CENTER FOR CAPITAL MARKETS COMPETITIVENESS

TOM QUAADMAN
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5540
tquaadman@uschamber.com

July 21, 2017

The Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11933
Suite 400
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Submitted Electronically -- EBSA.FiduciaryRuleExamination@dol.gov

Re: RIN 1210-AB82 – Response to Question 1 of the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions: Extending the January 1, 2018, Applicability Date of Certain Provisions (the Transition Period)

To Whom It May Concern:

The U.S. Chamber of Commerce ("the Chamber") is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Most of our members are sponsors of employee benefit plans, and they take their responsibilities as plan sponsors and plan fiduciaries very seriously.

As our members are directly affected by the Department of Labor's ("Department") rule redefining fiduciary investment advice and its associated new and amended prohibited transaction class exemptions (collectively the "Fiduciary Rule" or "Rule")[1], we appreciate the opportunity to respond to the Request for Information ("RFI") to provide information the Department needs to properly review the Rule as directed by President Trump.[2]

In this letter, we are responding only to Question 1 of the RFI regarding the extension of the Transition Period. The Chamber will be providing a separate letter

[1] 81 Fed. Reg. 20,945 – 21,221 (Apr. 8, 2016).

[2] *See*, President's Memorandum, 82 Fed. Reg. 9675 (Feb 7, 2017).

responding in detail to the additional questions posed in the RFI. Both of these letters, particularly our response to Questions 2-18, will outline the harmful consequences of the Fiduciary Rule.

Accordingly, the Chamber recommends that the Department limit the further harm the Rule will otherwise cause by extending the Transition Period for at least 18 months, from January 1, 2018 to June 30, 2019, or a later date if needed by the Department.

I. Overview

As we consistently explained to the Department throughout the rulemaking process, the execution and implementation of the Fiduciary Rule has harmed retirement investors and small business plan sponsors. The Rule has increased costs for retirement investors, reduced access to advice and investment products (especially for persons with small accounts), and reduced choices for small businesses sponsoring plans for their workers. As Secretary Acosta testified in a recent U.S. House of Representatives Appropriations Subcommittee hearing, our comments, and the thousands of similar comments received by the Department since 2015 fell on deaf ears during the Obama Administration's single-minded pursuit of the Rule, stating that "[t]hose concerns certainly surfaced the first time around, and unfortunately, they were not heard."[3]

The Department now has a chance to correct that error by: fully reviewing the Rule, completely understanding its negative impacts, and undertaking a measured, orderly, and reasonable process to amend the Rule to address its significant defects. We applaud the Department for issuing this RFI as the first step in this new regulatory process, gathering the actual facts with which to make informed decisions, rather than relying on flawed academic predictions in service to a pre-determined policy goal.

- **Extending the Transition Period Avoids Further Costs to Retirement Savers**

It is essential that the Department limit the further harm the Rule will otherwise cause by extending the Transition Period for at least 18 months, from January 1, 2018 to June 30, 2019, or a later date if needed by the Department. Only

[3] "Labor Secretary Acosta: Concerns with DOL Fiduciary Rule 'Not Heard' During Original Rulemaking," InvestmentNews, Greg Iacurci, June 7, 2017.

by taking this critical step can the Department avoid even more damage to retirement investors that will result from the applicability of the "full" Best Interest Contract Exemption ("BIC Exemption"), the amended Prohibited Transaction Exemption 84-24 ("PTE 84-24"), and the "full" Principal Transaction Prohibited Transaction Exemption ("Principal Transaction Exemption"). These exemptions contain critical flaws that will deny access to advice from certain financial professionals and impose significant new costs by requiring major investment into systems and business structures—all to meet regulatory requirements that are currently under review by the Department, and that may well be materially changed. It does not make sense for the Department to impose the last and most onerous requirements of the Rule even as those very requirements are under review, increasing investor confusion, and resulting in unnecessary, multiple rounds of costly change.

- **Extending the Transition Period Provides Time for Orderly Change and Coordination with Other Regulators**

While we still believe the Department should have delayed the applicability of the entire Rule until it had completed its review, rather than partially implementing the Rule beginning June 9th, the Department has the opportunity to prevent the most harmful and negative effects of the Rule on retirement savers if it acts to extend the Transition Period as we request. Further, if the result of the Department's review is to propose amendments to the Rule and its associated prohibited transaction exemptions—an outcome that we believe is urgently needed to protect retirement savers—we request that the Department extend the Transition Period by at least one year following the promulgation of such amendments to allow an orderly transition to the new regulatory requirements.

