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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 – Comments on Issues Raised in Presidential Memorandum dated February 3, 2017 and in Preamble to Proposed Delay of Fiduciary Rule

Dear Sir or Madam:

On behalf of a group of firm clients, I am writing today with respect to the issues raised in the President's Memorandum dated February 3, 2017 regarding the effects of the following rules: the new definition of a fiduciary, the new prohibited transaction exemptions, and the modifications of existing exemptions (together referred to herein as the "Fiduciary Rule" or "Rule").

We greatly appreciate the President's leadership in directing this review. As discussed below, the Fiduciary Rule is clearly in need of a review, followed by a complete rewrite of the Rule. Without such a rewrite, the Rule will have extremely adverse effects on retirement security.

As explained further below, it is essential that the 60-day delay finalized on April 7th be extended by at least 180 days in order to provide time to complete a thorough review and to rewrite the Rule.

SUMMARY

I. Characterization of new definition of fiduciary as "noncontroversial" is erroneous.

- On April 7th, DOL announced that the new definition of a fiduciary rule is sufficiently "noncontroversial" that it should go into effect on June 9th. This statement is inconsistent

with the record that includes thousands of pages of intense concerns about the definition of a fiduciary. In fact, the very core of the problem with the Fiduciary Rule is its expansion of the definition to include pure sales activities and casual suggestions.

II. Issues raised by the President's Memorandum.

- Two independent analyses conducted after the Rule was finalized severely undercut the economic analysis provided by the prior Administration's Department of Labor ("DOL") in connection with the Rule. The independent analyses support the need to revisit the Fiduciary Rule to ensure that great harm is not inadvertently done to retirement investors. According to those analyses, under the Rule, retirement investors will lose access to personal advice, pay far more for advice, lose access to protection against outliving their retirement savings, and pay for the increased paperwork and litigation stemming from the Rule.
- Documented effects on variable annuity sales have already been extremely adverse, again directly undermining DOL's prior economic analysis.

III. Clearly erroneous economic analysis provided by the prior Administration; need to start over.

- The Obama Administration's DOL dismissed job loss attributable to the Rule as a "transitional friction" that need not be studied.
- The following is a clear example where DOL's economic analysis has been proven wrong even before the applicability date:
 - **DOL economic analysis (page 312):** "the Department believes that quality, affordable advisory services will be amply available to small plans and investors under the final rule and exemptions."
 - **Actual results:** An independent study has found that over 70% of advisors will cease providing services to many small retirement investors. Also, in light of the new Rule, a business consultant recommended consideration be given to ceasing providing services to retirement accounts under \$200,000.
- The prior Administration's well-documented political conflict of interest tainted DOL's economic analysis, which was fundamentally flawed, as detailed below.
- DOL's conflict of interest was most evident in its consistent refusal to discuss the value of financial advice, focusing only on the fact that fees reduce investment returns.
- A large advice gap arose in the United Kingdom due to a very similar rule; DOL failed to even acknowledge that gap, much less take it into account.
- DOL's analysis concluded that all studies supporting the Rule are sound and all opposing studies are flawed, which by itself raises questions about DOL's analysis.
- DOL disregarded the advice of other agencies, including the SEC, in preparing its economic analysis.

IV. The Fiduciary Rule needs to be rewritten completely. A good starting point would be the workable best interest standard established in proposed 2015-2016 bipartisan fiduciary legislation. The new rule should be developed in close coordination with the SEC to establish a uniform best interest standard.

V. A 180-day extension of the 60-day delay of the entire Fiduciary Rule is needed for a thorough review of Fiduciary Rule issues.

A corresponding extension is needed with respect to the end of the transition period, i.e., the period from April 10, 2017 through December 31, 2017 during which the BICE can be satisfied in a simpler manner.

Finally, a delay is needed with respect to Q&A-12 of the Conflict of Interest FAQs (Part I – Exemptions) issued on October 27, 2016. That FAQ states that back-end adviser recruitment incentives would generally violate the requirements of the BICE. However, DOL grandfathered any such agreement entered into prior to October 27, 2016, thus in many cases prohibiting any new such agreements as of October 27, 2016. A delay of the Rule is not fully effective if this October 27, 2016 date is allowed to remain in effect. In connection with the extension of the 60-day delay, Q&A-12 should be modified to grandfather agreements entered into prior to the ultimate applicability date of the Rule.

Under the Administrative Procedure Act (“APA”), there is no need to issue a re-proposal in order to extend the delay, as described above. The proposed delay expressly invited comments on the possibility of issuing “a further extension of the applicability date.” Under the APA, that clearly puts the public on notice of the possibility of such an extension. Notably, the Obama Administration extended a delay in almost identical circumstances in 2009, without a re-proposal.

VI. It is critical that DOL include in any extension of the delay a finding of good cause for having the extension be immediately effective.

VII. Continued uncertainty is harming individuals, triggering a need for the preambles to all delay regulations to send a signal that broad grandfathering will be provided.

DISCUSSION

I. DEFINITION OF FIDUCIARY IS NOT “NONCONTROVERSIAL;” ON THE CONTRARY, IT IS THE CORE OF THE REGULATORY PROBLEM

On April 4, DOL announced that the new definition of a fiduciary rule is sufficiently “noncontroversial” that it should go into effect on June 9th. This is incorrect.

- **Characterization of new definition of fiduciary as “noncontroversial” is erroneous.** DOL states that the new definition of a fiduciary is sufficiently “noncontroversial” that it can go into effect on June 9, 2017 without public comment or the Presidentially-ordered review. This statement is inconsistent with the record that includes thousands of pages of intense concerns about the definition of a fiduciary. In fact, the very core of the problem with the Fiduciary Rule is its expansion of the definition to include pure sales activities and casual suggestions.

