Docket ID No. EBSA-2010-0050

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

U.S. DEPARTMENT OF LABOR
EMPLOYEE BENEFITS SECURITY ADMINISTRATION

Concerning

Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice

In Response to the March 2, 2017 Federal Register Notice
Inviting Additional Comments (82 Fed. Reg. 12319)
(RIN 1210-AB79)

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Re: Comments Concerning Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice (RIN 1210-AB79)

To Whom It Concerns:

Washington Legal Foundation (WLF) submits the following comments in response to the Department of Labor's (DOL) March 2, 2017, Federal Register Notice (82 Fed. Reg. 12319), which invited additional feedback on DOL's new definition of "Fiduciary" in its Conflict of Interest Rule (the Fiduciary Rule). That public notice followed the President's February 3, 2017 memorandum directing DOL to examine whether the final rule may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of that examination, DOL is undertaking an updated legal analysis concerning the likely impact the final rule will have on all stakeholders. We welcome DOL's revisiting and—we hope—ultimately withdrawing this sweeping new regulation.

WLF does not oppose commonsense regulations that require financial and insurance professionals to serve the best interests of their clients—provided those regulations are promulgated by a duly authorized agency in accordance with the rule of law. WLF believes, however, that the Fiduciary Rule assumes vast power over retirement investment advisors and employees that Congress never bestowed upon DOL. Simply put, Congress granted DOL regulatory and enforcement authority over fiduciaries that render investment advice but granted virtually *no* authority over broker-dealers, their registered representatives, insurance companies, and their commission-based sales agents. Moreover, by severely curtailing the right of professionals to engage in truthful non-misleading commercial speech, the rule raises serious free speech concerns under the First Amendment. *See* Donald M. Falk & Eugene Volokh, *Labor Department's Fiduciary*

Rule Tests First Amendment Limits, WLF Legal Opinion Letter (October 14, 2016), at www.wlf.org/publishing/publication_detail.asp?id=2601.

Given the lack of any clear congressional mandate for DOL to radically expand the scope of an "investment advice fiduciary" under federal law, as well as the Fiduciary Rule's myriad First Amendment deficiencies, WLF urges DOL to withdraw the rule in its entirety.

I. Interests of WLF

Founded in 1977, WLF is a nonprofit, public-interest law firm and policy center based in Washington, DC, with supporters nationwide. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has successfully sought to enjoin, on First Amendment grounds, DOL's "Persuader Rule," which would vastly expand certain employer disclosure requirements to lawyers and other consultants who have no direct contact with employees. *See Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-066-C, 2016 WL 8193279 (N.D. Tex. Nov. 16, 2016); *see also Labnet Inc. v. Dep't of Labor*, No. 16-CV-0844 (D. Minn., dec. pending); *Associated Builders & Contractors of Arkansas v. Perez*, No. 4:16-CV-169 (E.D. Ark., dec. pending). WLF also successfully opposed according deference to DOL's novel reinterpretation of the Fair Labor Standards Act's "outside sales" exemption. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). From time to time, WLF has also filed formal comments with DOL on matters of public interest. Most recently, WLF submitted comments critical of OSHA's proposed rule to "Improve Tracking of Workplace Injuries and Illnesses" (March 10, 2014; Docket No. OSHA-2013-0023).

Similarly, WLF's Legal Studies Division, the publishing arm of WLF, produces and distributes timely publications on a wide array of legal issues related to DOL's regulation of employers and workplace standards. Some of WLF's recently published works in these areas include: Eric J. Conn, *OSHA's Midnight Attempt to Overrule Federal Court's Decision Is Ripe for Rescission*, WLF Legal Opinion Letter (February 24, 2017); Eric J. Conn, *New DOJ and DOL Reliance on Environmental Laws Lowers Bar for Workplace-Safety Criminal Prosecutions*, WLF Legal Backgrounder (April 1, 2016); Michael J. Lotito, *Department of Labor Issues New Guidance on Determining Joint-Employer Status*, WLF Counsel's Advisory (February 26, 2016).

II. Overview of the Fiduciary Rule

The Employee Retirement Income Security Act of 1974 (ERISA) and parallel provisions of the Internal Revenue Code (IRC) require fiduciaries of an ERISA plan to act prudently and "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1), and they prohibit certain transactions absent an exemption, § 1106. Both ERISA and the IRC identify three ways that a person becomes a fiduciary: by (1) exercising discretionary control over the management of a plan; (2) rendering investment advice for a fee; or (3) exercising responsibility in the plan's administration. 29 U.S.C. § 1002(21)(A); 26 U.S.C. § 4975(e)(3).

