



# SHURWEST

April 17, 2017

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
United States Department of Labor  
200 Constitution Avenue NW  
Washington, D.C. 20210

Attn: Fiduciary Rule Examination

VIA EMAIL: [EBSA.FiduciaryRuleExamination@dol.com](mailto:EBSA.FiduciaryRuleExamination@dol.com)

Re: RIN 1210-AB79  
Comments on Existing Fiduciary Rule

Ladies and Gentlemen:

This letter is written on behalf of Shurwest, LLC (Shurwest), an Insurance Intermediary and Independent Marketing Organization (“IMO”) based in Scottsdale, Arizona. Thank you for the opportunity to comment on the United States Department of Labor’s (“DOL” or “Department”) Conflicts of Interest Rule (“Rule”).

As expressed in previous comment letters, Shurwest supports the intent of the Rule of acting in the best interest of the Retirement Investor. We believe that acting in the best interest of the Retirement Investor is the current practice of the vast majority of financial professionals, including Shurwest and our affiliated independent advisors.

This comment letter is in response to the Department’s March 2, 2017, request for comments in accordance with the Presidential Memorandum on the Fiduciary Duty Rule dated February 3, 2017. Shurwest is providing the comments below in support of a revision or repeal of the Rule as currently put forth for the following reasons.

17550 N. Perimeter Drive | Suite 300 | Scottsdale, Arizona 85255  
480.949.1088 | 800.440.1088 | 480.949.2427 FAX

[SHURWEST.COM](http://SHURWEST.COM)

LEVERAGE OUR PARTNERSHIP

The Rule, as currently written, is likely to 1) harm investors by reducing Americans' access to retirement savings products and financial advice, especially for low-to-middle income Retirement Investors; 2) cause significant disruption and confusion within the retirement services industry that will negatively affect investors or retirees; and 3) cause an increase in litigation, leading to a corresponding increase in the price investors and retirees must pay to gain access to retirement services.

**1. The Rule will harm investors by reducing access to retirement products, financial services, and financial advice.**

The Rule, if implemented in its current form will cause Retirement Investors to lose access to sound retirement planning. The increased likelihood of litigation (as will be discussed below) will result in financial advisors abandoning lower-to- middle-income investors to the detriment of these clients. The overall result will be retirement investors losing access to financial planning advice and services that has been shown to benefit their retirement funds. Many Retirement Investors that no longer have access to human financial planning advice will logically seek a solution through robo-advising, which is based solely on mathematical rules or algorithms with minimal human intervention. This will naturally result in a gap for low-to-middle income investors for sound financial advice with human participation, which will ultimately harm investors. The experience of Retirement Investors in the United Kingdom should serve as a warning to the Department to re-evaluate the Rule as currently written to mitigate this loss of human-based financial advice based on the pivot to robo-advisors or, worse yet, to “do-it-yourself” financial advice for retirement investors.

A report of the United States Senate Committee on Homeland Security and Governmental Affairs, citing a 2015 Oliver Wyman study, states that among individuals with \$100,000 or less in annual income, retirement investors who receive investment advice save 38% more than individuals that do not receive investment advice. Committee on Homeland Security and Governmental Affairs & Senator Ron Johnson, *The Labor Department's Fiduciary Rule: How a Flawed Process Could Hurt Retirement Savers* (2d Sess. 2016). The same Senate report goes on to quantify an estimated loss of retirement savings of \$68-80 billion per year from the Rule, and

states that the Rule will jeopardize retirement readiness for an estimated 11.9 million IRA retirement participants. Additionally, up to 7 million small investors could lose their current broker as an effect of the Rule being put in place.

An Oliver Wyman report further supports the important role that financial advisors play in retirement planning for lower-to-middle income retirement investors. According to the report, “58% of households with under \$100,000 in investable assets and 75% of households with over \$100,000 in investable assets solicit professional financial advice.” Oliver Wyman, *The Role of Financial Advisors in the US Retirement Market 5* (2015). As the Rule is currently written, it is highly probable that financial advisors will move away from serving lower-to-middle income investors since the cost to service an account with minimal investible assets far surpasses the fees that such accounts would generate. Thus, the Rule will reduce the number of financial advisors and thereby harms investors by limiting their pool of options for financial advice.