- **Casual “suggestions” can give rise to fiduciary status, thus cutting off retirement investors from almost any helpful information.** Under the DOL rule, casual “suggestions” about investments or distributions that are clearly not intended to be relied upon as advice would give rise to fiduciary status. This is clearly not appropriate and is the core problem with the Rule. When an employee or IRA owner calls a call center for informal assistance, no such assistance will be available because any casual suggestion is a fiduciary act. When an employee asks a human resources employee for help, no help will be provided because that would give rise to fiduciary status. (There is an illusory exception for human resources employees that only applies to human resources employees who violate company policy by answering questions.) To call this aspect of the Rule “noncontroversial” is simply wrong.
- **New definition of a fiduciary is so outrageous that it goes far beyond even what DOL proposed in 2010.**
 - **In one and only one industry – the retirement industry -- marketing, promoting, and selling are now being regulated as fiduciary acts.** In every industry in the country, promoting and selling are part of doing business. Under DOL’s shocking new definition of a fiduciary, persons openly acting as salespersons must assume fiduciary status and be subject to severe liabilities simply by reason of promoting their own products. This is such an amazing result that even DOL did not dare propose this in 2010, expressly treating selling as selling in 2010. But in the radicalization of the Rule in 2016, this common sense provision was eliminated. “Noncontroversial?” Not under any definition of the word that I have seen.
 - **New definition devastating to investment education.** One of DOL’s great achievements in the last 25 years was the issuance of Interpretive Bulletin 1996-1, which opened the door to massive increases in investment education for millions of Americans. The 2010 DOL proposal very appropriately preserved 1996-1. In the radicalization of the 2016 Rule, investment education was cut way back. Under 1996-1, education includes (1) guidance on the extent to which an individual should invest in different asset classes (such as large and small cap equity funds, and long and short-term bond funds) based on her age and other factors, and (2) examples of investments that fit within such asset classes. This definition of education has worked very well for more than 20 years. Under the Fiduciary Rule, however, providing examples of investments that fit within asset classes would be fiduciary advice, not education, in the case of IRAs. Thus, education would be limited to conversations about investment theory that will be of little use to most retirement savers. As a result, we will have less informed retirement investors who will be less able to put investment education to practical use and will be much less able to make informed decisions about investing their IRA assets.

II. ISSUES RAISED BY THE PRESIDENT’S MEMORANDUM

Issue #1. *“Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans’ access to certain retirement savings*

offerings, retirement product structures, retirement savings information, or related financial advice.”

Two questions raised. This issue breaks down into two distinct questions. First, will the Fiduciary Rule cause a reduction in access to retirement savings help? Second, will that reduction cause harm?

Two independent studies of the final Fiduciary Rule conclude that the Fiduciary Rule will very significantly deprive small retirement accounts of access to personal investment advice. Because the Rule is not yet in effect, there is not a large amount of data on the effects of the Rule, but the data that does exist indicates very powerfully that the Rule will cause small accounts to lose access to investment assistance.

Two major studies of the effects of the final regulation demonstrate the extent to which small retirement accounts will lose access to advice. One study was conducted by CoreData Research UK, which is the London unit of a global financial services research and strategy consultancy. CoreData Research UK issued a ***non-commissioned report*** based on an October 2016 survey of 552 U.S. financial advisors. Here is a key conclusion of the study:

- **71% of advisors will cut off advice to many small retirement clients.** “The fiduciary rule could result in mass market investors being left out in the cold, creating the prospect of an advice gap. ***Seven in ten (71%) financial advisors will disengage with at least some mass-market investors because of the DOL’s rule.*** These advisors estimate they will disengage with an average of 25% of their mass market clients.” (emphasis added)
 - For purposes of the report, mass-market investors are defined as investors with less than \$300,000 in net investable assets. In our view, this underscores the depth of the problem with the Fiduciary Rule. For the truly small accounts, like those under \$25,000, the result may be that almost none of the 71% will provide services.

In October of 2016, A.T. Kearney, a global management consultant, published a study of the effects of the Fiduciary Rule, in connection with a discussion of how Kearney can help financial institutions adjust to the Rule. The study was not structured to influence rulemaking in any way, but rather was structured to identify the effects of the Rule and to offer financial institutions strategies to deal with those effects. Here is a key excerpt from the Kearney study:

“The rule will usher in several key shifts that industry players must understand to position themselves effectively for the future. . . . As firms move toward fee-based advisory, many low-balance accounts will no longer be served, shifting many assets to formats such as robo-advice and self-directed.”

The study recommends that broker/dealers should: **“Accelerate the transition to fee-based services and advisory, and evaluate account thresholds to continue to serving (for example, accounts greater than \$200,000).”** Thus, we have a management consultant recommending that broker/dealers consider ceasing to provide personalized advice to retirement accounts under, for example, \$200,000, due to the Fiduciary Rule.

Will investors' lack of access to investment assistance cause harm? There is clear evidence, almost completely ignored by the prior Administration, that the lack of access to an advisor can have very adverse effects on retirement savings.

In “The role of financial advisors in the US retirement market” (July 10, 2015) (part of the record as a comment submitted with respect to the 2015 proposal), the consulting firm Oliver Wyman finds that:

- Small businesses that work with a financial adviser are 50% more likely to set up a retirement plan (and micro businesses with 1-9 employees are almost twice as likely).
- Advised individuals, segmented by age and income, have a minimum of 25% more assets than non-advised individuals.
- In the case of individuals aged 65 and older with \$100,000 or less in annual income, advised individuals have an average of 113% more assets than non-advised investors.
- Advised investors have more diversified portfolios – they own twice as many asset classes, have more balanced portfolio asset allocations, and use more packaged products for equity exposure compared with non-advised investors.
- Advised investors stay more invested in the market – advised individuals hold less cash in their investment accounts (36%-57% less than non-advised individuals for similar age and wealth cohorts).
- Advised investors re-balance more frequently, and are 42% more likely to re-balance their portfolios at least every two years.

Conclusion. In response to the question raised in the President’s memorandum, there is clear evidence that the Fiduciary Rule will cause small retirement accounts across the country to lose access to an advisor. Moreover, there is clear evidence that the effects of this loss will be devastating for low and middle-income individuals with small retirement accounts in need of financial advice.