As sponsors of retirement plans, our members support the goal of ensuring access to quality investment advice for all retirement savers. However, the execution of the Fiduciary Rule to date has failed in this crucial task, imposing requirements that have reduced access to investment products and services. The Department can address this if it confronts the problems the Rule has created, and moves forward through a responsible, coordinated rulemaking that honestly takes into account the real-world, empirical evidence. The first critical step is to extend the Transition Period to do no further harm.

II. Extending the Transition Period Benefits Retirement Savers and Plan Sponsors

Question 1 seeks information to determine the costs and benefits to retirement investors of extending the Transition Period, as well as evaluating specific factors relevant to that decision, such as whether an extension "would benefit retirement investors by allowing for more efficient implementation responsive to recent market developments" or would carry any risks.[4] There is little doubt that an extension serves the best interest of retirement investors, and does not pose any additional risks.

- **Extension Avoids Further Reductions in Access to Investment Products and Services**

As we will explain in more detail in our responses to the other questions in the RFI, extending the Transition Period avoids many new and costly restrictions that will further reduce access to advice and investment products, especially for small savers. This is because the new restrictions scheduled to become applicable on January 1 will result in significant frivolous and costly litigation, prohibit advice regarding certain products from certain providers, and impose poorly defined but very expensive operational changes.

The "full" BIC Exemption will require new contracts with IRA owners that inappropriately limit arbitration rights, and establish new class action litigation in state courts. First, as the Department recently conceded in Federal Court, the arbitration limits scheduled to take effect on January 1 violate federal law governing rights to arbitration.[5] Unless the Transition Period is extended, these illegal provisions will become applicable. At the very least, an extension is needed to ensure that the regulation accurately reflects the Department's position in litigation that the limitation on arbitration is illegal.

Second, the class action provision will result in frivolous litigation in county courts in various states around the country. The outcome will be conflicting, and confuse rulings as county judges attempt to reconcile state contract laws with new federal fiduciary standards. The resulting patchwork of case law will make uniform standards nearly impossible, directly in contradiction of one of ERISA's primary purposes, and undermining the goals of coordinating with the SEC and other regulators to develop complimentary rules and requirements. All of these costs, and

[4] 82 Fed. Reg. 31279 (Jul. 6, 2017).

[5] Insert appropriate citation to DOJ brief.

the confusion related to contradictory legal standards from state to state, will significantly harm retirement investors.

Further, if the Transition Period is not extended, independent insurance agents will not be able to recommend certain products at all. The Department has been aware of this problem for at least two years, and while it did provide temporary relief through the Transition Period version of PTE 84-24, it has taken no action to permanently address the issue beyond receiving comments on a highly controversial proposed exemption.[6] After January 1, only the "full" BIC Exemption will be available to allow the receipt of commissions related to Fixed Index Annuities and similar products, but insurance brokers, insurance marketing organizations, and other insurance intermediaries are not defined as financial institutions able to enter into a BIC Exemption arrangement on behalf of independent agents. As a result, independent insurance agents that do not also have a securities license are generally prohibited from selling Fixed Index Annuities under the Fiduciary Rule.[7] Unless the Transition Period is extended, this will directly harm retirement savers who will be unable to receive advice services and some investment products from their insurance professionals.

- **Extension Avoids Multiple Rounds of Costly and Confusing Regulatory Change**

President Trump has emphasized that efficient regulation is a key goal of his Administration, issuing an Executive Order to reduce the regulatory burden the Federal government places on the economy.[8] A failure to extend the Transition Period is directly at odds with this Presidential priority. Not only would a failure to extend result in the imposition of new and costly burdens ultimately borne by retirement investors, but as the Department is conducting a review of the Rule ordered by the President and may well make substantive changes, it is quite likely that the requirements will change yet again.

[6] See., 82 Fed. Reg. 7,336 (Jan. 19, 2017).

[7] While the Department has noted that insurance carriers could act as financial institutions for independent agents under the "letter" of the "full" BIC Exemption, the reality is that such carriers generally cannot reasonably be expected to take on the fiduciary risk and liability associated with the BIC Exemption with respect to agents they do not directly supervise.

[8] *See.,* Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339 Feb. 3, 2017).

