



**Independent Insurance Agents
& Brokers of America, Inc.**

127 S. Peyton St.
Alexandria, VA 22314

20 F Street, NW, Suite 610
Washington, DC 20001

April 17, 2017

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

SUBMITTED VIA www.regulations.gov

Re: Comments on defining who is a “fiduciary” under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code of 1986 (Code) related to the President’s February 3, 2017 Executive Order. (RIN 1210-AB79)

To Whom It May Concern:

On April 8, 2016, the DOL published in the Federal Register a regulation commonly referred to as the “fiduciary rule.” The rule defines who is a “fiduciary” when giving investment advice related to employee benefit plans governed by ERISA and certain IRAs. In conjunction with the fiduciary rule in April 2016, the DOL issued certain exemptions to the rule such as the Best Interest Contract (BIC) exemption and the PTE 84-24. On February 3, 2017, President Trump issued an executive order directing the Department to examine the above referenced fiduciary rule. The order noted that the rule, “may significantly alter the manner in which Americans can receive financial advice, and may not be consistent with the policies of my Administration.” Pursuant to the order, on March 2, the DOL published in the Federal Register a Notice of Proposed Rulemaking to delay the fiduciary rule by 60 days and solicit comments in relation to the executive order. On behalf of the Independent Insurance Agents & Brokers of America, Inc. (IIABA), I would like to offer our comments on the fiduciary rule in relation to President Trump’s recent executive order.

IIABA is the nation’s oldest and largest trade association of independent insurance agents and brokers, and we represent a nationwide network of approximately a quarter of a million agents, brokers, and employees. IIABA represents independent insurance agents and brokers who offer customers a choice of policies from a variety of insurance companies across all lines of insurance—property, casualty, life, health, employee benefit plans and retirement products. These broad offerings allow IIABA members to assess the financial needs of their customers on a holistic basis.

IIABA members are for the most part small businesses or “Main Street” advisors and therefore work at small firms with limited administrative support. Annuities, both fixed and variable, are the most common retirement product offered by IIABA members, though many IIABA members also offer non-insurance financial services products such as mutual funds. Many IIABA members work through independent

marketing organizations (IMOs) to be able to deliver annuities to consumers.¹ Some IIABA members also work as registered representatives of independent broker-dealers or are dually registered as investment advisors and broker-dealers to provide retirement products to consumers.

Introduction

It is a well-known fact that there is a retirement crisis looming in America. Americans are not saving enough. According to the Federal Reserve's most recent report on the economic well-being of U.S. households, one third of non-retired adults report that they have no retirement savings or pension. Of those who do save, 52% do not seek out advice because they either cannot afford assistance or would like help but do not know where to get it. Furthermore, half of adults with self-directed retirement accounts are either "not confident" or only "slightly confident" in their ability to make the right investment decisions.² As such, IIABA believes public policy should promote making retirement advice more readily available. Americans' need affordable and reasonable options, and personalized assistance in navigating the complex factors that are involved in adequately funding one's retirement.

IIABA has previously noted that the rule's overly broad and complex requirements could lead to investor harm and limit consumer access to professional advice. Since the rule became final last summer the market has begun to react in anticipation of the rule's forthcoming applicability date. The increased costs and legal exposure are already working to limit access to financial advice for those consumers who need it the most—low and middle income consumers with small balance retirement accounts. The bottom line is that the rule makes retirement advice more costly and complicated—the exact opposite of what is needed. As such, IIABA recommends the Department (1) further delay the rule to provide market consistency; (2) update and revise previous impact and cost benefit analysis related to the rule because said analysis is flawed; and (3) substantially revise, or rescind and re-propose the rule in order to provide the greatest benefit to consumers.

The rule should be delayed beyond June 9, 2017.

IIABA suggests that the DOL delay the rule for at least an additional 180 days in order for the Department to complete its analysis and determine if it is necessary to rescind or revise the rule. Furthermore, this delay should encompass all applicability dates and compliance obligations under the rule, including compliance obligations that become applicable on both June 9, 2017 and January 1, 2018. This is necessary to provide consistency and certainty in the market while the DOL reevaluates the rule, as required by the President's February 3 executive order.³

Specifically regarding the June 9 compliance date, the DOL seems to have concluded it can complete its review of the rule after June 9 without further delaying the fiduciary definition and the impartial conduct standards beyond June 9 because those provisions are "among the least controversial aspects of the rulemaking project." IIABA respectfully requests that the DOL reconsider this position.