Issue #2. *“Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees.”*

The data noted above provide a complete basis for concluding that investors and retirees will be adversely affected by the changes in the retirement services industry caused by the Fiduciary Rule. But there are even more adverse effects documented by the two studies cited above.

The CoreData study found that because of the Fiduciary Rule:

- **“Most” investors will find advice too expensive.** “Meanwhile, the cost of advice is expected to increase and be passed on to investors. *Nearly four in ten (39%) advisors believe the cost of personal financial advice will become too expensive for most investors.*” (emphasis added)

- **Annuity sales will be very adversely affected.** “About a third (32%) believe shifting away from certain products, such as annuities and non-traded REITs, is one of the biggest challenges posed by the fiduciary rule.”

Similarly, the Kearney report states:

“Certain high-cost investment products (such as variable annuities) will be phased out as the business model is no longer viable under the new rule. . . .”

- **Adverse effects on annuities have already occurred.** A March 28 article in Investment News has documented the devastating effect that the Fiduciary Rule has already had on the sale of variable annuities:

The variable annuity industry took a beating in 2016, with several of the top sellers inking losses upwards of 25% on the year and some exceeding 40%. The Department of Labor's fiduciary rule, issued in its final form last spring, played a big role in the industry's bruising, observers said. . . . The DOL fiduciary rule "brought some tentativeness from advisers" in terms of using variable annuities with clients, said Todd Geising, assistant research director at the Limra Secure Retirement Institute. "It's not a particular product or company's strategic decision moving the industry itself," he added. "It truly is the forces specifically with the DOL rule." . . . If the rule is delayed, Limra is forecasting VA sales to dip another 10-15% this year, Mr. Geising said. If it goes into effect on schedule, that estimate swells to 20-25%.

Conclusion. In short, retirement investors and retirees of modest means will find themselves adversely affected in numerous ways. Such investors and retirees will:

- Find personal advice unavailable;
- Be hurt by such unavailability, as evidenced by the Oliver Wyman study noted above;
- Even where advice is available, likely find it too expensive to afford;
- Be much less able to protect themselves from outliving their retirement savings due to the adverse effects of the Fiduciary Rule on the annuity market, a view strongly held by the advisors in the CoreData survey and by Kearney, and borne out by the variable annuity sales numbers cited above.

Issue #3. *“Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.”*

As noted above, almost 40% of the advisors surveyed by CoreData believe that most retirement investors will be priced out of the investment advice market by reason of the Fiduciary Rule, a very disturbing prospect. Moreover, the threat of litigation is very real. Many advisors are fearful of litigation, as the CoreData survey found that:

- “A majority (57%) believe increased paperwork stemming from reporting and disclosure requirements will be one of the top three challenges of the fiduciary rule. . . . Advisors

are also in a heightened state of readiness for a potential rise in lawsuits related to the fiduciary rule. Nearly two in 10 advisors (18%) believe preparing for potential litigation will be one of the biggest challenges they must overcome.”

Conclusion. The findings by CoreData and Kearney support the need to revisit the Fiduciary Rule to ensure that great harm is not done to retirement investors who will lose access to personal advice, pay far more for advice, lose access to protection against outliving their retirement savings, and pay for increased paperwork and litigation.

III. CLEARLY ERRONEOUS ECONOMIC ANALYSIS PROVIDED BY THE PRIOR ADMINISTRATION: NEED TO START OVER

The preamble to the proposed delay asks for input that “might inform updates to [DOL’s] legal and economic analysis, including any issues that the public believes were inadequately addressed in the RIA and particularly with respect to the issues identified in the President’s Memorandum.” In brief, we found the economic analysis performed by the prior Administration to be constructed more like a legal brief prepared by an advocate retained to defend the DOL rule. Moreover, DOL’s analysis was, as demonstrated below, deeply flawed and has already been proven wrong in key respects. In this context, we strongly urge this new Administration to start over with a clean slate, and not rely on an economic analysis aimed to support a political objective.

DOL: job loss dismissed as a “transitional friction” that need not be studied. Before turning to the clear evidence that DOL’s prior economic analysis was wrong, one observation is important regarding DOL’s utter disregard for the possible job losses attributable to its proposal. On page 244, DOL states:

transitional frictions may introduce some social costs; for example, if the resource being saved is worker labor, then there would be search and training costs associated with finding new employment within or outside of the financial industry. These related costs have not been quantified due to a lack of data, literature, or other evidence . . .

In other words, some unknown number of financial services workers may lose their jobs, but this is just a “transitional friction” and not worthy of additional study. In other words, job loss should not stand in the way of over-regulation, exactly the opposite of the view of this new Administration.

Clear examples where DOL’s economic analysis has been proven wrong even before the applicability date. Normally, it can take years before predictions regarding the effects of a regulation can be determined, but here the Fiduciary Rule was so egregiously constructed that its adverse effects have already surfaced, directly contradicting central themes of DOL’s economic analysis. Here are two clear and important examples.

- **DOL economic analysis (page 312):** “the Department believes that quality, affordable advisory services will be amply available to small plans and investors under the final rule and exemptions.”
 - **Actual results:** As noted, an independent study has found that over 70% of advisors will cease providing services to many small investors. Also, in light of the new Rule, a business consultant recommended consideration be given to ceasing providing services to retirement accounts under \$200,000.
- **DOL economic analysis (page 313):** “revisions to the 2015 Proposal reflected in the Best Interest Contract Exemption will reduce compliance costs and thereby help make advice affordable to small investors.”
 - **Actual results:** As noted, an independent study has found that almost 40% of advisors believe that *most* investors will be priced out of the retirement advice market because of the Fiduciary Rule.