It appears that the Department believes that robo-advisors may be an adequate source of financial advice to fill the human void created by financial advisors eliminating accounts that are no longer profitable as a result of the Rule. However, the use of robo-advisors as an alternative to a financial advisor completely ignores the personalized element of financial advice that benefits retirement investors and that they seek. In an April 1, 2016, Policy Statement, the Massachusetts Securities Division noted that retirement investors hire investment professionals to gain access to personalized and professional investment advice that cannot be provided by robo-advisors. The Policy Statement specifically stated that “robo-advisors’ failure to conduct due diligence, in addition to providing financial advice in an impersonal structure, often rendering them unable to provide adequately personalized investment advice and make appropriate investment decisions.” *Policy Statement of the Massachusetts Securities Division, April 1, 2016*. This reduction to personalized financial advice and channeling of retirement investors (particularly in lower-to-middle-income classes) to robo-advisors will surely increase problems in the industry and leave retirement investors financially vulnerable.

**2. The Rule has already caused, and is continuing to cause, major disruption and confusion to the entire financial services industry.**

The Rule, and its implementation, have already caused substantial disruptions to the financial services industry. And when it comes to the fixed indexed annuity (FIA) industry, this disruption could cost Retirement Investors access to guaranteed income products during retirement. It appears that the Department failed to take into account the foundational distribution system for “FIAs” when promulgating the rule—namely that approximately 60% of all FIAs are sold through independent IMOs. By removing FIAs from PTE 84-24 and placing them in the BIC exemption, it appears that the Department believed the Broker-Dealer (“BD”) distribution model could be utilized for FIAs. This assumption by the Department has already had a significant adverse impact on the entire financial services industry as IMOs, insurance carriers, BDs, and Registered Investment Advisers (RIAs) struggle to prepare for compliance with this Rule.

To date, Shurwest has spent a significant amount of time and financial resources to prepare for the implementation of the Rule. Across the financial industry, compliance estimates range from insurance carriers spending upwards of eight figures to try to comply with the Rule to an estimate by the Securities Industry and Financial Markets Association (“SIFMA”) indicating start-up costs for large and medium broker-dealers would be \$4.7 billion with on-going costs of \$1.1 billion. Kenneth E. Bentsen, Jr., Securities Industry and Financial Markets Association Conflict of Interest Rule Comment Letter (July 20, 2015), <http://www.sifma.org/issues/item.aspx?id=8589955445>. These estimates were well above the Department’s own initial estimates of the cost to comply with the final rule being between \$10 billion and \$31.5 billion over 10 years with the primary estimate being \$16.1 billion. Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,951 (April 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550). These increased compliance costs will ultimately be passed on to retirement investors and/or will cause a reduction of advisors providing financial advice. Furthermore, the simple fact that the estimates by the Department are low when compared to what the industry is reporting requires further study of the Rule to ascertain the actual costs and evaluate whether those

costs outweigh the alleged benefit to investors based on costs to the investors or lack of access to sound financial advice. To be crystal clear: The industry in general will not absorb the costs of compliance. Rather, the costs of compliance will be passed on to consumers via higher pricing in products and fees associated with transactions.

This Rule represents the biggest change in the history of the FIA industry and its distribution system. Systems and processes required for operation under the Rule do not currently exist and must be constructed. The amount of time (and resources) required to create and implement these systems is far greater than what has been allowed by the Department, and is clearly evidence of the Department's lack of industry understanding. As pointed out in a previous Shurwest comment letter, each carrier maintains unique policies, procedures, and systems in areas such as applications, data maintenance and transfer, producer contracting, product features, paymaster issues, compensation structure, selling agreements, producer monitoring, marketing, and policies and procedures development, etc. Each and every one of these areas (and possibly more) are impacted by the Rule, with technology requirements and processes needing to be built out and fully tested before the industry can begin to function under the Rule.