Allowing these key parts of the rule to take effect before completion of the DOL's review creates a substantial risk that the rules will change multiple times in a relatively short period of time. Furthermore,

¹ For more information see, IIABA Comment Letter to DOL on the Best Interest Exemption for Insurance Intermediaries RIN 1210-ZA26 (Feb 17, 2017).

² See, "Report on the Economic Well-Being of U.S. Households in 2015," Federal Reserve (May 2016). Available at: <https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf> (accessed April 13, 2017).

³ For more information see, IIABA Comment Letter to DOL on Extending the Applicability Date of the Fiduciary Rule, RIN 1210-AB79 (March 16, 2017).

while there is general support for a “best interest” standard there is limited support for the approach taken by the current rule. Allowing parts of the rule to go into effect while delaying others will cause market disruption and considerable confusion for retirement savers and advisors. Finally, as explained below the Department’s analysis of the rule is flawed. As such the real costs and benefits of further delaying the rule are not consistent with what the DOL understands them to be. This is because the DOL failed to consider the cost to savers who will lose retirement advice and savings options under the rule.

The impact and cost-benefit analysis related to the rule is flawed and must be updated and revised.

The rule imposes a multitude of new fiduciary obligations which bring with it new administrative costs and burdens, as well as increased exposure to litigation, and the impact of these costs on consumers has not been adequately analyzed by the Department. In 2015 the Financial Services Institute estimated that the DOL's fiduciary rule would cost firms and clients nearly \$3.9 billion to implement the rule.⁴ The Securities Industry and Financial Markets Association, also in 2015, estimated that compliance costs could range from \$240 million to \$570 million per year, which is \$2.4 billion to \$5.7 billion over ten years.⁵ Specifically related to IIABA members, it is anticipated that the costs associated with errors and omission insurance (i.e. professional liability insurance) will increase substantially. These costs will ultimately be passed down to consumers in the form of more expensive financial advice and products.

As explained further below, the rule is already beginning to have negative consequences for consumers as the use of certain financial products is declining and financial advisors are beginning to pull back from servicing particular market segments. IIABA anticipates that should the rule and its exemptions become applicable as is, the negative impacts on consumer access to retirement advice will only be intensified. IIABA urges the DOL to thoroughly analyze the unintended consequences of the rule that are already occurring, including factors limiting consumer access to personalized professional advice and certain product options.

One effect of the rule is that some firms, particularly smaller firms, will no longer service smaller sized plans or individuals with lower balance accounts and may leave the market entirely. A recent report noted that there are roughly 250,000 active, licensed financial advisors who either work on or get paid for a defined contribution plan and an estimated 225,000 of them will be impacted by the rule, resulting in some portion leaving the market.⁶ In fact, some IIABA members have indicated depending on the ultimate outcome of the fiduciary rule implementation process they may leave the market.

A study conducted after the rule was finalized found that 71% of financial advisors will stop servicing at least some retirement savers due to the fiduciary rule. These advisors estimate they will no longer work with a quarter of investors with less than \$300,000 in net investable assets, effectively creating an advice gap for low and middle income investors.⁷ Another 2016 study found that by 2020, broker-dealer firms—including independent broker dealers and dually-registered broker-dealer/investment advisors will stop

⁴ See, “Despite Uncertainty, Department of Labor Fiduciary Rule Upends 401(K) biz,” Investment News (March 19, 2017). Available at <http://www.investmentnews.com/article/20170319/FREE/170319929/despite-uncertainty-department-of-labor-fiduciary-rule-upends-401-k> (accessed April 13, 2017).

⁵ Id.

⁶ Id.