The prior Administration’s well-documented political conflict of interest tainted DOL’s economic analysis. It is ironic that a very profound conflict of interest underlies the prior Administration’s economic analysis. In other words, instead of striving for accuracy, the prior Administration let its political perspective completely control the analysis, establishing a clear conflict between the Administration’s political objectives and its duty to create a sound rule. The following excerpt from a report issued by Senator Ron Johnson (R-WI) included very disturbing quotes from DOL regarding the biased nature of DOL’s economic analysis:

The Administration was predetermined to regulate the industry and sought evidence to justify its preferred action. In emails to senior White House advisors, a Labor Department official wrote of the ‘**challenges in completing the [regulatory impact analysis]**’ and of the need to find literature and data that ‘**can be woven together to demonstrate that there is a market failure and to monetize the potential benefits of fixing it.**’ In another email, a Labor Department official discussed ‘**building the case for why the rule is necessary.**’ (emphasis added)”

In a document that is aimed at targeting conflicts of interest, the Administration’s own conflicts of interest were never disclosed, acknowledged, or mitigated.

DOL’s conflict of interest was most evident in DOL’s consistent refusal to discuss the value of financial advice. DOL’s economic analysis is very lengthy, but a great deal of it can be boiled down to one key point: fees paid to advisors reduce returns, so that, if everything else is equal (an unrealistic and unsupported assumption), advised investors have lower returns than non-advised investors who do not pay those fees. That is the core point made repeatedly in one form or another over hundreds of pages.

The overriding problem with DOL’s analysis is that it does not take into account the benefits of advice. In very isolated places, DOL made brief references to this issue, but generally this critical issue gets very little attention. For example, the landmark study on the benefits of advice cited above, prepared over years by Oliver Wyman and submitted to DOL as a comment, is *never* discussed by DOL and is only cited perfunctorily in a footnote on page 314. How can

DOL decide whether investors benefit from advice without examining a study of the benefits of that advice?

DOL dismisses overwhelming evidence that advised investors have greater savings than non-advised investors. As noted, DOL refused to even discuss the landmark study done by Oliver Wyman on this topic. DOL's basis for dismissing such evidence is that there is no showing that the advice "caused" the greater savings, relying heavily on the notion that the type of investors who seek advice may be better savers than non-advised investors. See page 316. But even DOL knows that this explanation is incorrect. On page 156, DOL admits that advised and non-advised investors "appear not to be very different across observable characteristics."

It is especially odd that in some places DOL actually admits that there is a huge hole in its analysis attributable to the failure to take into account the value of advice.

- DOL measures the harm of conflicted advice by comparing mutual funds distributed directly to consumers versus mutual funds distributed by full-service brokers. But then DOL admits on page 299 that this comparison does not take into account "the value of the advisory services."
- Also on page 299, DOL admits that some harm "caused" by full-service brokers may reflect "unobserved, indirect, fair compensation for advice. . . . However, . . . retail investors are unaware of such indirect compensation (and of 12b-1 fees), so it is implausible that they reflect efficient market pricing of advisory services." DOL's statement is a non-sequitur: the evidence that brokers do not deliver value is that investors do not fully understand how brokers get paid. There is simply no logic here.

Other nominal attempts by DOL at analyzing the benefits of advice are at best half-hearted:

- Examples of DOL's extremely weak attempts to analyze benefit of advice (***italicized material below provided to demonstrate the weakness of DOL's analysis***):
 - "Both the industry-generated investor survey results and Foerster et al.'s finding of savings impacts suggest that at least some of advised investors' excess fees (and associated underperformance) can be interpreted as fair payment for financial services that yield consumer benefits other than improved investment performance. ***[DOL admits that fees reflect payment for valuable services.]*** Neither of these, however, challenges the more extensive and robust evidence, presented above, that investors often cannot understand the cost of their advisers' services and generally cannot determine whether the value of those services justify their cost. As such, both of these findings are consistent with the proposition that advised investors' higher fees and underperformance are excessive relative to the services their advisers provide." (Page 157) ***[DOL's best rebuttal again is a non-sequitur. DOL says that investors may not understand the cost of services; this is no rebuttal at all regarding whether advisors provide services that justify their fees. The weakness of DOL's rebuttal is very telling***

- regarding the fact that DOL could not effectively rebut the notion that fees are justified by the benefits of advice.]*
- “[A]dvisers incur substantial costs pursuing IRA customers, and IRA investors ultimately bear such costs.” (Page 127) *[This criticism demonstrates the weakness of DOL’s position. If advisors are being condemned for passing on marketing costs, that is a condemnation of our entire economy. By definition, every retail business has to market and has to pass on marketing costs to stay in business.]*
 - “Stoughton, Wu, and Zechner (2011) . . . find that, “kickbacks are always associated with higher portfolio management fees and negatively impact fund performance” [italics added]. Some in the industry have made the claim that although fees are hidden and advice is conflicted, consumers are still better off in these advice arrangements than getting no advice at all. Results like those from Stoughton, Wu, and Zechner (2011) cast doubt on that assertion. (Page 133) *[Again, DOL could not do better than simply say that fees reduce returns, which is a mathematical fact and does not address whether advised investors do better than non-advised investors. And DOL’s same point could be made against non-conflicted advice, which also reduces returns. DOL could not disprove the value of advice so it simply repeated over and over the tired point that fees reduce returns.]*
 - “There is evidence that advisers often recommend investments that they should know are not the best alternative for their customer. Numerous academic studies have found that, as a group, passively managed mutual funds (i.e. index funds) consistently outperform actively managed funds, largely due to their low fees, (Gruber 1996; French 2008; Fama and French 2010). Therefore it is likely that IRA advisers who honor their customers’ best interests would widely recommend index funds with low fees.” (Page 145) *[Again, no effort is made to evaluate the benefits of advice. DOL instead bases its analysis on the same tired point: fees reduce returns, so all actively managed funds are bad, a condemnation of a multi-trillion dollar industry. But if that is the basis for condemning actively managed funds, the same criticism would apply to the fees charged for non-conflicted advice, which also reduce returns. What DOL seems to be suggesting is that it would be better for retirement investors if advisors did not charge for advice. That is certainly the case, but that point is silly to say the least.]*
 - “Hackethal, Haliassos, and Jappelli (2012) . . . show that brokerage clients who receive investment advice have inferior portfolio returns relative to those who do not receive advice, in the amount of 5.0 percent per year after fees have been factored in.” (Page 154) *[Actually, the article comes to no definitive conclusion regarding whether the value of advice justifies its cost. DOL picked certain parts of the article to reference, but left out the authors’ extensive discussion of uncertainty regarding how to analyze the data.]*
 - “To the extent that 12b-1 fees are fair compensation to a BD in exchange for advice, it may be appropriate to back out these fees when estimating underperformance. However, where 12b-1 fees are charged on retail investor assets for any other purpose, this charge is appropriately reflected in the performance of the assets.” (Page 163) *[DOL starts by making a completely*