Imposing multiple rounds of major regulatory change in a short period of time will be very costly and confusing to retirement investors. Immediately prior to June 9th, millions of American's received notices limiting advice in their existing IRAs, modifying their agreements, or recommending new types of accounts. Thousands of employer retirement plans had to review and amend agreements with their financial professionals. These types of changes will occur again in just five months if the Transition Period is not extended, because the "full" BIC Exemption and the amendments to PTE 84-24 substantively change current compliance requirements. These arrangements would have to change yet again if the Department completes its review and further modifies the Rule. The Department must extend the Transition Period to avoid harming retirement investors and plan sponsors through inefficient, unnecessary and costly regulatory changes.

- **Extension Provides Time for Needed Coordination with Other Regulators to Develop Optimal Responses in the Marketplace**

We urge the Department to closely coordinate with the Securities and Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA"), and other relevant federal and state regulatory entities. The strong statements by Secretary Acosta and SEC Chair Clayton expressing their desire to coordinate fiduciary advice requirements to ensure the Rule and any future SEC actions work together in a complimentary fashion are very encouraging, but there must be sufficient time for this coordination to take place. The reality is that neither the Department nor the SEC can make the necessary changes to their respective rules before January 1, 2018. Failing to extend the Transition Period will be to repeat the errors of the prior Administration in rushing through a new Rule without adequate time for financial service providers and other regulators to develop optimal outcomes for retirement investors.

As the Department noted in the RFI, there are innovations and changes taking place in the marketplace to try to better serve retirement investors in the new regulatory environment. However, many of these require other regulators to modify their own rules and requirements regarding products and services. Other regulators need time to evaluate these innovations and approve, reject, or modify them. The broad scope of the Fiduciary Rule overlaps with other regulatory entities, and the Department will harm retirement investors, limiting access to retirement products and services, if the Transition Period is not extended to permit this work to continue. Further, if the Department makes substantive changes to the Rule as a result of its

review, time will again be needed for other regulators to respond. The Department must provide that time to protect the best interests of plan participants and IRA owners.

- **Extension Poses No Additional Risks to Retirement Investors Because the Impartial Conduct Standards Already Require Reasonable Fees and Best Interest Advice**

While, as discussed above, there are significant benefits to retirement investors if the Department extends the Transition Period, there are little, if any, corresponding costs or risks. The Fiduciary Rule and its Impartial Conduct Standards have already been applicable since June 9th, ensuring reasonable fees and advice in the best interest of the IRA owners, plan participants and beneficiaries. While the Chamber believes that additional changes are needed to better serve retirement investors, and to reduce existing harm caused by the Rule (we will discuss these in detail in our next comment letter responding to the RFI), the Department's economic analysis should clearly conclude that there are no additional risks posed merely by extending the Transition Period.

According to the Department's economic analysis in the April 7, 2017, rule establishing the Transition Period, the vast majority of the benefits it believed the Rule provides come from the fiduciary obligations of the Rule and the Impartial Conduct Standards that became applicable on June 9th. Thus, extending the Transition Period does not result in any new risks or costs. In April, the Department concluded that, "Because of Firms' anticipated efforts to satisfy the Impartial Conduct Standards…the Department believes that most…of the investor gains predicted in the 2016 RIA for the transition period will remain intact," and that "…affected investors will generally receive the full gains due to the fiduciary rulemaking." [9]

According to information received from our members, advisors are adhering to the Impartial Conducts Standards, and extending the comment period poses no additional risks to retirement investors—in fact, instead, the benefits of an extension dramatically outweigh any potential costs.

[9] 82 Fed. Reg. 16,902 at 16,907 and 16,909 respectively (Apr. 7, 2017).

Conclusion

The hurried and confusing implementation of the Fiduciary Rule has, predictably, resulted in significant harm to retirement savers. This is due not only to flawed policies that we hope will be identified and changed following the Department's review, but also to the rush to impose sweeping changes affecting $15 trillion dollars in retirement savings without adequate coordination with other regulators or time for the marketplace to develop better solutions.

The Transition Period created by the Department in April provides some stability for retirement investors while future changes are considered—a standard is in place, and while more changes are needed, keeping that standard in place will avoid more harm during that process. Extending the Transition Period until June 30, 2019, or a later date if needed by the Department, is essential for responsible rulemaking that protects the best interests of retirement investors. Similarly, providing at least a one-year transition period following any amendments to the Rule is essential to orderly, efficient rulemaking.

We appreciate the opportunity to provide these comments and would be happy to answer any questions you may have.

Sincerely,

Thomas Quaadman