). This isolated analysis provides no basis for regulating the entire advice market and all products, including annuities, that may not have any relation to mutual funds.¹⁰

The Department also grossly underestimated the costs of the new rules. For starters, the Department did not consider the significant costs of the class action lawsuits that will proliferate under the new rules. A proper analysis of this known consequence of the new rules should reference the now industrialized class action litigation to which 401(k) plans are subject under a substantially identical ERISA rule set.

The Department also ignored the costs associated with the known (not unanticipated) consequence of the new rules. Namely, the new rules will substantially increase costs and decrease the accessibility of advice for retail investors, particularly investors who have not accumulated significant savings and are most in need of advice. By any measure, the new rules discourage commission-based compensation arrangements and encourage fee-based compensation arrangements. When the U.K. enacted rules with the same aim several years ago, they found that the rules had real and significant adverse effects on retirement savers, particularly those with lower income. They increased the costs and reduced the accessibility of personalized investment advice. In fact, political and regulatory leaders in the UK now view the “advice gap” (as they call it) as a serious issue that requires a solution.¹¹ Incredibly, a little more than five years ago, the Department itself estimated that access to financial advice reduced the cost of investor “mistakes” by \$15 billion per year ... and that increasing access to financial advice would enable investors to save billions more.¹² Yet, the Department chose to entirely ignore its prior work on the grounds that only advice from an individual labeled a “fiduciary”

¹⁰ The narrow review of mutual fund performance was also, in itself, flawed. The Department’s analysis of investors’ experience with mutual funds (for the period 1993 through 2009) did not analyze actual holding periods, or even a full market cycle. Rather, the Department relied on a study of returns for the single year in which funds were purchased. One group of economists found this to be “not a minor ‘detail’ ... but a fundamental oversight that does not permit reliable conclusions to be drawn.” *“Good Intentions Gone Wrong: The Yet-To-Be-Recognized Costs of the Department of Labor’s Proposed Fiduciary Rule,”* Economists Incorporated (Robert Litan and Hal Singer), July 2015, p. 22 (<http://www.ei.com/wp-content/uploads/2015/07/LitanSingerFiduciary.pdf>).

¹¹ See Rovnick, Naomi, and Emma Dunkley. “FCA Proposes Reforms to Close ‘Advice Gap’.” *Financial Times*. Financial Times Limited, 14 Mar. 2016. Web. 14 Mar. 2017 (<https://www.ft.com/content/4324f4dc-e9c8-11e5-888e-2eadd5fbc4a4>).

¹² Investment Advice-Participants and Beneficiaries, 76 Fed.Reg. 66135 (October 25, 2011) pp. 66152.



yielded these beneficial effects of advice, completely ignoring that many financial advisors offer comparable services and advice free of the conflicts that the new rules are intended to address.

Finally, but importantly, the Department barely considered the impact of the new rules on annuities. Guaranteed lifetime income products offer immense benefits to consumers, and the new rules significantly and adversely effect their utilization. Since the new rules have been released, there has been a 30% drop in the market for guaranteed lifetime income products ... and the new rules are not even applicable yet. The new rules have understandably paralyzed advisors and thereby exposed millions of investors to the risks of market loss and outliving their assets, which they could have mitigated or eliminated through the purchase of a product that offers guaranteed lifetime income.

A Delay Should Clearly Grandfather Advice Given During the Pendency of the Delay.

The “grandfathering” provisions of the new rules have sown confusion regarding their applicability to certain retirement investment advice and transactions, particularly transactions involving products like variable annuities, which frequently involve advice relationships that last over many years. A delay in the new rules’ applicability date is highly likely to exacerbate this confusion. The Department should preempt this confusion with clear guidance to the industry and consumers.

When finalizing the Proposal, the Department should state clearly and plainly that neither the new rules, nor any potential successor to them, will apply to any investment advice given, or sales enacted, during the period of delay of the applicability dates. This clear statement is a first step. Jackson has additional views regarding grandfathering that we will incorporate into our comments relating to the Department’s request for information contained in the proposed rule.

In sum, Jackson urges the Department to impose a delay in the application date of the new rules for 240 days. Thank you for the opportunity to comment.

Sincerely,

James R. Sopha
President