unsupported observation that the only fee that may be treated as fair compensation for advice is a 12b-1 fee. DOL never justifies that statement. DOL then goes on to repeat the same obvious point – fees reduce returns – without ever even acknowledging the question of the value of the advice given.]

A large advice gap arose in the United Kingdom due to a very similar rule; DOL failed to even acknowledge that gap, much less take it into account. Again, one has to wonder about the role of DOL's conflict of interest noted above. Effective as of January 1, 2013, the United Kingdom adopted a rule that had an effect very similar to the effect the DOL's prohibited transaction rules would have under the proposal – making payments from mutual funds to advisers illegal. (Under the DOL rule, such payments are illegal unless the very risky and burdensome BICE is used, which many firms are not using.) As a result, and as predicted by the industry, U.K. advisers ceased servicing small accounts in droves, as shown below by a description of the January 1, 2013 results of the U.K.'s new rules. Some of these practices were implemented before the U.K. rule went into effect but were clearly done in anticipation of the rule, as recognized by a study commissioned by the U.K. regulator itself.

- **U.K.'s "big four" banks (an important source of investment advice in the U.K.)**
 - **HSBC:** provided investment advice only for customers with at least \$80,000¹ in total assets or \$160,000 of annual income.
 - **Lloyds:** provided face-to-face investment advice only for customers with at least \$160,000 in assets.
 - **Royal Bank of Scotland:** charged \$800 to set up a financial plan, and made changes to gear investment advice services to high net-worth clients.
 - **Barclays:** provides investment advice only for customers with at least \$800,000 in assets.

These banks previously had entire business arms or strategies providing investment advice to investors with less assets, but just prior to the U.K.'s implementation of its new rule, HSBC, Lloyds, and Barclays completely pulled out of offering investment advice to such investors, and, as noted, Royal Bank of Scotland overhauled its offerings to target high net-worth clients. For example, Barclays closed Barclays Financial Planning, leaving only Barclays Wealth to offer financial advice to individuals with at least \$800,000 in assets.

- **Examples of other actions taken in the U.K.**
 - **Aviva:** ceased offering face-to-face investment advice.
 - **AXA:** ceased offering face-to-face investment advice.
 - **Adviser firm AWD Chase de Vere:** stopped accepting clients with \$80,000 or less in assets.
 - **Adviser firm Towry:** stopped accepting clients with less than \$160,000 in assets.

DOL had the opportunity to learn from the U.K. experience but chose to ignore it with incorrect statements such as the following:

¹ The dollar references are approximate, based on 2013 pound to dollar conversion rates.

- **DOL statements in its RIA.**
 - **DOL:** “[The U.K. rule] hasn’t resulted in the sizable advice gap that the advisers feared.” (Page 77.) **Facts:** *No citation is provided by DOL, nor has DOL ever responded to the above data, which contradicts DOL’s statement and which has been submitted to DOL.*
 - **DOL:** “Any advice gaps are questionable, not attributable to the [new rule], or small and will be resolved by the market.” (Page 80.) **Facts:** *This statement is directly contradicted by the U.K. regulator itself in a later report cited below.*
 - **DOL:** There is “evidence that advisers are available to serve even small investors.” (Page 84.) **Facts:** *One of DOL’s cites is to a study by Towers Watson that itself directly contradicts DOL, as noted below.*
 - **DOL:** “Some commenters point to reports that . . . minimum account balance requirements have increased in the U.K. But this evidence appears to be mostly anecdotal.” (Page 86.) **Facts:** *As noted below, the U.K.’s own regulator has acknowledged the advice gap that DOL denies. Again, DOL has never responded to the facts of the new minimums cited above.*
 - **DOL:** “A Towers Watson report indicated demand for around 25,000 individual advisers, compared with estimates of around 30,000 financial advisers currently active in the market, although supply and demand may not be perfectly aligned across the market.” (Page 86.) **Facts:** *It is shocking that DOL failed to mention the key aspect of that report, which was Towers Watson’s statement that “A different picture is likely to emerge in considering individual consumer markets, as opposed to the total market. . . . it has not been possible to analyse supply by segment. . . . However, anecdotal evidence . . . suggests that advice capacity serving less affluent segments is likely to have reduced.”*
 - **DOL:** “Concerns also were expressed regarding an ‘advice gap’ within the UK when the RDR became effective. However six months after the effective date the FCA commissioned research showing that investment advisers continue to serve clients with savings and investments between £20,000 and £75,000 and that a third of advisers continue to serve clients with less than £20,000.” (Page 179) **Facts:** *DOL’s own statement reveals that roughly two thirds of advisers refuse to provide services to individuals with less than \$31,200 (the then-equivalent of 20,000 pounds). Why didn’t DOL find this extremely troubling? Why didn’t DOL follow up on this point and find out how many advisers serve individuals with less than \$10,000?*
- **Additional facts:**
 - **Minimums cited above.** Please see above the account minimums adopted in connection with the new U.K. rule, a point never refuted by DOL.
 - **Study by U.K. government concedes existence of advice gap caused by new rule.** On March 14, 2016, the United Kingdom government published a study confirming that investment advice for holders of accounts with small balances has been diminished following the 2013 rule change. The report was primarily a review of the U.K. regulator by the U.K. regulator, so not surprisingly much in the report simply defends the appropriateness of the regulator’s own regulation.