On April 8, 2016, DOL adopted the final version of the Fiduciary Rule, 81 Fed. Reg. 20946 (Apr. 8, 2016), which drastically expands the scope of retirement investment advisors and employees who are deemed to be "fiduciaries" under ERISA and the IRC. Abandoning 40 years of settled statutory interpretation, DOL now maintains that a fiduciary is *anyone* who provides "recommendations" that are individualized or specifically directed to the recipient for consideration in making investment or management decisions with respect to securities or other property of an ERISA plan or IRA. The rule defines "recommendation" as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." *Id*. at 20948. In its earlier proposed rulemaking, 80 Fed. Reg. 21927, 21941 (April 20, 2015), DOL conceded that this expanded definition of fiduciary encompasses communications that "Congress did not intend to cover as fiduciary 'investment advice' and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality." The rule thus sweeps broker-dealers, their registered representatives, insurance companies, and their commission-based sales agents into the broad definition of "fiduciary" and subjects them to conflict-of-interest duties.

III. The Fiduciary Rule's Drastic Expansion of "Fiduciary" Far Exceeds DOL's Statutory Mandate

The Fiduciary Rule's newly expanded definition of what constitutes a fiduciary cannot be squared with the plain meaning of ERISA and the IRC, both of which cabin the agency's discretion to redefine the scope of "investment advice" under federal law. At a bare minimum, Congress defined a fiduciary as one who "renders investment advice for a fee or other compensation, direct or indirect." 29 U.S.C.§ 1002(21)(A); 26 U.S.C. § 4975(e)(3). Nonetheless, the Fiduciary Rule purports to expand the concepts of "fiduciary" and "investment advice" to subject non-fiduciaries such as brokers,

salespersons, and insurance agents to conflict-of-interest duties. Such a regulatory overreach is inconsistent with the clear statutory requirement that a fiduciary is one who "renders investment advice" for a fee.

Because sales agents are compensated *not* for providing individual investment advice but for merely closing a sale or executing a sales transaction, they should not be treated as fiduciaries. *See e.g., Am. Fed. of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of U.S.*, 841 F.2d 658, 664 (5th Cir. 1988) ("Simply urging the purchase of [a company's] products does not make [the employee] an ERISA fiduciary with respect to those products."). Yet under the new rule, DOL conflates "sales" with "advice" and treats all brokers, salespersons, and insurers as fiduciaries.

This overbroad definition would appear to include those who deliver generic investment communications in targeted sales calls or who send individually addressed marketing materials via electronic or traditional mail. Even a one-time sales pitch could render one as a fiduciary. By sweeping such sales agents into its new definition of fiduciary, DOL would subject persons who offer no real investment advice to conflict-of-interest duties, thereby distorting the scope of "fiduciary" and "investment advice" under the plain language of federal law.

DOL's construction also contradicts the historical and common-law understanding of the term "fiduciary" that existed prior to the enactment of ERISA. It is a "cardinal rule of statutory construction" that, when Congress employs a term of art, "'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'" *Molzof v. United* States, 502 U.S. 301, 307 (1992) (quoting *Morissette v. United* States, 342 U.S. 246, 263 (1952)). When Congress used the term "fiduciary" in ERISA and the IRC, it incorporated the common law understanding that a fiduciary is "one who holds a special position of confidence or trust." H.R. Rep. No. 93-533, at 2082 (1973).

Not only has this understanding been consistently followed, but the Supreme Court in *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996), expressly relied on the common-law definition of "fiduciary" to interpret the scope of ERISA's fiduciary obligations. That is why DOL's 1975 regulation implementing ERISA's fiduciary provision—precisely the same statutory language at issue here—strictly construed "investment advice" as advice given "on a regular basis," "pursuant to a mutual agreement, arrangement, or understanding" as to fiduciary status, and "serv[ing] as a primary basis" for an investor's decision. 29 C.F.R. § 2510.3-21(j)(1)(i)(B)(2). But those requirements have all been swept aside under the Fiduciary Rule.

It is also "a fundamental canon of statutory construction that the words of a statute must be read … with a view to their place in the overall statutory scheme." *David v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the "overall statutory scheme" reinforces what the plain statutory language makes clear: that the term "fiduciary" does not encompass short-term, merely transactional relationships. As noted above, a person is a fiduciary under both ERISA and the IRC "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A); 26 U.S.C. § 4975(e)(3).

