



March 17, 2017

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Submitted Electronically – EBSA.FiduciaryRuleExamination@dol.gov

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

Re: Definition of the Term “Fiduciary”—Delay of Applicability Date (RIN 1210-AB79)

Ladies and Gentlemen:

We are writing in strong support of the Department of Labor’s (the “Department”) proposed regulation (the “Proposal”)<sup>1</sup> delaying the applicability date of the regulation redefining fiduciary investment advice and its related prohibited transaction exemptions (collectively, the “Fiduciary Rule”)<sup>2</sup> from April 10, 2017 to June 9, 2017. Our comment today relates to the Proposal’s delay in the applicability date, and not to the questions posed in the Proposal for which a longer comment period has been made available.

Though we support this proposed delay as the minimum necessary to protect the interests of retirement investors, we believe a longer delay will be necessary to complete the review ordered by President Trump in his February 3, 2017 Presidential Memorandum. A longer delay will also be necessary to issue a final class exemption for insurance intermediaries that works in the marketplace.<sup>3</sup> 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.

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.

<sup>1</sup> 82 Fed. Reg. 12,319 (Mar. 2, 2017). <sup>2</sup> 81 Fed. Reg. 20,945 – 21,221 (Apr. 8, 2016). <sup>3</sup> 82 Fed. Reg. 7,336 (Jan. 19, 2017).

## **Delay is Essential to Protect Retirement Investors Relying on Insurance Professionals**

As we explained in our previous comment letters and testimony on the proposed Fiduciary Rule, the Department failed to analyze the impact of recent efforts to improve understanding in the retirement savings marketplace, or to prove that financial markets were harming retirement savers. We warned that the provisions and restrictions in the proposal were very likely to reduce choice and access for average retirement savers.<sup>4</sup>

While the Department's flawed economic analysis predicted retirement investors would benefit from the fiduciary rule, the real-world experience of the past 11 months of implementation efforts shows the opposite to be true. Even before compliance plans have been fully implemented, workers and retirees are already seeing access to advice and investment products reduced even as costs increase. Reports have indicated 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.<sup>5</sup> Fully implementing the Fiduciary Rule on April 10, 2017 will result in significant harm to retirement investors. This is especially true for the millions of Americans who rely on their insurance professionals to help them achieve retirement security.

Our members have always acted in the best interest of their clients and policyholders. The products and services they offer are uniquely important in retirement planning, because only through insurance products can workers and their families find the guarantees that provide real retirement and financial security. The Department consistently noted in the course of promulgating the Fiduciary Rule that the defined contribution system requires workers to face greater market return risks as they manage their own retirement assets. At the same time, however, the execution of the fiduciary rule has made it more difficult, and in some cases impossible, for insurance professionals to provide advice or to recommend certain products to help them manage those risks.

The Fiduciary Rule would prevent many insurance professionals from being able to use a Best Interest Contract Exemption (“BIC Exemption”) as they do not have a financial institution providing them access to such an arrangement. The Department has not completed action on its proposed class exemption for insurance intermediaries to address this problem. Until this issue is addressed in a way that works in the marketplace, the Fiduciary Rule will have a particularly negative effect on retirement savers who would benefit from access to insurance products for their retirement planning needs. Millions of Americans rely on insurance professionals to help them achieve retirement security. Even a temporary period during which the Fiduciary Rule is applicable to transactions that affect retirement investors seeking this type of security will cause significant harm.

## **The Department Must Avoid a “Gap Period” or Announce Additional Measures Necessary to Prevent Significant Disruptions to Retirement Investors**

In the Department's recently released Field Assistance Bulletin 2017-1 (“FAB”), the Department acknowledged that it may not complete its work finalizing the Proposal before the Fiduciary Rule becomes applicable on April 10. If that happens, a “gap period” during which the rule applies, only to be potentially delayed again, would result. The consequences of such a gap period would be confusion and chaos for our members' clients. We urge the Department in the strongest possible terms to complete consideration of the Proposal well in advance of April 10th.

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<sup>4</sup> For AALU's full comments on the Department's proposal, see Letter from David J. Stertz, 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. Stertz, 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>.

<sup>5</sup> 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/>.



However, if the Department finds that a gap period will likely occur, the relief provided in the FAB will not be enough, and the Department must announce additional relief measures as soon as possible. Specifically, because the Department does not enforce the prohibited transaction rules applicable to IRAs and other entities subject to Internal Revenue Code Sec. 4975, the Department's non-enforcement policy adopted in the FAB does little to address the real problems resulting from a gap period. The Department should announce right away that it will propose a prohibited transaction class exemption to prevent this outcome by exempting prohibited transaction violations if there is a gap period. Alternatively, the Department should consider an Interim Final or similar immediately-effective rule type to delay the applicability date from April 10th through the end of the Proposal's rulemaking process. This would not replace the notice and comment rulemaking process of the Proposal—instead, it would provide emergency relief preventing the rule from taking effect only long enough to complete the regulatory process, avoiding significant disruption and client confusion.

To allow a gap period to occur with only the relief available in the FAB would be irresponsible. It would cause significant confusion for retirement investors of all kinds. Further, it would make it impossible for insurance professionals who do not have a financial institution providing them access to a BIC Exemption arrangement to serve their clients without engaging in a prohibited transaction. Again, the clients of insurance professionals are uniquely harmed if the rule takes effect, through a gap period or otherwise, because certain advisors and products would be no longer available to them.

### **Conclusion**

On behalf of the clients and policyholders of our members, we urge you to delay the applicability date for a period sufficient to protect the interests of America's workers and retirees. We further urge you to rapidly provide additional relief measures preventing or mitigating the harms that would result from a gap period. Thank you for the opportunity to comment on the Proposal.

Sincerely,

A handwritten signature in black ink, appearing to read 'David J. Stertz', written in a cursive style.

David J. Stertz  
Chief Executive Officer  
AAU