But even the U.K. regulator admits that there is a serious problem, squarely contradicting DOL's characterization of the U.K. experience.

- **U.K. regulator admits that the new regulation only helps the wealthy:** “We believe that the [new regulation] has brought about a positive step change in the quality of advice available to those with larger amounts to invest. However, steps need to be taken to make the provision of advice and guidance to the mass market more cost-effective.” And “at present, this high standard of advice is primarily accessible and affordable only for the more affluent in society.” *In other words: the wealthy are getting the help they need, but lower income individuals cannot get advice.*
 - **Minimum required assets of \$142,000 becoming common:** “a survey of advice firms suggested that, over the last two years, the proportion of firms who ask for a minimum portfolio of more than £100,000 [approximately \$142,000] has more than doubled, from around 13% in 2013 to 32% in 2015.” *In other words, since the new regulation took effect in 2013, minimum asset thresholds for advice have soared, just as predicted by the industry in the U.K. and by the industry here.* DOL acknowledged this fact, but inexplicably seemed to dismiss its importance.
 - **Large majority of advisors not interested in small accounts:** “In a 2016 survey . . . 69% of advisors said they had turned away potential clients over the last 12 months.” *In other words, almost 70% of advisors have turned away low income customers.*
 - **Almost 50% of firms rarely help customers with less than \$42,600.** The U.K. regulator's own survey revealed that “45% of firms very rarely advise customers on retirement income options, if those customers have small funds (i.e. less than £30,000 to invest) [approximately \$42,600].” *In other words, entire firms will not work with small accounts.*

DOL's own conflict of interest: all supporting studies are sound; all opposing studies are flawed. It is remarkable to read the economic analysis prepared by the prior Administration's DOL. Every supporting study is sound; every opposing study is flawed. For example, in 3.2.4 of the economic analysis alone, DOL cites with approval 14 studies or submissions that support the DOL position. DOL only discusses one opposing view, the ICI comment letter. DOL makes the following comments regarding ICI's position: DOL “rejects” ICI's argument; ICI's argument “obscures meaningful differences;” ICI's estimates are “far less reliable;” and ICI “makes several comparisons that provide no relevant information.”

Another egregious example of bias relates to a SIFMA report. DOL quoted an anonymous commenter as saying without any support whatsoever: “The [SIFMA] report has no credibility, particularly in light of the gross misrepresentations of the rule included in SIFMA's comment letters.” Well-reasoned and documented reports from the industry have “no credibility” while unsupported attacks by Rule supporters are accepted as gospel. This is sad.

One could pick any section of DOL's analysis that addresses submissions from critics of the rule, and the pattern is exactly the same. What are the chances that every study supporting DOL is correct and every study criticizing the Rule is flawed? Mathematically, the chances are

almost nil, a clear indication that DOL's economic analysis was constructed to reach a political result, exactly as noted in DOL's e-mails to the White House.

DOL disregarded the advice of other agencies in preparing its economic analysis. On page 260 of its economic analysis, DOL states that the "Department consulted closely with the IRS/Treasury, SEC staff, and FINRA in developing the proposal." In fact, based on documents that the Administration agreed to turn over, Senator Johnson (R-WI) prepared a report, which very powerfully shows that DOL rejected comments from the SEC, Treasury, and OMB. *Moreover, the report shows very clearly that the SEC raised some of the key concerns that the industry has raised – such as concerns that the Rule will cut off access to advice.*

The report documents the following disturbing points:

- **DOL has refused to turn over what must be extremely damaging material.** As shown below, DOL consistently rejected much input from the SEC, Treasury, and OMB. And this is only based on the material that was turned over to Senator Johnson. *DOL steadfastly refused to turn over what must be damaging communications among the agencies, without any claim of privilege.*
- **Urging SEC not to cooperate.** *DOL urged the SEC not to cooperate with Congressional requests for information about the SEC's comments on the fiduciary project.*
- **Inaccurate statement regarding DOL/White House communications.** *DOL told Senator Johnson's office that there were no documented communications between the White House and DOL on the Fiduciary Rule, yet Senator Johnson's office obtained such documents from the SEC.*
- **More than half of SEC's 26 comments unheeded.** Career, non-partisan SEC staff identified at least 26 items of concern related to the substantive content of the proposed rule. As discussed in the report, DOL rejected or failed to implement 14 of those comments, more than half.
- **SEC's concerns about DOL cutting off access to advice unheeded.** SEC e-mail to DOL: "[W]e continue to believe that commenters are likely to raise concerns that the proposal may result in reduced pricing options, *rising costs and limited access to investment advice, particularly for retail investors.* Commenters also may express concerns that broker-dealers, as a practical matter, may be unlikely to use the exemptions provided and *may stop providing services* because of the number of conditions imposed, likely compliance costs, and lack of clarity around several provisions." (emphasis added)
- **More SEC concerns about cutting off access rejected.** *DOL did not follow SEC's recommendation "that the Labor Department analyze the costs and risks associated with the possibility that the rule could decrease the availability of investment advice and could drive firms to switch to registered investment advisor models from broker-dealer models."*
- **DOL expressly rejected SEC's request to examine the costs and benefits of alternative approaches.** Such an examination is required by Executive Orders.
- **Treasury's concern about regulating IRAs was rejected.** As stated in the report, "Treasury officials voiced concerns that the Labor Department's proposal, by attempting

to regulate IRAs through the proposed rule, ‘fl[ies] in the face of logic’ and was contrary to Congressional intent.”

