

April 17, 2017

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

Re: RIN 1210-AB79; Proposed Delay and Reconsideration of DOL Regulation Redefining the Term “Fiduciary”

To whom it may concern:

The American Council for Capital Formation (ACCF)¹ is hereby providing comments regarding the Department of Labor’s (DOL) proposed delay and reconsideration of its redefining the term “fiduciary” (Rule) under the Employee Retirement Income Security Act of 1974, as amended (ERISA).

President Trump’s February 2017 Memorandum raises serious questions about how the current Rule is drafted given his instruction to ensure that the current Rule would **not** 1) limit access to services, products, information, and advice; 2) increase litigation; and 3) “disrupt” the financial services industry to a point where retirement investors would be adversely effected.

The ACCF believes that the Rule will limit products and services as well as increase costs for the retirement investor; will likely increase both the cost and volume of related litigation; and it is already apparent that the financial services industry has had to invest a considerable amount of time and money in preparing for the Rule that will result in less choice, reduced access to knowledge, and over all higher costs.²

I. Limited Access to Retirement Products and Services

¹ The American Council for Capital Formation, is a 501(c)(6) nonprofit, nonpartisan organization, has served as a liaison between Washington’s leading policymakers, the press, and representatives of the business community for over four decades. For more information visit www.accf.org

² Michael Wursthorn, "A Complete List of Brokers and Their Approach to ‘The Fiduciary Rule’." *Wall Street Journal*, Feb. 6 2017. <https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491>

The Rule, as currently drafted, has the potential to negatively impact trillions of dollars in retirement assets. Investors will lose access to many of the products and services that are currently available to them. This will result in fewer choices and less flexibility for their financial planning. Given that most retirement accounts are heavily invested in brokerage accounts, it is concerning that the Rule will result in less personal interaction, and rely more on the internet and automated services to provide information to the investor. This will be done in part as a way to insulate the brokerage firm from the fiduciary liability that the personal contact would create. The resulting confusion and reduced support for millions of U.S. households, will cause significant disruption and less access across the board. This becomes even more important when factored in to the fact that investors' returns are higher with support from a financial professional. As indicated in ACCF 2015 report,³ "[t]he data show that advised individuals have a minimum of 25 percent more assets than non-advised individuals."⁴ In addition, "[a] recent Investment Funds Institute of Canada report shows the trend holds regardless of household income, and that advised households save at twice the rate of non-advised households."⁵

In response to the Rule, many financial institutions indicated that they will limit their products to advisory programs and then only if the account balance is above a certain balance. This will preclude a large percentage of IRA holders from getting the advice they need given that many will not meet the minimum requirements being discussed by financial institutions.⁶ This limitation will have a noticeable effect on those lower and middle income households who will not qualify for these advisory programs. This will also compound the problem of getting younger working age individuals to start investing for their future.

As for the products themselves, financial institutions have indicated that because of the fiduciary liability, that they will be reluctant to sell annuities and mutual funds. Given the importance of a diverse portfolio and uncertainty in the requisite amount necessary for retirement, eliminating or reducing these products could have a substantial effect on the long-term financial planning.

II. Increased Litigation

³ Pinar Cebi Wilbur, "DOL's Retirement Advice Rule: Helping or Harming Sound Retirement Planning?" November 2015, <http://accf.org/2015/11/17/dols-retirement-advice-rule-helping-or-harming-sound-retirement-planning-2/>

⁴ Oliver Wyman, "The Role of Financial Advisors in the U.S. Retirement Market," July 10, 2015, <http://fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf>

⁵ The Investment Funds Institute of Canada, "The Value of Advice Report," 2012, <https://www.ific.ca/wp-content/uploads/2013/02/IFIC-Value-of-Advice-Report-2012.pdf/1650/>

⁶ Copeland, C. (2017). Individual Retirement Account Balances, Contributions, Withdrawals, and Asset Allocation Longitudinal Results 2010-2014: The EBRI IRA Database.

While protecting the vulnerable from predatory practices is important, when unnecessary protection is afforded and the burden is lowered, the result will inevitably be increased litigation. Currently under this area of the law a fiduciary relationship attaches when there is a “mutual” understanding of the services being provided. This however, has historically not applied to broker-dealers when their advice is merely incidental to the sale of the product and not given after a mutual understanding of some fiduciary advice. This creates an unnecessary burden on broker-dealer to prove a negative. The DOL’s insistence on changing the practice so that a fiduciary relationship will exist irrespective of a “mutual” agreement, will lead to more litigation and ultimately less access to financial planning options. The response from DOL has been the creation of a Best Interest Contract (BIC) exemption.

The BIC was included in the repurposed rule in 2015 to alleviate this problem. However, the requirements of the BIC are widely seen as impractical and unworkable.⁷ One such requirement involves giving advice “without regard to the financial interest of the advisor or the financial institution.” This effectively means that an advisor must not know what the financial interests are before giving a recommendation. This seems rather counterintuitive given that an investor is requesting information from an advisor that will presumably increase the return on the investment. Another unworkable requirement is the requirement that “every” material conflict of interest be identified and disclosed given the broad definition of a “material conflict.”