Finally, it appears that the DOL believed a broker-dealer distribution system could be easily and efficiently implemented into the FIA industry. This belief is seriously flawed and has already resulted in a great deal of confusion. If systems are not properly developed and implemented, every facet of the retirement services industry will be disrupted. If the Department is truly concerned with protecting Retirement Investors, it has the responsibility to allow the necessary time for systems to be built, tested, and implemented with the least amount of disruption to the very Retirement Investors the Department is seeking to protect.

**3. The Rule will likely cause an increase in litigation, and specifically class action litigation.**

As mentioned previously, the Rule positions the insurance industry to experience a dramatic increase in litigation, which will result in the industry passing litigation costs on to Retirement Investors. Although the DOL and Internal Revenue Service ("IRS") maintain enforcement authority under the Rule, the practical reality is that enforcement of the Rule will be carried out by attorneys who bring lawsuits under

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the Rule. "It is very likely that the plaintiffs' bar will play a primary role in enforcing the new rules in the IRA space. And it is possible if not likely, that the Fiduciary Rule will result in a spate of class action litigation in the not-too-distant future." Michael Kreps & George M. Sepsakos, *The Impact of the Department of Labor's Fiduciary Rule*, Business Law Today (November 2016), [http://www.americanbar.org/publications/blt/2016/11/keeping\\_current.html](http://www.americanbar.org/publications/blt/2016/11/keeping_current.html).

By opening the door for class action lawsuits under the Rule, the Department essentially delegated its duty as a regulator to provide clear direction to those impacted by the rule. Instead, the Department chose vague language with no clear direction, or worse, misguided direction in the form of FAQs which also indicate a lack of understanding of the industry. This delegation of enforcement to financially motivated plaintiff's lawyers is a dereliction of its regulatory duty by the Department.

Furthermore, this transfer of responsibility to lawyers only serves to harm consumers. Regardless of the merits of potential class action claims, financial institutions and carriers will be required to spend millions of dollars to defend against such claims. These costs will be passed on to the consumers in the form of higher priced products and will result in the reduction of products and services as insurance carriers mitigate their risk by watering down products or leaving the space altogether. This, of course, will ultimately reduce retirement product options available for investors, which is the exact opposite of the Rule's and Department's intention, and is clearly not in the best interest of the investor. If the Department is intent on implementing this Rule, the Department should take responsibility for enforcement rather than delegating these duties to attorneys whose objective is financial self interest and not in the best interest of the investor.

### **Conclusion**

The Rule as currently written will have a detrimental effect on Retirement Investors and the industry as a whole by limiting access for investors, continuing to create substantial disruption to the insurance industry, and increasing litigation and compliance costs which will be passed on to investors.

Respectfully, Shurwest believes the Department's lack of industry understanding has led to a theoretical-based Rule which is not practical to implement. This has led to



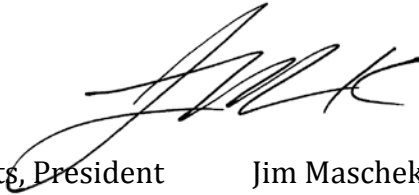
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substantial confusion in the industry that will ultimately benefit parties outside of the industry seeking to capitalize on interests that may often not be in the best interest of the investor. Finally, Shurwest believes enhanced regulation in this area should be delegated to subject matter experts that reside in state insurance departments and the SEC. Permitting entities who understand the objectives of the Rule and the industry to craft workable standards will result in the greatest possibility of protection of the party to which the Rule is designed to protect (the investor), while helping to limit confusion and disruption within the industry.

We at Shurwest greatly appreciate this opportunity to comment, and we will be happy to discuss any of the aforementioned information put forth in this letter.

Sincerely,

SHURWEST, LLC



Ron Shurts, President

Jim Maschek, Vice President of Distribution