- **E-mails from DOL employee harshly rejecting input from the SEC.** DOL employee: “*Well, I hate to break it to you, but you’re wrong . . . We have now gone far beyond the point where your input was helpful to me. . . . If you have nothing new to bring up, please stop emailing me.*” The SEC staffer responded: “*I am now also utterly confused as to what the purpose of the proposed DOL rule is*” (emphasis added)
- **SEC: DOL Rule’s required disclosures “have very little economic meaning and thus no value to consumers.”**

The Johnson report draws a very clear picture of an agency determined to complete a regulation without regard to whether the regulation reflected the input of experts and could have adverse effects. This is even further evidence of the need to start over with the economic analysis.

IV. THE FIDUCIARY RULE NEEDS TO BE REWRITTEN COMPLETELY. THE NEW RULE SHOULD BE BASED ON THE WORKABLE BEST INTEREST STANDARD ESTABLISHED IN PROPOSED 2015 AND 2016 BIPARTISAN FIDUCIARY LEGISLATION

For over six years, the financial services industry has been fully supportive of a workable best interest standard. The Obama Administration’s Fiduciary Rule fell far short of that goal, establishing an unworkable framework that was flawed in almost every way imaginable: a harmfully designed regulation supported by a biased and flawed economic analysis. The Rule and the economic analysis should be discarded and the process should start over in a constructive and thoughtful manner, starting with a new proposed regulation from DOL. In this regard, we believe that a good starting point for that proposed regulation is the sound structure of the only bipartisan effort in this area, the legislative proposals described below establishing a workable best interest standard.

In late 2015, two bipartisan House bills were introduced to address the issues raised by DOL’s proposed new definition of a fiduciary. One bill makes changes to ERISA with respect to the definition; the other bill makes parallel changes to the Internal Revenue Code. ***In combination, these bipartisan bills would establish a workable best interest standard.*** It was anticipated that the two bills would be combined as they moved forward through the legislative process. Corresponding bills were introduced in the Senate in 2016, albeit not on a bipartisan basis.²

² The original sponsors of the House ERISA bill were Representatives Roe (R-TN), Neal (D-MA), Larson (D-CT), Carter (R-GA), and David Scott (D-GA). The tax bill was introduced originally by Representatives Roskam (R-IL), Neal, Roe, Larson, Reed (R-NY), and Lujan Grisham (D-NM). The tax and ERISA bills were approved by the Ways and Means Committee and the Education and the Workforce Committee, respectively, with slight modifications. The original sponsors of the Senate ERISA bill were Senators Isakson, Kirk, Cotton, Daines, and Wicker. The original Senate tax bill sponsors were Senators Kirk, Isakson, Blunt, Ayotte, Cotton, and Wicker.

Very briefly, here are the five key elements of the bipartisan bills, compared to the DOL rule. More details are provided below.

- **Best interest standard applies.** The bills apply a best interest standard to the provision of investment advice to retirement plans and investors. For ERISA plans, this standard is the same as under the DOL Rule. For IRAs, the best interest standard is enforceable by the IRS, like all other IRA rules, not by state law class actions with punitive damages.³
- **Casual “suggestions” can’t give rise to fiduciary status.** Under the DOL rule, casual “suggestions” about investments or distributions that are clearly not intended to be relied upon as advice would give rise to fiduciary status. This is clearly not appropriate. Under the bipartisan bills, investment or distribution advice would not give rise to fiduciary status unless there is a mutual agreement, arrangement, or understanding that the advice is individualized and that there will be material reliance on the advice.
- **Real seller’s exception.** Financial professionals who make it clear that they are selling products or services and not undertaking to advise the investor will not be considered fiduciaries. DOL had proposed a real seller’s exception like this in 2010, but mostly eliminated it in the final rule.
- **Preserving investment education.** Like the 2010 DOL proposal (but unlike the Rule), the important distinction between non-fiduciary investment “education” and fiduciary investment “advice” that has worked very well for over 20 years would be preserved by the bills.
- **Preservation of commission-based advice models.** The bills include a workable prohibited transaction exemption, based on full disclosure of variable compensation, so as to preserve the commission-based model, which is so important for smaller accounts. In combination with the best interest standard, participants are fully protected in a workable manner.

Finally, it is very important that DOL’s fiduciary standard be developed in close coordination with the SEC to establish a uniform best interest standard.

V. EXTENSION OF DELAY NEEDED FOR THOROUGH REVIEW

In light of the very large number of issues involved in this review process, a thorough review of the Fiduciary Rule will take much longer than 60 days. We ask that in connection with the broader review of the effects of the Rule, the delay be extended by a substantial period, e.g., at least 180 days.

It took several years to prepare the 2015 economic analysis of the proposed Fiduciary Rule. A careful review of the new circumstances, including the adverse effects of the Rule described above, will take an extended period of time. It is critical for retirement savers across the country that we get this right.

³ The DOL “permits” punitive damages to be waived to the extent permitted by law, but this is illusory, since generally waivers of punitive damages are void under state law.

A corresponding extension is needed with respect to the end of the transition period, i.e., the period from April 10, 2017 through December 31, 2017, during which the Best Interest Contract Exemption (“BICE”) may be satisfied in a simpler manner. If the April 10th applicability date is extended by an additional 180 days, for example, the end of the transition period should be delayed 240 days, so that the time between the applicability date of the Fiduciary Rule and the applicability date of the full BICE requirements is the same as it was under the original Fiduciary Rule.

Finally, a delay is needed with respect to Q&A-12 of the Conflict of Interest FAQs (Part I – Exemptions) issued on October 27, 2016. That FAQ stated that back-end adviser recruitment incentives would generally violate the requirements of the BICE. However, because this FAQ would actually create new law (which FAQs are not permitted to do), DOL grandfathered any such agreement entered into prior to October 27, 2016, thus in many cases prohibiting any new such agreements as of October 27, 2016. In other words, without any assurance that this feature of the Rule will be modified, some firms have viewed it as necessary to stop entering into these types of agreements as of October 27, 2016.

A delay of the Rule is not fully effective if this October 27, 2016 date is allowed to remain in effect. In connection with the extension of the 60-day delay, Q&A-12 should be modified to grandfather agreements entered into prior to the ultimate applicability date of the Rule.