The "control," "management," and "administration" of a plan are all crucial functions requiring a substantial and ongoing relationship to the plan. The "investment advice" provision of subsection (ii) must therefore be read in harmony with the surrounding subsections. In defining fiduciary, Congress hardly would have required, in two provisions, a substantial and direct connection to the essentials of plan operation but then insert between them a provision that merely required a casual, short-term relationship bottomed on sales rather than on significant investment advice provided on a regular basis and through an established relationship. When at all possible, the provisions of a statute should be interpreted in a way that renders them compatible, not contradictory. Because DOL's urged constructions of "fiduciary" and "investment advice" would do violence to the overall statutory scheme adopted by Congress, the Fiduciary Rule should be withdrawn.

Finally, DOL has never explained why the myriad protections afforded to consumers of fixed indexed annuities by comprehensive state insurance laws are insufficient to protect consumers. When Congress enacted the McCarran-Ferguson Act, 15 U.S.C. § 1011 (1945), it saw no compelling need for the federal government to intrude into insurance regulation, but instead created an express exemption from federal antitrust law for the "business of insurance" and provided that federal regulation of insurance could neither be inferred nor assumed unless explicitly announced by federal law. In justifying the rule, DOL has cited no evidence that any variance in state laws or their enforcement has harmed fixed annuity buyers.

Of course, fixed indexed annuity sales must already comply with stringent requirements to qualify for the exemption from the federal securities laws created by the Harkin Amendment. Dodd-Frank Act, Pub. L. No. 111-203, § 989J, 124 Stat. 1376,

1949-50 (2010) (directing both SEC and FINRA *not* to regulate fixed indexed annuities so long as they are sold in compliance with National Association of Insurance Commissioners suitability standards). Yet DOL has never explained why Congress's considered determination that additional federal regulation of fixed indexed annuities is unwarranted does not also apply with equal force here.

IV. The Fiduciary Rule Cannot Survive First Amendment Scrutiny

The Fiduciary Rule regulates speech within a particular subject matter: "investment advice," or "recommendations" to purchase retirement products. "Advice" and "recommendations" are broadly defined to encompass any "suggestion" to take or not take some action. The Rule then imposes strict fiduciary obligations on the speaker based solely on the content of the speaker's message, which triggers liability for various statutory violations including the receipt of commission-based compensation for such speech.

By banning, regulating, and burdening truthful investment recommendations and sales solicitations by salespersons, brokers, and insurance agents, the Fiduciary Rule clearly implicates First Amendment concerns. Although the regulation of truthful commercial speech is subject to at least intermediate scrutiny under *Central Hudson*, strict scrutiny applies where, as here, the government specifically targets speech solely on the basis of its content. Because the rule cannot survive either level of scrutiny, it violates the First Amendment.

A. The Rule Constitutes Content-Based Regulation of Speech that Cannot Withstand Strict Scrutiny

The Fiduciary Rule prohibits salespersons, brokers, and insurance agents from recommending retirement products to consumers as a part of an ordinary sales pitch unless the speaker agrees to adhere to the onerous requirements of a fiduciary relationship. These requirements are so burdensome that the rule all but abolishes investment-related commercial speech outside a fiduciary context.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). Thus, regulation is content-based if it draws distinctions based on the message the speaker conveys either by subject matter or by function or purpose. *Id.* The Rule regulates a specific subject matter—investment advice or recommendations to purchase retirement products—by imposing fiduciary obligations upon the speaker solely based on the content of speech.

The Supreme Court has consistently held that when a rule "imposes a restriction on the content of protected speech, it is invalid unless [the government] can demonstrate that it passes strict scrutiny." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011). And in the context of a regulation that "burdens disfavored speech by disfavored speakers," the Court has held that "[c]ommercial speech is no exception" to the First Amendment's "heightened" scrutiny standard for government imposed content discrimination. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564-566 (2011).

Because the Fiduciary Rule is a content-based restriction on speech, it is presumptively unconstitutional and subject to strict scrutiny. That standard of review requires the government to prove that its content-based regulation is "narrowly tailored to serve compelling [government] interests." *Town of Gilbert*, 135 S. Ct. at 2226. "It is rare that a regulation restricting speech because of its content will ever be permissible," *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000), and the Fiduciary Rule is no exception.