⁷ See, “CoreData Research UK: Fiduciary rule to leave US mass-market investors stranded,” (November 2016). Available at <http://www.valuwalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-percentE2percent80percent93-CoreData-Research.pdf> (accessed April 14, 2017).

servicing the majority of low-balance retirement accounts. Collectively this represents almost \$400 billion of retirement savings or 11% of the industry's total.⁸

Furthermore, some firms and financial professionals are already making shifts in product allocation and scaling back their use of commission-based products such as variable annuities because of concerns about the potential implications of the rule. This is occurring despite economic factors that have generally led to increased sales of variable annuities. Some firms have even gone so far as to no longer allow direct mutual fund or variable annuity business.⁹ Sales for variable annuities declined by 21.6% from 2015 to 2016.¹⁰ This is particularly troubling because annuities provide defined benefits (i.e. mimic pension plans) and are an attractive option to many lower and middle income individuals who have not accumulated large amounts of retirement savings and want guaranteed retirement income. Less product options impact all retirement savers, but especially low and middle income savers who need affordable and accessible retirement options and advice the most.

The President by memorandum, dated February 3, 2017, directed the DOL to update legal and economic analysis of the rule to examine all of the issues addressed above. Specifically, the order directed to DOL to consider:

1. Whether the fiduciary rule has harmed or is likely to harm investors due to a reduction in Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice.
2. Whether the rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees.
3. Whether the 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.

IIABA supports the President's direction that the DOL more thoroughly analyze the impacts of the rule, especially given the market reactions since the rule was finalized last year (as noted above). The rule is already resulting in less consumer choice, less access to financial advisors and increased costs for consumers. IIABA expects that the negative impacts on consumer access to retirement advice will only be amplified should the rule and its exemptions become applicable as is.

IIABA believes that in undergoing its review the DOL should not only focus on the "costs of conflicted advice" but also the impact of less retirement products and options on low and middle income savers, the impact of higher management fees on all investors, and the long-term costs of increased litigation including the potential impact on product offerings and the advisor-advisee relationship, among other issues.

IIABA also recommends that the DOL specifically consider the real benefits individuals and small businesses realize when they receive personalized retirement planning advice. Not only does professional

⁸ See, "The \$20 billion impact of the new fiduciary rule on the U.S. wealth management industry," A.T. Kearney, (October 2016). Available at <https://www.atkearney.com/financial-institutions/dol-fiduciary-rule> (accessed April 13, 2017).

⁹ See, "DOL Fiduciary Rule Change Not One Size Fits All," Investment News (March 29, 2017). Available at <http://www.investmentnews.com/article/20170329/BLOG09/170329905/dol-fiduciary-rule-changes-not-one-size-fits-all> (accessed April 13, 2017).

¹⁰ See, "Department of Labor's Fiduciary Rule Blamed for Insurers' Massive Hit on Variable Annuities," Investment News (March 28, 2017). Available at <http://www.investmentnews.com/article/20170328/FREE/170329922/departments-of-labors-fiduciary-rule-blamed-for-insurers-massive-hit> (accessed April 14, 2017).

retirement advice through a trusted relationship with a financial advisor give consumers piece of mind, overall those who receive personalized financial advice are better off than those who do not.¹¹ Financial advisors help people plan and save for retirement, and help employers offer reasonable retirement options to their employees.

For example, a 2015 Oliver Wyman survey found that advised investors have a minimum of 25% more assets than non-advised investors. Significantly, individuals over 65 with \$100,000 or less in annual income who had received retirement planning and investment advice had an average of 113% more in assets than those who had not received financial advice.¹² A 2016 study found that Americans accumulate more savings when working with a financial professional, saving twice the amount over a seven- to 14-year period.¹³ Additionally, workers receiving help in workplace plans have annual returns that are more than 3% higher than workers without help¹⁴ and assistance from financial professionals when changing jobs or retiring helps prevent between \$20 and \$30 billion in lost retirement savings.¹⁵

It is also significant to note the benefits of retirement planning advice for minorities and women. Women are more than twice as likely to be “confident in their outlook” on retirement if they work with a financial advisor.¹⁶ African Americans are nearly three times more likely to save in an IRA when working with a financial professional¹⁷, and Hispanic Americans are almost four times as likely to contribute to a retirement plan when working with a professional.¹⁸

The rule must be substantially revised, or rescinded and re-proposed.

The rule must be substantially revised, or rescinded and re-proposed because the negative consequences of the rule are already being realized as outlined above. To be clear, IABA does not oppose a “best interest” standard. However, since the rule was first proposed IABA has contended that for any rule to be workable it must allow for the independent agent distribution channel to be preserved. Below IABA provides some general considerations for revising the rule.