Finally, under the Administrative Procedure Act (“APA”), there is no need to issue a re-proposal in order to extend the delay, as described above. The proposed delay expressly invited comments on the possibility of issuing “a further extension of the applicability date.” Under the APA, that clearly puts the public on notice of the possibility of such an extension.

Notably, the Obama Administration extended a delay in almost identical circumstances in 2009, without a re-proposal. Set forth below is the sequence that occurred under the Obama Administration in 2009:

- On January 21, 2009, the Bush Administration adopted a final fiduciary advice rule under ERISA section 408(g); the rule was set to be effective on March 23, 2009.
- On February 4, 2009, the Obama Administration proposed to delay the effective date by 60 days to May 22, 2009. The proposal also asked for comments on the final rule in order to evaluate whether to modify, retain, or withdraw the rule.
- On March 20, 2009, DOL finalized the delay until May 22, 2009.
- On May 22, 2009 DOL issued a final rule, further delaying the effective date until November 18, 2009. DOL did not issue any proposal to extend the delay, but rather went directly to a final delay regulation.
- On November 17, 2009, DOL further delayed the effective date until May 17, 2010. Again, DOL did not issue any proposal to extend the delay, but rather went directly to a final delay regulation.
- On November 20, 2009, DOL withdrew the final rule, again without any new proposal.

VI. IT IS CRITICAL THAT DOL INCLUDE IN ANY EXTENSION OF THE DELAY A FINDING OF GOOD CAUSE FOR HAVING THE EXTENSION BE IMMEDIATELY EFFECTIVE

It seems likely that any extension of the 60-day delay would be issued within 30 days of the expiration of the 60-day delay, triggering a need to deal with two regulatory issues arising under the Congressional Review Act (“CRA”) and the Administrative Procedure Act (“APA”).

Based on prior findings, it appears that any extension of the 60-day delay would be an economically significant regulatory action “because it would likely have an effect on the economy of \$100 million in at least one year.” This same finding would appear to make any extension a “major rule” under the CRA. See 5 U.S.C. § 804(2). If the extension is a major rule, the CRA generally states that the rule cannot be effective for at least 60 days after publication as a final rule in the Federal Register. See 5 U.S.C. § 801(a)(3)(A). There are, however, key exceptions to the 60-day rule that would permit a major rule to be effective on publication.

Under section 808(2) of the CRA, the 60-day rule may be overridden by an agency if the agency “for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” There is clear precedent for other agencies using this exception in the context of a final rule;⁴ moreover, DOL made this exact same finding in connection with the final delay rule. However, in order to use this exception, DOL needs to incorporate the good cause finding in the delay extension document, as was done in the HHS document cited and in DOL’s final delay document.

Under section 553(d) of the APA, a substantive regulation generally cannot be effective until 30 days after publication, subject to certain exceptions, two of which are listed below. (There are questions regarding whether a delay is a substantive regulation, but we assume here that it is.)

- Under APA section 553(d)(1), the 30-day delay does not apply to substantive regulations that provide an “exemption or relieve a restriction,” which the delay would do, as acknowledged by DOL in the delay document.
- Under APA section 553(d)(3), the 30-day delay also does not apply if the agency finds good cause for not having a delay and publishes that finding of good cause.

⁴ See, e.g., 70 Fed. Reg. 58,845 (Oct. 7, 2005) (waiver of 60-day delay in HHS final rule: “We ordinarily provide a 30-day delay in the effective date of the provisions of a rule in accordance with the Administrative Procedure Act (APA) (5 U.S.C. 553(d)), which requires a 30-day delayed effective date. The Congressional Review Act (5 U.S.C. 801(a)(3)), requires a 60-day delayed effective date for major rules. As stated in our regulatory impact analysis below, we believe this is a major rule. However, we can waive the delay in effective date if the Secretary finds, for good cause, that such delay is impracticable, unnecessary, or contrary to public interest, and incorporates a statement of the finding and the reasons in the rule issued. 5 U.S.C. 553(d)(3); 5 U.S.C. 808(2).”).

April 14, 2017

To be safe, we recommend that, in connection with publishing an extension of the delay, DOL publish a finding of good cause under section 553(d)(3) of the APA, as it did in the final delay document.

As under DOL's final delay document, a finding of good cause under both the CRA and the APA would be based on the disruption and harm that would be caused by having the Fiduciary Rule apply for a brief period prior to the effective date of the delay extension, especially since the purpose of the delay extension would be to reevaluate the Fiduciary Rule to determine if it needs to be modified or withdrawn. This brief period of application prior to the delay extension would cause enormous confusion among plans, plan participants, and IRA owners, and would impose huge compliance costs that would generally be borne by the same entities.

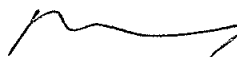
VII. CONTINUED UNCERTAINTY IS HARMING INDIVIDUALS, TRIGGERING A NEED FOR THE PREAMBLE TO THE FINAL DELAY REGULATON TO SEND A SIGNAL THAT BROAD GRANDFATHERING WILL BE PROVIDED.

The looming Fiduciary Rule is causing great harm already. Advisors are hesitant to make recommendations for fear that such recommendations will later trigger fiduciary obligations and prohibited transaction problems. This is depriving many investors of needed help, especially with respect to variable annuities, which, as noted in the CoreData and Kearney studies and in the Investment News article, are particularly hurt by the Fiduciary Rule.

While the public policy discussion goes on, we ask DOL to consider sending a strong signal in the preambles to all delay regulations that it is considering a much broader grandfather rule that would fully protect transactions entered into prior to any future applicability date, including future advice regarding any assets acquired prior to that date. This signal should indicate that neither the Fiduciary Rule, nor any potential successor rule, will apply to advice given, or transactions entered into, during the pendency of the delay. Otherwise, the adverse impacts of the Rule will continue to harm investors while the Rule's effect on the goals of the Administration is under review.

Thank you for your consideration of the views expressed in this letter.

Sincerely,



Kent A. Mason