A regulation generally cannot withstand strict scrutiny if a less restrictive alternative is available. *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("The Government may … regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."). Here, DOL could have chosen many less restrictive alternatives: It could have regulated commissions and compensation directly, in connection with transactions rather than by targeting free speech; it could have regulated retirement products themselves; or it could have allowed consumers to receive truthful commercial speech from a non-fiduciary with a simple disclosure agreement. Because any of these alternatives could achieve DOL's alleged interest in the integrity of retirement investments without restricting or burdening free speech rights, the Fiduciary Rule fails to satisfy strict scrutiny.

B. The Rule Cannot Withstand the Intermediate Scrutiny Demanded by *Central Hudson*

At a minimum, the Supreme Court requires that regulation of truthful and non-misleading commercial speech must "directly advance" a "substantial governmental interest" and be "narrowly tailored" to achieve a reasonable "fit" between DOL's stated goals and the agency's means of achieving them. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). Under the *Central Hudson* test, a challenged regulation violates the First Amendment unless government regulators can show that (1) they have identified a substantial government interest, (2) the regulation "directly advances" the asserted interest, and (3) the regulation "is not more extensive

than is necessary to serve that interest." *Id.* at 566. DOL's Fiduciary Rule cannot possibly satisfy this test either.

The Fiduciary Rule does not advance a substantial government interest. At bottom, DOL maintains that government-enforced silence is better for consumers than receiving truthful information about retirement investment products from salespeople who are paid by a commission from those sales. But because the rule burdens even truthful, non-misleading speech about retirement investment products, DOL has the burden of showing how such truthful, non-misleading commercial speech negatively affects American consumers' retirement investments. DOL has not—because it cannot—satisfied that burden.

Indeed, it is precisely because a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (internal quotations omitted), that the First Amendment "presumes that some accurate information is better than no information at all." *Cent. Hudson*, 447 U.S. at 562. Simply put, the fact that salespeople have pecuniary interests in mind when conveying truthful information does not mean that the information being conveyed is any less vital or deserving of protection.

Nor does the rule directly and materially advance DOL's posited interest. Rather than protecting consumers' retirement investment interests, the rule would actually impede consumers' access to valuable, accurate investment information. By placing speaker-based burdens on those who provide such truthful investment information, the Rule impermissibly chills brokers, agents, and salespeople from keeping investors informed. Not only will this decrease the availability of vital information, but it will ultimately increase the price that consumers must pay for the same information.

Lastly, the Fiduciary Rule fails intermediate scrutiny because it is not narrowly tailored. Again, instead of adopting its sweeping, extra-statutory definition of "fiduciary," DOL could have simply required all agents and broker-dealers to disclose to customers whether they are in fact fiduciary advisers or merely salespeople. That approach would have been more narrowly tailored and, while directly addressing any confusion that might exist on the part of consumers, would still allow consumers to evaluate the information for themselves. Instead, DOL chose to classify vast swaths of speech as "fiduciary advice" so that sellers must communicate as a fiduciary, or not at all. Far from being "designed carefully" to avoid overburdening speech, *Cent, Hudson*, 447 U.S. at 564, the rule is vastly overbroad by design.

Because the Fiduciary Rule cannot survive even the intermediate scrutiny required by *Central Hudson*, DOL cannot possibly satisfy its burden under the First Amendment.

V. Conclusion

For the foregoing reasons, WLF encourages DOL to abandon its failed experiment with the "Fiduciary Rule" altogether. By sweeping broker-dealers, their registered representatives, insurance companies, and their commission-based sales agents into the broad definition of "fiduciary"—and subjecting them all to conflict-of-interest duties—the Fiduciary Rule far exceeds any Congressional or statutory mandate under ERISA or the IRC. By including such sales agents into its new definition of fiduciary, the rule would subject persons who offer no real investment advice to conflict-of-interest duties, thereby distorting the scope of "fiduciary" and "investment advice" under the plain language of federal law.

Likewise, by banning, regulating, and burdening truthful investment recommendations and sales solicitations by salespersons, brokers, and insurance agents, the Fiduciary Rule raises serious First Amendment concerns. Because the rule cannot survive either the strict scrutiny required of content-based speech regulation, or the intermediate scrutiny *Central Hudson* requires for burdens on commercial speech, it violates the First Amendment.

Rather that increasing access to valuable investment education and expanding consumer choice, the rule will make it more difficult for America's workers and retirees to receive quality advice about their investment options. WLF urges DOL to withdraw the Fiduciary Rule in its entirety.

Respectfully submitted,

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