First, the rule contains an excessively restrictive definition of investment education which results in advisors who do not wish to trigger fiduciary status (and its associated costs and requirements) no longer being able to provide any meaningful education to their clients, whether their clients are individuals or

¹¹ See, “Putting a Value on Your Value: Quantifying Vanguard Advisor’s Alpha” explaining that financial professionals help their clients overcome the emotional aspects of investing, which can add one percent to two percent in net return. Available at <http://www.vanguard.com/pdf/ISGQVAA.pdf> (accessed April 14, 2017).

¹² See, “The Role of Financial Advisors in the US Retirement Market,” Oliver Wyman (July 10, 2015). Available at <http://fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf> (accessed April 14, 2017).

¹³ See, “The Gamma Factor and the Value of Advice of a Financial Advisor,” by Claude Montmarquette, Nathalie Viennot-Briot. Centre for Interuniversity Research and Analysis on Organizations (CIRANO). Available at <https://cirano.qc.ca/files/publications/2016s-35.pdf> (accessed April 14, 2017).

¹⁴ See, “Help in Defined Contribution Plans: 2006 through 2012,” Aon Hewitt and Financial Engines. Available at <https://corp.financialengines.com/employers/FinancialEngines-2014-Help-Report.pdf> (accessed April 14, 2017).

¹⁵ See, “Access to Call Centers and Broker Dealers and Their Effects on Retirement Savings,” Quantria Strategies. Available at http://quantria.com/DistributionStudy_Quantria_4-1-14_final_pm.pdf (accessed April 14, 2017).

¹⁶ See, “Financial Experience & Behaviors Among Women: 2014-2015 Prudential Research Study,” Prudential Financial, Inc. Available at: http://www.prudential.com/media/managed/wm/media/Pru_Women_Study_2014.pdf (accessed April 14, 2017).

¹⁷ See, “The African American Financial Experience,” Prudential Financial. Available at <http://www.prudential.com/media/managed/aa/AASStudy.pdf> (accessed April 14, 2017).

¹⁸ See, “Hispanic Americans on the Road to Retirement,” Prudential Financial. Available at http://www.prudential.com/media/managed/Hispanic_Retirement_FINAL_3-19-08.pdf (accessed April 14, 2017).

small businesses that direct employee retirement plans. The scope of the education safe harbor is too narrow and is so generic that it is effectively meaningless. The result is less education on retirement options for those who need it.

Saving for retirement is complex. To provide meaningful education some level of specificity is needed in order to give individuals and businesses the tools necessary to make informed decisions about which products best meet their needs. If the types of education that are permitted has not broadened people will lose access to meaningful advice. For example, the rule as currently drafted does not allow for plan design education (without triggering fiduciary status). The help provided to employers from financial professionals regarding the selection and monitoring of funds is vital for small businesses. Small business owners, who lack the ability to design plan options for the employees, may simply forgo setting up any retirement plan at all. For example, one study shows that without this help, almost 30% of small businesses would likely stop offering their workers a plan, and half would reduce contribution matches, offer fewer investment options, or increase fees paid by workers.¹⁹ There is little risk of conflicts at the plan design stage, as the advisor is only helping the small business owner understand how to select options not advising on the final selection of investment options. As such, IABA recommends that the education safe harbor be broadened.

Second, marketing and advice regarding the selection of an investment advice professional, commonly called a referral, can trigger the fiduciary rule if the action constitutes a “recommendation” as defined by the rule. Extending the fiduciary standard to marketing materials and those who give advice about the selection of another individual to provide advice is counterproductive. IABA recommends a broader exception for marketing activities and allowing for non-fiduciary referrals.

Sales pitches in the financial advisor context are just that: sales pitches designed to create awareness of products and services so that said product and services can be provided to willing consumers. There is no evidence to suggest that individuals and small business owners cannot differentiate between a sales pitch and investment advice. Additionally, referrals, as opposed to actual investment advice, pose little if any threats of conflicts of interest. As noted above, half of retirement advisors either cannot afford assistance or *would like help but do not know where to get it*. Limiting the ability of financial advisors to market their services or individuals to provide referrals will only serve to hurt people who are looking for retirement advice but are unsure where to obtain it.