In addition, the enforcement of the BIC is specifically left to private litigation. The fact that there is no other remedy offered, virtually guarantees increased law suits and litigation. This is especially concerning given the inevitable increased costs for these financial services on the investor, not to mention that it is unnecessary given the memorandum of understanding between with other agencies that could help resolve disputes without increasing private law suits.

The alternative for financial services firms may well be to forgo the BIC all together and move to a system where the investor has no financial contact with the financial advisor, as previously discussed. The other option is to only provide asset-based fee advisory program which tends to be more expensive for the retirement investor. Either way, these changes will and have already caused significant negative disruption in the industry which will be bore by the investor through increased costs and fewer choices of investment options.

III. Inherent Problems with the Rule

⁷ Pinar Cebi Wilbur, “DOL’s Retirement Advice Rule: Helping or Harming Sound Retirement Planning?” November 2015, <http://accf.org/2015/11/17/dols-retirement-advice-rule-helping-or-harming-sound-retirement-planning-2/>

A fundamental problem with the Rule is that it is based on outdated and flawed studies.⁸ The White House Council of Economic Advisors (CEA) summarized the academic literature on the costs of “conflicted” advice on retirement savings and found that this “conflicted” financial advice underperformed and ultimately cost the investor \$17 billion.⁹ The DOL’s Regulatory Impact Analysis found a similar loss to the investor and concluded that the Rule would eliminate that cost and actually be a net gain of \$4 billion.¹⁰ While the original studies relied on have been undermined and challenged by subsequent studies,¹¹ the most important critique of this rule is that it ignore the benefits received by the investor from financial advice. This is even more important when one understands that the DOL acknowledged that investor mistakes amounted to more than \$114 billion in 2010.¹²

This lack of financial advice is exhibited in a number of different ways and most of which have been acknowledged by the DOL. One way is the increased “leakage” that occurs when one transferred jobs, which is becoming increasingly the norm with millennials. The problem is that the individual does not know the benefits of options other than withdrawing the money when they leave the job. A financial advisor could help teach an otherwise naïve person about their long-term retirement options. Another way is that small businesses that are not large enough to offer a Defined Contribution program are unaware or lack the wherewithal to setup other retirement options for their employees. Lastly, investment education in general could help guide a number or otherwise bad investments from occurring and provide basic knowledge and understanding of the retirement system and the importance of diversification.

The problems inherent with this rule will disrupt the financial services industry in a way that ultimately harm the individual retirement investors with less options and higher costs. The higher costs will be a direct result of the disruption to the financial services industry that the President’s memorandum seeks to avoid.

IV. Delay Is Prudent

The ACCF disagrees with DOL’s intention to allow the Rule to become effective within 60 days given that the mandated report, by the President’s memorandum, has not been completed. It is contrary to the memorandum to proceed with the Rule given the potential for

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Litan, R., & Singer, H. (2015). Good Intentions Gone Wrong: The Yet-To-Be-Recognized Costs of the Department of Labor’s Proposed Fiduciary Rule. *Report prepared by Economists Incorporated for the US Department of Labor*; Berkowitz, J., Comolli, R., & Conroy, P. (2015). Review of the White House Report Titled “The Effects of Conflicted Investment Advice on Retirement Savings”.

¹² Id at 7.

suggested modifications. These changes could well cost the industry and consumer additional and unnecessary costs.

The ACCF suggests that the DOL delay the applicability date of the Rule and its accompanying exemptions until a date at least 180 days from publication in the Federal Register of any final revisions in the package, or a notice that there will be no such changes. This will allow all relevant information could be collected and assessed by the President and Secretary of Labor before proceeding with this costly and industry changing Rule.

In addition, the delay would help alleviate uncertainty and confusion among consumers and those advising them on retirement options. This is particularly important given the very real possibility that many investors will no longer have access to the investment information and advice regarding their financial planning.

To ensure the that retirement investor is not adversely effected with higher costs and less options, the industry must be given adequate time to fully analyze the potential changes to properly make the adjustments to their services so as to efficaciously advise their clients and potential investors. This is even more important given the increased likelihood of litigation and that the DOL will likely continue to issue interpretive guidance documents such as the FAQs issued in 2016.

V. **Conclusion**

Given the uncertainties discussed in this comment letter, the ACCF recommends that to protect the retirement investor, especially those of low- and middle-incomes, this Rule should be reevaluated and changed. Those changes should be made to ensure that the repurposed rule will be consistent with the President's memorandum that the Rule **not** 1) limit access to services, products, information, and advice; 2) increase litigation; 3) "disrupt" the financial services industry to a point where consumers would be adversely effected.

Sincerely,

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