Third, IABA believes that the rule should not favor certain product types and compensation structures over others. Proprietary products and annuities (or other guaranteed life income products developed in the future) can be an important part of a retirement plan. Many low and middle income investors purchase annuity products because they mimic defined benefit pension plans and are thus a helpful retirement planning tool. These products should continue to be widely available under the rule and options should not be limited.

In addition, many IABA members are compensated through commissions, and commissions based products (such as many annuities) are often well suited and beneficial for low and middle income investors who cannot afford upfront advisory fees. Generally fee-based advisory only makes sense if accounts have certain balances, and many fee-based accounts carry account balance minimums. It is unnecessary for any “best interest” or “fiduciary standard” to proscriptively dissuade or bar certain compensation

¹⁹ See, “The Impact of the Upcoming Re-Proposed Department of Labor Fiduciary Regulation on Small Business Retirement Plan Coverage and Benefits.” U.S. Hispanic Chamber of Commerce and Davis & Harman. Available at http://ushcc.com/wp-content/uploads/2014/05/survey_0029436_embargoed_002095743.pdf (accessed April 14, 2017).

arrangements. For example, the BIC is proving unworkable in many contexts and as such is severely limiting commission-based retirement products.

Fourth, the rule imposes a multitude of new fiduciary obligations which bring with it new costs and burdens, as well as increased exposure to litigation. For example, Morningstar recently estimated that the fiduciary rule could lead to an annual \$70 million to \$150 million of class action lawsuit settlements.²⁰ This will directly impact advisor errors and omissions insurance and make the cost of providing retirement advice higher. It will also substantially change the relationship between the advisor and the advisee, due to the threat of class action lawsuits. The rule effectively shifts policing the market from regulators to private litigation, including class action. As such, IIABA recommends that the Department reconsider the litigation burdens imposed by this rule and ensure that regulators continue to be the foremost enforcement authority.

Finally, the Big “I” suggests the DOL consider the following principles developed by a bipartisan group of lawmakers in making any potential adjustments to the rule. The principles listed below were specifically created in relation to concern that the DOL rule would make it harder for low and middle income families to plan for retirement.

- Promoting families and individuals saving for a financially-secure retirement is an essential public policy good.
- Retirement advisors must serve in their clients’ best interests and must be required to do so.
- Retirement advisors must deliver clear, simple, and relevant disclosure of material conflicts, including compensation received and all investment fees to individuals saving for retirement.
- Public policies must protect access to investment advice and education for low and middle income workers and retirees.
- Public policies should never deny individuals the financial information they need to make informed decisions.
- Investor choice and consumer access to all investment services – such as proprietary products, commission-based sales, and guaranteed lifetime income – should be preserved in a way that does not pick winners and losers.
- Small business owners should have access to the financial advice and products they need to establish and maintain retirement plans and help workers save for retirement.

It is also important to note that a universal fiduciary may be developed by the Securities and Exchange Commission (SEC) and could create two competing and conflicting compliance standards, which is troubling. The Big “I” urges the DOL to continue to work closely with the SEC moving forward, and to consider that it may be more appropriate for the SEC to take the lead on this issue.

Conclusion

We would like to thank you for the opportunity to express the views of independent insurance agencies on this issue. As noted above, IIABA does not oppose a “best interest” standard but has concerns about the fiduciary rule’s overly broad and complex requirements. Since the rule became final last summer the market has begun to react, and the increased costs and exposure are already having the effect of limiting access to advice for low and middle income consumers with small balance retirement accounts. In short, retirement advice is getting more costly and complicated at a time when the exact opposite is needed. As such, IIABA hopes that our comments and recommendations are helpful to the DOL in reviewing the rule.

²⁰See, “Financial Services: Weighing the Strategic Tradeoffs of the Fiduciary Rule” (March 30, 2017) <http://news.morningstar.com/articlenet/article.aspx?id=798573> (accessed April 13, 2017).

IIABA encourages the Department to consider further delaying the applicability date of the rule and substantially revising or rescinding and re-proposing the rule, as noted in this letter. Last but not least, the IIABA greatly appreciates the effort that is going into this review. Please contact our office at (202) 863-7000 should you wish to have additional information regarding our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer M. Webb". The signature is written in a cursive, flowing style.

Jennifer M. Webb
Counsel, Federal Government Affairs